

LAW,
IDENTITY
AND VALUES

LAW, IDENTITY AND VALUES

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BUDAPEST | MISKOLC | 2024



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1122 Budapest, Városmajor St. 12.
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HU ISSN 2786-2542 (print)
HU ISSN 2786-3840 (online)

The Journal was established in 2021 in cooperation with the Budapest-based Ferenc Mádl Institute of Comparative Law. Volume 1 and Issue 1 of Volume 2 were co-published by the Ferenc Mádl Institute of Comparative Law and the Central European Academic Publishing.

TABLE OF CONTENTS

ARTICLES

MAREK ANDRZEJEWSKI Divorce in Poland or About the Helplessness of the Law.	9
MAREK BIELECKI Cooperation of the State and the Church for the Good of the Family and Its Development.	25
EMESE FLORIAN – MARIUS FLOARE Let the Children Come Forward – Positive Legal Inducements for Family Growth in Romania.	41
LILLA GARAYOVÁ The Best Interest of the Intended Child – Children's Rights in Assisted Reproduction and Surrogacy.	69
MONTSERRAT GAS-AIXENDRI Rediscovering Family Ties in a Postmodern World: Canon Law and the Pastoral Action of the Church in the Face of Postmodernity's Challenge	85
ALEKSANDRA KORAĆ GRAOVAC Legal Regulation of Medically Assisted Reproduction in Croatia: Is the Grass Green Enough on Our Side?.	101
GORDANA KOVAČEK STANIĆ Assisted Reproduction Technologies: Legal Challenges.	123
SUZANA KRALJIĆ The Management and Disposal With Child's Property – Especially in Light of Kidfluencers.	139
ZDEŇKA KRÁLÍČKOVÁ Vulnerability and Family Solidarity in Czech Law	159
EDIT SÁPI The Complex Legal Framework of Assisted Reproductive Techniques and Its Role in Addressing Demographic Challenges: A Hungarian Perspective	181

PAWEŁ SOBCZYK

Government Social Programmes Tasked With Fulfilling the Obligation of Public Authorities To Provide Special Assistance to Women Before and After Childbirth	197
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ARTICLES

DIVORCE IN POLAND OR ABOUT THE HELPLESSNESS OF THE LAW*

Marek Andrzejewski¹

ABSTRACT

The author discusses the issue of divorce from legal, demographic, and sociological points of view. In his analysis, he refers to the excellent book published 40 years ago by the prominent Polish demographer Edward Rosset titled 'Divorces'. The publication of this book was a scientific event, since, except for the authorities of the Catholic Church, at that time no one had criticised divorce so strongly and unequivocally. Therefore, the paper presents E. Rosset's views in detail, especially the breadth of his scientific reflections, emphasising the diverse scientific perspectives from which criticism of divorce was articulated. Against the backdrop of this criticism, E. Rosset also formulated ideas of what should be done to prevent divorce. For him, divorce was a very pressing issue, so the book has a slightly alarmist tone. To battle divorce, E. Rosset emphasised its pedagogical aspects and consequences. He considered it necessary for schools and parents to educate children and young people to respect the family, marriage, and parenthood. He also paid a lot of attention to the law, pointing out the need to create regulations more restrictive than those in force at the time. He was fully aware that the content of the law was important but wished to highlight that sometimes the way it is implemented is more important. Therefore, he strongly, and with good reason, criticised the liberal attitudes of judges.

The author then proceeds to present the legal and quantitative evolution of divorce after the 1989 breakthrough in Poland. He admits that modern law contains mechanisms in favour of the permanence of marriages, yet courts do not resort to them, instead ruling out more and more divorces nowadays. The author concludes that the transformation of civilisation is too profound, and it cannot be prevented even with the best scientific diagnoses and legal solutions.

KEYWORDS

divorce
demography
law
Edward Rosset
childlessness

* With Reference to E. Rosset's Classic Book Divorces.

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1. Initial remarks

The subtitle of this article points to the helplessness of law in the face of dramatic demographic trends in Europe, but this helplessness applies to all fields of science, especially pedagogy, psychology, economics, theology (especially dogmatic and pastoral), or the axiology of several philosophical currents. The emphasis on the helplessness of the law, however, is justified by the fact that its power and the public's naive faith in changing the world through the act of voting are often overestimated. This faith derives in part from ascribing causality to the law since the very reason it is created is to solve problems. The belief in the power of the law persists in society, despite the fact that the law is constantly being changed and unresolved problems remain. Nevertheless, it would be a mistake to treat the law as an asset in itself. In spite of its obvious weaknesses, it is more reasonable to see it as a tool for solving various social problems but not to have excessive expectations in this regard. It is worth mentioning here that the solutions found in legal acts do not come from lawyers, but from politicians, and the role of lawyers is to formulate these ideas in the specific language used in law, called legal language.² Many lawyers deny this observation because they do not understand and/or do not accept the reality in which they operate. Therefore, the assumption that this demonstrates a lack of humility is not unfounded.

The insignificant role of the law in counteracting negative social trends is indicated, among others, by the fact that the law is unlikely to prevent these trends. At most, it reacts to these processes after they occur – as a rule – with a delay and little effectiveness.

On the other hand, there are some examples showing that the law has exacerbated negative social processes, including changes in demography. In particular, no positive correlation was found in Poland between the significant extension of pro-family social benefits after 2015³ and the (expected) increase in the number of births. The benefits reduced poverty affecting children, while in demographic terms they only might have made those who already had a child consider the possibility of having another one (usually the second). The negative demographic effect, however, was brought about by poorly addressed social benefits. At the root of a radical increase in the number of divorces was the allowance targeted at formal single parents, introduced in November 2003. This was because it benefited women cohabitating with partners, as they were formally single mothers.⁴ The legislation introduced at the time caused the number of divorce petitions to increase by ¼ in 2004 compared to the previous year, and the number of separation cases increased by 300%.⁵

To prepare an appropriate legal tool (a legal act or part of it) for solving a social problem, it is necessary first to diagnose the problem. The basic field of knowledge necessary for making an accurate diagnosis of social issues, including family issues, is demography. In addition to demography, psychology, pedagogy, medicine, social work, and economics⁶ have had and continue to have a significant role in the search for solutions on the

2 | Morawski, 2010, pp. 97–114; Choduń, 2007.

3 | Szukalski, 2016, pp. 1–5.

4 | Act of 28 November 2003 on Family Benefits, *ct. Journal of Laws of 2023*, item 39.

5 | Zarzycki, 2005, p. 115.

6 | Andrzejewski, 2017, pp. 80–97; Wierzchosławski, 1991, pp. 19–25.

grounds of family law. Sometimes the accumulated knowledge leads to abandonment of the intention to issue another law. In family matters, legislative restraint seems particularly advisable due to the specific nature (delicacy) of family relations. Today's legislators align with progressive circles and thus tend to regulate issues concerning the family that should be addressed with restraint, as exemplified by regulations created under pressure from supporters of so-called 'reproductive human rights'.⁷

Poland's Primate Cardinal Stefan Wyszyński, who died in 1981, warned against the demographic crisis. He included demography in the broad context of teachings about the family, and it was a key element of the theology of the nation that he preached.⁸ He spoke out about family responsibilities, including the importance of fertility, as well as the dangers posed by divorce. He did so during a period of relatively stable demographic growth in Poland: then the fertility rate reached 2.4 and the population was growing. The Primate held a doctorate in sociology and had a social intuition, but the state authorities of the time ignored his warnings for ideological reasons. Neither was there much response from scientists, though knowledge of the so-called 'negative growth' observed in many Western European countries in the 1970s was already accessible.⁹ Less than a decade after the Primate's death, social changes took place that brought a demographic crisis of a magnitude no one had predicted. In all European countries, the birth rate fell to a level described as a demographic catastrophe.

The reasons for this collapse are numerous and significant. They mostly encompass profound long-term civilisation processes, such as, in particular, urbanisation, industrialisation, and internal migration from villages to cities.¹⁰ In addition, changes in the structure and functioning of families were also significantly influenced by the process of emancipation of women.¹¹ These phenomena were partly inevitable and partly objectively positive (women's equality). Due to the strength of these processes, few governments have succeeded in counteracting their negative effects, or at least mitigating them. Many others have not even attempted to do so.

The societies of Central European (post-communist) countries were further disorganised as a result of the systemic transformation that began in 1989. At that time, family ties were significantly weakened, among other things as a result of the structural unemployment that lasted until about 2015 (in Poland ca. a third of the country was unemployed),¹² and the professional and economic instability of a significant part of the population. All this was a source of permanent stress and family conflicts that led to the breakdown of ties and broken relationships, oftentimes ending in divorce. This also contributed to a sharp decline in the number of children being born. At that time, the focus was on building democracy, which was however devoid of an ethical vision of how individuals, groups, and society as a whole should function. In Poland, it was only the Constitution of the Republic of Poland, passed in 1997, that 'codified' the axiological foundations of the new social order, but it did it on a very general level.¹³

7 | The magnitude of the problem can be also observed in: Mostowik, 2019; Łukasiewicz, 2022.

8 | Struzik, 2010, pp. 105–119; Gałązka, 2010, pp. 127–141.

9 | Rosset, 1986, pp. 95–97.

10 | Adamski, 2002, pp. 205–208; Rosset, 1986, pp. 310–338; Szukalski, 2004, pp. 145–146; Drobny, 2007, pp. 69–87.

11 | Rosset, 1986, pp. 315–316.

12 | Kozysa, 2005, pp. 67–77; Główny Urząd Statystyczny, 2023.

13 | Journal of Laws of 1997, N.78, item 483, as amended.

The authorities of many countries have long tried to boost birth rates by creating laws banning or allowing abortions. Today, this approach is still adopted in poor countries of the so-called third world.¹⁴ In Europe, this way of conducting demographic policy has long lost its relevance due to the widespread use of contraception and women's awareness of their own sexuality. Between 1956 and 1993, abortions on demand¹⁵ were permitted in Poland and, according to cautious estimates, about 450,000 were performed annually.¹⁶ During the same period, about 520-630 thousand children were born each year. Currently, the Act of January 1993 on Family Planning, Protection of the Human Foetus, and the Conditions for Permissibility of Abortion, protects the life of the unborn,¹⁷ but paradoxically fewer children are born each year. Since the mid-1990s, the number of live births has not exceeded 400,000 per year, and in 2023, for the first time, it did not reach the threshold of 300,000.¹⁸ Naturally, there is no basis for attributing this result to the measures contained in the aforementioned act of 1993, just as there is no basis for stating that the Law on the Protection of Life has prevented or reduced the low birth rate phenomenon since Poland ranks 212th in terms of the reproduction rate¹⁹ (1.35, with a replacement rate of 2.1). Contemporary disputes over the legal protection of the life of the child, the dignity of the conceived child, and – describing it in terms used on the other side of the barricade – i.e. the alleged human right to abortion as one of the manifestations of so-called reproductive human rights – are all strongly grounded in divergent worldviews, featuring ideological and axiological, and, to a much lesser extent, demographic aspects.

2. Divorce as a demographic category

The demographic situation of a country can be looked at from the perspective of a wide range of statistics and indicators, all showing various trends. These indices may range from the total number of the population; the fertility rate for women of childbearing age; the scale of migration (the emigration of its own citizens, the influx of immigrants, the outflow of population from rural areas to the cities and from the cities to the countryside); the number of marriages; the age of those getting married and their education or their economic situation; the number of marriages that have been terminated, distinguishing those that have terminated as a result of death or divorce; the scale of cohabitation; the magnitude of single parenthood, including single motherhood arising from a woman's choice (rather than widowhood or abandonment); up to the dynamics of life expectancy growth.²⁰ As for divorce, in addition to the absolute number of divorces and their dynamics over the years, pivotal from the point of view of demographics is the attitude toward

14 | Gwiazda, 2017, pp. 220–234.

15 | Act of 27 April 1956 on the Conditions of Admissibility of Termination of Pregnancy, Journal of Laws of 1956, No. 12, item 61.

16 | Dyczewski, 1988, pp. 99–128.

17 | Ct. Journal of Laws of 2022, item 1575.

18 | From January to September of 2023, 21,000 fewer children were born in comparison to the period from February to September of the previous year. Therefore, the birth rate in 2023 will be lower by 20,000 than the number of 305,000 born in 2022; Misztal, 2023.

19 | Central Intelligence Agency, 2023.

20 | Balicki, Frątczak and Nam, 2007. Cf. Rocznik Demograficzny, 2022, pp. 7–8.

this subject of individual divorcees (from trauma to trivialisation), their age, marital seniority, education, occupation, the number and age of their children (divorce of their parents is a border event for them), and the attitude to divorce of those close to the divorcing spouses. What matters for demographics is how public institutions, including those creating and applying laws, respond to the divorce phenomenon. It matters, for example, whether they facilitate divorce (when it is adjudicated based solely on the will expressed by the spouses, with a simplified procedure, sometimes outside of court), or whether they take the institution of marriage seriously by protecting its permanence. Also of significance is the attitude toward divorce of religions and religious institutions (despite the weakening of their influence), political parties, social organisations, and various types of media productions.

What also matters for demographics is that the consequences of divorce affect the lives of the children of those who have divorced. Divorce is a kind of conflict and crisis in which children are caught up, which adversely affects their psyche and may in the future influence their attitude toward marriage. This crisis lasts for a long time before the legal proceedings begin and continues afterwards. Children grow up feeling anxious about their future after their parents' divorce and then enter their relationships with fear, knowing that they, too, may experience the breakup of their marriage. Growing up in a conflicted family, they experience inconsistency in their upbringing by their parents, which lowers the parental authority and prompts children to manipulate them.²¹

3. Divorces according to Edward Rosset

There are few contributions in the scientific literature that combine legal and demographic reflection. The theme has only gained a high profile in recent years in the form of a research project coordinated from 2023 to 2024 by the Ferenc Mádl Institute of Comparative Law in Budapest, within the framework of which this article was written, as well as a Western European initiative coordinated by the European Association for Population Studies.²² The research conducted within both frameworks is a formal expression of acknowledgment of the high profile of the problem of the demographic crisis, as well as a manifestation of a kind of optimism that the law (especially the family law) can improve this dire situation.

Edward Rosset's book 'Divorces', published in 1986 in Warsaw by the State Economic Publishing House, stands out in the Polish literature on law and demography. It was written at a time when the divorce rate was not dramatically high, but it nevertheless caused concern among the church hierarchy, as well as among scientists, including those ideologically sympathetic to Marxism. Edward Rosset published the book at the age of 88, which evokes an obvious appreciation for the enlightenment of his mind, but even more for the commitment and undisguised emotion in his approach to the subject and also for his polemical verve and, at the same time, for the clarity and firmness of the views he proclaims, focusing attention on matters of importance without enmeshing the reader in issues of lesser importance.

21 | Izdebska, 2000, pp. 45–61; Beisert, 2000, pp. 135–138, 239–248; Rosset, 1986, pp. 340–355.

22 | Family demography and family law, 2023.

Edward Rosset, who was undoubtedly an outstanding demographer of international renown, was born in Łódź on 4 November 1897, and died there on 2 June 1989, i.e. two days before the first partially free elections in Poland after World War II. This date (4 June 1989) is symbolically marked as the beginning of post-communism. In 1922, he graduated from the University of Warsaw with a degree in law and political science. Academically, however, he was concerned only with demography. From 1929 to 1939, he was a senior assistant at the Lodz branch of the Free Polish University and an official at the Statistical Department of the Łódź City Board. At that time, he was associated with the outlawed (in 1936) Polish Association of Free Thinkers. During World War II, he went into hiding in Warsaw.

After the war, he participated in the founding of the University of Łódź. He received his doctoral degree in 1947 and became an assistant professor in 1954, associate professor in 1958, and full professor in 1963. He headed the Department of Statistics, then Demography and Statistics, at the University of Łódź (1945-1968). From 1961 to 1965, he was vice-chancellor of the university. He was also a correspondent member (1962) and then, from 1976, a full member of the Polish Academy of Sciences. He was repeatedly awarded state decorations and medals of an academic nature.²³

The book *Divorces* begins by discussing the history of divorce and shows the basic legal aspects of the titular institution. The author then outlines the social background of divorce, extensively discussing how the family has been transformed in the course of carrying out its functions. He also discusses the processes that have disorganised the family, such as the so-called 'sexual revolution,' extramarital births, and the development of the phenomenon of cohabitation, among others.

What is particularly important is the presentation of the doctrinal and pragmatic aspects of divorce. Worth emphasising is the author's thoroughness in the portrayal of both the teachings of the Catholic Church (which was not common at the time) and of these ideological currents which feature divorce as something ordinary, almost natural, and necessary. The latter approach to divorce was described by E. Rosset, with a hint of irony, as apologetic and firmly dismissed by him.

As an opponent of divorce, the author drew attention to the importance of upbringing, pointing to the '.../ the mistake of many generations/.../ manifested in the neglect – in the process of upbringing adolescents – of stressing the spirit of full moral responsibility for the established family and the fate of its members.'²⁴

In an attempt to outline the paths leading to the strengthening of the family and the prevention of divorce, E. Rosset emphasised the need to educate young people about marriage and to discourage them from marrying too early. He emphasised the importance of pedagogy by writing:

*.../ approval of divorce as one of the legal institutions that normalise marriage and family relations would be, in my eyes, an acceptance of the fact that people recklessly enter into marriage and no less recklessly bring human beings into existence, because such an approach does not exclude the readiness to abandon the family if the opportunity arises to change the current marital relationship for another, more attractive one.'*²⁵

23 | Domański, 2016, pp. 781–787.

24 | Rosset, 1986, p. 146.

25 | Ibid., pp. 146–147.

He also linked divorce to alcoholism and called for taking a firm countermeasure against this link (unfortunately, still current today) seen as a manifestation of social pathology destructive to families.²⁶

The book's numerous excerpts on law, social policy, pedagogy, philosophy, and sociology, provide the context for the key strictly demographic considerations, especially those concerning birth rates, marriages, and the adjudication of divorces and remarriages. Particularly noteworthy are the descriptions of the mechanisms governing divorce, including the explication of the causes of marital conflict, factors destabilising families, public awareness of divorce, including the public's increasing tolerance of the phenomenon, and what Rosset described as tolerance on the part of the law. He also pointed to the professional activism of women as a process that significantly disorganises family life and the fulfilment of functions by family members.

Regarding the consequences of divorce, E. Rosset focused attention on the fate of divorced women, the phenomenon referred to as 'orphanhood resulting from divorce,' as well as the mental condition of divorced persons.

The author's approach to the subject of the book is vividly demonstrated by the title of one of the chapters: 'How to fight divorce?' In it, he devotes much space to the role of the law. He advocated preventing divorce by creating more restrictive regulations. He did so knowing that the influence of legal norms, as well as religious, moral, and social norms, was becoming weaker and weaker, but it was on these norms that he pinned his hopes for changing the situation. At the time, some studies in the sociology of law shared a common thesis not to overestimate the impact of law on the functioning of society. Citing the prominent sociologist of law Maria Borucka-Arctowa, he wrote as follows:²⁷ '.../ the law can affect social relations only to a limited extent, which one should be aware of in order not to succumb to the false notion that intricate social problems can be solved through legal regulations alone.'²⁸

The author's knowledge of the literature on the sociology of law did little to undermine his confidence in the effectiveness of the legal changes he advocated. Looking from today's perspective, it can be assumed that the tendency to overestimate the law was the result of the great magnitude of the problem described, the firmness of the author's objections, and an awareness of ... 'the weakness of other conceivable tools.' In addition to the law, he placed high hopes in pedagogy and family-oriented teaching and upbringing of young people and their influence on shaping an approach supporting the permanence of marriages.

Referring to legal issues, E. Rosset distinguished between the creation of law and its application. Therefore, in addition to advocating for changes in the content of the law, he also advocated for a change in the liberal (as he perceived it) attitude of judges adjudicating divorce cases. This apt assessment prompts consideration of what term he would use had he been given the opportunity to observe the direction that divorce jurisprudence has taken some 15 years later.

In his final thoughts in the book, Rosset dwelled on the possible future of divorce in Poland, lamenting (prophetically, especially for divorce) the low credibility of demographic

26 | Falewicz, 1976, pp. 347–370; Obłąkowska and Bartoszewicz, 2022, pp. 5–25.

27 | Borucka-Arctowa, 1981.

28 | Rosset, 1986, p. 77.

forecasts.²⁹ In attempting to formulate the prediction, he pointed out the consistent negative impact of industrialisation, urbanisation, and migration (at that time it was mainly about the movement from the rural areas to the cities). He also made some remarks about the increase in the level of education, the phenomenon of addictions, especially alcoholism, the decreasing age of people getting married, and increasing sexual freedom, which also manifested in marital infidelity.³⁰ Rosset was only wrong about the impact of the low age of those marrying on their vulnerability to divorce, since now many more divorces are recorded than then, while the average age of those getting married has increased by about eight years.

The author of the book under discussion dreamed of a society without divorce, writing that 'this is one of the most beautiful dreams of a different, better future,'³¹ but he did not dream of introducing a formal ban on divorce. He hoped that its scale would be significantly reduced as a result of society's recognition of the importance of marriage and family. In the final section of the book, he created – based on the views of contemporary psychologists, pedagogues, and sociologists – a catalogue of recommendations for creating a dream society. In these recommendations, he emphasised the educational and upbringing aspects and the creation of a family-friendly policy by the state.³² He stated that there was '.../ nothing more erroneous than the view, found here and there, tinged with optimism, that divorce is simply a way to change a failed marriage into a more successful one.'³³

He used metaphors, writing that divorces '.../ are .../ a manifestation of social pathology that harms the life of society like a poisoned arrow.'³⁴

He also criticised supporters of informal unions writing that

.../ they want to remedy the institution of marriage by taking it out of the jurisdiction of the law, while the path to a happy and lasting marriage leads through educating young people to live in marriage by awakening in them a sense of moral responsibility for the family they have founded, for its happiness and permanence.³⁵

Critical of divorce, the main idea of E. Rosset's book was consistent with the teaching of the Catholic Church in Poland, although the author did not write it from a religious standpoint. The coherence was found especially in the legal postulates and the demand for the adoption of appropriate pro-family pedagogical proposals, in particular, in the call to educate young people so that they would treat marriage and family responsibly. On the issue of divorce, E. Rosset shared the opinion of the axiological justification of the permanence of such unions, but not of their indissolubility. At the deepest roots of the phenomenon of divorce, he saw a deep moral crisis in Polish society. Probably, both E. Rosset, as well as the Catholic Church in Poland at the time, would not have approved of solutions that would fall within the framework of today's popular postmodernism, as well

29 | Ibid., pp. 400–401.

30 | Ibid., pp. 402–403.

31 | Ibid., p. 78.

32 | Ibid., pp. 392–394.

33 | Ibid., p. 362.

34 | Ibid., p. 362.

35 | Ibid., p. 134.

as the individual (and therefore subjective) resolution of family ethics issues promoted by Pope Francis, which leads to expanding the scale of exceptions at the expense of departing from the rules.

This placed E. Rosset far from the ideologically justified disregard for the institution of marriage and the promotion of moral freedom advocated in communist literature, for which the revolutionary views of Alexandra Kollontai or Lenin were authoritative.³⁶ Similarly, E. Rosset was positioned far away from his Marxist contemporaries who emphasised the virtues of moral relativism (moral norms, as an element of the superstructure, were to be a function of the changing economic situation, i.e. the base). In the official narrative of the 1980s, divorce was described – according to the Communist doctrine – as a positive development in the process of secularisation. While secularisation was invented in – what Marxists described as – bourgeois states, Marxism took it over and developed it, eventually reaching the point of absurdity in Soviet Russia and later in China.

4. Divorces in the context of numbers and post-1989 Polish law

In the Polish legal literature, it is difficult to find statements as strongly critical of divorce as those made by E. Rosset. A group of author-lawyers wrote about divorce responsibly, at a high academic level, but no one did so as emphatically as he did. However, the voice of E. Rosset did not break through into the consciousness of the broader public. In scientific discourse it is mentioned,³⁷ but not to the extent it deserves. This was mainly due to the rapid social changes, including demographic changes, which took place in Poland after 1989. Among these changes which should be noted are high social mobility of an economic nature (business careers and bankruptcies, unemployment for some, precarious earnings for others) and geographic nature (money was earned far away, often very far from home and family). These were accompanied by the erosion of previously existing legal, moral, and religious norms, which were becoming less important due to the impact of what has been described as ‘the unfortunate gift of freedom.’³⁸ The Poles, unprepared for its arrival, were unable to properly manage it.

In the face of the scale of these changes, including the dynamics of divorce, Rosset’s warnings and postulates soon proved to be a reaction highly inadequate to the scale of the problems. Indeed, after his death, things only got worse, and although the laws changed to protect the permanence of marriage, divorce lawsuits were filed in increasing numbers and the judges ruling on divorce cases became even more liberal.

For about two decades, one in three marriages in Poland has ended in divorce. In the 21st century, the number of divorces has been fairly constant, with about 65,000 being granted annually.³⁹ Only during the years of the pandemic did the number drop to about 50,000, which can also be explained by the peculiar problems Polish citizens had at that time in their approach to the courts. It is easy to estimate that in the 21st century, about 3 million people in Poland have been divorced, or about 10% of the adult population. In

36 | Lityński, 2017, pp. 280–283.

37 | Szukalski, 2017.

38 | Tischner, 1992.

39 | Ibid., p. 232.

contrast, in the last few decades of the 20th century, about 20,000 fewer divorces were granted each year, or about 40,000 per year.

The marital length of divorcees now averages about 14 years. The age of men who divorce has reached an average of 41 years, and that of women has reached an average of 39 years.⁴⁰ An analysis of data in demographic yearbooks shows that the age of divorcees is increasing slightly each year.

More than two-thirds of divorce petitions are filed by women. There is a preponderance of cases in which the court, at the consensual request of the spouses, does not adjudicate fault in the dissolution of marriage (74% of cases). With the sole fault of the husband, 18% of divorces are adjudicated, and in 3%, the sole fault of the wife was recognised by the court.⁴¹

Among the reasons for the dissolution of marriage, spouses mainly declare incompatibility of character (about 30% of cases), infidelity or an intimate emotional relationship with another person (25% of cases), and alcoholism (10% of cases).⁴²

In 2021, out of 60,100 divorces, as many as 25,500 cases involved childless marriages. This raises the suspicion that, at least for some of them, childlessness was a choice and the cause of burnout in the relationship.⁴³

The remaining 36.3 thousand divorced couples had a total of 53.1 thousand children. An average of about 50,000 children from divorced families per year yields about 1.2 million children in the 21st century alone.

A total of 20.3 thousand couples with one child got divorced, the number of those with two children was 12.7 thousand, and the rest had three or more children each. A total of 29.1 thousand children of divorcing parents were between zero and six years old, and there were 34 thousand children between seven and 18 years old.⁴⁴

The prerequisites for divorce set forth in Article 56 of the Family Guardianship Code (FGC)⁴⁵ have not been modified since the FGC came into force in 1965. They include a complete and permanent breakdown of marital relations, as well as the incompatibility of divorce with the welfare of their common minor children or with other rules of social interaction. The court cannot grant a divorce if the spouse who is solely to blame for the breakdown of marriage applies for divorce.⁴⁶ The existence of grounds for divorce makes divorce cases a responsibility of the courts. This demonstrates the positive attitude toward marriage on the part of lawmakers, who have resisted the demands of liberals to abandon the need to prove, in the course of proceedings, the existence of legally defined prerequisites and instead to grant divorce only at the request of the spouses. The latter trend prevails in Europe, as a result of which in some countries divorce cases are not held before a court, but rather divorce is declared on the basis of declarations made before a notary or to an administrative authority. Documents issued by these authorities are declaratory in such cases.

40 | Ibid., pp. 239–242.

41 | Ibid., p. 236.

42 | Archive: Marriage and births in Poland, 2015.

43 | Rocznik Demograficzny, 2022, pp. 243–244.

44 | Ibid., pp. 243–245.

45 | Ct. Journal of Laws of 2020, item 1359.

46 | Smoczyński and Andrzejewski, 2022, pp. 164–176; Ignatowicz and Nazar, 2016, pp. 351–363.

In 2004, mediation was introduced into the divorce procedure, which can be requested by either party and can also be ordered by the court on its own motion.⁴⁷ Mediation may concern how to arrange the situation of the family after the divorce, but it may also serve to raise the question of whether divorce in a particular case is justified at all. The institution of mediation is a sign of the departure in Polish procedural law from the confrontational principle of adversarial divorce proceedings to conciliatory solutions. A similar solution is a parental agreement concluded by divorcing spouses regarding the exercise of parental authority after divorce, including contact and child maintenance.⁴⁸ Like mediation, the agreement is voluntary. Among its advantages are a reduced length of court proceedings and lower tension and less strain on the emotions of those involved. It should be emphasised, however, that the changes in the laws introduced in the 21st century were not aimed at reducing the number of divorces but at easing divorce proceedings and making the lives of former spouses and their children fairer and more stable.

In the scientific debate, approval for the current solutions dominates, but there are also opinions voiced in favour of liberalising the divorce laws – both the material-legal prerequisites for divorce and issues related to the divorce adjudication procedure. In the public domain, on the other hand, postulates are sometimes expressed that, in addition to the current regulations, there should be a possibility to conclude marriages without the possibility of their dissolution by divorce (on the model of non-dissolvable adoption).

It is also worth mentioning that in 2021, the Ministry of Justice presented a project to introduce family information proceedings as part of the divorce procedure. It was supposed to appear alongside mediation and parental agreement. This proceeding stemmed from the intention to encourage the spouses to give the idea of divorce deeper reflection, and it was supposed to be mandatory. The draft went against the European tendency to trivialise marriage by making it more accessible than it is today, as the European trend grants the possibility of marriage to seriously mentally disturbed people, to people younger than is required in modern times, and to homosexual couples. The proposal went against the flow so as not to allow termination of marriage without compelling reasons, at the request of one of the parties, and – if the spouses had any children from the marriage – at the request of both of them. The idea behind the new procedure was to talk to divorcing spouses about the legal, economic, pedagogical, and psychological aspects of divorce so that they would consider it more consciously, or in light of the information they received, consider the validity of this step. The intention of the drafters was criticised by the liberal media, which strongly objected both to the prospect of prolonging divorce proceedings by obliging spouses to participate in information proceedings and to possible attempts to discourage spouses from taking this step. It is to be regretted that for political reasons, the Ministry of Justice withdrew this project.

47 | Białycki, 2012, pp. 193–222; Kwaśniewska, 2007, pp. 1–16.

48 | Stojanowska, 2014, pp. 300–310; Długokęcka, 2013, pp. 29–39.

5. Heading for the punchline

The legal institution of divorce has always provoked disputes and continues to do so. New legal monographs on its various aspects are being published. In their reflections on divorce, lawyers usually focus on how divorce occurs and what effects divorce has, and only occasionally do they pose the question of the sense/justification of taking this step. Looking at the current volume of divorces, one can wonder about the usefulness of demographic forecasts and the possibility of modifying the social situation with the help of the law. Their magnitude – as well as the declining birth rate, the increasingly low fertility rate of women of childbearing age, and other parameters that prove the demographic collapse – was not anticipated by any study, including the alarmist-in-tone book by E. Rosset. Barely a decade after its publication, life has outgrown the vision that kept the old demographer awake at night, leading his wise outlook to be forgotten. In the face of an onslaught of dynamic changes, it is difficult to describe them on an ongoing basis, let alone analyse them in depth, so that the analyses might assist in attempts to counteract the changes. In conclusion, it should be said that scientific research (the analyses and forecasts of demographers, as well as the transformations of jurisprudence, or views expressed by representatives of legal science) has little impact on the course of significant social phenomena, let alone on the possibility of preventing them and their negative effects.

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COOPERATION OF THE STATE AND THE CHURCH FOR THE GOOD OF THE FAMILY AND ITS DEVELOPMENT

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ABSTRACT

The subject matter of the present article is, mutual cooperation between local self-government units and churches as well as other legally regulated religious associations in the context of family security. The analysis covers the current legal acts, confessional subjects' teachings, and the doctrine and the standpoints of the judiciary. The author presents family security as a category of human needs. He also proposes a different approach to defining the concept of a family, which is not only limited to the normative definition but also considers the achievements of other fields of knowledge, including psychology and philosophy. In the last part, specific legal clarifications anticipating the cooperation of both communities are analysed.

KEYWORDS

security
family
cooperation
Church
State

1. Introductory remarks

The family, as the basic social unit, is a subject of interest to central and regional public authorities, as well as churches and other religious associations. Concern for its security should be the background issue for actions taken in both communities. A society cannot function properly when some types of dysfunction concerning the family appear (e.g., alcoholism, drug abuse, and others). The subject of the present study is to examine mutual cooperation between local governments in Poland and churches as well as other legally regulated religious associations.

In Poland, the state's cooperation with other entities is conducted at both the central and local governmental levels. Thus, the local level can be recognised as a broad plane of cooperation between the secular and ecclesiastic communities. The political reform

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that took place in the late 1990s introduced a three-step structure of local government. In addition to the already existing communes and voivodeships, the division into counties was reestablished after more than twenty years. The basic assumption of the reform was to introduce the principle of decentralisation of power, aiming to transfer some functions to the local government level that had previously assigned to central government bodies. This involved not only a major increase in competencies, but also the imposition of tasks that generated significant financial commitments. Consequently, two basic categories – own and commissioned tasks – have been distinguished in the structure of local government units' obligations. The first group includes categories of obligations that local government units (LGUs) are obliged to implement even when they do not have separate financial resources. The commissioned tasks, however, are not included in local government acts;² therefore, they are implemented in situations when the central government's administration recognises them to be crucial.

It is estimated that a large number of churches and other legally regulated religious associations are functioning in Poland. However, in the context of public awareness, there are only a few with a large number of followers. Fifteen of them have a statutory form of regulation of their legal relations,³ while the remaining ones are included in the register of the Minister of the Interior and Administration.⁴ Poland has always been a country where

- 2 | In Polish: Ustawa z dnia 8 marca 1990 r. o samorządzie gminnym (t.j. Dz. U. z 2024 r. poz. 609 ze zm.); ustawa z dnia 5 czerwca 1998 r. o samorządzie powiatowym (t.j. Dz. U. z 2024 r. poz. 107.); ustawa z dnia 5 czerwca 1998 r. o samorządzie województwa (Dz. U. z 2024 r. poz. 566.).
- 3 | In Polish: Ustawa z dnia 17 maja 1989 r. o stosunku Państwa do Kościoła Katolickiego w Rzeczypospolitej Polskiej (t.j. Dz. U. z 2023 r. poz. 1966.); Ustawa z dnia 4 lipca 1991 r. o stosunku Państwa do Polskiego Autokefalicznego Kościoła Prawosławnego (t.j. Dz. U. z 2023 r. poz. 544.) 2014r., poz. 1726 j.t.); Ustawa z dnia 13 maja 1994 r. o stosunku Państwa do Kościoła Ewangelicko-Reformowanego w Rzeczypospolitej Polskiej (t.j. Dz. U. z 2015 r. poz. 483.); Ustawa z dnia 13 maja 1994 r. o stosunku Państwa do Kościoła Ewangelicko-Augsburskiego w Rzeczypospolitej Polskiej (t.j. Dz. U. z 2023 r. poz. 509.); Ustawa z dnia 30 czerwca 1995 r. o stosunku Państwa do Kościoła Ewangelicko-Metodystycznego w Rzeczypospolitej Polskiej (t.j. Dz. U. z 2023 r. poz. 85.); Ustawa z dnia 20 lutego 1997 r. o stosunku Państwa do Kościoła Starokatolickiego Mariawitów w Rzeczypospolitej Polskiej (t.j. Dz. U. z 2023 r. poz. 47.); Ustawa z dnia 20 lutego 1997 r. o stosunku Państwa do Kościoła Katolickiego Mariawitów w Rzeczypospolitej Polskiej (t.j. Dz. U. z 2023 r. poz. 8); Rozporządzenie Prezydenta Rzeczypospolitej Polskiej z dnia 28 marca 1928 r. o stosunku Państwa do Wschodniego Kościoła Staroobrzędowego, nie posiadającego hierarchii duchownej (Dz. U. z 1928 r. nr 38, poz. 363. ze zm.); Ustawa z dnia 21 kwietnia 1936 r. o stosunku Państwa do Muzułmańskiego Związku Religijnego w Rzeczypospolitej Polskiej (Dz. U. z 1936 r. nr 30, poz. 240 ze zm.); Ustawa z dnia 21 kwietnia 1936 r. o stosunku Państwa do Karaïmskiego Związku Religijnego w Rzeczypospolitej Polskiej (Dz. U. z 1936 r. nr 30, poz. 241 ze zm.); Ustawa z dnia 30 czerwca 1995 r. o stosunku Państwa do Kościoła Polskokatolickiego w Rzeczypospolitej Polskiej (t.j. Dz. U. z 2023 r. poz. 51.); Ustawa z dnia 30 czerwca 1995 r. o stosunku Państwa do Kościoła Adwentystów Dnia Siódmego w Rzeczypospolitej Polskiej (t.j. Dz. U. z 2022 r. poz. 2616.); Ustawa z dnia 30 czerwca 1995 r. o stosunku Państwa do Kościoła Chrześcijan Baptystów w Rzeczypospolitej Polskiej (t.j. Dz. U. z 2023 r. poz. 1874.); Ustawa z dnia 20 lutego 1997 r. o stosunku Państwa do gmin wyznaniowych żydowskich w Rzeczypospolitej Polskiej (t.j. Dz. U. z 2014 r. poz. 1798.); Ustawa z dnia 20 lutego 1997 r. o stosunku Państwa do Kościoła Zielonoświątkowego w Rzeczypospolitej Polskiej (t.j. Dz. U. z 2015 r. poz. 13.).
- 4 | In Polish: Ustawa z dnia 17 maja 1989 r. o gwarancjach wolności sumienia i wyznania (t.j. Dz. U. z 2023 r. poz. 265 - Articles 30-38); rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 31 marca 1999 r. w sprawie rejestru kościołów i innych związków wyznaniowych (Dz. U. z 1999 r., nr 38, poz. 374).

the followers of various religions lived side by side. Their mutual coexistence was appropriate, although some conflicts that led to tragedy sometimes appeared between them. Despite being tolerant of diversity, the Polish state has turned several times against the followers of specific religions or rituals in its history. A particular intensification of hostility to the Church and other religious associations appeared in the period of the Polish People's Republic (1945-1989). The Byzantine-Ukrainian (Greek Catholic) Catholic Church should be mentioned here because it was delegalised after World War II and its property was nationalised. A similar situation occurred with Jehovah's Witnesses. The Catholic Church of the Latin Rite functioned continuously during the period of communism, but particular repression affected both its property and its clergy, who often sacrificed their lives for their beliefs. A commonly known figure is the priest Jerzy Popiełuszko, who was violently murdered by security services in 1984.

The present study aims to present the areas of mutual cooperation between churches and other religious associations, focused on the wellness of the family and its development and security. Moreover, the aim of the study is to present cooperation between churches and other religious organisations. Therefore, mainly applicable normative acts will be analysed; however, some reference to the teachings of confessional entities and the doctrine and position of the justice system will also be made.

The American philosopher Abraham Maslow included security among the basic needs without which an individual cannot function properly. It is considered the lack of risk of losing important values, including freedom, sovereignty, health, and respect.⁵ Because a person possesses an inborn dignity, a human being is the disposer of these values. Personal dignity belongs to every human, regardless of their status, origin, or any other factors. The concept of dignity is equivalent to a value that cannot be changed or replaced. Moreover, this natural and innate dignity belonging to all people is based on the ability of every human (rational) being to create moral law.⁶ It should be perceived as an inherent and long-lasting value of a human, arising from his nature and providing him with the opportunity to rationally exercise his own rights without affecting or limiting the other people's rights.⁷ Due to the attribute of dignity, a human being not only feels the need for security, but also has a right to it; therefore, it should be consequently protected in every dimension by the entities responsible for these issues.

The concept of security is a universal category which is appropriately comprehended by the field of science and whose scope scholars have attempted to accurately define. Objective factors as well as subjective feelings equally influence an individual's perception of their security level. Security affects the quality of human life and, by some representatives of the doctrine, it is perceived as a primary and autonomous value, conditioning the existence of other manifestations of human activity, both in the material and spiritual dimensions.⁸

Security can be comprehended from various perspectives, i.e. subjective, objective, subjective-objective, and time-based.⁹ The scope of the undertaken research implies the

5 | Krztoń, 2017, p. 42.

6 | Sadowski, 2007, p. 14.

7 | Bielecki, 2018, p. 164.

8 | Bereźnicka, 2012, p. 110; Kubiak, Rosa and Lipińska-Rzeszutek, 2007, p. 319.

9 | Bereźnicka, 2012, p. 111.

need to focus on the first of the above-mentioned because the family (a small social group), along with the individuals, society, and all of humanity, is the basic subject of security.¹⁰

The necessity of assuring the family security belongs to the group of primary needs, thus its execution determines not only the preservation of life and health, but also the development of the individuals. The proper functioning of the family is influenced by many factors, including living conditions, parents' hours spent working, parents' socio-cultural level, harmonious cohabitation, and proper organisation of family life.¹¹ Undoubtedly, children's sense of security is affected by the condition of their parents. The shortage of resources to provide an appropriate lifestyle means that the youngest family members may begin to feel deficiencies, which consequently may result in various frustrations.¹² Therefore, it should be noted that caring for the safety of the family correspondingly means caring for each of its individual members. All dysfunctions occurring within the family seem to be a threat not only to the family itself, but also to local communities and even to national security. Family dysfunction may result in situations in which the community cannot fulfil its responsibilities in a democratic state of law.¹³

Security provides a sense of balance and stability. The task of the generally recognised authorities, including local governments, is to create and improve the factors affecting the development of the family.¹⁴ By confirming the basic needs of the smallest and at the same time most basic social unit – the family – the state and the Church fulfil their elementary obligations focused on caring for the common good. The development of the family determines the development of the entire society; furthermore, proper support from these both communities guarantees the strengthening of the entire nation.

2. The concept of family

Defining the term 'family' depends on the approach presented by a given field of knowledge, which may focus on various aspects of a family's activities. Even though the term 'family' is a normative category, the legislator does not clearly indicate how this term should be interpreted. Depending on the issues regulated by individual normative acts, we can distinguish various personal scopes of this concept. Some attempts of determining the concept of family can be found in psychology, pedagogy, and sociology. In psychology, the concept of family is sometimes referred to as the 'basic group' for an individual in which all the members remain in close contact with each other and interact with each other as well. Pedagogy describes the family either in terms of the tasks it performs or by enumerating the basic bonds connecting its members. On the other hand, from a sociological perspective, a family is the basic social unit and the fundamental and constitutive component of every society.¹⁵ On the basis of philosophy, Mieczysław Albert Krąpiec

10 | Krztoń, 2017, pp. 45–46.

11 | Olak, 2016, pp. 153–164.

12 | Miczyńska-Kowalska, 2013, p. 46.

13 | Wróbel-Delegacz, 2013, p. 214.

14 | Gdula, 2019, pp. 46.

15 | Szymczak, 2002, pp. 153–156.

considers the family to be the basic form of social life and the essential site of a human's development.¹⁶

As far as the normative definition of a family is concerned, it should be noted that the legislator has decided to define this concept several times in various normative acts. It should be emphasised, however, that neither the Constitution (Constitution)¹⁷ nor the Family and Guardianship Code (FGC)¹⁸ define this term despite the fact that they apply it but only in a limited version including the features that are assigned to a family and indicating the basic assumptions of the state's policy towards this community.

On the basis of the Constitution, along with marriage, motherhood, and parenthood, the family is under the care and protection of the Republic of Poland.¹⁹ Therefore, the tasks of the authorities are supposed to be focused on both meeting the needs of the above-mentioned entities by immediate actions and on creating protective mechanisms in the form of appropriate normative and institutional guarantees. The above assumptions also correspond to the guarantees specified in Article 71 of the Constitution, where the state is obliged to consider the good of the family in its social and economic policy. Those families that are in a difficult financial and social situation, especially those with many children and single-parent families, have the right to special assistance from public authorities. Moreover, children are given special care in the Constitution. In Article 72, Paragraph 1, the law establishes *actio popularis*, granting everyone the right to demand that public authorities protect a child against violence, cruelty, exploitation, and demoralisation. Additionally, to protect the interests of children, the institution of the Ombudsman for Children was established in 2000.²⁰ Among the personal rights and freedoms granted to an individual, the right to protect one's family's life appeared.²¹

The Constitutional Tribunal (CT), in its judgment of April 12, 2011, attempted to define the term 'family', even though, as it noted, this definition is not present in the Constitution.²² Referring to the dictionary term (DPL), the Constitutional Tribunal stated that a family, in the strict sense, can be defined as a community consisting of parents (mostly married couples) and children. However, an 'incomplete family' is a family in which one parent is not present. According to the Constitutional Tribunal it is claimed that, on the basis of the constitutional provisions, there are no reasons to depart from the universal meaning of the concepts that have been developed in Polish language. Using the dictionary definition, the Constitutional Tribunal recognised that '[...] in the light of the constitutional provisions, a 'family' should be considered as any lasting relationship of two or more people, consisting of at least one adult and a child, based on emotional and legal bonds, mostly on blood bonds.' Furthermore, the CT defines the types of families, distinguishing, among others: 'full' family, large family, and 'incomplete' families. A 'full'

16 | Krąpiec, 1986, pp. 160–161.

17 | In Polish: Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Dz. U. z 1997 r., nr 78, poz. 483 ze zm.).

18 | In Polish: Ustawa z dnia 25 lutego 1964 r. Kodeks rodziny i opiekuńczy (t.j. Dz. U. z 2020 r. poz. 1359, ze zm.).

19 | Article 18 of the Constitution.

20 | In Polish: Ustawa z dnia 6 stycznia 2000 r. o Rzeczniku Praw Dziecka (t.j. Dz. U. z 2023 r. poz. 292.).

21 | Article 47 of the Ombudsman for Children Act.

22 | In Polish: Wyrok Trybunału Konstytucyjnego z dnia 12 kwietnia 2011 r. (sygn. SK 62/08 - OTK-A z 2011 r., nr 9, poz. 22).

family consists of two adults and at least one child. Consequently, an ‘incomplete’ family consists of one adult and a child raised by him or her.²³ Both the dictionary definition and the position of the Constitutional Tribunal recognise that children raised by two or one parent are an integral component of the family. This corresponds to the intention of the law, which separates the concepts of a family and a marriage treated as a formalised relationship between a man and a woman.²⁴

Correspondingly to the Constitution, the Family and Guardianship Code does not define the concept of ‘family,’ since it is used in the context of the rights and tasks of spouses who are responsible for its well-being.²⁵ Despite disagreements in the doctrine concerning the question whether an informal union between a man and a woman (cohabitation) can be defined as a family, there is no doubt that it should be provided with legal protection suitable for its needs.²⁶

The scope of the term ‘family’ has been further specified in the legal Act of 2004 on Social Assistance (hereinafter: Social Assistance Act).²⁷ According to Article 6, Section 14 of the Act, a family consists of related or unrelated people who are in an actual relationship and live and coexist together. Therefore, the definition is not limited only to parents and their children but includes a wider range of people. The above definition reflects the purpose of social assistance defined by the law, because according to Article 2, Section 1 of the Act: ‘social assistance is an institution of a state’s social policy aimed at supporting individuals and families to overcome difficult life situations that their own rights and capabilities are unable to overcome.’ Therefore, the law’s concern extends to all people living in a common household and working for its well-being.

A different family configuration is articulated in the legal Act of 2003 on Family Benefits (hereinafter: Family Benefits Act).²⁸ According to Article 3, Section 16 of the Act, a family consists of spouses, parents, children, the child’s actual guardians, children up to the age of 25, children after the age of 25 with a certificate of a significant degree of disability (if due to this disability they are entitled to care benefits or a special care allowance). However, the following instances are excluded from the definition: a child under the care of a legal guardian, a married child, or an adult child who has become a parent. This particular definition should be treated only for the purpose of identifying individuals entitled to receive family benefits based on the above-mentioned Act.

Due to Poland’s membership in the European Union, it is also worth mentioning the interpretation of the concept of family in its internal laws. After the European Union accessed the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),²⁹ the provisions included there became the part of the common law.³⁰ According

23 | More: Sterna-Zielińska, 2016, pp. 101–110. The author also indicates legal acts in which the term ‘family’ was formulated.

24 | Article 18 of the Constitution.

25 | E.g. Articles 23, 24, 27, and Article 28, Section 1 of the Family Code.

26 | Sterna-Zielińska, 2016, p. 106.

27 | In Polish: Ustawa z dnia 12 marca 2004 r. o pomocy społecznej (t.j. Dz. U. z 2023 r. poz. 901.).

28 | In Polish: Ustawa z dnia 28 listopada 2003 r. o świadczeniach rodzinnych (t.j. Dz. U. z 2023 r. poz. 390 ze zm.).

29 | European Convention for the Protection of Human Rights and Fundamental Freedoms 4. 11. 1950 (as amended by Protocols Nos. 11, 14 and 15).

30 | Article 6 paragraph 4 – Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (OJ UE 2016/C 202/01).

to Article 12 of the ECHR, men and women of eligible age have the right to marry and start a family, in accordance with the internal laws regulating the implementation of this right. The European Court of Human Rights also supports the existence of heterosexual marriages, which has been expressed in its numerous judgments.³¹

The law adopted by the EU bodies is much more liberal when it comes to the perception of the family and the institution of marriage itself.³² The Charter of Fundamental Rights (CFR),³³ adopted in 2000, states that the right to marry and to start a family are guaranteed in regulations included in internal laws.³⁴ Therefore, marriage is not limited to the union of a man and a woman, and decisions on whether to allow same-sex marriages are left to the national legislators. EU law was made more specific in the context of qualifying particular categories of persons as family members under Directive 38/2004/EC.³⁵ According to Article 2, point b, a family member is considered to be:

- a) a spouse;
- b) a partner with whom the Union citizen has entered into a registered partnership on the basis of the legislation of the Member State concerned, if the legislation of the host Member State acknowledges the equivalence between a registered partnership and marriage, and in accordance with the conditions expressed in the relevant legislation of the host Member State;
- c) direct descendants who are under the age of twenty-one or are dependents, and those of the spouse or partner as defined in point b);
- d) direct ascendants being dependent and those of the spouse or partner as defined in point b).

The concepts of a spouse and a registered partner are clarified in the case law and the doctrine. As for the first category, the term of 'spouse' refers only to those persons who have entered into a formal marriage. As stated by the CJEU, there are no reasons to include permanent partners in informal relationships in this definition. It is also not required that marriage should be concluded on the basis of the legislation of a Member State.³⁶ On the other hand, to classify a given person as a permanent partner, first, the relationship should be concluded on the basis of the law of a Member State. Secondly, the legislation of the host Member State should recognise the equivalence between a registered partnership and marriage.³⁷

In both internal and international laws, the law has not established a legal definition of family but it is limited only to the recognition of the entities that constitute it.

31 | Cichoń, 2013, pp. 224–231.

32 | Gierycz, 2015, pp. 69–83.

33 | Charter of Fundamental Rights (OJ UE. 2010/C 8302).

34 | Article 9 of the Charter of Fundamental Rights.

35 | Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Dz. Urz. U.E. L 158/77).

36 | CJEU judgment *Netherlands v. Reed* (58/85, EU:C:1986:157).

37 | Skupień, 2015, pp. 112–113.

3. The principle of cooperation

The cooperation of the political community, which also includes local government units, churches, and other religious associations, has its origins in the social teaching of the Catholic Church. In the literature on the subject, some attempts are made to explain the premises of cooperation between the state and churches and other religious associations. These include focusing on the common good; the fact that the same people co-create the state and belong to individual churches and religious associations; and the fact that there are certain areas of social life that are of the interest to both the state and individual churches and religious associations.³⁸

The essence of cooperation manifests itself in joint activities focused on achieving the same goals. This idea also includes support of one entity for the activities undertaken by another.³⁹

In Poland, the practice of cooperation between the state and the Church dates back to the beginnings of our statehood. In the past, the Church performed a variety of public functions, replacing the state.⁴⁰ Because of constitutional regulations, cooperation has become a systemic principle covering all confessional entities with a regulated legal situation. According to Article 25, Section 3 of the Polish Constitution, relations between the state and churches and other religious associations are shaped, among others, on the basis of cooperation for the good of a man and the common good of society. As Paweł Sobczyk notes, the concept of the common good adopted by the law is expressed in the inclusion of various partial goods in this term including all social conditions for the development of a man and the communities he creates.⁴¹ Undoubtedly, the 'good' that fulfils the idea of the common good is the 'family good' in which the individual grows up. In the literature on the subject, there are attempts to define what this 'good' is. Referring to the teachings of the Catholic Church, Tomasz Kornecki notes that the good of the family focuses on ensuring that the family can function properly, starting with parents' earning and housing opportunities. Moreover, respect for the family's rights is the condition for the implementation and development of the family's well-being.⁴² The state should cooperate with churches and other religious organisations in matters concerning the raising of children. Moreover, the cooperation should include the support for pro-family activities, overcoming psychological crises of marriage and family, and providing assistance in economic crises.⁴³

Local government units may cooperate with churches and other religious associations in various areas of their activities, both in institutionalised and spontaneous forms.⁴⁴ However, it is not clarified in the doctrine whether the constitutional provisions oblige both communities to cooperate with each other or only provide them with such an opportunity. Michał Olszówka notes that the constitutional principle of cooperation

38 | Steczkowski, 2008, p. 156; Krukowski, 2004, p. 97.

39 | Mezglewski, Misztal and Stanisław, 2006, p. 76.

40 | Sobczyk, 2013, p. 163; The author refers to: Uruszczyk, 2007, pp. 15–34.

41 | Sobczyk, 2013, pp. 166–167.

42 | Kornecki, 2013, p. 165, the author refers to: Papieska Rada ds. Rodziny, *Etyczny i pastoralny wymiar przemian demograficznych*, Łomianki, 1997, p. 20.

43 | Sztuchmiller, 2011, pp. 161–171.

44 | Sobczyk, 2013, p. 160.

does not result in an obligation, but in a necessity to cooperate. In his opinion, this norm is a kind of a program (a principle of state policy), and he understands it as an imperative indicating the directive, which should be implemented according to actual possibilities and needs. Moreover, according to the same author, potential beneficiaries (churches and religious associations) do not have the right to make claims against the authorities if they do not cooperate. The public authority always decides matters regarding possible support from the state or local government for the activities carried out by a confessional entity.⁴⁵ A similar opinion is expressed by Wojciech Góralski, who believes that the reason for cooperation between the state and the Church is the common good executed within the competencies of both communities. The essence of cooperation between these communities is not to serve and help each other. Church and state have no direct obligations to each other.⁴⁶ A different view is presented by Józef Krukowski, who believes that the proclamation of the principle of cooperation obliges both entities to work together to determine in which sectors there is a need for cooperation. As an example, he presents the issue of the effectiveness of internal norms in the Polish legal system.⁴⁷

Cooperation of local government units in the field of family security should be based on the principle of subsidiarity, which was included in the preamble to the Constitution. The essence of the principle of subsidiarity is based on the idea that the government should fulfil an auxiliary function in relation to its citizens and the communities in which they function by fulfilling those tasks that cannot be performed effectively at lower organisational levels.⁴⁸

4. The scope of cooperation

Taking care of the family is a subject of interest for the state and churches as well as other religious associations functioning in Poland. In both, the laws regulating the situation of religious entities and local government laws, regulations specifying the obligations of both communities in relation to the family with regard to the situation of its individual members were included.

Supporting the family and organising the system of foster care and social assistance, as well as enacting pro-family policies, have been classified as the task of all local government units^{49,50,51}. Moreover, the Local Government Act obliges the community to provide social and medical care to pregnant women.⁵²

45 | Olszówka, 2016, pp. 164–165.

46 | Góralski, 2000, p. 22.

47 | Krukowski, 2008, p. 77; Tunia, 2015.

48 | Bielecki, 2008, pp. 193–209.

49 | Article 7, paragraph 1 p. 6–6a–16 of the Act on Local Self-Government. In Polish: Ustawa z 8 marca 1990 r. o samorządzie gminnym (t.j. Dz. U. z 2023 r. poz. 40, ze zm.).

50 | Article 4, paragraph 3–3a–4 of the Act on County Self-Government. In Polish: Ustawa z dnia 5 czerwca 1998 r. o samorządzie powiatowym (t.j. Dz. U. z 2022 r. poz. 1526, ze zm.).

51 | Article 14, paragraph 1, 4–4a–5 of the Act on Regional Self-Government. In Polish: Ustawa z dnia 5 czerwca 1998 r. o samorządzie województwa (t.j. Dz. U. z 2022 r. poz. 2094 ze zm.).

52 | Article 17, Sections 1 and 16 of the Local Self-Government Act.

Social assistance tasks are a part of the functions performed by individual churches and religious associations and are included in the scope of charitable and welfare activities; thus, their cooperation with local government units is specified in the legal Act of 2004 on Social Assistance⁵³; in light of this Act, social assistance is organised by the government and local government administration bodies cooperating in this respect with the Catholic Church and other churches and religious associations on a partnership basis,⁵⁴ which may run social assistance homes after obtaining the permission of the voivode.⁵⁵ In a situation when a social assistance home is run by alternative entity, its employees are obliged to cooperate with churches and religious associations to ensure social integration.⁵⁶ In addition, religious entities along with the local government, voivode, social and professional organisations, and scientific environment, may delegate representatives to the so-called Social Welfare Council (SWC).⁵⁷ The scope of activities of the SWC includes giving opinions on legal acts and initiating changes in regulations in the field of social assistance as well as preparing expert opinions on selected areas of social assistance.⁵⁸ By adopting the Act of 2011 on supporting the family and the foster care system (hereinafter: Act on supporting the family and the foster care system),⁵⁹ in the preamble the belief that effective protection and assistance for children can be achieved by the cooperation of all people, institutions, and organisations working with children and parents is expressed. An obligation has been imposed on local government units and government administration bodies to support families experiencing difficulties in fulfilling their caregiving and upbringing functions.⁶⁰ The implementation of tasks in this area should be carried out, in particular, by cooperation with the local community, courts and their auxiliary bodies, the police, educational institutions, and medical entities, as well as churches, religious associations, and social organisations with the regard to the principle of subsidiarity.⁶¹

The county self-government or entities indicated by the county units are obliged to organise the family foster care system.⁶² As part of the above-mentioned activities, it is required that they cooperate with the local community and the organisations that constitute it (including churches and religious associations).⁶³ Also, in the case of fractionation within individual local government units, adoption centres cooperate with churches and religious associations. On the basis of Article 190, Section 1, local government bodies may assign implementation of tasks aiming at the good of the family to legal entities and organisational units operating on the basis of the provisions on the state's relationship to the Catholic Church in the Republic of Poland, the state's relationship with other churches

53 | In Polish: Ustawa z dnia 12 marca 2004 r. o pomocy społecznej (t.j. Dz. U. z 2023 r. poz. 901, ze zm.).

54 | Article 2, Section 2 of the Social Assistance Act.

55 | Article 57, Sections 1 and 3 of the Social Assistance Act.

56 | Rozporządzenie Ministra Pracy i Polityki Społecznej z dnia 9 grudnia 2010 r. w sprawie środowiskowych domów samopomocy (Dz. U. z 2020 r., poz. 249 ze zm.).

57 | Article 125, Section 1 of the Social Assistance Act.

58 | Article 124, Section 2 of the Social Assistance Act.

59 | In Polish: Ustawa z dnia 9 czerwca 2011 r. o wspieraniu rodziny i systemie pieczy zastępczej (t.j. Dz. U. z 2023 r. poz. 1426, ze zm.).

60 | Article 3, Section 1 of the Act on Supporting the Family and the Foster Care System Act.

61 | Article 3, Sections 2 and 3 of the Act on Supporting the Family and the Foster Care System Act.

62 | Article 76, Section 1 of the Act on Supporting the Family and the Foster Care System Act.

63 | Article 76, Section 4, Point 8 of the Act on Supporting the Family and the Foster Care System Act.

and religious associations, and the guarantee of freedom of conscience and religion if their statutory goals include conducting activities concerning the support of the family and the foster care system or social assistance. They also include working with a family, caring for and raising children in a daycare support centres, running family orphanages, organising family foster care, running regional therapeutic and educational centres, and running intervention pre-adoption centres. The provisions of the Act of 2003 on Public Benefit Activities and Voluntary Service (hereinafter: Public Benefit Activities and Voluntary Service Act)⁶⁴ are employed to outsource the above tasks, where legal entities and organisational units of churches and religious associations with a regulated legal situation may execute such tasks, provided that their statutory objectives include them.⁶⁵

Care for the interests of individual family members and mutual cooperation of local government units with churches and religious associations were proclaimed in the Act of 2005 on Counteracting Domestic Violence (hereinafter: Counteracting Domestic Violence).⁶⁶ Government and local government administrative bodies cooperate with non-governmental organisations and churches and religious associations in providing assistance to people suffering from domestic violence, influencing people using domestic violence and raising social awareness of the phenomenon of domestic violence, focusing in particular on the causes and effects of domestic violence as well as the methods and forms of counteracting domestic violence.⁶⁷ Moreover, organisational units and legal entities of particular churches and religious associations may implement a program concerning the methods of counteracting domestic violence financed by the minister responsible for social security.⁶⁸ The law also provides for the establishment of a Monitoring Team for Counteracting Domestic Violence, as an opinion-giving and advisory body to the minister for social security,⁶⁹ which includes, among others: twelve representatives of non-governmental organisations, associations, and agreements of non-governmental organisations, as well as churches and religious associations from among the persons nominated by these entities.⁷⁰

The well-being and security of the family is also expressed in the concern for the health of its individual members. According to the law, mutual cooperation between local government units and churches and religious associations includes, among other things, care and assistance for pregnant women.⁷¹ In addition, these entities should also cooperate in limiting the consumption of the alcohol, changing the structure of its consumption, initiating and supporting projects aimed at changing customs regarding

64 | In Polish: Ustawa z dnia 24 kwietnia 2003 r. o działalności pożytku publicznego i wolontariacie (t.j. Dz. U. z 2023 r. poz. 571.).

65 | Article 3, Section 3, Point 1 of the Public Benefit Activities and Voluntary Service.

66 | In Polish: Ustawa z dnia 29 lipca 2005 r. o przeciwdziałaniu przemocy domowej (t.j. Dz. U. z 2021 r. poz. 1249, ze zm.).

67 | Article 9, Section 1 of the Counteracting Domestic Violence Act.

68 | Article 8, Section 7, Letter c of the Counteracting Domestic Violence Act.

69 | Article 10a, Section 1 of the Counteracting Domestic Violence Act.

70 | Article 10b, Sections 1 and 4 of the Counteracting Domestic Violence Act.

71 | In Polish: Ustawa z dnia 7 stycznia 1993 r. o planowaniu rodziny i warunkach dopuszczalności przerywania ciąży (t.j. Dz. U. z 2022 r. poz. 1575.) Article 3, Section 1 of the Family Planning, the Protection of Foetuses, and Grounds for Permitting the Termination of a Pregnancy Act.

the consumption of the alcohol, promoting sobriety in the workplace, and preventing and eliminating consequences of alcohol addiction).⁷²

5. Conclusions

The family as the basic social unit is an expression of the common concern of the political community, represented, among other entities, by local government units and churches and religious associations. The personal substrate is a common part of both communities, which also obliges them to cooperate. The concept of the family, on which the implemented actions are to be focused, should be broadly interpreted as a community living in a common household and jointly contributing to its development. In order to fully realise an individual's rights, children should grow up in an environment that provides them with a sense of security. Therefore, it is important for the smallest social unit – the family – to be provided with appropriate conditions for development and a dignified existence. The need for security is a primary value without which other goods cannot be achieved.

The presented normative solutions should be considered positively; however, most of them seem to be only declarations of potential cooperation and whether they will be filled with appropriate intent is dependent only on mutual commitment. Summarising the findings made in this study, the following conclusions can be drawn:

1. The family as the basic social unit is a subject of interest to the authorities as well as churches and other religious associations.
2. Care for the good of the family should be the point of reference for actions taken for the temporal community, which is the state, and the spiritual community, which is the Church.
3. Society cannot function properly in a situation in which some dysfunctions concerning the existence of the family are present because the well-being of the family determines the well-being of the entire nation.
4. Despite being tolerant of its diversity, the Polish state has turned several times against the followers of specific religions or rituals in its history. A particular intensification of hostility toward the Church and other religious associations was present during the period of the Polish People's Republic (1945 - 1989).
5. Personal dignity belongs to every human person, regardless of their status, origin, or any other factors. It should be perceived as an inherent and long-lasting value of a human, arising from his nature and providing him with the opportunity to rationally execute his own rights without affecting or limiting other people's rights.
6. The necessity of ensuring family security belongs to the group of primary needs; thus, its execution determines not only the preservation of life and health, but also the development of individuals.

72 | In Polish: Ustawa z dnia 26 października 1982 r. o wychowaniu w trzeźwości i przeciwdziałaniu alkoholizmowi (t.j. Dz. U. z 2023 r. poz. 2151.). Article 1, Section 1 of the Uprising in Sobriety and Counteracting Alcoholism Act.

7. The proper functioning of the family is influenced by many factors, including living conditions, parents time spent working, parents' socio-cultural level, harmonious cohabitation, and proper organisation of family life.

8. Family dysfunction may result in a situation in which the community cannot fulfil its responsibilities in a democratic state of law.

9. By ensuring the execution of the basic needs for the smallest and at the same time most basic social unit – the family – the state and the Church fulfil their basic obligations of caring for the common good.

10. Even though the term 'family' is a normative category, the law does not clearly indicate a straightforward interpretation of the term. Depending on the matter as regulated by individual normative acts, we can distinguish various personal scopes of this concept.

11. In both internal and international laws, the law has not established a legal definition of a family but it is limited only to the recognition of the entities that constitute it.

12. The cooperation of the political community, which also includes local government units along with churches and other religious organisations, has its origins in the social teaching of the Catholic Church.

The concept of the common good, which determines cooperation between the state and the Church, is expressed in the inclusion of various partial goods in this term, which include all social conditions for the development of a man and the communities he creates.

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LET THE CHILDREN COME FORWARD – POSITIVE LEGAL INDUCEMENTS FOR FAMILY GROWTH IN ROMANIA

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ABSTRACT

Historically, Romanian law provides few incentives to family growth. The most significant statutory intervention in the demographic issues of the previous century was an abortion ban, which was in effect from 1966 to 1990; however, this punitive approach had short-lived positive demographic effects.

The demographic crisis that has affected Romania since the 1990s has caused the successive political leaderships of the previous decade to use all the normative tools at their disposal to promote family growth and child-rearing. Accordingly, today, even some types of non-traditional families, such as single-parent and nonmarried heterosexual couples, which do not have any clearly defined status in Romanian private law, can avail of all the social protection benefits for their children. However, private law and tax law are much less accommodating to the situations faced by new family types. Furthermore, although medically assisted reproduction is endowed with a family law framework, it is plagued by a lack of detailed follow-up legislation.

This paper presents an overview of all the positive law inducements to family growth in Romania by using a ‘black letter law’ approach. Further, it clarifies some considerations about the future changes in law, particularly those regarding the discrepancies between the very conservative vision of family law and more progressive family approach of social law. Finally, the study presents some recent family law-related European Court of Human Rights and European Court of Justice decisions pertaining to Romania, together with their statute-altering consequences.

KEYWORDS

children
family
parents
allowance
leave
reproduction

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1. History of Legal Inducements to Family Growth in Romania

| 1.1. *Ban of abortions in the post-war period*

In 1957, following World War II, abortion was legalised in Romania by Decree no. 463 of the steering committee of the Great National Assembly. Subsequently, abortion became the preferred contraceptive method, and the total number of abortions increased from 112,000 in 1958 to 1,115,000 in 1966, which was four times more than the total number of births at the time.³

In 1966, the prior permissive legislation was abolished by Decree no. 770/1966 of the State Council⁴, and abortion was banned, in general, with the following exceptions: Pregnancy endangers the mother's life, one of the parents has a serious transmissible hereditary disease, the pregnant woman has a serious mental or physical disability, the woman is over 45 years of age, she has already given birth to four children whom she cares for, and the pregnancy is the result of rape or incest⁵. These exceptions are applicable only during the first three months of pregnancy, with abortions justified by an exceptional pathological condition being accepted only till the sixth month of pregnancy⁶. The limited permissible abortions could be carried out only by specialist physicians in specialised medical institutions following the prior authorisation of a county- or town-level medical committee⁷.

As there were no other readily available contraceptive methods, this abortion ban caused a rapid, but short-lived increase in the number of births, which doubled in two years. However, by the 1980s, clandestine abortions and improvised contraception became widespread, and the poor economic outlook of the time led to a decrease in the number of live births. By 1983, birth rates and fertility rates were close to the levels recorded in 1966 immediately before the adoption ban.

| 1.2. *Material benefits enjoyed by large families during the Communist regime*

Before 1989, childcare state allowance was paid only to children below 16 years of age⁸ and it was differentiated according to the total number of dependent children within a family, recipient parent's income, and family's rural or urban domicile⁹. The allowance varied from a minimum of 130 lei for an only child in a rural domicile and having a high-income parent to a maximum of 500 lei for each child in a family having four or more children in an urban domicile and having a low-income parent¹⁰. The highest possible individual allowance was only approximately 20% of the low-income threshold, whereas

3 | Cârstea and Domnariu, 2021, p. 4.

4 | State Council Decree no. 770 of 1 October 1966 [Online]. Available at: <https://legislatie.just.ro/Public/DetaliuDocument/177> (Accessed: 28 October 2023).

5 | Article 2 of State Council Decree (SCD) no. 770/1966.

6 | Article 3 SCD no. 770/1966.

7 | Article 4 and 5 SCD no. 770/1966.

8 | Article 1 SCD no. 410/1985 [Online]. Available at: <https://legislatie.just.ro/Public/DetaliuDocument/637> (Accessed: 28 October 2023).

9 | Article 2 SCD no. 410/1985.

10 | Article 3 SCD no. 410/1985.

the lowest was less than 3% of the highest income threshold for which a childcare allowance could be paid.

In the 1980s, state childcare allowance was not universally applicable because it was awarded only when one or both parents were state enterprise employees for an indefinite period, in the military, teachers hired on one-year contracts, full-time university students, or pensioners¹¹. Special exceptions were made for cooperative workers, artists, and lawyers, for whom allowance was paid by their organisations, rather than the state¹². There were some strange restrictions to receiving the allowance: For instance, it was first paid to the husband, and it was paid to the wife only if he was not eligible¹³; further, the parent lost the allowance once they became unemployed¹⁴.

Besides the state childcare allowance, mothers caring for three or more underage children received additional benefits of 400 lei for three or four children and 500 lei for five or more children¹⁵. This benefit was available when the descendants were students between 18 and 25 years of age, but it did not consider the children who were in foster care or were adopted out¹⁶.

Furthermore, the wives of men doing military service enjoyed additional benefits. These benefits were 500 lei per month for those domiciled in cities or towns and 350 lei for those living in rural areas if the wives were pregnant at least in the fifth month and had a child who was below 8 years of age or with severe disabilities¹⁷. Finally, mothers giving birth to more than one child were entitled to a 'birth indemnity' of 1,500 lei, equivalent to approximately half the average monthly wage at the time, for each of the second and subsequent children¹⁸.

1.3. Maternity leave before 1989 and day-care facilities

Prior to 1989, maternity leave alone was regulated in Romania, and it could not exceed 112 days, which was very low compared to the leave allowed in the other socialist countries of Eastern and Central Europe; some countries had been allowing even up to three years of parental leave since the 1970s.¹⁹ To enable women's full participation in the workforce, a system of widely accessible public nurseries was made available, particularly in towns and cities. In 1989, 47,239 children were enrolled in 840 such establishments.²⁰

2. Family Law and Civil Law

Romania's private law regulations can be considered neutral with respect to the growth of families and improvement of the demographic situation. Private law maintains

11 | Article 5 para. 1 SCD no. 410/1985.

12 | Article 28 SCD no. 410/1985.

13 | Article 5 para. 2 SCD no. 410/1985.

14 | Article 7 and 8 SCD no. 410/1985.

15 | Article 19 para. 1 SCD no. 410/1985.

16 | Article 19 para. 2 and 3 SCD no. 410/1985.

17 | Article 22 SCD no. 410/1985.

18 | Article 25 SCD no. 410/1985.

19 | Băluță, 2014, p. 232.

20 | Ibid., pp. 232–233.

a very traditional perspective on marriage and family. Although this traditional view of the family, which is based solely on heterosexual marriage, does not hinder families' growth, it does not provide a comprehensive private law framework for non-traditional families, involving single parents, consensual couples, or other living situations where related or nonrelated individuals live together in the same dwelling.

Although Romanian family law regulates only the traditional heterosexual marriage, bans same-sex marriages, and fails to recognise registered partnerships for any couple, it includes a well-established and significantly progressive perspective toward children, irrespective of whether they are born or conceived during or outside marriage. Hence, the law treats all children equally regardless of their birth status, the treatment differing only slightly in the establishment of paternity. Family law accommodates non-traditional families by allowing exceptions for the exclusive or unilateral exercise of parental authority by a single parent, the joint exercise of parental authority by nonmarried parents, the subsequent adoption of a child by a consensual partner of the adoptive parent, and several common law provisions pertaining to the joint ownership of assets.

| 2.1. *Concept of family in private law*

2.1.1. *Definition of marriage*

Romanian law defines spouses as a man and a woman joined together in marriage²¹. Moreover, marriage is the free consenting union between a man and a woman formalised according to law.²²

Romanian family law explicitly forbids and denies any recognition of same-sex marriages²³, including those formalised abroad or involving foreign citizens.²⁴ The same position on nonrecognition applies to civil partnerships contracted abroad that involve same- or different-sex partners. These civil partnerships are not expressly forbidden in domestic law; however, they are not regulated. The nonrecognition of such unions is considered a matter of public order in international private law.²⁵

Even the preliminary stage of 'engagement' is specifically regulated only between a man and a woman²⁶. The only area where Romanian law recognises certain effects of foreign same-sex marriages or foreign civil partnerships is the free movement of individuals, according to E.U. law.²⁷

In this respect, the European Court of Justice case C-673/16 deserves mention: Coman and Hamilton, a Romanian citizen and an American citizen, respectively, got married in Belgium in 2010; however, their same-sex marriage was not recognised by the Romanian authorities with respect to Mr. Hamilton's immigration status. The E.C.J. decision, which came on 5 June 2018, states that the term 'spouse' has a specific meaning in EU law, with no reference to internal law, with respect to freedom of movement. The regulation of marriage in all other aspects should be a matter for member states, and the issue of same-sex

21 | Article 258 para. 3 Civil Code.

22 | Florian, 2022, pp. 6–7; Florian, 2021, pp. 325–327; Hageanu, 2023, p. 6.

23 | Article 277 para. 1 Civil Code.

24 | Article 277 para. 2 Civil Code.

25 | Popescu and Oprea, 2023, pp. 365–366.

26 | Article 266 para. 5 Civil Code.

27 | Florian, 2022, pp. 7–8; Baiaș, 2021, pp. 359–360.

couples is deemed a matter of the right to private or family life, not giving way to a specific right to marriage.²⁸

Romanian legal doctrine notes that the sociological definition of a family is broader than the narrow legal definition of a family based on marriage and includes other criteria such as cohabitation and maintaining a joint household.²⁹ However, the law is yet to fully encompass this notion, only recognising an equal status in relation to the children, including those born and conceived outside marriage or those adopted, after the Second World War.³⁰

On 23 May 2023, the European Court of Human Rights found in Case no. 20081/19 *Buhuceanu and others*³¹ that Romania had violated the rights to family and private life of the plaintiffs (21 same-sex couples) enshrined in Article 8 of the European Convention on Human Rights by not providing any form of legal status or recognition for same-sex couples. This decision foretells some legal upheavals, with a probable future statute on civil partnerships, both for same-sex and heterosexual couples, which will broaden the landscape of legally recognised family types. In the preceding, several attempts were made to adopt a statute on civil partnerships. However, the Parliament rejected two of these initiatives in 2014³² and 2015³³ after another similar bill, which was introduced in 2010, was withdrawn in 2012.³⁴ The fourth recorded initiative, promoted in 2016,³⁵ was rejected by the Senate in October 2016; ever since, it has been entangled in never-ending parliamentary procedures in the Chamber of Deputies (the Lower House of Parliament), lacking any noticeable political support. Another law project regulating civil partnerships was registered in Parliament in June 2018³⁶; however, it was rejected by the Senate in October 2018, as well, immediately after the failed referendum of 2018 regarding the narrow and traditional constitutional definition of marriage. Subsequently, on 28 September 2021, the project was rejected by the Chamber of Deputies, with 226 votes against and only 57 in favour.

28 | Popescu and Oprea, 2023, p. 366.

29 | Motica, 2021, p. 14.

30 | Avram, 2022, pp. 17–18.

31 | Cases nos. 20081/19 and 20 others *Buhuceanu and others v. Romania* [Online]. Available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-224774%22%5D%7D> (Accessed: 26 May 2023).

32 | Law Project Pl-x 670 of 23 December 2013, rejected on 11th June 2014 [Online]. Available at: https://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=13901 (Accessed: 14 August 2023).

33 | Law Project Pl-x 340 of 7 April 2015, rejected on 9th December 2015 [Online]. Available at: https://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=14867 (Accessed: 14 August 2023).

34 | Law Project BP 855 of 13 October 2010, withdrawn on 23rd February 2012 [Online]. Available at: https://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=11483 (Accessed: 14 August 2023).

35 | Law Project PL-x 498 of 31 October 2016. [Online]. Available at https://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=16017 (Accessed: 14 August 2023).

36 | Law Project PL-x 662 of 31 October 2018. rejected on 28th September 2021. [Online]. Available at: https://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=17482 (Accessed: 14 August 2023).

2.1.2. *Relatives by blood*

Romanian family law attributes considerable significance to blood relationships. It considers relationships defined by blood to be 'standard' or 'normal' as opposed to those originating from a lawful act and are called 'civil' relationships. Accordingly, article 405 para. 1 Civil Code defines blood relatives as individuals based on the descendancy of a person from another person or on several persons having a common ancestor, whereas civil relatives result from adoptions.³⁷

Further, blood relatives are classified into two: Direct-line relatives occur when a person is a descendant of another³⁸: parent–child, grandparent–grandchild, and so on. Collateral relatives³⁹ are individuals having a common ancestor: siblings, uncle/aunt–nephew/niece, cousins, and so on.⁴⁰ In such relationships, intestate inheritance is received mainly by blood relatives, apart from surviving spouses and adoptive relatives.

2.1.3. *Family by consent – adoption and medically assisted reproduction*

2.1.3.1. Adoption

Romanian law generally reserves adoption for children who are yet to reach full legal capacity⁴¹. It allows the adoption of individuals with full legal capacity only for those raised by adoptive parents during childhood.⁴²

Further, legal doctrine clarifies the following conditions of adoption for children: A child lacks, temporarily or permanently, the protection of his or her biological parents, or it is in the child's best interests not to be left in the parents' care. Although relevant special legal provisions are lacking, a child's right to be brought up by his or her biological parents is a fundamental one, and an 'acceptable' level of parental protection cannot give way to adoption.⁴³ Further, the adoption process requires the consent of the child's biological parents or legal guardian, adopted child if he or she is at least 10 years old, single adopter or adoptive couple, and adopter's spouse who does not join the adoption process.⁴⁴

Adoptive parents should be single individuals or married couples who have complete legal capacity and do not have any psychiatric afflictions or mental handicaps⁴⁵. In general, they must be at least 18 years older than their prospective adoptees; however, for well-grounded reasons, the guardianship court can allow adoptions to proceed even when the age gap is at least 16 years between adoptive parents and adopted children⁴⁶. Romanian law does not stipulate a maximum age for adoptive parents.⁴⁷

37 | Avram, 2022, p. 240.

38 | Article 406 para. 1 Civil Code.

39 | Article 406 para. 2 Civil Code.

40 | Avram, 2022, pp. 240–241.

41 | Article 455 para. 1 Civil Code.

42 | Florian, 2022, pp. 492–494.

43 | Ibid., pp. 494–495.

44 | Ibid., pp. 496–498; Avram, 2022, pp. 332–336.

45 | Article 459 Civil Code.

46 | Article 460 Civil Code.

47 | Florian, 2022, pp. 502–503, 508.

However, prospective adopters must provide both moral and material guarantees to raise, educate, and ensure the adopted child's development. These conditions are verified and certified by state authorities.⁴⁸

In general, simultaneous or successive adoptions by two different individuals are not allowed, the only exceptions being married couples⁴⁹ and stable consensual heterosexual couples who raised the adopted child together for at least five years⁵⁰. Additionally, successive adoptions are allowed following the cessation of the previous adoption process for any reason or the death of the previous adoptive parents followed by the authorisation of a new adoption⁵¹. Further, two people of the same sex cannot adopt the same child together⁵² or adopt the biological or previously adopted child of another same-sex parent.⁵³

Further, brothers and sisters cannot adopt one another under any circumstances⁵⁴, however, when they are adoptees themselves, they must be adopted together, except when this is not in their best interests⁵⁵. Moreover, Romanian law forbids the adoption of spouses or former spouses together by the same adoptive parent, as well as adoptions among spouses or former spouses when one current or former spouse becomes the adoptive parent of the other.⁵⁶

2.1.3.2. Paternity and maternity issues arising from legal human reproductive procedures

The gamete 'donor' can be the parent of a child conceived through assisted reproductive procedures (ARPs) only when there occurs a reproductive cell 'transplant' between partners, which is called in-vitro fertilisation (IVF). Third-party donations of gametes, either male or female, do not result in legal parenthood because maternal filiation depends solely on giving birth, in a similar manner to natural motherhood.⁵⁷ However, the law specifically excludes the fatherhood of the third-party donor, or genetic father⁵⁸. It broadly states that medically assisted reproduction with a third-party donor gives rise to filiation between the child and donor.

ARPs do not involve any special presumptions of parenthood; the mother is the person giving birth, and the father is presumed to be the mother's husband at the time of birth,⁵⁹ former husband at the time of conception, or mother's cohabiting partner at the time of conception (the latter presumption is applied only during paternity trials).

The true source of paternal filiation in cases of medically assisted reproduction with a third-party donor is the consent provided by the mother's husband or consensual partner to undergo the procedure. Paternal filiation can be contested only for any lack of previous

48 | Florian, 2022, pp. 503–504; Avram, 2022, pp. 337–338.

49 | Article 462 para. 1 Civil Code.

50 | Article 6 para. 2c Law no. 273/2004 on adoption procedure [Online]. Available at: <https://legislatie.just.ro/Public/DetaliiDocument/52896> (Accessed: 1 May 2023).

51 | Article 462 para. 2 Civil Code.

52 | Article 462 para. 3 Civil Code.

53 | Florian, 2022, pp. 508–509.

54 | *Ibid.*, p. 507.

55 | Article 456 Civil Code.

56 | Florian, 2022, pp. 507–508.

57 | *Ibid.*, p. 475.

58 | Article 441 para. 1 Civil Code.

59 | Florian, 2022, p. 475.

consent from the father or if the pregnancy does not involve any medically assisted procedure.⁶⁰ A consensual partner who gives his consent to this procedure is liable to recognize paternal filiation after birth⁶¹ if there is no intervening marriage between parents.

2.1.4. *Diminished importance of in-laws in contemporary law*

Contemporary law⁶² defines in-laws as the relatives of one's spouse; they can be fathers-in-law, mothers-in-law, sons-in-law, daughters-in-law, stepparents, brothers, or sisters-in-law. The in-laws' degrees are matched to the relatives' degree to the spouse⁶³. The in-laws remain as they are for the duration of the marriage unless an individual's blood or civil relationship with one of the spouses ceases prior to the end of the marriage due to adoption.⁶⁴

The older Romanian laws emphasised the situation of in-laws, often even hindering the marriage between a former parent-in-law and their former children-in-law or other relatives of their former spouse⁶⁵. For instance, provisions of the old Romanian Civil Code of 1864⁶⁶ forbade the marriage between a former spouse and the other spouse's direct descendants or ascendants or even the direct relatives of a former cohabiting partner.⁶⁷ The prohibition of marriage extended even to the former spouse's collateral relatives up to the fourth degree, such as their siblings, aunts, uncles, nephews, nieces, and first cousins.⁶⁸

Currently, being someone's in-law has very limited practical importance in private law. For example, in-laws up to the third degree (such as the spouse's aunts, uncles, or nephews/nieces) cannot be witnesses⁶⁹ in a civil trial that their in-law is a party to unless the other party agrees to it or the trial pertains to family issues, such as a divorce or filiation⁷⁰.

2.2. *Parental authority and children's rights in Romania*

In Romania, parental authority and children's rights are primarily regulated by the Civil Code of 2009⁷¹ and the Law no. 272/2004 on the protection and furthering of children's rights⁷². Parental authority is legally defined as the ensemble of rights and duties that is applicable to both the person and assets of the child and is the responsibility of both

60 | Ibid., pp. 476–477; Motica, 2021, p. 228.

61 | Florian, 2022, pp. 478–480.

62 | Article 407 para. 1 Civil Code.

63 | Article 407 para. 2 Civil Code.

64 | Avram, 2022, p. 241.

65 | Alexandresco, 1906, pp. 583–590.

66 | Civil Code of 26 November 1864 [Online]. Available at: <https://legislatie.just.ro/Public/DetaliiDocument/1> (Accessed: 28 April 2023).

67 | Article 143 of the Civil Code of 1864; Alexandresco, 1906, p. 586.

68 | Alexandresco, 1906, p. 589.

69 | Article 315 para. 1 section 1 Code of Civil Procedure of 2010.

Code of Civil Procedure – Law no. 134 of 1 July 2010 [Online]. Available at: <https://legislatie.just.ro/Public/DetaliiDocument/140271> (Accessed: 2 May 2024).

70 | Article 316 Code of Civil Procedure of 2010.

71 | Civil Code – Law no. 287 of 19 July 2009 [Online]. Available at: <https://legislatie.just.ro/Public/DetaliiDocumentAfis/288566> (Accessed: 29 April 2023).

72 | Law no. 272 of 21 June 2004 on the protection and furthering of the rights of the child [Online]. Available at: <https://legislatie.just.ro/Public/DetaliiDocument/52909> (Accessed: 2 May 2023).

parents equally.⁷³ Parents can exercise their parental authority only in the best interests of their child, respecting the child's person and associating the child with any decision that concerns them according to their age and maturity⁷⁴. Parental authority lasts until the child becomes fully legally capable⁷⁵. Although full civil capacity is generally achieved at the age of 18 years, it can be achieved earlier in some cases through either civil emancipation or underage marriage.⁷⁶

Any disagreements between parents regarding their exercise of parental authority are settled by the guardianship court, which must hear the parents' explanations, consider the results of the psychosocial enquiry made by local authorities, and hear the child if they are at least ten years old⁷⁷. Finally, any court decision is rendered according to the child's best interests.⁷⁸

Usually, parents jointly exercise their parental authority as soon as filiation is established toward both, even if they are not married or living together. The parents who do not live together but are required to exercise their joint parental authority must make major decisions concerning the child together, such as choosing a type of education or professional training for the child, agreeing to complex medical treatments or surgery, choosing the child's residence, and managing the child's assets.⁷⁹ If, for any reason, one parent does not express an opinion on the major child-related decisions, the parent with whom the child resides must make the decision, except when this contravenes the child's best interests⁸⁰.

The valid reasons that justify the permanent unilateral exercise of parental authority by only one parent include the other parent's alcoholism; psychiatric illness; drug addiction; violence towards the child or the other parent; criminal convictions for people trafficking, drug trafficking, sex offences, and violent offences; and any other reason related to the risks for the child derived from this parent's exercise of parental authority⁸¹. Further, parental authority is exclusively exercised by only one parent by default when the other is deceased, legally incapable, or stripped of parental rights by the court.⁸²

Romanian law specifically regulates a vast array of children's rights, such as the right to establish and maintain their identity⁸³; maintain personal relations and direct contacts with parents, relatives, and any other individual to whom the child has an attachment⁸⁴; protection of their public image, as well as their intimate, private and family life⁸⁵; freedom of expression⁸⁶; freedom of thought, conscience, and religion⁸⁷; and freedom

73 | Florian, 2022, p. 547; Avram, 2022, pp. 411–412.

74 | Article 483 para. 2 Civil Code.

75 | Article 484 Civil Code.

76 | Florian, 2022, pp. 552–553; Avram, 2022, pp. 421–422.

77 | Article 486 Civil Code.

78 | Florian, 2022, pp. 575–576; Avram, 2022, pp. 530–531.

79 | Avram, 2022, pp. 428–429.

80 | Article 36 para. 4 Civil Code.

81 | Article 36 para. 6 Law no. 272/2004.

82 | Florian, 2022, pp. 576–579; Avram, 2022, pp. 431–436.

83 | Article 9 Law no. 272/2004.

84 | Article 17 Law no. 272/2004.

85 | Article 27 para. 1 Law no. 272/2004.

86 | Article 28 para. 1 Law no. 272/2004.

87 | Article 30 para. 1 Law no. 272/2004.

of association⁸⁸. Some other rights are as follows: the rights of children belonging to ethnic minorities to preserve their cultural life, language, religion, and ethnicity⁸⁹; right to respect for their personality and individuality; right to be safeguarded from physical punishment and humiliating or degrading treatments⁹⁰ and to be raised alongside their parents⁹¹; right to health and healthcare⁹²; right to social assistance⁹³; right to education⁹⁴; and right to rest and holidays⁹⁵.

| 2.3. Property, liability, and maintenance aspects in relation to nuclear and extended families

The only legally joint property of a family is the one belonging to the spouses choosing a community property regime. Matrimonial community property is both the default legal regime and a contractual regime, and some limited alterations can be made to the default regime.⁹⁶ Further, spouses can choose a separation of assets regime, which can also be judicially established if one of the spouses abuses any type of community property regime.⁹⁷

Romanian law ensures patrimonial independence between parents and children, as well as other family members, with parents having no rights on their child's assets and children having no rights on their parents' fortune⁹⁸. The only exceptions to this rule are related to maintenance and inheritance rights.

Maintenance obligations involve family members such as spouses, direct relatives (parents and children and, grandparents and grandchildren), and siblings⁹⁹ and include a special provision for stepparents who voluntarily provide maintenance to their spouse's children and can be compelled to continue providing for them if the child is underage and their natural parents are deceased, have disappeared, or are in need themselves.¹⁰⁰ Legal maintenance must be provided only to those in need, that is, individuals who cannot use their assets and income to provide for themselves.¹⁰¹ Underage children can request maintenance from their parents when they cannot provide for themselves with their own income, disregarding their assets.¹⁰²

Legal inheritance or intestate inheritance is applicable to spouses and extended families to the fourth degree. Spouses inherit jointly with any relatives of the deceased without excluding the latter and without being legally excluded¹⁰³. Spouses inherit one quarter of the deceased's estate if there are descendants, one third if there are both

88 | Article 31 para. 1 Law no. 272/2004.

89 | Article 32 para. 1 Law no. 272/2004.

90 | Article 33 para. 1 Law no. 272/2004.

91 | Article 35 para. 1 Law no. 272/2004.

92 | Article 46 para. 1 Law no. 272/2004.

93 | Article 48 para. 1 Law no. 272/2004.

94 | Article 51 para. 1 Law no. 272/2004.

95 | Article 53 Law no. 272/2004.

96 | Florian, 2022, pp. 193–273; Avram, 2022, pp. 657–768.

97 | Florian, 2022, pp. 274–289, 294–297; Avram, 2022, pp. 759–766.

98 | Article 500 Civil Code.

99 | Article 516 para. 1 Civil Code.

100 | Florian, 2022, pp. 600–601; Avram, 2022, pp. 516–517.

101 | Florian, 2022, pp. 604–606; Avram, 2022, pp. 519–521.

102 | Florian, 2022, pp. 625–629; Avram, 2022, pp. 537–542.

103 | Article 917 para. 1 Civil Code.

surviving parents and siblings or nephews, one half if there are only surviving parents or siblings/nephews, and three quarters if the only inheriting relatives are distant ascendants (grandparents or great-grandparents) or cousins¹⁰⁴. The existence of close relatives, particularly descendants, cancels the other relatives' effective inheritance rights¹⁰⁵.

| 2.4. New legislation on the prevention of parents' separation from their children

In summer 2023, a new law no. 156/2023 was introduced to prevent children's separation from their families. The law establishes obligations for local public authorities, particularly public social assistance services, to identify and provide support services to vulnerable children and families in areas with increased risk of family separation. This new regulation is not revolutionary because the Law on the protection and furthering of children's rights no. 272/2004 already stipulated in 2004 that absolute priority should be assigned to raising children in their natural families, and these families should receive comprehensive support from local authorities to prevent the separation of children.

3. Social, Work, and Pension Benefits for Child-Rearing

| 3.1. Law on universal child allowance

For more than three decades, Romania has been maintaining a universal child allowance for all children below 18 years of age; it even considers as children the individuals between 18 and 26 years of age who are still in high school, attend trade schools, or pursue other forms of secondary (non-university) education (article 1 L. 61/1993). Moreover, this allowance is available to children with foreign citizenship, as well, provided they are residing with their parents in Romania (article 2 L. 61/1993).

The universal child allowance differs for children between 2 and 18 years of age, a higher amount being offered to children under 2 years or those with disabilities (article 3 L. 61/1993). Until 2019, the allowance was mainly symbolic for children between 2 and 18 years of age, with the amounts being 84 lei (20 Euro) in 2015, 150 lei (32 Euro) in 2019, and 256 lei (52 Euro) in 2023. For children below 2 years or children with disabilities, the universal child allowance increased from 200 lei (55 Euro) in 2008 and 300 lei (63 Euro) in 2019 to 631 lei (127 Euro) in 2023.

| 3.2. Allowance for child-rearing

One of the most generous family benefits ensured by Romanian law is the allowance for child-rearing, which is paid during the corresponding leave for child-rearing. This provision, which dates to 2010, has not undergone substantial changes over the years.

The allowance for child-rearing can be paid to either the biological mother or biological father of the child or to the adoptive parent, legal guardians, or nonprofessional foster

104 | Article 972 para. 1 Civil Code.

105 | Article 975 para. 2 Civil Code.

parents who fulfil taxable income requirements¹⁰⁶. Although the person demanding this allowance can be a Romanian or foreign citizen, they must reside in Romania with the child and effectively care for the child directly¹⁰⁷.

The allowance is paid if the claimant has taxable income (salary, independent contractor or freelance revenues, intellectual property royalties, or agricultural revenues) for at least 12 months in the two years before the child's birth¹⁰⁸. However, this income requirement has several broad exceptions, rendering the allowance almost universal (e.g. the 12 months of taxable income also include the durations of unemployment benefits, paid medical leave, childcare leave, and studies from high school to the doctoral level¹⁰⁹).

The allowance for child-rearing is 85% of the average after-tax income gained in the last 12 months before the child's birth¹¹⁰. It should not exceed 8,500 lei (1,700 Euro) per month; however, it should maintain a guaranteed minimum allowance threshold of 2.5 times the Social Reference Indicator (SRI; 598 lei/120 Euro in 2023). Hence, this allowance is between 300 and 1,700 Euro at 2023 levels. If twins or other forms of multiple pregnancies occur, the standard allowance of 85% of the previous income is supplemented with 300 Euro (2.5 times the SRI) for each supplemental child¹¹¹. A 2022 change to this provision states that the supplemental allowance will be 50% of the standard allowance without falling below 2.5 times the SRI.

The allowance for child-rearing is paid from the end of maternal childbirth leave (which is a minimum of 42 days after birth) to when the child is two years, three years old for children with disabilities, of age¹¹². If both parents fulfil the conditions for receiving the allowance, the second parent must take at least two months off and receive this allowance; otherwise, the two months are lost and non-transferrable to the other parent¹¹³.

The parents who choose not to take the child-rearing leave and, instead, earn taxable income receive a monthly bonus of 1,500 lei (300 Euro) until the child is six months old, or one year old for a child with disabilities¹¹⁴. Later, the bonus is reduced to 650 lei (130 Euro), which is paid from six months to two years old (one year to three years old for a child with disabilities)¹¹⁵.

The parents who return to earning taxable income after finishing their child-rearing leave can receive a work return allowance of 650 lei (130 Euro) for one year, between the second and third birthdays of the child (the third and fourth birthdays of the child with disabilities)¹¹⁶.

106 | Article 8 Government Emergency Decree (GED) no. 111/2010 on the allowance and leave for child rearing [Online]. Available at: <https://legislatie.just.ro/Public/DetaliuDocument/124331> (Accessed: 28 October 2023).

107 | Article 12 para 1 GED no. 111/2010.

108 | Article 2 para. 1 GED no. 111/2010.

109 | Article 2 para 5 GED no. 111/2010.

110 | Article 2 para. 1 GED no. 111/2010.

111 | Article 5 GED no. 111/2010.

112 | Article 16 GED no. 111/2010.

113 | Article 11 para. 1 GED no. 111/2010.

114 | Article 7 para. 1a GED no. 111/2010.

115 | Article 7 para. 1b GED no. 111/2010.

116 | Article 7 para. 2 GED no. 111/2010.

3.3. Allowance for families with underage children and limited means (Law no. 277/2010¹¹⁷)

To support low-income families with underage children, Romania has, since 2010, been providing a special allowance to supplement the family's income to provide better living conditions for and promote the school attendance of children¹¹⁸. This law defines recipient families as those composed of a husband, wife and their dependent children living together; those comprising a single adult and their dependent children living together; or families where an unmarried man and woman live together with either of their children¹¹⁹. Additionally, families include soon-to-be adopted children who are placed with their adoptive parents by the court, foster children who are placed with their unpaid foster parents, and children under guardianship¹²⁰.

Further, the income and corresponding allowance of families were appraised using SRI, which was 598 lei (120 Euro) in 2023. Two-parent families with an average after-tax monthly income per person less than 40% of the SRI (less than 48 Euro/month/person) receive an allowance between 16.4% of the SRI (20 Euro/month), for one child, and 65.6% of the SRI (80 Euro/month), for four or more children¹²¹. Families with a mean after-tax monthly income per person between 40% and 106% of the SRI (between 48 and 126 Euro/month/person) receive an allowance between 15% of the SRI (18 Euro/month) for one child and 60% of the SRI (72 Euro/month) for four or more children¹²².

Further, single-parent families with a mean after-tax monthly income per person less than 40% of the SRI (less than 48 Euro/month/person) receive an allowance between 21.4% of the SRI (26 Euro/month) for one child and 85.6% of the SRI (104 Euro/month) for four or more children¹²³. Similarly, single-parent families with a mean after-tax monthly income per person between 40% and 106% of the SRI (between 48 and 126 Euro/month/person, respectively) receive an allowance between 20.4% of the SRI (24.5 Euro/month) for one child and 81.6% of the SRI (98 Euro/month) for four or more children¹²⁴. This family allowance is provided to Romanian legal residents irrespective of their citizenship and the homeless people who have not received this allowance from other local authorities¹²⁵. The family support allowance is conditional on school attendance for school-age children, with special accommodations being made for medical reasons or to include children with disabilities¹²⁶.

117 | Law no. 277 of 24 December 2010 on the allowance for family support [Online]. Available at: <https://legislatie.just.ro/Public/DetaliiDocument/124905> (Accessed: 28 October 2023).

118 | Article 1 Law no. 277/2010.

119 | Article 2 para. 1 Law no. 277/2010.

120 | Article 4 para. 1 Law no. 277/2010.

121 | Article 5 para. 1 Law no. 277/2010.

122 | Article 5 para. 2 Law no. 277/2010.

123 | Article 6 para. 1 Law no. 277/2010.

124 | Article 6 para. 2 Law no. 277/2010.

125 | Article 7 Law no. 277/2010.

126 | Article 8 Law no. 277/2010.

| 3.4. *Guaranteed minimum income (Law no. 416/2001)*¹²⁷

Since 2001, Romania has been providing social minimum income to families and single individuals having either Romanian citizenship¹²⁸ or domicile or legal residence in Romania¹²⁹. Romanian social law provides the following broad definition of families: married different-sex spouses with or without dependent children, single parents with children, adult childless siblings living together separately from their parents, and different-sex couples cohabiting with dependent children.¹³⁰

The level of guaranteed social minimum income is adjusted to the SRI (which was 598 lei/120 Euro in 2023) and depends on the number of cohabiting family members. It varies between 28.3% of the SRI (62 Euro) for a single-person household and 105.4% of the SRI (127 Euro) for a five-person household, with an additional 7.3% of the SRI (9 Euro) for each supplemental family member¹³¹.

| 3.5. *Minimum income for inclusion (Law no. 196/2016)*¹³²

Since 2016, Romania has been offering the so-called 'minimum income for inclusion', a selective social benefit for families and single persons who experience dire situations during their lifetime for socioeconomic, health, or social environment reasons and have no or diminished capacity for social integration¹³³. The state provides this financial support to prevent social exclusion and poverty and enhance the affected children's participation in the education system.

Families are broadly defined by this law as follows: both traditional families with married spouses who either are childless or have underage or dependent children, single-parent families, families comprising individuals who informally cohabit with different-sex partners and may or may not have underage or dependent children.¹³⁴ The benefits of social inclusion are means-tested and, to qualify for these benefits, the beneficiary's monthly after-tax income must be less than 700 lei (140 Euro) for a single person, with 350 lei (70 Euro) being added for each additional family member¹³⁵.

The minimum income for social inclusion offers a broad array of social benefits: financial aid, including that for social inclusion and families with children and other complementary measures such as in-work stimulus and contribution exemptions¹³⁶. The aid provided to families with children is two-tiered¹³⁷. The first tier is for families earning less than 275 lei/month (55 Euro) for the first person and 50% of that amount for each subsequent person. The aid for two-parent families is between 107 lei (22 Euro) for one child and 428 lei (88 Euro) for four or more children, whereas the aid for single-parent

127 | Law no. 416 of 18 July 2001 on the guaranteed minimum income [Online]. Available at: <https://legislatie.just.ro/Public/DetaliiDocument/29731> (Accessed: 28 October 2023).

128 | Article 1 para. 1 Law no. 416/2001.

129 | Article 2 para. 7 Law no. 416/2001.

130 | Hageanu, 2023, p. 8.

131 | Article 4 Law no. 416/2001.

132 | Law no. 196 of 31 October 2016 on the minimum income for social inclusion [Online]. Available at: <https://legislatie.just.ro/Public/DetaliiDocument/183328> (Accessed: 28 October 2023).

133 | Article 1 Law no. 196/2016.

134 | Hageanu, 2023, p. 8.

135 | Article 9 Law no. 196/2016.

136 | Article 3 Law no. 196/2016.

137 | Article 18 Law no. 196/2016.

families is slightly larger, between 120 lei (24 Euro) and 480 lei (96 Euro). The second tier is for families earning between 276 lei (55 Euro) and 700 lei (140 Euro) monthly for the first person and 50% of this amount for each subsequent person; the aid for two-parent families is between 85 lei (17 Euro) for one child and 340 lei (68 Euro) for four or more children, whereas that for single-parent households is between 110 lei (22 Euro) and 430 lei (86 Euro).

The aid for families with children is contingent on the children's regular school attendance, except for medical reasons¹³⁸. Further, unjustified truancy leads to financial penalties that increase from 50% of the monthly aid for each child who misses more than 15 classes per month¹³⁹.

| 3.6. Medical, social, and merit-based public scholarships

Romania offers several types of public scholarships for primary-, middle-, high-, trade-school students¹⁴⁰, as well as university students. These scholarships either are merit based or focus on social reasons, including healthcare. Merit-based scholarships are awarded for either results in school competitions or very good results in everyday learning.

In the 2023–2024 school year, merit-based scholarships for non-university students were at least 450 lei (90 Euro) monthly for good results in everyday learning and being in the top 30% of each class, at least 700 lei (140 Euro) monthly for good results in national school competitions, and the equivalent of the minimum monthly wage (3,000 lei or 600 Euro) for coming first in international school contests¹⁴¹. Social scholarships are 300 lei (60 Euro) monthly, with the same minimum amount being stipulated for the scholarships awarded to trade-school students. Further, special monthly scholarships of 700 lei (140 Euro) are granted to underage mothers who attend school¹⁴²; however, they have compulsory attendance requirements.

Decisions regarding the scholarships for university students, which are broadly classified into merit-based and social categories, are made by the universities themselves and their senates. For example, in 2023, Babes-Bolyai University in Cluj County, Romania, divided its state-financed scholarship fund into 70% for different types of merit-based scholarships and 30% for social scholarships. The most common types of scholarships, which are awarded every semester, are between 700 lei/month (140 Euro) and 1,000 lei/month (200 Euro) for merit-based scholarships and 580 lei/month (116 Euro) for most social scholarships.

| 3.7. Maternity leave

In Romania, paid maternity leave is up to 126 days and includes pregnancy and childbirth leave¹⁴³. The mother's income during her maternity leave is 85% of her average pre-tax income for the preceding six months, capped at a maximum of 12 gross minimum

138 | Article 19 para. 1 Law no. 196/2016.

139 | Article 19 para. 2 Law no. 196/2016.

140 | Law no. 198/2023 on pre-university education [Online]. Available at: <https://legislatie.just.ro/Public/DetaliuDocument/271896> (Accessed: 28 October 2023).

141 | Article 108 Law no. 198/2023.

142 | Article 108 para. 19 Law no. 198/2023.

143 | Article 23 para. 1 GED no. 158/2005 on social health insurance leaves and allowances [Online]. Available at: <https://legislatie.just.ro/Public/DetaliuDocument/66305> (Accessed: 3 May 2023).

wages per month¹⁴⁴, which was 36,000 lei in 2023 (7,200 Euro); further, it is paid out of the National Health Insurance Fund¹⁴⁵. Usually, both pregnancy leave, and childbirth leave are 63 days; however, the mother can choose, based on a physician's advice or her personal choice, to adjust the two types of maternity leave, while taking at least 42 days for childbirth leave and keeping the total below 126 days¹⁴⁶.

| 3.8. Parental leave for child-rearing

The law on child-rearing leave allows either parent to take paid time off for child-rearing; however, this can only be granted after the mother's minimum compulsory 42 days of maternity leave after childbirth. This parental leave is continued until the child is two years old (three years old for a child with disabilities¹⁴⁷. This leave becomes available to biological, adoptive, and future adoptive parents, after the court entrusts the child to them, as well as foster parents, legal guardians, or emergency foster parents but not to paid maternal assistants¹⁴⁸.

The 2023 update to the law compels the parent who has not yet taken the paid time off for child-rearing to take at least two months off if they qualify¹⁴⁹. If they do not share the child-rearing leave, both parents lose the benefit of the last two months of paid time off.

| 3.9. Special family-related work leaves incorporated in labour law

Romanian law provides for two special family-related work leaves, which can be considered to help family growth: the paid leave for medical childcare¹⁵⁰ and the one for maternal risk¹⁵¹.

Romanian labour law¹⁵² allows employees to take paid child-rearing leave until the child is two years old; the age is extended to three years old for children with disabilities¹⁵³. Furthermore, it allows the employees to take a maximum of 45 days per year of medical leave to care for a sick child until age seven; for children with disabilities and intercurrent afflictions, the age limit is 18 years¹⁵⁴. For the duration of such work leaves, the employment contract is suspended¹⁵⁵; however, it cannot be terminated by the employer¹⁵⁶. A 2023 change to the medical leave law¹⁵⁷ allows parents to benefit from the medical leave to care for the sick child until the latter's twelfth birthday, provided the child is without disabilities. For children with disabilities or serious afflictions, the age limit is 18 years¹⁵⁸.

144 | Article 25 and Article 10 para. 1 GED no. 158/2005.

145 | Article 25 para. 2 GED no. 158/2005.

146 | Article 24 GED no. 158/2005.

147 | Article 2 para. 1 GED no. 111/2010.

148 | Article 8 GED no. 111/2010.

149 | Article 11 para. 1 GED no. 111/2010.

150 | Article 26 GED no. 158/2005.

151 | Article 2 para. 1d¹ and 1e GED no. 158/2005.

152 | Labour Code – Law no. 53 of 24 January 2003 [Online]. Available at: <https://legislatie.just.ro/Public/DetaliiDocument/128647> (Accessed: 28 October 2023).

153 | Article 51 para. 1a Labour Code.

154 | Article 51 para. 1b Labour Code.

155 | Article 51 para. 1 Labour Code.

156 | Article 60 para. 1e and 1f Labour Code.

157 | Article 26 para. 1 GED no. 158/2005.

158 | Article 26 GED no. 158/2005.

This paid medical childcare leave is usually up to 45 days per year for each child; however, this amount can be surpassed if the child has a contagious disease, is immobilised, or has undergone surgery. In these situations, the specialist physician determines the appropriate amount of childcare leave based on disease progression¹⁵⁹.

A pregnant employee or recent mother has the right to avail supplemental work leave for maternity risk¹⁶⁰ for up to 120 days¹⁶¹. This leave can be used before the regular maternity leave (usually 63 days before birth) or after the regular leave for childbirth (usually 63 days after birth) if the employer cannot accommodate the risks to mothers' health and safety or negative consequences for pregnancy or breastfeeding by changing the working conditions, work schedule, or place of work.¹⁶² Moreover, the leave for maternity risk can be availed by pregnant employees, recent mothers, or breastfeeding mothers who cannot be transferred from night-time to daytime work schedules for objective reasons,¹⁶³ as well as those who cannot be transferred from dirty or difficult work environments¹⁶⁴.

3.10. Day-care provisions

In Romania, day cares (*creșe*) are considered a part of the educational system, and they benefit children below the age of three years. Kindergartens are institutions that educate children between the ages of three and six. The new law on the pre-university education system, which was enforced on 3 September 2023, specifically mentions day cares as educational institutions for children between three months and three years old that can function either independently as legal persons or as part of other educational institutions that are legal persons¹⁶⁵.

The villages, towns, and cities where there are no day cares/kindergartens or where the number of day-care/kindergarten places is less than the number of children below the age of 3, respectively between 3 and 6, can develop complementary early education services such as organised playgroups or community kindergartens¹⁶⁶. Further, some employers establish early educational institutions to support their employees; they can either receive financial benefits from the government for such efforts or opt for partial tax deductions for the funds provided by them to their employees to promote early education¹⁶⁷.

According to the current day-care regulations¹⁶⁸, day cares can be either educational institutions or so-called day centres (*centre de zi*); they comprise social services that provide care, education, and counselling to children during daytime to prevent their

159 | Article 29 para. 1 Labour Code.

160 | Article 31 GED no. 158/2005.

161 | Article 10 GED no. 96/2003 on the protection of motherhood in the workplace [Online]. Available at: <https://legislatie.just.ro/Public/DetaliuDocument/47216> (Accessed: 28 October 2023).

162 | Dub, 2017, p. 11.

163 | Ibid., pp. 11–12.

164 | Article 20 para. 4 GED no. 96/2003.

165 | Article 30 Law no. 198/2023.

166 | Article 30 para. 3 Law no. 198/2023.

167 | Article 30 para. 6 Law no. 198/2023.

168 | Methodology on day-cares and early pre-school education, approved by the government order (GO) no. 566/2022 [Online]. Available at: <https://legislatie.just.ro/Public/DetaliuDocument/254657> (Accessed 28 October 2023).

separation from parents¹⁶⁹. Day cares can be either public or private and offer standard programs (5 hours/day), extended programs (10 hours/day), or both¹⁷⁰. These institutions use a 'group' system to divide children according to their age into small (below 12 months), medium (between 13 and 24 months), and big (between 25 and 36 months) groups. On average, the small, medium, and big groups should have 7 (between 5 and 9), 12 (between 8 and 15), and 12 (between 8 and 20) children, respectively¹⁷¹. Extended-program day cares must be open throughout the year, including school holidays; however, they can provide restricted services during the holidays in accordance with demand and personnel holidays¹⁷².

3.11. *Survivor pension benefits for the deceased provider's dependent children and spouse (Law no. 263/2010173)*

Similar to the pension laws enacted previously, the current Romanian public pension law, Law no. 263/2010, provides a 'survivor pension' for the children and spouse of a deceased provider who either was a retiree at the time of death or fulfilled the conditions to receive a pension¹⁷⁴. Children receive the survivor pension following their parent's death if they are below 16 years of age, without fulfilling any further condition. They receive the pension between 16 and 26 years of age only if they attend any type of organised studies or for the duration of their disability, in case they become disabled during their studies or before the age of 16¹⁷⁵.

The surviving spouse receives the survivor pension for the duration of their life if they have reached the retirement age and the marriage had lasted at least 15 years¹⁷⁶. If the marriage's duration is between 10 and 15 years, the survivor pension is diminished by 0.5% for each month that is missing from the required 15-year duration¹⁷⁷. Even for marriages with durations less than 10 years, the spouse can receive the pension in the following special circumstances: They have severe disability, the marriage lasted at least one year, the survivor's personal income is less than 35% of the monthly national average pre-tax wage, and either the deceased died in a work-related accident or due to a work-related illness¹⁷⁸ or the surviving spouse has one or more dependent children below the age of seven¹⁷⁹. A surviving spouse without any income or with an income less than 35% of the national average monthly pre-tax wage can receive a survivor's pension for six months if they do not fulfil the other conditions for this type of pension¹⁸⁰.

169 | Article 1 para. 4 of the Methodology on day-cares.

170 | Article 8 para. 3 and 4 of the Methodology on day-cares.

171 | Article 10 of the Methodology on day-cares.

172 | Article 14 paras. 1 and 3 of the Methodology on day-cares.

173 | Law no. 263 of 16 December 2010 on the unitary system of public pensions [Online]. Available at: <https://legislatie.just.ro/Public/DetaliiDocument/262643#A65367497> (Accessed: 28 October 2023).

174 | Article 83 Law no. 263/2010.

175 | Article 84 Law no. 263/2010.

176 | Article 85 para. 1 Law no. 263/2010.

177 | Article 85 para. 2 Law no. 263/2010.

178 | Article 86 Law no. 263/2010.

179 | Article 88 Law no. 263/2010.

180 | Article 87 Law no. 263/2010.

Survivor pension is calculated based either on the pension that the deceased was receiving or was entitled to receive or on the pension for a person with severe disabilities if the provider had died before reaching the standard retirement age¹⁸¹. If the recipient is a single person, their survivor pension is 50% of the deceased person's pension; the pensions are correspondingly 75% and 100% of the same for two and three or more recipients, respectively¹⁸².

4. Tax Benefits for Family Growth

4.1. Fiscal code – limitations in tax credits for parents with children

All the allowances for pregnancy risk, maternity leave, child-rearing, and caring for a sick child are exempted from income tax¹⁸³ and social security contributions¹⁸⁴. Further, all other allowances and material benefits related to children and families are exempted from income tax and social security contributions. They include birth or adoption bonuses and money gifts or gift certificates for employees' underage children not exceeding 300 lei (60 Euro) per person per event, such as Christmas, Easter or other equivalent religious holidays, and 1st of June¹⁸⁵. The payments made by employers for the early education of employees' children do not give rise to income tax or social security contribution liabilities for the receiving employee¹⁸⁶.

Often, employees receive 'personal tax deduction', accounting for each of their dependent family members, including spouse, children, close relatives, or in-laws, whose monthly income does not exceed 20% of the national minimum wage¹⁸⁷. This tax deduction is available to only one of the parents or caregivers of other family members and available solely with respect to salary income taxes¹⁸⁸. Basic personal tax deduction is available for only those caregiving employees whose monthly income exceeds the gross national minimum monthly wage (3,000 lei/600 Euro in 2023) by up to 2,000 lei (400 Euro)¹⁸⁹. It is a regressive benefit, which is deducted from pre-tax wages and depends on their level and the number of dependents, oscillating between 45% of the gross national minimum monthly wage for a person earning the minimum monthly wage and having four or more dependents and 0% for a person earning slightly below 5,000 lei (1,000 Euro) per month and having no dependents¹⁹⁰.

Another more limited tax deduction is 'supplemental personal tax deduction', which can be availed by all parents with underage school-going children. However, it amounts

181 | Article 89 para. 1 Law no. 263/2010.

182 | Article 89 para. 2 Law no. 263/2010.

183 | Article 62c Tax Code – Law no. 227/2015 [Online]. Available at: <https://legislatie.just.ro/Public/DetaliuDocument/171282> (Accessed: 28 October 2023).

184 | Article 142b Tax Code.

185 | Article 76 para. 4a and article 142b Tax Code.

186 | Article 76 para. 4x and article 142z Tax Code.

187 | Article 77 para. 5 Tax Code.

188 | Article 77 para. 6 Tax Code.

189 | Article 77 para. 3 Tax Code.

190 | Article 77 para. 4 Tax Code.

to only 100 lei per child per month (20 Euro) and is deducted from pre-tax gross wages¹⁹¹. Further, employees under 26 years of age receive a supplemental tax deduction for themselves, which is 15% of the gross national minimum monthly wage (i.e. 450 lei/90 Euro in 2023), but only if their pre-tax income is less than 5,000 lei (1,000 Euro) per month¹⁹².

Exemption from health insurance contributions is an important universal family support benefit that affects a diverse array of people, including all children under 18 years of age and the youngsters between 18 and 26 years of age who study, follow an apprenticeship, or are soldiers in training¹⁹³. Those between 18 and 26 years of age coming from the child protection system are exempt from health insurance contributions even when they are not studying or following professional instruction, provided they are not employed, independent contractors, or agricultural workers¹⁹⁴. Dependent spouses or parents with no income are exempt from health insurance contributions, as well¹⁹⁵. Finally, a distinct category of exemptions from health insurance contributions is reserved for those on post-adoption or child-rearing leave¹⁹⁶.

| **4.2. Tax benefits for employers providing early education facilities for the employees' children**

A 2020 Tax Code modification was supposed to allow employers to make deductible expenses for early education of up to 1,500 lei (300 Euro) per month per child. This deduction is initially possible directly from profit taxes and on surpassing the payable profit tax level, the expenses can subsequently be deducted from payroll taxes, value-added taxes, and excise duties¹⁹⁷. Unfortunately, the implementation of this generous family support benefit, which was adopted in 2020 and should have been enforced on 1 April 2021, has repeatedly been delayed, the latest announced delay being until the end of 2023. As a partial replacement for this generous early education tax deduction, Tax Code allows employers to deduct (for profit tax purposes) the expenses for running their own day cares and kindergartens, these social deductible expenses being capped at 5% of total payroll expenses.

5. Medically Assisted Reproduction

| **5.1. Private law framework**

The private law framework for medically assisted reproduction is founded on a seven-article section of the Civil Code¹⁹⁸ that regulates only certain aspects of medically assisted reproduction with a third-party donor.¹⁹⁹ Other relevant Civil Code provisions

191 | Article 77 para. 10b Tax Code.

192 | Article 77 para. 10a Tax Code.

193 | Article 154 para. 1a Tax Code.

194 | Article 154 para. 1b Tax Code.

195 | Article 154 para. 1c Tax Code.

196 | Article 154 para. 1k Tax Code.

197 | Article 25 para. 4i² Tax Code.

198 | Dobozi, 2011, pp. 532–535.

199 | Dobozi, 2013, pp. 60–61.

include those pertaining to individuals' rights to life, health, and physical integrity. ARPs are regulated by the Law on Healthcare Reform no. 95/2006, Law on the Rights of the Patient no. 46/2003, and some low-level regulations such as the Health Minister's Order on Therapeutic Transplants no. 1763/2007 and Health Minister's Order no. 377/2017 on the Implementation of National Public Health Programmes.²⁰⁰ The general Civil Code provisions were supposed to be followed by a new detailed law on medically assisted reproductive procedures with a third-party donor, but to no avail even after 13 years.²⁰¹

Articles 441–444 of the Civil Code regulate paternity-related issues in cases of medically assisted reproduction with a third-party donor. In particular, Article 441 states that no legal filiation or liability can be established with a third-party donor in cases of medically assisted human reproduction with a third-party donor.²⁰² For this procedure, both the intended parents, who can be married or unmarried but should be a man, woman, or single woman, have to provide consent before a notary.²⁰³

This consent lacks legal meaning if one of the parties dies or the individuals separate or petition for divorce before the medically assisted conception is carried out.²⁰⁴ Further, the consent to this procedure can be unilaterally revoked, in written form, even in front of the physician carrying out the procedure.²⁰⁵

Although this section does not contain any direct provisions on the presumption of the husband's paternity, it includes a provision stating that the child's filiation cannot be challenged by anyone for reasons associated with medically assisted reproduction²⁰⁶. Hence, it is inferred that regular presumptions of paternity may apply. The mother's husband can challenge paternity in cases of medically assisted reproduction only if he did not consent to the procedure²⁰⁷. However, the regular provisions regarding paternity challenges fully apply when conception takes place outside the medically assisted procedure.²⁰⁸

If the man consenting to the reproductive procedure is the mother's consensual partner, paternity is established by the father's extrajudicial acknowledgement. However, if the male partner refuses to acknowledge the child after having previously consented to the procedure, paternity is established judicially, which in this case is based solely on consent, not the biological facts of conception.²⁰⁹

Because ARPs are not extensively regulated in primary legislation (comprising both laws enacted by the parliament and governmental decrees) or secondary legislation (such as ministerial orders),²¹⁰ we cannot identify any bans on specific ARP techniques. Hence, we conclude that both intracytoplasmic sperm injection and IVF are allowed. Most ARP-related restrictions are the general ones included in the new Civil Code of 2009, which came into force on 1 October 2011. The Civil Code contains a special section on the rights

200 | Motica and Tec, 2019, pp. 358–360.

201 | Florian, 2022, p. 468; Avram, 2022, p. 309.

202 | Florian, 2022, p. 475.

203 | Avram, 2022, p. 310.

204 | Article 442 para. 2 Civil Code.

205 | Ibid.

206 | Article 443 para. 1 Civil Code.

207 | Article 443 para. 2 Civil Code.

208 | Florian, 2022, pp. 476–477.

209 | Ibid., pp. 478–480; Avram, 2022, p. 311.

210 | Dobozi, 2020, pp. 473–474; Irinescu, 2019, pp. 209–210.

to life, health, and physical integrity of natural persons.²¹¹ These provisions ban eugenics; cloning; genetic interventions without a curative purpose; and the use of ARPs for sex choice purposes, with the sole exception of preventative actions for sex-related genetic diseases.

The general provisions of Article 441, Paragraph 3, of the Civil Code specifically clarify that both heterosexual couples and single women have access to medically assisted reproduction with a third-party donor. The law does not distinguish between male and female third-party donors; hence, it can be broadly construed to include both genders, as well as the simultaneous donation of both sperm and oocytes for the same receiving couple or single woman.²¹²

With respect to other reproductive techniques, we indicate only transplant-related secondary legislation (e.g. Health Minister's Order no. 1763/2007) that tangentially references access to these procedures. According to this secondary legislation, only different-sex couples in a declared intimate relationship have access to reproductive cell transplants between partners. No specific legal limitations have been placed on access to ARPs; only the broad Civil Code restrictions on eugenics, in Article 62, and genetic alteration, in Article 63, as well as general transplant regulations and patient consent requirements are established.

Since 2011, publicly funded IVF with embryo transfer has been the subject of a national public health subprogram,²¹³ with funding being extended from 2022 onward. The procedure is restricted to infertile heterosexual couples. A certified specialist Doctor of Medicine should diagnose such couples as having an affliction that is incompatible with natural reproduction or as being unable to reproduce after one year of unprotected sexual relations in the absence of any third-party sperm or oocyte donations. Surrogacy is specifically excluded in (probably) the only specific mention of this procedure in Romanian domestic law.²¹⁴ To receive public funding for IVF, both partners must have public health insurance, and the woman must be 24–40 years of age, have a body mass index range of 20–25, and have an ovarian reserve that is determined to be within normal limits.²¹⁵

Article 441, Paragraph 3, of the Civil Code defines parents for the purposes of ARPs with third-party donations as either a couple or a single woman. This provision is not restricted to married couples but specifically refers to heterosexual couples (including a man and a woman).²¹⁶ The legal doctrine debates whether a single woman refers only to those women who do not have a partner or if it encompasses women whose partners are yet to consent to the medical procedure. Further provisions allowing the husband to deny paternal filiation if he had not previously agreed to medically assisted reproduction with a third-party donor suggest that this procedure is available for women who are not technically single but have partners who do not agree to such procedures.²¹⁷

211 | Diaconescu and Vasilescu, 2022, pp. 303–307.

212 | Motica, 2021, p. 224.

213 | Brodeala, 2016, p. 64.

214 | Brodeala, 2016, pp. 64–65; Florian, 2022, p. 473.

215 | Florian, 2022, p. 473.

216 | Motica, 2021, p. 224.

217 | Florian, 2022, pp. 474–475; Avram, 2022, pp. 310–311.

| 5.2. Failed attempts to establish a detailed regulation

Since 2011, at least two attempts have been made to establish a detailed regulation. The efforts were in vain because all the law projects were rejected, even those initiated by the government or a cross-party private member's bill. The first project to be promoted after the enactment of the new Civil Code was established by the government in 2012 (PL-x no. 63/2012) and finally rejected by the lower house of parliament in 2016 because the draft was poorly written from a technical perspective, the rejection report of the parliamentary commission being drawn from the Legislative Council's objections. This project was considered too vague and incapable of offering practical solutions to a delicate and important societal issue.

Later, another project²¹⁸ called the cross-party private members' bill PL-x no. 462/2013 (rejected in 2022) was also rejected by the lower house of parliament with a similar reasoning (too vague, elliptically written, the absence of practical solutions to a delicate social problem, and the lack of resources to meet stipulated expenses).

6. Law's Limitations with Respect to Family Growth

| 6.1. Gap between the end of regular time off for child-rearing and onset of early education

The availing of parental leave and paid time off for a child without disabilities ends when the child becomes two years old. The kindergartens, which are more widely available than day cares, admit only children aged three years or older²¹⁹. For children below the age of three, the law allows day-care facilities alone from the age of three months; however, public day cares are very limited in number, and private day cares are expensive.

One reason why France has probably the highest fertility rate in the European Union (1.79 in 2022) is that it has an excellent day-care system (*crèches*). Parents who experience difficulties in raising and caring for their first child, due to the scarcity, unavailability, or cost of day cares, generally avoid having a second or third child.

Romanian legislation provides only partial relief for the parents of children between two and three years of age when they have no access to day-care facilities or other private childcare arrangements. Labour laws and medical leave provisions allow employees to take a maximum of 45 days of medical leave per year to care for a sick child²²⁰. During such work leaves, the employment contract can be suspended²²¹ but not terminated by the employer²²². The amount for 45 days per year for each child can be surpassed if the child has a contagious disease, is immobilised, or has undergone surgery. In these situations, the specialist physician determines childcare leave based on disease progression²²³.

218 | Irinescu, 2014, pp. 16–18.

219 | Article 30 para. 1 Law no. 198/2023.

220 | Article 51 para. 1b Labour Code.

221 | Article 51 para. 1 Labour Code.

222 | Article 60 para. 1e and 1f Labour Code.

223 | Article 29 para. 1 GED no. 158/2005.

| **6.2. Lack of family-centred tax facilities**

The Tax Code provisions include very limited tax deductions for family providers. Further, personal tax deduction, whose amount is very low, targets low-income parents. Moreover, middle- and high-income families receive almost no tax benefits associated with having children or large families.

| **6.3. Scarcity of medically assisted reproduction provisions**

Since 2011, Article 447 of the Civil Code has required a special detailed statute regarding medically assisted reproduction with a third-party donor.²²⁴ However, the government and parliament have consistently failed to approve such regulations. To date, the general provisions of the Civil Code in this respect, as well as its section on the natural person's rights to life, health, and physical integrity, remain unsupported by more detailed statutory rules.²²⁵ Currently, health law lacks specific provisions regarding medically assisted reproduction, in general, the only relevant statutes being the one concerned with patients' rights, Law no. 46/2003, and a series of adapted human transplant provisions related to cell- and tissue-level transplants such as Law no. 95/2006 on health reform and its accompanying secondary legislation.²²⁶

| **6.4. Lack of regulation of surrogacy**

The concept of surrogacy is almost non-existent in Romanian positive law.²²⁷ The concept is mentioned only with respect to concerns such as the non-funding of surrogacy procedures using public funds. However, discussions on surrogacy are plentiful in legal doctrine.²²⁸

General family law provisions are largely hostile towards surrogacy because they tie maternal filiation exclusively to giving birth and do not allow voluntary transfers of parental authority. Hence, there needs to be statutory clarity such that surrogacy is either accepted, at least in its altruistic form, or forbidden it in no uncertain terms. Legal doctrine and case law are unclear in this respect, and isolated voices and cases claim that surrogacy is allowed even by current law as part of upholding fundamental rights to private and family life.²²⁹

7. Conclusions

Romanian private law has no specific and detailed regulations on consensual couples and other non-traditional family structures (single-parent families, same-sex couples, couples cohabiting with children from different marriages, and stepparents). However, international private law expressly forbids the recognition of foreign same-sex marriages and all types of foreign registered partnerships. Simultaneously, social law supports a

224 | Tec, 2017, pp. 235–236.

225 | Sztranyiczki, 2021, pp. 398–399.

226 | Dobozi, 2013, pp. 60–61.

227 | Dobozi, 2020, p. 474.

228 | Predescu, 2020, pp. 476–481.

229 | Dobozi, 2013, pp. 64–67.

wide array of family structures. The need to incorporate a consistent vision on families in all aspects of current legislation requires private law to provide detailed regulations for extant family structures, particularly in conformance with Article 8 of the European Convention of Human Rights definition and the recent case law pertaining to the rights to family life and private life.

Currently, Romanian social protection law maintains a progressive view of family structure. Benefits are provided to families comprising a husband, a wife, and their dependent children living together; single-parent families comprising a single adult and their dependent children living together; or an unmarried man and woman living together with either of their children. Moreover, families include soon-to-be adopted children placed with their future adoptive parents by the court, foster children placed with unpaid foster parents, children living under guardianship.

A broad definition of families is provided by Law no. 416/2001 on guaranteed social minimum income, as well: married different-sex spouses with or without dependent children, single parents living with their children, adult childless siblings living together separately from their parents, and different-sex couples cohabiting with their dependent children. Further, families are broadly defined by Law no. 196/2016 on the minimum social income for inclusion as comprising traditional families with married spouses, either childless or with underage or dependent children; single-parent families; and the informal cohabitation of different-sex partners, with or without underage or dependent children.

Romanian tax law has always been frugal with respect to tax law deductions for children and families. Personal tax deductions for dependents have always been limited and targeted, particularly for low-income employees. Further, day care and early education deductions for employers and employees are poorly implemented and very limited in scope. The immediate purpose of positive law inducements on family growth is to allow families to have as many children as they want by alleviating their material concerns regarding childcare. Finally, childbirth and child-rearing should not result in poverty for working- and middle-class families.

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THE BEST INTEREST OF THE INTENDED CHILD – CHILDREN'S RIGHTS IN ASSISTED REPRODUCTION AND SURROGACY

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ABSTRACT

This study examines the complex legal landscape of assisted reproduction, exploring the dynamic interaction between emerging reproductive technologies and established legal principles. It seeks to analyse the implications of assisted reproductive technologies (ART) on traditional family constructs and the fundamental legal principle of the best interest of the child, thereby contributing to a nuanced understanding of how law can evolve in tandem with technological advancements while remaining anchored in core societal values. This study aims to offer a balanced perspective that acknowledges the benefits of ART in aiding family formation, while addressing the potential legal and ethical dilemmas it poses. It endeavours to bridge the gap between rapid technological advancements in reproduction and the slower pace of legal adaptation, offering insights into how the law can evolve to better accommodate these changes without compromising core family values and child welfare principles.

KEYWORDS

*best interest of the child
children's rights
medically assisted
reproduction
surrogacy*

1. Introduction

In the evolving landscape of family law, assisted reproductive technologies (ART) have emerged, reshaping the structure of families and the dynamics of childbearing. The advent of ART, encompassing a range of medical procedures such as in vitro fertilisation (IVF), surrogacy, and sperm or egg donation, has transformed traditional paradigms of conception and parenthood. This technological revolution, while a beacon of hope for countless individuals seeking parenthood, simultaneously presents unique challenges

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and considerations within the legal domain, particularly concerning the preservation of family values and the protection of children's best interests.

At the core of this discourse lies the evolving interplay between the innovative potential of ART and the legal system's continuous efforts to adapt to these rapid advancements. As ART transcends conventional boundaries of reproduction, it raises legal questions pertaining to parentage, custody, and the rights of all parties involved, including the offspring. These questions are not merely technical; they are deeply entrenched in ethical and moral considerations, reflecting broader societal values and beliefs.

The significance of ART in contemporary society extends beyond merely enabling parenthood. It encompasses a broader narrative of individual rights, societal norms, and the evolving definition of a family. Within this context, the role of the legal system becomes twofold: safeguarding the interests and rights of those who utilise ART, while concurrently upholding the fundamental principles of family law, including prioritising the child's welfare and recognising the legitimacy of diverse family structures.

To comprehend the complex interplay between ART and family law, it is imperative to explore how ART intersects with traditional family values and the legal implications arising from this convergence. Traditional family values, often characterised by biological connections and conventional parenthood roles, face significant redefinition in light of ART. The essence of these values resides in the nurturing of familial bonds, typically grounded in biological lineage and societal norms. However, ART, by enabling individuals and couples to conceive through non-traditional methods, poses a challenge to these established norms. For instance, surrogacy arrangements and sperm or egg donation introduce third-party contributors into the conception process, thus reconfiguring the traditional understanding of parentage and lineage.

The use of ART also raises questions about the rights and responsibilities of all parties involved. Legal complexities arise when determining the parental status of donors, surrogates, and intended parents. This is particularly poignant in scenarios where there is a divergence between genetic, gestational, and intended parenthood, resulting in potential disputes over custody and parental rights.

The legal ramifications of ART are as diverse as the technologies themselves. One of the primary legal challenges is the determination of legal parentage. Traditional laws often base parentage on genetic relationships or childbirth, but ART introduces complications by separating conception from the act of bearing a child. Legal systems worldwide grapple with questions such as: Should egg or sperm donors have parental rights or obligations? What parental rights, if any, should a non-biological intended parent hold in the context of a surrogacy arrangement? The answers to these questions often vary significantly across jurisdictions, reflecting differing societal values and legal principles.

Another legal challenge is the protection of the rights and welfare of children born through ART. The principle of the best interests of the child, a cornerstone of family law, mandates that all decisions regarding children must prioritise their well-being and development. This principle becomes particularly complex in the context of ART, where questions about the anonymity of donors, the child's right to know their genetic origins, and the stability of the child's family environment emerge.

Moreover, ART raises ethical and moral considerations that legal systems must address. Issues such as the commodification of reproduction, exploitation in surrogacy arrangements, and the potential for discrimination based on genetic qualities necessitate a legal framework that balances technological possibilities with ethical constraints.

Navigating this intersection requires a legal framework that respects traditional family values while accommodating the realities of modern reproductive technologies. It calls for laws that are sufficiently flexible to adapt to technological advancements and robust enough to protect the interests of all parties involved, especially the children. Such a framework must also consider the diversity of family structures and the evolving societal norms surrounding parenthood and family life.

The primary purpose of this study is to critically analyse the legal ramifications of ART within the context of traditional family values and the doctrine of the best interest of the child. It aims to provide a comprehensive overview of how ART is reshaping family law, focusing specifically on the challenges and implications for traditional family constructs. In exploring the complexities of parentage, custody, and the rights of children born through ART, this study contributes to a deeper understanding of this evolving legal domain. Furthermore, it aims to offer a balanced perspective that acknowledges the benefits of ART in aiding family formation while addressing the potential legal and ethical dilemmas it poses. Additionally, this study strives to bridge the gap between rapid technological advancements in reproduction and the slower pace of legal adaptation. It offers insights into how the law can evolve to better accommodate these changes without compromising on core family values and child welfare principles.

2. A Brief History of Assisted Reproductive Technologies

The development of ART represents one of the most significant milestones in the history of reproductive medicine. This journey, characterised by scientific innovation and ethical debates, has fundamentally altered the landscape of fertility treatment and family planning. Over the years, ART have undergone a remarkable evolution since their inception, radically transforming reproductive medicine and offering new hope to countless individuals and couples facing fertility challenges.

Human reproductive research has historically been fraught with scientific, ethical, and legal challenges that hinder the development of infertility treatments. The first verified attempts at artificial insemination in humans were made in the nineteenth century and are attributed to the physician J. Marion Sims, who conducted fifty-five postcoital inseminations using highly controversial methods, mostly on slaves, without their consent.² Only one insemination resulted in pregnancy, which ultimately ended with a miscarriage. The low success rate of his attempts can be attributed to his belief that ovulation occurred during menstruation.³ The first child conceived through ‘artificial insemination’ is associated with the 1884 experiment conducted by an American surgeon, William Pancoast. He performed a modified insemination procedure during which he injected the sperm of a donor into a female patient who was under anaesthesia and unaware of the impregnation. Nine months later, she gave birth to a baby. While this experiment raised moral concerns, it paved the way for future medical advancements. Artificial insemination is now a crucial aspect of modern surrogacy. Similar to artificial insemination, in vitro fertilisation has been associated with numerous ethical dilemmas.

2 | Sartin, 2004, pp. 500–505.

3 | Ombelet and Robays, 2015, pp. 137–143.

Advancements in understanding the human body and medical development in the 1970s made the 'in vitro fertilisation' of human oocytes possible, a technique that allows fertilisation to occur outside the human body. This breakthrough was marked by the birth of the world's first IVF baby in 1978, a moment that signalled a new era in reproductive medicine and fertility treatments.⁴ This achievement was not just a medical breakthrough but also a cultural and societal landmark, challenging existing norms and opening up new possibilities for individuals struggling with infertility.

Following this, there have been significant advancements in the techniques and technologies used in ART. The evolution of 'cryopreservation methods,' particularly vitrification, has been a key development. This process allows for the freezing and storage of gametes and embryos, significantly expanding the scope and efficacy of fertility treatments.⁵ The ability to preserve reproductive materials has been pivotal in facilitating treatments, such as egg freezing, sperm donation, and embryo storage, thereby offering more flexible and accessible fertility options.

Another significant advancement in ART has been the development of 'genetic screening techniques.' Methods such as Preimplantation Genetic Diagnosis (PGD) and Preimplantation Genetic Screening (PGS) enable the identification of embryos with genetic anomalies, thus reducing the risk of hereditary diseases and improving the success rates of ART procedures. Additionally, advancements in mitochondrial DNA modification have opened new frontiers in treating infertility, particularly for those individuals with mitochondrial disorders. However, this area of research remains complex and ethically sensitive.⁶

Over the years, ART has continued to evolve, addressing an increasingly broad spectrum of fertility issues and incorporating cutting-edge scientific discoveries. As ART technologies have advanced, they have also ignited considerable ethical, legal, and social debates. Key issues include the rights of donors and surrogate mothers, the welfare of children born through ART, and the societal implications of these reproductive technologies. This ongoing development reflects a commitment to enhancing reproductive outcomes and addressing the diverse needs of individuals seeking fertility assistance. The history of ART serves as a testament to the remarkable progress made in reproductive medicine, offering new possibilities and hope for those seeking to overcome fertility challenges.⁷

The evolution of ART over the past few decades has been nothing short of remarkable. From the first successful IVF birth to today's sophisticated genetic screening and cryopreservation techniques, ART has continually expanded the boundaries of reproductive medicine. As ART continues to evolve, it will undoubtedly challenge and reshape our understanding of fertility, parenthood, and the fundamental nature of family creation in the modern world.

4 | Steptoe and Edwards, 1978, p. 366.

5 | Vanderzwalmen et al., 2020, pp. 142–157.

6 | Ishii, 2018, pp. 88–99.

7 | Petrushko, Piniaiev and Yurchuk, 2021, pp. 315–328.

3. Overview of Existing Legal Frameworks Governing ART and Family Law

The legislation governing ART and family law is as diverse and complex as the technologies themselves. Numerous countries have established legal frameworks that address the myriad issues associated with ART, reflecting a balance between enabling technological advancements and safeguarding the rights and welfare of all individuals involved.

One of the critical areas in ART law is the determination of legal parenthood in surrogacy arrangements. The laws governing these arrangements often reflect underlying societal perceptions and ethical considerations. For instance, the current legal provisions that define parenthood following surrogacy are inconsistent, frequently regarding surrogacy as less legitimate compared to other methods of family formation. This situation has prompted calls for legal reforms to recognise pre-conception intentions and commitments to care, thereby providing a more stable foundation for establishing parenthood status in ART legislation.⁸

ART laws are also influenced by cultural and religious factors. In Israel, for instance, the right to procreate, including the use of ART, is influenced by a combination of civil legal systems, religious law (primarily Jewish law), and cultural practices. This complex interplay affects regulations governing surrogacy, egg donation, and even posthumous fertilisation, reflecting the societal values and religious beliefs prevalent in Israeli society.⁹

The legal frameworks for ART vary significantly internationally across different countries, with some nations embracing more liberal approaches while others adopt restrictive policies. This variation results in substantial differences in the availability and legality of specific procedures such as surrogacy, embryo donation, and posthumous fertilisation, which directly impact couples seeking reproductive treatments. This divergence primarily stems from different ethical perceptions and convictions that inform national legislations. Countries such as Sweden, with more restrictive ART laws, contrast sharply with nations such as Greece, where legal frameworks are less stringent. This variance in legal attitudes towards reproductive technologies, such as surrogacy and embryo donation, reflects a complex interplay of social acceptance, ethical considerations, and political opinions within each society.¹⁰

The differing regulations surrounding ART across various countries have given rise to the phenomenon of cross-border reproductive medicine, commonly referred to as reproductive tourism. Couples unable to access certain procedures in their home countries due to legal restrictions, lack of availability, or cost factors often travel to other nations where these procedures are permitted or more readily accessible. This trend raises several legal and ethical issues, particularly regarding the legal parentage of children born through such arrangements.¹¹ The legal recognition of parentage in cross-border reproductive

8 | Horsey, 2011.

9 | Westreich, 2016.

10 | Pikramenou, 2014.

11 | Anastasiadou, Masouras and Papademetriou, 2023.

cases presents a significant challenge. When a child is born in a country with different ART regulations, and the couple subsequently returns to their home country, issues related to legal parentage often arise. This matter is crucial as it affects the child's identity, citizenship, and the parents' legal rights and responsibilities. Effective policy-making and legal reforms are essential to address the complexities of reproductive tourism and ensure the protection of all parties involved, especially the children born through these arrangements.

The legislation governing ART in Europe presents a fascinating topic at the intersection of modern medical advancements and deeply rooted traditional family values. These laws, which vary significantly across the continent's diverse cultures, both support and challenge conventional notions of family, parenthood, and child-rearing. The relationship between these legal frameworks and traditional family values reveals a complex interplay of alignment and conflict, reflecting the dynamic nature of societal evolution in response to technological advancements.

At their core, many European ART laws are fundamentally aligned with the traditional values of family formation. These laws enable individuals and couples who might otherwise face insurmountable fertility challenges to realise their dreams of parenthood. Through providing legal avenues for fertility treatments, such as in vitro fertilisation and sperm donation, these laws reinforce the traditional family model by aiding in the creation of new family units.

Furthermore, in certain European countries, ART laws highlight the critical role of genetic connections in establishing legal parenthood. This emphasis on biological connections resonates with traditional views that associate family identity and lineage through blood relations. By prioritising genetic parents in cases of surrogacy or gamete donation, these laws uphold a conventional understanding of family that is rooted in biological connections.

Additionally, a key aspect in which ART laws align with traditional family values is their focus on the welfare of the child. Reflecting a universally held belief in the paramount importance of a child's well-being, several of these laws include stringent regulations to ensure the ethical sourcing of gametes, the safety of ART procedures, and the stability of the child's family environment. This focus is a clear nod to the traditional tenet that the interests of children should be at the forefront of family-oriented policies.

Conversely, ART laws in certain European countries present a challenge to traditional family structures. A notable aspect of this issue is the legal recognition of diverse forms of parenthood that extend beyond biological ties. In jurisdictions that acknowledge the parental rights of non-biological parents in same-sex couples or surrogacy arrangements, there is a distinct shift from the conventional definition of a family. This inclusive approach, while progressive and empowering for many, can be perceived as a departure from traditional family values that emphasise biological parenthood.

The practice of donor anonymity in ART also poses challenges to family values centred around heritage and lineage. The ethical and legal dilemmas surrounding a child's right to know their genetic origins often conflict with the traditional emphasis on family history and the knowledge of bloodline. This aspect of ART regulation creates a friction between the desire for privacy and the traditional value of familial identity.

Similarly, surrogacy, as regulated in certain European regions, often raises ethical concerns that contradict conventional views of family and motherhood. The commodification inherent in surrogacy, where a woman carries a child for another

individual or couple, can clash with traditional notions of motherhood and the sanctity of the family unit.

Due to variations in ART laws, many individuals and couples engage in cross-border reproductive care, seeking ART services in countries with more favourable legal frameworks. This phenomenon highlights the need for a more harmonised approach to ART regulation in Europe. Moreover, the phenomenon of cross-border reproductive care, driven by the varying stringency of ART regulations across Europe, leads to situations where individuals might bypass the regulations of their home countries. This trend can create discordance with the family values upheld in their native legal systems, as individuals seek reproductive assistance that may not align with their country’s traditional norms.

ART laws are a testament to the evolving nature of societal norms in response to medical and technological advancements. While they align with traditional values by enabling family formation and emphasising child welfare, they also challenge conventional family structures through inclusive definitions of parenthood and practices like surrogacy and donor anonymity. As European societies continue to navigate this evolving area, the balance between ART laws and traditional family values will remain a dynamic and critical aspect of family law and policy discussion.

The existing legal frameworks governing ART and family law are characterised by diversity and complexity. They are shaped by cultural, ethical, and technological considerations, reflecting the dynamic interplay between societal values and technological advancements in reproductive health. As ART continues to evolve, these legal frameworks will undoubtedly require continual adaptation and refinement to ensure that they effectively address the challenges posed by these rapidly developing technologies.

4. Best Interest of the Child in Assisted Reproduction

The principle of the best interest of the child occupies a central place in both international and national legal systems concerning family law and child welfare. This principle, while universally recognised, is subject to a broad range of interpretations and applications, reflecting the diverse legal, cultural, and societal contexts in which it operates.

The legal definition of the principle of the child’s best interest is both multifaceted and dynamic. At its core, it mandates that all decisions impacting a child must prioritise the child’s well-being, safety, and holistic development. However, the interpretation of what constitutes a child’s best interest can vary significantly.

The concept of the best interest of the child is a key principle that guides how we think about and act on matters involving children’s rights and well-being. It is based on the understanding that children, due to their young age and developing judgment, often need adults to make decisions for them.¹²

This principle was legally enshrined thirty-five years ago with the adoption of the United Nations Convention on the Rights of the Child in 1989 (hereinafter UNCRC).¹³ Signifying a significant milestone in the history of human rights, the Convention has emerged

12 | Zermatten, 2010, pp. 483–499.

13 | UN General Assembly, 1989, p. 3.

as the most universally endorsed human rights treaty. The principle prioritising the best interests of the child serves as a cornerstone of the UNCRC. Article 3, paragraph 1 of the Convention explicitly states that ‘in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.’ Furthermore, Article 18, paragraph 1 of the Convention designates parents as primarily responsible for the upbringing and development of the child, emphasising that the child’s best interest should be their fundamental concern. Article 18 asserts that

States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

This principle, therefore, not only guides institutional and legal processes but also emphasises the parental role in fostering and safeguarding the welfare and development of children. It reflects a global consensus on the importance of prioritising children’s welfare in all spheres of society, ensuring that their rights and needs remain at the forefront of all pertinent decisions and actions.

The principle of the child’s best interest, while widely acknowledged and adopted in child welfare and family law, faces criticisms and challenges. This principle, foundational in ensuring children’s rights and welfare, encounters difficulties, primarily due to its inherent indeterminacy and the evolving nature of societal norms and cultural differences. The core issue with the principle of the child’s best interest lies in its ambiguous and often subjective nature. The principle’s indeterminacy stems from the lack of a clear definition of what exactly constitutes a child’s welfare. This ambiguity can lead to difficulties in its practical application, as decision-makers struggle to determine which should be considered when determining a child’s best interests.¹⁴ Another layer of complexity arises from the cultural differences that exist among various nations and communities. The Convention on the Rights of the Child, as a global instrument, must accommodate a diverse array of cultural contexts. This diversity can result in varying interpretations and applications of the principle, as demonstrated by the cross-cultural studies of child welfare practices in different countries.

The principle also raises the issue of balancing the interests of children with those of adults. Emphasising the child’s welfare can, at times, inadvertently make the value of childhood contingent upon, and subordinate to, the value of adulthood.¹⁵ Addressing these critiques requires a balanced and contextual approach to applying the principle of the child’s best interest. It is not solely about prioritising children’s interests over those of adults, but rather about finding an equilibrium that respects the rights and needs of all parties involved. This balance is particularly crucial in cases where children’s welfare might conflict with adults’ rights and interests.

In family law, the principle is often employed in custody disputes, adoption cases, and matters involving child welfare and protection. This principle forms the cornerstone of family and guardianship codes, shaping the interpretation and application of other legal

14 | Reece, 1996, pp. 267–289.

15 | Pennings, 1999, pp. 1146–1150.

norms within these codes.¹⁶ The significance of this principle in legal contexts cannot be overstated, as it serves as a guiding standard for courts and child welfare agencies, ensuring that the child’s physical, emotional, and psychological needs are at the forefront of any decision-making process. It also provides a legal framework for balancing competing interests, such as those of biological parents, adoptive parents, and the state, in matters concerning the child.

In child custody cases, for example, the principle necessitates a thorough examination of the living conditions, emotional bonds, and overall environment offered by each parent. The child’s own preferences are also increasingly being considered, especially in cases involving older children.

The application of the principle of the child’s best interest is not without its challenges. One of the primary challenges stems from its subjectivity; what constitutes the best interest of one child may not necessarily be in the best interest of another. This subjective evaluation requires a deeper and individualised understanding of each individual child’s circumstances, needs, and background. Moreover, the principle must be balanced against other legal rights and societal values. In cases involving international adoption or cross-border custody disputes, for instance, the principle may intersect with issues of cultural heritage and national identity, further complicating legal decisions.

The principle of the child’s best interest is a cornerstone of child-centric legal frameworks globally. It emphasises the legal and moral responsibility to prioritise the well-being of children in all decisions affecting them. While its application can be challenging due to its inherently subjective nature, its role in safeguarding children’s rights and welfare is indisputable. As legal systems evolve, the ongoing refinement and implementation of this principle will remain crucial in ensuring that the welfare of children is upheld.

The intersection of ART and the legal principle of the best interest of the child introduces unique challenges and considerations. ART, which includes practices, such as in vitro fertilisation, surrogacy, and gamete donation, raises complex questions about parentage, identity, and welfare that are central to understanding and applying this principle. Traditionally applied to safeguard the rights and welfare of existing children, this principle encounters unique dilemmas when extended to the context of ART, where the child in question is yet to be conceived.

A critical question arises regarding the application of the best interest framework to potential future children. Traditionally, this principle is meant for children who already exist, rather than for determining whether allowing conception align with the best interests of any resulting children. This distinction necessitates a differentiation between applying the principle in family law and family autonomy versus reproductive law and reproductive autonomy.¹⁷ Furthermore, this issue is complicated by the uncertainties surrounding the future child’s health and mental condition, making it difficult to assess their best interests in advance. For instance, in the context of surrogacy, the principle of the best interest becomes even more nuanced, as we must balance the interests of the child, the surrogate mother, and the prospective parents. This balancing act puts a particular emphasis on the child’s right to know their genetic origins and upholds the principle of human dignity for the surrogate mother.¹⁸

16 | Walaszek, 1970, pp. 26–27.

17 | Cohen, 2011, pp. 423–437.

18 | Henriksson, 2016.

Another significant challenge is the absence of reliable predictive criteria for inadequate parenting. The current methods do not guarantee the child's best interests, as there is no foolproof way to predict the future parenting capabilities of individuals. The complexities of surrogacy agreements, including the logic of donation and the primary interest of the child, necessitate a thorough and ethical approach to ensuring the child's welfare in such arrangements.¹⁹

Additionally, we need to emphasise the distinction between reproductive and parental rights in ART. While adults have reproductive rights, the future child's welfare, according to the principle of the best interest, must be assessed primarily through the parents' ability to ensure their well-being. This perspective aligns with the observations of G. Stanić, who discusses the challenges of cross-border reproductive medicine in the European Union, noting the paramount significance of the child's best interest in contemporary family law.²⁰ As T. Barzó argues, psychological expertise can often assist in making the right decisions regarding the child's best interests,²¹ this is, of course, not an option when we discuss future children.

The most evident facet of the principle of the best interest centres on the physical needs of the child, such as nutrition and care. While intended parents who opt for surrogacy or ART often possess the financial means to support these needs, it is crucial to recognise that financial resources alone do not determine parental capability. Furthermore, the emotional well-being of the child requires equal attention. Every child deserves to grow up in a nurturing and loving environment that supports their future development and education. This reasoning underpins the decisions of many states that restrict or outright prohibit surrogacy based on the child's best interest.²²

The child's right to know about their origins, including their genetic connections, is an integral aspect of their identity and must be considered when utilising ART. This principle of acknowledging the child's interest in genetic ties is critical for their sense of self and connection to their heritage.²³

In the context of embryo donation, for instance, the principle of the child's best interest takes on other dimensions. There is a significant role of genetic connections in constructing kinship ties among donors, recipients, and the offspring.²⁴ The ethical responsibility towards the child's welfare in decisions regarding embryo donation cannot be overlooked, and the best interest of the child must be interpreted broadly, including not only as a matter of physical well-being but also of emotional and psychological integrity. The ethical considerations surrounding embryo donation are extensive, ranging from informed consent and confidentiality to the financial aspects of the process. To uphold the ethical dimensions of the embryo donation, it is essential to respect the autonomy of donors and recipients, ensure informed decision-making, and maintain confidentiality. A critical aspect is the child's right to know their biological origins, which must be balanced with the principles of justice and respect for autonomy.²⁵ The consenting processes

19 | Chini, 2016.

20 | Stanić, 2015, pp. 5–23.

21 | Barzó, 2022, pp. 105–146.

22 | Bosch, 2018.

23 | Vij, 2015.

24 | Goedeke, 2014.

25 | Farin et al., 2014, pp. 153–182.

in embryo donation also play a crucial role in safeguarding the interests of all parties involved, including the potential child. An aspect of consent is the agreement regarding the disposition of surplus embryos, which highlights the decisional conflicts stemming from the moral status of embryos and evolving personal values.²⁶

The case of surrogacy and its implications for child welfare further illustrates the complexities involved in applying the principle of the child’s best interest.²⁷ Surrogacy legislation faces the intricate task of balancing the best interests of the child born via surrogacy with the rights and expectations of the surrogate mother and the intended parents. The challenge lies in ensuring that the child’s welfare remains the primary consideration in all aspects of surrogacy, a goal that necessitates careful legislative and ethical considerations. Different models of surrogacy address child welfare issues in varying ways. Research indicates a correlation between the level of protection afforded to intended parents and the emphasis on the child’s best interests.²⁸ In certain jurisdictions, such as California, surrogacy laws significantly emphasize the fulfilment of contractual obligations, potentially at the expense of the child’s welfare. This approach may result in scenarios where, despite the intended parents’ inability to provide adequate care, legal parenthood is still established in their favour. Such a model raises concerns about prioritising contractual rights over the child’s well-being.²⁹ The enforcement of surrogacy regulations presents unique challenges. For instance, the UK’s emphasis on the principle of the best interest may render legislative regulations ineffective. This situation can lead to circumstances in which parties involved in surrogacy arrangements bypass legal rules, operating under the assumption that the court will assign legal parenthood to the intended parents based on this principle. Such practices highlight the difficulty in achieving a balance between protecting the child’s welfare and ensuring the enforceability of surrogacy laws.³⁰ Developing balanced surrogacy legislation requires addressing the competing interests of all parties involved: the surrogate, the intended parents, and the child born to the surrogate. Legislation must be crafted to discourage misconduct and abuse in surrogacy arrangements, ensuring the protection of all parties, especially the child. This includes analysing the legal and ethical implications of surrogacy arrangements. The international context of surrogacy adds another layer of complexity; different countries have varying stances on surrogacy, which influences the legal recognition of these arrangements and the protection of the child’s rights and interests.

The application of PGD raises ethical objections and poses significant challenges for the principle of the child’s best interest.³¹ This technique, which involves genetic profiling of embryos before implantation, has ignited debates around its implications for the welfare of children conceived through this method. One of the primary concerns is the potential for PGD to be misused for non-medical purposes, such as sex selection for family balancing or screening for the traits unrelated to medical necessity, such as intelligence or beauty. This aspect raises ethical dilemmas surrounding the potential commodification of human life and the societal implications of ‘designer babies.’ The ethical

26 | Khorshid and Alvero, 2020, pp. 380–384.

27 | Tan, 2019.

28 | Trowse, 2013, pp. 199–209.

29 | Neofytou, 2018.

30 | Norrie, 2016.

31 | Bączyk-Rozwadowska, 2017.

concerns extend to the rights of the child, particularly concerning their welfare and the potential impact of selective reproduction on their future quality of life.³² Another controversial aspect of PGD involves the practice of selecting for disability, which highlights the complex interplay between parental autonomy, the rights of the child, and societal values surrounding disability and genetic selection.³³

The application of the principle of the best interest in ART is not merely about prioritising children's interests over those of adults; rather, it entails finding a balance between competing interests. While there are instances where adult interests must be set aside for the child's welfare, a compromise should be sought that satisfies all parties to a reasonable extent. This balancing act is particularly crucial in surrogacy and other ART practices, where the rights and welfare of prospective parents, surrogate mothers, and future children are intricately intertwined. In cases involving ART, the application of the principle of the child's best interest requires a delicate balance between technological possibilities, ethical considerations, and the child's overall welfare. The principle serves as an ethical framework for navigating the complex terrain of modern reproductive technologies, ensuring that the physical, emotional, and psychological needs of the child remain the central concern in all decisions. As ART continues to evolve, so too must the legal and ethical frameworks that uphold the best interest of children born through these technologies.

5. Conclusion

In the constantly evolving field of family law, ART have significantly altered the traditional concepts of family and childbearing. While ART offers invaluable opportunities for many aspiring parents, it also introduces complex legal and ethical considerations, particularly regarding the upholding family of values and the prioritisation of children's well-being.

Central to this discussion is the dynamic relationship between the innovative potential of ART and the legal system's response to these rapid advancements. As ART pushes the boundaries of traditional reproduction, it raises critical questions around parentage, custody, and the rights of everyone involved, especially the children. These questions are not merely technical; rather, they explore deep ethical and moral realms, reflecting broader societal beliefs and values.

The role of ART in today's society extends beyond helping individuals become parents. It represents a larger narrative about personal rights, societal norms, and the changing definition of a family. In this context, the legal system assumes a crucial dual role: it must protect the interests of those using ART, while simultaneously preserving the core tenets of family law, which prioritize a child's welfare and recognize diverse family structures. To truly comprehend the interplay between ART and family law, it is essential to explore how ART intersects with family values and their legal implications. Traditionally, family values have entered around biological connections and conventional parenting roles. However, yet, ART challenges these norms by enabling individuals to conceive in non-traditional

32 | Øivind, 2014, pp. 3–9.

33 | Elliston, 2012, pp. 89–125.

ways. Practices such as surrogacy and egg or sperm donation introduce third parties into the conception process, thereby reshaping our understanding of parentage and lineage.

ART also prompts us to consider the legal rights and responsibilities of all parties involved. There are complexities in determining who is considered a parent, especially in situations where genetic, gestational, and intended parenthood do not align, potentially leading to legal disputes over custody and parental rights.

One of the primary legal challenges posed by ART is the determination of legal parentage. Traditionally, laws have based parentage on genetic ties or childbirth; however, ART complicates this framework by separating conception from childbirth. Legal systems worldwide are grappling with questions regarding the rights of egg or sperm donors as well as the parental rights of intended parents in surrogacy agreements, often reflecting diverse societal values and legal principles.

Another significant challenge involves protecting the rights and welfare of children born through ART. The principle of the child's best interest, which is fundamental to family law, dictates that all decisions concerning children should prioritise their overall well-being. This becomes increasingly complex in the context of ART, raising questions about donor anonymity, the child's right to know their genetic origins, and ensuring a stable family environment.

Moreover, ART brings to the forefront ethical and moral issues that legal frameworks must address. Concerns about the commercialisation of reproduction, potential exploitation in surrogacy arrangements, and discrimination based on genetic traits call for legal structures that balance technological possibilities with ethical limitations.

Navigating the confluence of ART and traditional family values requires a legal framework that respects historical family norms while adapting to the realities of modern reproductive technologies. Laws must be flexible to accommodate technological advances, yet strong enough to safeguard the interests of all parties involved, particularly children.

This study aims to critically analyse the legal implications of ART against the backdrop of family values and the doctrine of the child's best interest. It offers a comprehensive overview of how ART is reshaping the legal contours of family law, emphasising the challenges and implications for traditional family structures. Through this analysis, the study describes the complexities of parentage, custody, and the rights of children born via ART, thereby contributing to a deeper understanding of this evolving legal domain. Additionally, the study aims to offer a balanced perspective that acknowledges ART's role in enabling family formation while addressing its potential legal and ethical concerns. Ultimately, this study bridges the gap between rapid advances in reproductive technology and the slower pace of legal adaptation, suggesting ways in which the law might evolve to better accommodate these changes without compromising core family values and child welfare principles.

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REDISCOVERING FAMILY TIES IN A POSTMODERN WORLD: CANON LAW AND THE PASTORAL ACTION OF THE CHURCH IN THE FACE OF POSTMODERNITY'S CHALLENGES

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ABSTRACT

The present-day 'hypermodern' society believes that the concept of family can be erased. However, the contemporary human being continues to bear a veiled nostalgia for ties, which is apparent in many of the postmodern cultural products (such as cinema, art, literature, etc.). These natural ties restore the unconditionality of family relationships as the only security against the contradictions and uncertainties of the world and serve as an antidote to postmodern chaos. Today's men and women try to recover the relational essence of the family in order to learn to build family ties that constitute us as human beings and are vital resources in the educational process. Therefore, it is essential to know what family ties are, how they are constituted, and at the same time understand the real difficulties we face today to be able to live these ties fully so that family becomes a 'point of resistance' against ideologies characterised by individualism and technocracy. The wisdom of the Church, through its Law and its pastoral experience, has throughout history shown the truth about family, which is based on the capacity of the human heart to love unconditionally. Even today, the Law and the pastoral of the Church should be able to accompany men and women in need of rediscovering the true essence of family, with proposals that consider the current cultural context.

KEYWORDS

Canon Law
family relationships
postmodern culture
family law
Catholic Church

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1. Familial relationality in the face of postmodern disembodiment

The cover of the December 2020 issue of *The New Yorker* depicts the image of a post-modern young woman against the backdrop of the pandemic, with all the characteristics and contradictions of Western culture. A solitary young woman is seen holding a mobile phone in her left hand and seated at her desk on which a computer screen and bottles of anxiolytic medication can be noticed. The contrast between the chaos of 'real' life – represented by the accumulated wine bottles in the kitchen, litter on the floor, and medications on the desk – and the seemingly carefree attitude towards the video call screen are noteworthy. The illustration is titled 'Love Life' denoting an affection for life. However, in contrast to this attitude, a 2019 YouGov survey shows that 22% of the millennials have no friends, thus confirming the profound loneliness experienced by contemporary individuals. The consequences of this condition have led some governments to establish Ministries of Loneliness in an attempt to mitigate the social repercussions of the pandemic (countries such as the United Kingdom and Japan).² Furthermore, we now see how robots are employed to care for older adults, as exemplified by the Zora robot,³ and the emergence of companies offering the service of renting a person who would silently listen to a client.

This cultural landscape was eloquently described by Carlo Caffarra, who used the famous verse from the *Aeneid*, *rari nantes in gurgite vasto* (I, 18), to refer to marriage and the family in the Western world, stating that 'we have the pieces, but we no longer have the building'.⁴ In the same discourse, he pointed out that the primary cause for this situation is the process of *de-biologisation* in postmodern society. This process disregards the biologically determined nature of an individual, disconnects the person from their bodily reality, and neglects the reality of their unity. The process of *de-biologisation* is directly linked to the abandonment of natural law.⁵ *De-biologisation* entails, among other things, a forgetting of the relational structure of the human person. Therefore, it is now imperative to rediscover the fundamental aspects of the human being as inherently relational and familial.

2 | In 2018, the United Kingdom established this ministry in response to the fact that 9 million Britons feel lonely 'always or almost always': See the official webpage: Loneliness minister: "It's more important than ever to take action", 2021. In 2021, Japan followed suit in response to the rising suicide rates and the consequences of the COVID-19 pandemic: Japan Appoints Minister of Loneliness, Can He Solve the Loneliness Problem?, 2021.

3 | Satariano, Peltier and Kostyukov, 2018.

4 | Caffarra, 2015, p. 22.

5 | The process of *de-biologisation* involves erasing or removing biological explanations or influences from certain phenomena and is intricately connected to the rejection or disregard of natural law. It implies moving away from explanations or interpretations based on biological factors and instead considering other factors or frameworks (such as cultural, environmental, or psychological factors). Natural law refers to a set of ethical principles or rules inherent in nature and discoverable through reason. These principles provide the basis for moral judgement and social order. Rejecting the biological dimension of human beings leads to questioning or abandoning the notion of inherent moral order in the universe. For example, one of the goals of J. Butler, a proponent of gender ideology, was to denaturalise gender to turn it into a purely cultural product, subject to the will of individuals (Butler, 2005).

2. Family relationships are constitutive, not just functional

Every human comes into existence through the relationship between a man and a woman. In our genetic heritage lies the foundation of personal growth: every child born carries something very valuable, which is absolute trust in those to whom he/she has been entrusted. Every child entering the world seeks and deserves the best possible treatment from their parents, not from others who may hypothetically be 'more perfect'; children love their parents just as they are.⁶ The absolute unconditional love demanded by a newborn finds its response in what it means to be a parent. Much more than providing care and education, being a parent means accepting that one's entire being and life become the conditions for another's growth. That is the power of being a parent.⁷

To carry out this task of humanisation, nature provides us with the greatest resource: the committed love between a man and a woman, capable of generating life and containing the paternal and maternal codes necessary for our constitution and personalisation.⁸ What is inscribed in our human genetic code from birth unfolds through family relationships, through the bonds that shape and educate us, not as a theory, but in real life. Through shared life within the family, we learn that unconditional love is possible between imperfect and limited individuals. Family bonds give us the opportunity to learn, without unnecessary drama, that every human relationship also involves differences, and that conflict is not a pathology but a path to learning how to love better.⁹

In the context of family, relationality may serve the purpose of satisfying biological needs, as observed in some animals. However, in the case of human beings, this coexistence is essential for the process of humanisation. The inherent deficiencies and immaturity with which we are born can be addressed only through the care provided by parents over an extended period, giving rise to intimate bonds. The unique aspect of this care is the interaction that nurtures the spiritual dimension of the human being. As a network of relationships, the family not only serves to introduce us to culture and society but also shapes and defines us. Each individual achieves the full realisation of their identity within the family, where the bonds between its members facilitate the development and growth of the individual in all aspects, biological to cultural.¹⁰

The relationships established within the family sphere are not merely functional but also constitutive. We become more human through the tasks associated with child-rearing and the socialisation that accompanies our vulnerability. It is through these sometimes-mundane tasks that we forge the bonds of intimacy that personalise us. First, intrafamily relationships bring forth a fundamental aspect of personal identity: the question of origins. Understanding our origins is essential to knowing who we are. Every journey of identity growth stems from a relationship, from the proposition of another, through what is known as 'recognition bonds' as studied in attachment theory.¹¹

6 | Ceriotti, 2019, p. 30.

7 | Maioli, 2006, p. 63.

8 | Ibid., p. 81.

9 | Ceriotti, 2019, p. 69.

10 | Maioli, 2006, p. 42.

11 | Polaino, 2004, pp. 74 ff.

3. How are bonds established?

Family is the 'school of life', which educates one through life itself, through one's relationships with its members.¹² It educates both the contingent (what happens to individuals from external sources) and what is chosen, or how one lives the contingent events. Family education emanates from the very core of family itself. Relationships educate for as long as they endure, be it in a positive or negative manner. Within the family, education or its absence is always observable; it is not a neutral entity in shaping individuals. Although the foundation of family bonds lies in kinship, blood ties, and generations, when these elements are absent, as in the case of adoption, this framework can still be constructed, which, in any case, is based on and assimilated into the essence of being a family. This also explains the degradation of family's reality, of specific families that break apart even when initially formed under all conditions when interpersonal relationships are abandoned and not nurtured: it is then understandable that they slowly and tacitly deteriorate.

Relationships in this sphere need to be close; family relationships are intimate and touch upon the deepest aspects of individuals. Any form of communication, even if it is purely informational, carries a level of intimacy because it is filled with emotional significance. In this space that we know as 'home,' what we recognise as trust is essential. Trust, understood as firm and secure expectation, is necessary because it relates to the need to be unconditionally accepted and loved.

Family bonds, capable of facilitating the humanisation of individuals, are deeply encoded in our genetics. However, precisely because human nature is characterised by freedom, it is essential that we also desire this to be true. It requires taking actions and establishing habits that strengthen these bonds. The family serves as the most profound connection to reality, demanding the sharing of time and intimate space; it is, in essence, a shared life. Almost all aspects of family life revolve around rituals: waking the children, preparing meals, setting the table; every task of 'daily management' becomes a family custom (shared time). Intimately sharing the family space is what gives rise to the concept of 'home,' a place where people are cared for through love. Human 'radical' vulnerability, in the context of family relationships, becomes an opportunity and a pathway to understand love. It is not merely a place of functionality but also one of drama: an opening to life and an adventure of life.¹³

It is important to emphasise in this context that the family is not a closed system. Each individual has a vocation, a calling to a personal life. Love involves the joy of witnessing mutual growth, creating a framework of stability. Ultimately, family bonds emerge from the family's actions and habits through which intimacy is shared, communication happens, care is given, and celebrations are enjoyed.¹⁴

12 | Catechism of the Catholic Church, pp. 2221 ff.

13 | Yepes and Aranguren, 2014, p. 90.

14 | Ceriotti, 2019, pp. 143 ff.

4. Family relationships and the postmodern culture

Family is an integral part of all cultures because it aligns with human nature, although it takes on different forms in each because it is also an inseparable cultural reality. Nature and culture are two intimately related concepts that cannot exist independently. In recent years, many studies have analysed how the reality of 'being a family' is experienced in Western culture today, often focusing only on aspects that hinder families from unfolding all their natural potential.

To fully understand this reality, one must comprehend family in its entirety, and above all, first perceive its riches and strengths because, to propose possible 'solutions' for families to develop their authentic vocation, we need to rely on these strengths, which undoubtedly exist in our western culture as well. It is important to recognise that family is intrinsic to the human being; it has the strength of truth and is not merely a cultural construct. Every human being has the need and capacity to love within the family.

As mentioned initially, the *de-biologisation* characterising postmodernity disregards the biological determination of the individual, separating the person from their bodily reality and forgetting its unity. Before this paradigm shift occurred, the genome of marriage and family was constituted by the relationship between two different relationships: the relationship of reciprocity (spousal) and the intergenerational relationship (parenthood).¹⁵ These three relationships were intrapersonal, meaning, they were rooted in the person. They were not reduced to biological data but embraced and integrated into the entirety of the person. The body is a personal body, and the person is a bodily person.¹⁶ As Hadjadj points out, the crisis of the crisis is present here, and perhaps it is only a matter of supporting the natural unfolding that occurs.¹⁷ Our culture, and each of us, continues to yearn for unconditional bonds, even though ideologies may sometimes blind us.

Second, one of the characteristics of our culture in relation to family, compared to previous generations, is that young parents, especially fathers, are more involved in the upbringing of their children. It is common to see greater participation from fathers who feel a strong sense of responsibility towards their children and a genuine desire to be a good parent. We have shifted from the concept of the father as the 'breadwinner' to the father who 'plays with his children.' This shift is driven by a sense of playfulness and the pursuit of happiness. Another interesting feature is the blurring of lines between motherhood and fatherhood. Fathers are becoming 'more like mothers.' Additionally, young people are open to truth and generally lack prejudices. They eagerly seek truth and value the experiences of others.

When analysing the difficulties in our society in manifesting the family nature of human beings, we perceive a strong component of individualism that can be quite aggressive. The epidemic of individualism today is rooted in relationships where others are seen as instruments for one's own well-being. It is a relationship in which the other person loses their contribution and becomes an object. The 'self' becomes the sole measure of life. Others either adapt to me or become enemies, including children or spouses. Authors

15 | Donati, 2014.

16 | Caffarra, 2015, p. 23.

17 | Hadjadj, 2020, p. 20.

like Lipovetsky describe the contemporary citizen as 'hyper-individualistic'.¹⁸ Even volunteerism appears as a form of 'solidary individualism,' seeking to help others as a way to help oneself.¹⁹ The dominant culture has tried to exalt the autonomy of 'non-belonging' and the individual origin of each person, but the reality is that we all belong to a lineage. Even if only biologically, we come from others.

In contemporary society, individuals often eschew reason as their guiding principle, yielding instead to the superficiality of sentimentality or 'emotional pornography,' in what some have termed the 'tyranny of happiness.' The pursuit of happiness, construed as well-being, is seen as the sole driving force of existence.

Another note that characterises our era and complicates family relationships is that we no longer believe in 'forever.' We desire unconditional love but do not believe it is possible. We perceive human relationships, especially marital relationships, as having a kind of 'planned obsolescence.' Consequently, family bonds are fragile. The difficulties and conflicts inherent in all human relationships are seen as signs of failure, and a lack of trust in both others and oneself is observed when it comes to forming bonds because they are perceived as utopian. Today, humans are not the measure. Social systems, habits, and ways of life operate as if there were no inherent human nature, no purpose in common human nature. For example, the ideal worker is often portrayed as single, flexible, without fixed working hours, capable of geographical changes, etc. and children are clearly seen as obstacles.

Another forgotten aspect is the consideration that obstacles and difficulties in relationships are pathological, forgetting that they are inherent in any human relationship.²⁰

We have also overlooked how bonds are formed. Our smartphones allow us to be physically present, but we are constantly mentally and emotionally absent. We sit with our families at the dining table, each immersed in a separate world, merely living 'together.' Technology changes not only what we do but also who we are. We deny each other full attention; we are together in solitude. The problem is that this way of relating to others and to our own selves affects our capacity for reflection, which is the foundation for maturity. We are alone but afraid of intimacy. Social networks, social robots, etc. give us the illusion of companionship without the demands of friendship or love.

5. The Church's Law promoting family relationships

Family law, which justly governs family relationships, originated in classical times, built upon a society inspired by Christian principles and within a context of mutual interaction and symbiosis between canon law (*ius canonicum*) and civil law (*ius civile*). Over time, a progressive emphasis has been observed on the personalist dimension of family

18 | Gilles Lipovetsky Conferencia: Ciudadanía política: pluralismo y democracia en la era de la hipermodernidad, 2018: 'Without faith, skeptical of politics, and shaped by social media, they focus on a sort of hyper-individualism, aspiring to a good education because they consider it the wealth of tomorrow'. See also Lipovetsky, 2000.

19 | Béjar, 2006.

20 | Gas-Aixendri and Lacorte Tierz, 2015, p. 299.

relationships. This has led to a gradual improvement of the legal system, with more attention paid to the well-being of the family community and its members.²¹ As is well known, a proper and systematically organised canonical family law has not been fully developed²² because family relationships have primarily been considered relevant within the realm of internal morality, philosophy, and pastoral matters rather than as legal relationships regulated by law. Moreover, with the separation of secular civil family law, canonical law has tended to acknowledge the secular competence in the so-called purely civil effects of marriage and family relationships.²³

Civil family law has openly moved away from the anthropological paradigm of the natural family. As Pope Francis has pointed out, 'there is a legal deconstruction of the family taking place in many countries, which tends to adopt forms based almost exclusively on the paradigm of the autonomy of the will'.²⁴ This is particularly evident in the field of parentage, with the development of assisted reproductive technologies and fully realised in the concept of surrogacy, where the all-powerful and arbitrary will seeks to completely replace blood ties.²⁵ The cultural relativisation of the concept of nature, especially driven by gender ideology on the one hand and legal positivism on the other, presents today's women and men with a reality that is paradoxically unreal. It is a distorted view that contradicts the deepest aspirations of the human heart.²⁶ These aspects have recently been addressed by the Holy See in the Declaration *Dignitas infinita*.²⁷

In the ecclesial sphere, since the second half of the 20th century, significant progress has been made in understanding the concepts of marriage and family from the perspectives of anthropology and theology. One of the most relevant expressions of these advancements is Saint John Paul II's Theology of the Body, which is, so to speak, 'waiting to be fully explored.' The juridical expression of marriage in the canonical context continues to be one of the strongholds – perhaps the only one – that normatively reflects God's familial design for human beings. The elements that structure it as a relationship of justice do not derive from an externally imposed law (historical, cultural, or circumstantial reasons) but from an unwritten natural normativity. Therefore, considering the juridical dimension of canonical marriage is intimately linked to its character as a natural institution.²⁸

By reducing marriage to the realm of measurable utilitarian criteria, we have lost sight of the fact that all marital and family life is internally vivified by interpersonal giving and love.²⁹ The loss of this spousal dimension of marital life has decisively contributed to the secularisation (in recent times, one could speak of 'profanation') of marriage and the family. This process of secularisation, initiated by contractual privatisation, has been further radicalised through a legalistic mentality in which family law is viewed as

21 | Zuanazzi, 2019, p. 99.

22 | Molano, 2000, pp. 793–804.

23 | Cc. 1059, 1671 §2; 1672 CIC.

24 | Pope Francis, 2016, p. 53.

25 | See Fernández-Arrojo, 2020, pp. 98–136.

26 | Caffarra, 2015, p. 27. The same idea is expressed in the General Secretariat of the Synod of Bishops, 2014, pp. 11, 33.

27 | Declaration 'Dignitas Infinita' on Human Dignity, 2024.

28 | Gas-Aixendri, 2017, p. 4.

29 | About the contraposition on personalism and utilitarianism, see Pope John Paul II, 1994, pp. 9–15.

a mosaic of 'facts' that receive legitimacy through state recognition. The legality of the family appears to hinge on the act of recognition: hence, the family and various family relationships, when considered in themselves, are reduced to the level of mere factual circumstances, which constitutes a new form of 'profanation' of this sacred institution.

In this work, we wish to emphasise the significant protective role played by Church Law in family relationships. In fact, by configuring the legal structure of marriage and the family, it establishes the key components of the system, among which we can mention the following:

1. Blood and freedom are the two essential ingredients of every family system: on the one hand are the biological ties of blood, and on the other are the legal ties created by freedom.³⁰
2. Marriage, understood as the unconditional giving and acceptance of the persons of the spouses in their dimension as spouses, is the foundational principle of the family and the component that signifies the legitimacy of family relationships.³¹
3. Family is not just for a select few who are 'perfect'; it is for everyone. Therefore, it is essential to distinguish between difficulty and incapacity. The difficulties and conflicts inherent in all human relationships may lead to the breakdown of marital coexistence, but they are not necessarily a cause for the nullity of marriage.
4. Understanding the marital bond as the first, foundational family relationship serves as the key to interpreting all other relationships within the family.
5. Marital commitment is based on the consensual principle,³² rooted in marital love, with its inherent goods: unity and fidelity, openness to procreation, and finally, indissolubility, which is the flip side of the coin of the unconditional nature of marital love.³³

Among these aspects, we highlight two as particularly relevant in order to draw some conclusions in the realm of the Church's legal and pastoral action.

- a) Understanding the marital bond as the primary family relationship, which is foundational and key to interpreting all other relationships within the family: The marital bond appears as a purely contractual reality external to personal and family reality (i.e. biographical), which hinders the possibility of considering the marital relationship as intrinsically familial.³⁴ The familial consideration of the marital bond reinforces the idea – implicit in the entire canonical tradition – that married men and women belong to each other reciprocally and become the first relatives, as the identity of the spouse constitutes a biographical co-identity.³⁵ This idea is still uncontroversial in other family relationships because it is believed that, once established, the family relationship persists independently of the will of the parties involved in the relationship. The notion of 'ex-family member

30 | See Moreno, 1994, where interesting advances in anthropological research related to kinship systems are presented.

31 | See c. 1057 § 2 CIC.

32 | See c. 1057 § 1 CIC.

33 | See cc. 1056, 1134 CIC.

34 | Carreras, 2000, pp. 419–434.

35 | Viladrich, 2001.

- '- ex-father, ex-son, ex-sister—has not yet gained traction in the Western context, while the notion of 'ex-husband' or 'ex-wife' has come to be accepted because it is believed that these relationships do not reach the most intimate levels of a person, as explained above.³⁶
- b) Indissolubility, as the flip side of the coin of the unconditional nature characteristic of marital love: Indissolubility is not an extrinsic property of marital love but an intrinsic component of the unconditional love between spouses, which is reflected in and serves as the foundation for the unconditional nature of other family relationships.³⁷ The stability and duration of the parental bond serve as a reference point and support for children, not only when they are young but throughout their life. United parents continue to be role models for children who are already spouses. In contrast, marital breakup entails the collapse of the entire structure of family relationships. However, some elements of it may still be maintained, which are undoubtedly valuable.

Considering this truth has direct consequences in the realm of the Church's action, both in family pastoral work and in the understanding of marriage annulment processes. The idea that the annulment process is a kind of 'remedy' for marital failures should be abandoned. Thus, facilitating avenues for annulment and expanding efforts in this direction should not be seen as a pastoral action. The Church should accompany those in situations of failure but should do so based on the truth about marriage and the real situation of such individuals.³⁸

6. Proposals for the future

The elements of canonical matrimonial law have been and continue to be fundamental in safeguarding family relationships. Therefore, it is necessary to develop a genuine canonical family law that goes beyond the foundational relationship, which is marriage, to include all the richness of the Church's wisdom on other family relationships: parental and filial, fraternal relationships, and family education as a sphere of personal growth that encompasses all dimensions, including the spiritual. Parallely, it is essential to find new paths and formulas to propose pastoral action that highlights the beauty of family relationships in all their facets.

The efforts of Pope Francis in recent years, following the impetus of the two Synods on the Family, to reach out to families who have experienced failure are commendable.³⁹ The Post-Synodal Apostolic Exhortation *Amoris laetitia* offers a compassionate and realistic view of the challenges facing families in the contemporary world, while emphasising the fundamental role of the Church in accompanying, supporting, and strengthening families in all their forms and circumstances. The apostolic exhortation encourages a comprehensive and merciful pastoral perspective towards families, acknowledging the complexity of

36 | Carreras, 2000, pp. 419–434.

37 | Gas-Aixendri, 2002, pp. 335–344.

38 | On this issue, see Pérez-Soba, 2015.

39 | Pope Francis, 2016, pp. 291 ff.

their situations and challenges. It highlights the importance of communication, dialogue, and active listening within families as a means to strengthen family bonds and resolve conflicts. Recognising the diversity of family situations in today's world, it promotes an inclusive pastoral approach that accompanies all families, regardless of their situation or structure. Delicate issues such as divorce, single-parent families, and couples in irregular situations are addressed, urging the Church to welcome and accompany these families rather than judge them. Additionally, it underscores the importance of sexual education within the family and the need for comprehensive formation that promotes the human and spiritual development of family members. The recent responses from the Dicastery for the Doctrine of the Faith are a good example of the discipline's approach to the reality of families.⁴⁰

A concrete and practical initiative would be to develop pastoral and legal services within dioceses.⁴¹ The mission of these services would be to provide information, counseling, and mediation to couples in a crisis or separated individuals. Some may see this only as preparation for a potential annulment process. However, Pope Francis envisions it as a much broader form of accompaniment:⁴² a form that can help overcome marital crises and heal the wounds of those who have experienced failure, even if the marriage is not annulled.⁴³ A broader and more profound view of the possibilities of these services can be the development of positive pastoral care, not just preventive and restorative – pastoral care that accompanies couples from marriage preparation and continues to support them throughout their lives.

The starting point for understanding the importance of family accompaniment/support is understanding the nature of families in Western culture. Our diagnostic attempt has identified a trend showing the creation of highly individualised societies, where we struggle to come together, comprehend the significance of family bonds, and recognise the need to strengthen them. However, we tend to be non-reflective and seek immediate responses and actions when conflicts arise; moreover, in a world dominated by the idea of success, we interpret every crisis as an irreparable sign of failure. Lastly, today, we increasingly tend to 'reason with emotions' rather than with intellectual faculties.

With these underlying facts, family life can become quite complex, and helping from the outside is not easy. Until a few years ago, we believed that providing families with training would be sufficient to offer them assistance: giving them ideas about how the family should be and how things should be done, in a style that we could describe as 'directive.' Perhaps we forgot that education is not only about giving or receiving information. Comprehensive education requires having the freedom that allows each person, each family, to discover their unique role. Of course, education in this sense is still necessary, but it has become insufficient. We must learn to convey the beauty of the family in a different way, with a different methodology and style, in accordance with the culture in which we live, which, as mentioned earlier, has undergone radical changes in recent decades.

40 | See Fernández, 2023a; Fernández, 2023b.

41 | Apostolic Tribunal of the Roman Rota, 2016, p. 13.

42 | Pope Francis, 2013, p. 169.

43 | This is how various authors understand it; some dioceses such as Milan and Bergamo have implemented it. See Tocto Meza, 2018, pp. 220–221.

Pope Francis, from the beginning of his pontificate, has emphasised the need to be close to families in a practical and realistic way. Educating individuals within the family today requires not only transmission of knowledge but also guidance that supports individuals with closeness. What does it mean to accompany? Etymologically, to accompany means 'to share bread,' that is, space and time with another person. It signifies the intertwining of daily life's elements in the construction of an existence. Ultimately, to accompany means to share life.⁴⁴ Accompaniment is a concept that needs further exploration, but some aspects that are essential must be emphasised:

- a) Accompaniment requires being where families are. Therefore, accompaniment must happen in the places where families meet, where they act, and where they are located.
- b) Accompaniment means establishing a personal relationship. Accompaniment has a strong anthropological value. It is not simply about performing the role of a personal advisor. Accompaniment implies establishing a bond. Accompaniment can never happen without becoming vulnerable. As such, a bond is based on trust. Trust cannot be imposed; it is up to us to create the conditions that make trust possible.
- c) Accompaniment does not mean directing or replacing the decision-making process by solving others' problems. It is to accompany the individual because there is a path, a journey to be taken together. Accompaniment is about revealing the beauty that is attractive. Accompaniment is also about helping discover the resources that families can draw on to address their difficulties. Until recently, we believed that it was enough to assist families by offering them 'training,' forgetting that education also largely involves promoting individual freedom by proposing realistic and relatable models.
- d) Accompaniment is necessary not only in times of crisis. It should be considered a preventive aid in conflict situations. Nevertheless, moments when difficulties intensify may arise when a family is going through particularly challenging circumstances. Accompanying in this context requires starting with the premise that a crisis is not necessarily an irreparable failure. Crises are undoubtedly a threat; but they can also become a challenge and an opportunity for renewal, to discover new facets in individuals and relationships.
- e) Finally, it is important to emphasise that accompaniment is a *task of closeness* that requires specific training but is not necessarily a therapeutic action. Occasionally, some form of intervention may be necessary, but it may not be suitable for most of the difficulties that all families encounter eventually.

Based on everything we have discussed thus far, it is evident that the pastoral action of the Church (including all initiatives stemming from this institution as such and its various entities: parishes, associations, movements, and other ecclesial realities) is a privileged sphere for accompanying families. We must be aware that the trust and spiritual strength represented by this realm of accompaniment have immeasurable potential. Accompaniment is not merely a noble idea but an operational reality born from the very nature of the Church, which is 'a family that accompanies families'. The Church also possesses genuine wisdom about family life and needs to use it to accompany those who wish

44 | Pérez-Soba, 2022, p. 17.

to embark on the journey of forming a family or who have already done so. Those of us who consider ourselves living members of the Church bear the responsibility to learn how to accompany in this context.

Pastoral structures are often perceived as service-providing structures rather than structures for accompanying individuals. Hence, a change of mindset is required to understand that the fundamental mission to which the Church is called is to accompany us on the journey of life, just as Jesus accompanied the disciples on the road to Emmaus. Accompaniment should be integral to the entirety of the Church's actions.⁴⁵

As believers, we need spaces to share faith and life, including family life. In Catechumenal itineraries, it is stated that 'it is not so much about transmitting information as it is about guiding, assisting, and being close to couples on a journey to be undertaken together. In reference to accompaniment, concepts such as 'gradualness,' 'welcome,' 'support,' 'witness,' 'being present,' and the creation of an 'atmosphere of friendship and trust' are also used. It is evident that we must delve deeper into and, above all, demonstrate in practice what it means to accompany within the Church.⁴⁶

It is increasingly imperative to focus on what is commonly referred to as remote preparation for marriage, specifically the education of young individuals. Pérez Soba raises a question regarding why youth pastoral care is not regarded as authentic family pastoral care. There is a critical need to instil the virtue of love in young people. A question then arises: How and where is love learned? As previously emphasised, completing the circle of understanding, love is cultivated within the family, often regarded as the domestic Church. This becomes particularly evident when the family actively embodies the love that reflects God's love for each individual.

Accompanying families is not just a 'good idea' but an operational reality that arises from the vitality of the Church and its nature as a 'family.'⁴⁷ Accompanying means creating relationships, a difficult task, especially in an increasingly individualised social context. More than an action, it is above all an attitude. The Church possesses authentic wisdom about the family and must apply it to accompany those who wish to embark on building a family and those who have already begun their family project.

We should not lose hope that the family, understood in this way, responds to the aspirations of human beings today. We would like to conclude by recalling the proposal that was made in this same forum some years ago (I believe there is no other recipe): to showcase the beauty of unconditional family love, to educate people on the capacity to love unconditionally, and to accompany families in all their life moments.⁴⁸ This is why we need not only 'ideologues' and 'theorists' of family but also embodiments of family truth: an immersion in real models of families that accompany other families.

45 | To accompany is not to solve problems. Jesus did not come to solve problems but rather to create them, in the sense that the Christian existence, in a certain way, means complicating one's life. Pérez-Soba, 2022, p. 17.

46 | Dicastery for laity, family and life, Catechumenal itineraries for married life. Pastoral guidelines for particular Churches [Itinerari catecumenali per la vita matrimoniale. Orientamenti pastorali per le Chiese particolari] 2022, p. 20.

47 | Pérez-Soba, 2022, p. 88.

48 | Gas-Aixendri and Lacorte Tierz, 2015, pp. 287–308.

7. Conclusions

To address the current situation of the family in many places, with its strengths and weaknesses, it is necessary to undertake a comprehensive and organised pastoral action that involves all members of the Church to support families, especially those facing difficulties. Most likely, this is the most significant challenge for the Church in our times, as it involves 're-building' an institution (the family) that is fundamental for the future of our civilisation.⁴⁹ While it is necessary to involve all sectors of civil society, the Church, however, bears a particular responsibility in this endeavour due to its role in teaching the 'truth of the principle,' confirming the 'principles of moral order that arise from human nature itself'.⁵⁰

Despite clear signs of crisis, the desire for family remains alive, especially among young people, and many families respond with generosity, joy, and faith to their vocation, despite the obstacles, misunderstandings, and sufferings.⁵¹ We must be aware that those who work in favour of the family are swimming against the tide today. Counterculture, as defined by Theodore Roszak, consists of those social structures and tendencies that oppose the ones established in a society. In this context, the family represents a countercultural element, that is, a resistance to the significant forces of postmodernity, which include lack of commitment, relational poverty, loneliness, and self-referentiality. However, we must consider that counterculture entails creating a new culture, and therefore, it presupposes a positive attitude, being convinced that our proposal regarding the family aligns with the one of most authentic desires of human beings: 'to love and be loved.'

49 | We intentionally use this expression, in contrast to the 'deconstruction' advocated by gender ideology.

50 | Second Vatican Council, 1965, p. 14.

51 | General Secretariat of the Synod of Bishops, 2014, pp. 1–2.

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LEGAL REGULATION OF MEDICALLY ASSISTED REPRODUCTION IN CROATIA: IS THE GRASS GREEN ENOUGH ON OUR SIDE?

Aleksandra Korać Graovac¹

ABSTRACT

This article addresses the medical and family law aspects of the legal regulation of medically assisted reproduction in Croatia. Croatia has balanced legislation on medically assisted reproduction. The author explains the principles that governed the legislator; namely: the ultima ratio principle, the principle of the protection of participants (prospective parents, donors, and physicians), the principle of the protection of the best interests of the child, and the principle of state control. The Medically Assisted Reproduction Act (2012) and the family law rules in the Family Act are explained. In practice, some problems have emerged. What should be done with surplus cryopreserved embryos? How should donor programs be regulated? How can cross-border surrogacy arrangements be prevented? How should the efficiency of licenced fertility clinics be measured? The author concludes that, despite some objections, Croatia's legal regulations have successfully balanced the human rights of participants (the child, intended parents, donors, and medical staff).

KEY WORDS

*medically assisted reproduction
assisted reproduction technologies
the right of the child to know his origin
reproductive rights
donation of gametes
surrogacy*

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1. Introduction

For most people, one of the strongest human desires is the desire to fulfil oneself as a parent. Approximately 15% of couples face infertility² caused by the health factors of one or both partners.³ These couples often seek medical help. Notably, such reproductive medical supports are increasingly successful.

Robert, the first child conceived by *in vitro* fertilization (IVF) in Croatia, celebrated his fortieth birthday in September 2023. Croatia was the seventh country worldwide to achieve significant success with medically assisted reproduction. Robert's birth gave new hope to thousands of Croatian couples struggling with infertility.

According to the European Atlas of Infertility Treatment Policy (published on 10 December 2021 by the Fertility Europe Forum of the European Parliament for Sexual and Reproductive Rights), Croatia has maintained a high level of legislation related to medically assisted reproduction.⁴ More specifically, this atlas analyses the quality of legislation, availability, financing, and state investment. Based on these factors, Croatia given a 'very good' rating, attaining the highest percentage of required points (76%) among countries with the same rating.⁵

In the Republic of Croatia, sixteen health institutions conduct medically assisted reproductive procedures (eight public and eight private institutions). These institutions are listed in the register of authorised medically assisted reproductive institutions governed by the state.⁶

2 | The WHO defines 'infertility' as a disease of the male or female reproductive system defined by the failure to achieve a pregnancy after 12 months or more of regular unprotected sexual intercourse, see WHO, 2024.

3 | It seems that male fertility is especially endangered. Data and analyses confirm prior findings of an appreciable decline in sperm count between 1973 and 2018 among men from North America, Europe, and Australia and support a decline among unselected men from South/Central America, Africa, and Asia. This decline has continued and has notably steepened since 2000. This substantial and persistent decline is now recognized as a significant public health concern. In 2018, a group of leading clinicians and scientists called for governments to acknowledge decreased male fertility as a major public health problem and to recognize the importance of male reproductive health for the survival of the human (and other) species. *Amplius*: Levine et al., 2023, pp. 157–176, and Aitken, 2022, pp. 629–638. Swann, 2021 states that most couples may have to use assisted reproduction by 2045.

4 | The European Parliamentary Forum for Sexual and Reproductive Rights is a network of Members of Parliament throughout Europe committed to protecting the sexual and reproductive rights (SRHR) of all people, both at home and overseas. The Secretariat is based in Brussels. Croatia's position on the European Atlas of Infertility Treatment Policy is remarkable, especially considering that The European Parliamentary Forum for Sexual and Reproductive Rights aims to 'ensure that all European citizens receive equal access to treatment, as part of their right to the highest possible level of sexual and reproductive health.' See Bulmanska-Wingett, 2023.

5 | Only four countries earned an 'excellent' score (meeting 81% of the required criteria): Belgium, Israel, the Netherlands, and France. See: European Parliamentary Forum for Sexual & Reproductive Rights, 2021.

6 | The registry is also part of the European Union Register of Authorized Health Institutions and Tissue and Cell Banks. EU Coding Platform. European Commission, 2024.

Here, it is helpful to note that the International Committee for Monitoring Assisted Reproductive Technologies (ICMART)⁷ defines assisted reproductive technologies (ART) as

all interventions that include the in vitro handling of both human oocytes and sperm or of embryos for the purpose of reproduction. This includes, but is not limited to, IVF and embryo transfer ET, intracytoplasmic sperm injection ICSI, embryo biopsy, preimplantation genetic testing PGT, assisted hatching, gamete intrafallopian transfer GIFT, zygote intrafallopian transfer, gamete and embryo cryopreservation, semen, oocyte and embryo donation, and gestational carrier cycles. Thus, ART and ART-only registries do not include assisted insemination using sperm from either a woman's partner or a sperm donor.⁸

Broadly, medically assisted reproduction (MAR) comprises

reproduction brought about through various interventions, procedures, surgeries and technologies to treat different forms of fertility impairment and infertility. This include ovulation induction, ovarian stimulation, ovulation triggering, all ART procedures, uterine transplantation and intrauterine, intracervical and intravaginal insemination with semen of husband/partner or donor.⁹

MAR raises many medical, human rights, and ethical issues.¹⁰ These issues challenge the legislature to find appropriate and justified solutions that balance different interests, such as the interests of prospective parents, the interests of the child, and the interests of other participating persons (e.g. donors, surrogate mothers). It is also notable that reproductive medicine is a big business: providers of IVF reported profits of USD 12.5 billion in 2018 and are expected to generate profits of up to USD 25.6 billion in 2026.¹¹

Cross-border issues related to MAR are particularly critical. Couples and/or individuals may engage in MAR abroad. In addition, a MAR procedure may be started in one country but the relevant couple or individual may request the gametes or embryos to be transferred to another country. While a state can only regulate MAR rules within its borders, individuals and couples can seek MAR treatments in other countries and request an acknowledgement of parentage in a country that prohibits MAR technologies (e.g. surrogacy, giving birth to a child conceived with the egg of a female partner and born

7 | ICMART is a non-profit corporation governed by an international board of reproductive medicine professionals. Notably, in 2017, ICMART developed 'The International Glossary on Infertility and Fertility Care', which is used in this Art. The glossary was published in *Fertility and Sterility* (FNS) and *Human Reproduction* (HS). See ICMART, 2017.

8 | Ibid.

9 | Ibid.

10 | The Catholic Church strongly objected to 'artificial insemination' and IVF. The Church published a booklet, titled 'A child: a gift or an object?', that claimed that children conceived by such methods would suffer more health problems and that numerous embryos are destroyed during MAR procedures. In response, medical experts advised that most medical centres here have not destroyed embryos and are instead awaiting new legislation before they do so. See Wood, 2005. The Croatian Bishop's Conference made a statement in step with the teaching of the Catholic Church, expressed in the instructions *Donum Vitae* (1987) and *Dignitas Personae* (2008).

11 | Allied Market Research, 2019.

by her same-sex partner). Cross-border arrangements may challenge public order in the parents' domicile countries (e.g. in the case of surrogacy).

Croatia's legislation regarding the medical aspects of assisted reproduction (including the donation of gametes) is relatively balanced; however, there remain some unsettled issues of public concern, such as the destiny of frozen embryos, the lack of gamete and embryo donation banks, and the exclusion of single women and same-sex couples from being beneficiaries of MAR procedures.

This Art. offers a general overview of relevant legislation and specific questions that should be addressed in the future, such as how to address the uncertain legal status of frozen embryos and possible solutions for the lack of donors.

2. Legislation

As MAR has repercussions for sensitive personal status and must align with human rights, national legislation must carefully regulate the related aspects of medical and family law. There is also notable legislative activity at the European level on this issue, which is addressed in more detail below.

| 2.1. *The European Union and the Council of Europe*

The Charter of Fundamental Rights of the European Union¹² protects the right to integrity through a specific provision related to medicine and biology (Art. 3). The Charter obliges that, in the fields of medicine and biology, the free and informed consent of the person concerned must be respected. Further, according to the procedures laid down by law, it prohibits activities that treat the human body and its parts as sources of financial gain. Additionally, it prohibits the reproductive cloning of human beings. Related general provisions on dignity, the protection of privacy, and other issues should also be interpreted as necessary in the context of human rights.

While EU Directives prescribe technical quality and safety requirements,¹³ each EU country is free to regulate MAR procedures according to its needs. The Council of Europe

12 | Charter of Fundamental Rights of the European Union, 2012/C 326/02.

13 | Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells. This Directive is primary legislation and sets standards of quality and safety for the donation, processing, preservation, storage, and distribution of human tissues and cells. This Directive was recently replaced by a new one, the Proposal for a Regulation of the European Parliament and of the Council on setting standards of quality and safety for the substances of human origin intended for human application and repealing Directives 2002/98/EC and 2004/23/EC (The Proposal of 14 July 2022). Other notable Directives include: Commission Directive 2006/86/EC of 24 October 2006 implementing Directive 2004/23/EC of the European Parliament and of the Council as regards traceability requirements, notification of serious adverse reactions and events and certain technical requirements for the coding, processing, preservation, storage and distribution of human tissues and cells; Commission Directive 2012/39/EU of 26 November

Social Charter's provision¹⁴ on the right to health protection (Art. 11) also generally applies to the area of reproduction. Meanwhile, the Oviedo Convention (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)¹⁵ prohibits the selection of a child's sex (except in cases where doing so is necessary to prevent serious hereditary sex-related diseases; Art. 14), the creation of human embryos for research purposes (Art. 18, para. 2), and profiting from or disposing of a part of the human body (Art. 21). Although the Oviedo Convention was followed by several protocols, no protocol on reproductive technology has yet been issued.

Further, the European Convention on Human Rights (ECHR) has been invoked several times in cases related to reproductive issues.¹⁶ For example, on several occasions, the European Court of Human Rights (ECtHR) made rulings based on interpretations of Art. 8 of the ECHR. The jurisprudence of ECtHR included the cases that judged the right to access artificial insemination facilities,¹⁷ the possibility of using an embryo against the will of the ex-spouse,¹⁸ an unacceptable complete ban on specific artificial procreation techniques (e.g. ovum donation),¹⁹ the use of an artificial insemination by a couple that is not sterile or infertile but wants to conceive a child using MAR procedures to prevent genetic diseases (e.g. cystic fibrosis) for which they are carriers that could be passed to their child.^{20,21}

2012 amending Directive 2006/17/EC as regards certain technical requirements for the testing of human tissues and cells (Text with EEA relevance); Commission Directive (EU) 2015/565 of 8 April 2015 amending Directive 2006/86/EC as regards certain technical requirements for the coding of human tissues and cells (Text with EEA relevance); and Commission Directive (EU) 2015/566 of 8 April 2015 implementing Directive 2004/23/EC as regards the procedures for verifying the equivalent standards of quality and safety of imported tissues and cells. These Directives establish minimum quality and safety standards for procedures related to the donation, processing, preservation, storage, and distribution of human reproduction cells. These directives will be replaced by a single directive, detailed by the Commission in 2022 in a draft proposal for the revision of this legislation.

During the last revision of this Art. these directives were replaced by a single legal document: Regulation (EU) 2024/1938 of the European Parliament and of the Council of 13 June 2024 on standards of quality and safety for substances of human origin intended for human application and repealing Directives 2002/98/EC and 2004/23/EC.

14 | European Social Charter (Revised) ETS No. 163.

15 | Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (ETS No. 164). Entry into force for Croatia on the 1 March 2023.

16 | ECHR, 2023a.

17 | *Dickson v. the United Kingdom*, Application No. 44362/04, Judgement 4 December 2012.

18 | *Evans v. the United Kingdom*, Application No. 6339/05, Judgement 10 April 2007.

19 | *S. H. and Others v. Austria*, Application No. 57813/00, Judgement 3 November 2011.

20 | *Costa and Pavan v. Italy*, Application No. 54270/10, Judgement 28 August 2012.

21 | Lebret, 2020; Preložnjak, 2020.

The ECtHR also has dealt with several cases of surrogacy²² with cross-border elements. Case law has slowly led to the legal recognition of parenthood in some cases, although it still leaves a margin of appreciation for the state.²³

Notably, the ECtHR has been putting an increasing amount of pressure on contracting states to confirm the establishment of the parent-child relationship for children born abroad through surrogacy and taken back to countries of which their prospective parents are nationals. The ECtHR referred to the right to private and family life, weakening the validity of the ban on surrogacy due to cross-border arrangements. Additionally, this approach supported the European Commission's completion of the Parenthood Regulation Proposal²⁴; notably, this may affect whether the respondent state must acknowledge the parenthood status of couples who had children with the help of surrogate mothers and same-sex couples, which might be considered contrary to *ordre public*. Further, in 2019, the Parliamentary Assembly of the Council of Europe approved Recommendation 2156, calling for the Committee of Ministers to deliberate on waiving anonymity for all future human gamete donations to allow all children born through ART to know their origins.²⁵

| 2.2. National legislation

The Medically Assisted Reproduction Act (hereinafter referred to as 'MAR Act')²⁶ regulates several concerns, such as the medical aspects of procedures, the beneficiaries of MAR, legal procedures concerning consent, counselling when donor gametes are

22 | ECHR, 2023b.

23 | Recently, a very interesting position was taken in the case *K.K. and Others v. Denmark* (Application No. 25212/21, Judgment 6 December 2022), with no violation found against a woman who wanted to adopt two children born by a surrogate mother. The Danish Supreme Court had held that a ban on adoption in which payment to the person consenting to it existed under section 15 of the Adoption Act. The intention had been to stop children from becoming a commodity. Danish authorities had refused to allow the adoption and only granted shared custody—there was no legally recognized parent-child relationship. This placed the children in an uncertain legal position; for example, their legal position was uncertain regarding inheritance. Reiterating that the child's interests were paramount in such cases, the Court found that the Danish authorities had failed to balance the interests of the children and the societal interests in limiting the negative effects of commercial surrogacy. Therefore, there was a violation of Art. 8 regarding respect for the private lives of children.

24 | Proposal for a Council Regulation on Jurisdiction, Applicable Law, Recognition of Decisions and Acceptance of Authentic Instruments in Matters of Parenthood and on the Creation of a European Certificate of Parenthood. {SEC(2022) 432 final} – SWD(2022) 390 final} - {SWD(2022) 391 final} - {SWD(2022) 392 final}.

Under Art. 4 para. 3 of the Proposal, 'establishment of parenthood' means the legal determination of the relationship between a child and each parent, including the establishment of parenthood following a claim contesting parenthood established previously. The Explanatory Memorandum as well as the Preamble to the proposed Regulation elaborate that '[f]or the purposes of the proposal, parenthood may be biological, genetic, by adoption or by operation of law.' Explanatory Memorandum of the Parenthood Regulation Proposal, p. 13; Preamble of Parenthood Regulation Proposal, recital 24.

25 | Recommendation 2156 (2019) Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children.

26 | The Medically Assisted Reproduction Act (Zakon o medicinski potpomognutoj oplodnji), Official Gazette, No. 86/12. In text: the MAR Act.

used, informed consent, the cryopreservation of gametes and embryos, and *post mortem* insemination. Meanwhile, family law regulates the establishment of the origin of a child with the Family Act.²⁷ Here, it is also worth noting that the Criminal Code²⁸ penalises the illicit trading of parts of the human body, including human tissue, gametes, embryos, or fetuses; this rule extends to advertising related forms of commerce for financial gain (Art. 10. paras. 2–6); cloning and altering the human genome (Art. 108); mixing human sex cells with animal cells (Art. 109); malpractice (Art. 181); and the unauthorised taking and transplanting of parts of the human body, including tissues, gametes, embryos, and fetuses (Art. 182).²⁹

2.2.1. Basic principles

Several important principles have already been included in national legislation, including: the *ultima ratio* principle; the principle of protecting participants (prospective parents, donors, and physicians); the principle of the protection of the best interests of the child; and the principle of state control.^{30 31}

The *ultima ratio* principle reflects the idea that MPO may only be performed when it is truly necessary from the standpoint of medical science and when the protection of the human rights of all included parties can be confirmed (i.e. this work cannot be based on the wish of intended parents or scientific experimentation). According to Art. 4, para. 1 of the MAR Act, medical assistance may be provided 'only when the previous treatment of infertility has been unsuccessful or hopeless and when it is necessary to avoid, in the cases of natural conception, the transmission of a serious disease onto the child'.

Meanwhile, the principle of protecting participants is quite complicated to achieve because each participant has different interests and rights. Intended parents have reproductive rights, the right to privacy, and the right to informed consent; the child has his/her own set of children's rights; donors have an interest in remaining anonymous as well as in being remunerated for their services; and medical and non-medical staff have the right to

27 | The Family Act (Obiteljski zakon), Official Gazette Nos 103/15, 98/19, 47/20, and 49/23.

28 | Criminal Code (Kazneni zakon), Official Gazette Nos 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21, 114/22, and 114/23.

29 | In 2009, a huge scandal on the criminal liability of a distinguished professor who allegedly stole ova and transferred them to another woman to make her pregnancy concluded with a judgment that dismissed accusations against a gynaecologist. The state attorney did not succeed in proving that the ova were stolen because the patients (one of them a mother aged 52 years) did not allow their DNA to be used prove that a heterologous – rather than a homologous technique – had been used. The leader of feminist NGO B.a.B.e opposed the judgment, stating that this case 'undoubtedly revealed a violation of women's reproductive rights, because in an illegal procedure, without their knowledge and consent, explanted eggs, required far greater attention from the entire judiciary.' Udruuga B.a.b.e. zgrožena oslobođajućom presudom Asimu Kurjaku i ocjenama sutkinje, 2009.

30 | The state grants licenses to eligible medical clinics to perform MAR and regulates requirements for MAR proceedings. Additionally, the state must protect and balance different interests and rights.

31 | *Amplius*: Korać Graovac, 2009, pp. 231–232.

conscious objection³². In all actions and procedures, the priority should be the child's best interests, which are tied to rights such as the child's right to be cared for by both parents, the child's right to know his/her origin, and the child's right to healthcare.

States take different approaches to regulating MAR. Each state is free to limit procedures and techniques, introduce bans (to some extent), and regulate other important related issues as appropriate for its particular society. Along these lines, the ECtHR stressed³³ that each state should set its own legal rules.

2.2.2. Medical legislation

Medically assisted procreation in Croatia has been regulated since 1978 by the Act on Health Measures on the Exercise of the Right to Free Decisions about Giving Birth to

32 | It is not very common to think about the rights of physicians and non-medical staff; however, according to Art. 44 of the MAR Act, 'Health workers and non-health workers who should carry out or participate in medically assisted reproduction procedures have the right to appeal to conscience due to their ethical, religious or moral views, or beliefs, and refuse to carry out the medically assisted reproduction procedure or participate in that procedure.'

33 | In the case *Peřilová v. the Czech Republic*, Application No. 14889/19, Judgment 8.12.2022 [Section V], the ECtHR dismissed the widow's request to be fertilized with her deceased husband's frozen sperm based on the fact that domestic law only allows fertilization for couples and *inter vivos*. More specifically, this case concerned the domestic courts' dismissal of the widow's request to use her late husband's cryopreserved sperm in a MAR procedure that they had initiated before his death. Relying on Art. 8 (the right to respect for private and family life) of the European Convention on Human Rights, the applicant submitted that the State should respect her choice of a father for her child as well as her late husband's wish to father a child with her and should therefore allow her to continue the procedure using his frozen sperm. However, no violation of Art. 8 was found. In *S.H. and Others v. Austria* [GC], Application No. 57813/00, Judgment 3.11.2011 [GC], the Grand Chamber found no violation because Austrian law prohibited the use of ova and sperm from donors for *in vitro* fertilization. Two couples complained. Only *in vitro* fertilization with the use of ova from a donor would allow them to have a child for whom one of them was the genetic parent. However, both possibilities were ruled out by the Austrian Artificial Procreation Act, which prohibits the use of sperm from a donor for *in vitro* fertilization and ova donation in general. At the same time, the Act allows other MAR techniques, especially *in vitro* fertilization with ova and sperm from spouses or cohabitating partners themselves (homologous methods) and, in exceptional circumstances, donation of sperm when it is introduced into the reproductive organs of a woman. The ECtHR pointed out that 'according to the Austrian Constitutional Court's findings, the legislature had tried to reconcile the wish to make medically assisted procreation available on the one hand and the existing unease among large sections of society as to the role and possibilities of modern reproductive medicine on the other. However, the Court could not overlook the fact that the splitting of motherhood between a genetic mother and the one carrying the child differed significantly from adoptive parent-child relations. The legislature had thus been guided by the aim of maintaining a basic principle of civil law, that the identity of the mother is always certain, and of avoiding the possibility that two women could claim to be the biological mother of the same child. The Court further observed that all relevant legal instruments at the European level were either silent on the question of ova donation or – in the case of the European Union Directive on safety standards for the donation of human cells – expressly left the decision on whether to use germ cells to the State concerned.' ECHR, 2011.

Notably, this judgment is over a decade old; more recent liberalization in Europe may have led to some changes.

Children.³⁴ This Act introduced a modest regulation for time-available MAR technologies. In 2009, the first Act was dedicated only to MAR,³⁵ with some restrictive requirements concerning the duty of cohabiting couples to prove their status through judicial judgment and bans on the cryopreservation of embryos.

The MAR legislation was modified in 2012. The current version presents a possible solution for balancing the rights of prospective parents, the rights of the child, and the rights of donors.³⁶ Concerning prospective parents, the issues at hand are related to who may engage in MAR under the health insurance scheme as well as when and under what circumstances they may do so.

Holders of the right to MAR are men and women of legal age who have the legal capacity to give personal statements,³⁷ who are married or live in an extra-marital union, and who, in terms of their age and overall health conditions, are capable of exercising parental care (Art. 10, paras. 1 and 3). Extramarital spouses must provide a statement certified by a notary that they live in an extramarital union.³⁸

A single woman of legal age who has legal capacity and does not live in a marital, non-marital, or same-sex union; whose previous treatment of infertility has ended unsuccessfully or hopelessly; and who, because of her age and overall health condition, is capable of caring for the child, may also seek MAR treatment (Art. 10, para. 2). However, social infertility (impossibility to find a reproductive partner) and sexual orientation are not sufficient reasons for a woman to seek MAR; the main condition is that she has a medical need for MAR. Discussions on single women's right to MAR are based on the principle of proportionality between a woman's right to health and the fact that a woman would be giving birth to a child who will not have a father. The state – which limits who may be entitled to MAR and actively financially supports the medical aspects of the conception – maintains that a single woman may only use MAR for medical reasons.

Thus, beneficiaries who intend to found nontraditional families are excluded from MAR. These beneficiaries comprise single mothers without medical reasons for using MAR or same-sex female couples (the surrogacy ban places men in a relatively difficult position). Legal arguments for such solutions are needed to balance the rights and risks of the parties involved against societal values. However, such solutions may lead to reproductive tourism, where intended parents seek countries where they can get MAR technologies that are not allowed in their own country.

The Croatian Health Insurance Fund provides finances to cover four attempts of intrauterine insemination (IUI) and six attempts of *in vitro* fertilisation, with the obligation that two attempts must be conducted during a natural cycle. This provision attempts

34 | The Act on Health Measures for the Exercise of the Right to Free Decisions about Giving Birth to Children (Zakon o ostvarivanju prava na slobodno odlučivanje o rađanju djece), Official Gazette, No. 18/78.

35 | The Medically Assisted Reproduction Act (Zakon o medicinski potpomognutoj oplodnji), Official Gazette No. 88/09.

36 | Cf. Korać Graovac, 1999, p. 229.

37 | Under Art. 23 of the Convention on the Rights of Persons with Disabilities a person with disabilities has the right to freely and responsibly decide on the number and spacing of their children. According to this requirement, a person who is not deprived of legal capacity in the field of giving statements regarding her personal condition is also entitled to the right to medically assisted reproduction (Art. 10, para. 3 of the Medically Assisted Reproduction Act).

38 | Art. 11, para. 3 of the MAR Act.

to follow the principle of proportionality between the financial sources engaged and the probability of a successful pregnancy. Furthermore, given that hormonal stimulation can have negative effects for women, the health of women undergoing such treatment must also be supported. The state is quite generous, especially considering that it covers a significant part of the expenses of MAR technologies for couples forced to seek medical help abroad for a variety of reasons.³⁹

Generally, a woman must not be older than 42 years; however, this rule can be broken for justified health reasons. This age limit was set to guarantee that the mother will be able to take care of the child effectively and in his/her best interests. The physician overseeing the treatment is entitled to check whether the patient is concerned with her age and overall health condition and is capable of caring for the child.⁴⁰ The authority of a gynaecologist to assess the capacity of a woman to care for a future child leads to the conclusion that this assessment is quite fluid, especially as a woman may visit another medical clinic if she is unsatisfied with the original clinic's findings.

In addition, prospective parents have certain rights as patients, such as the rights to get medical help according to modern medical standards, to give informed consent,⁴¹ to receive psychological counselling when necessary, and to request the safe transfer of their gametes and embryos to another medical institution on their request and at their expense in the hope of getting better medical services. Contrary to such solutions, the liberal approach refers to reproductive rights and the non-discrimination clause⁴² and argues that everyone should have the right to seek medical help through MAR technologies regardless of his or her personal status or sexual orientation.

Concerning the child, issues centre on whether the child should have the right to know his or her origin and the right to be cared for by both (capable) parents from the very beginning of his or her life. These issues are related to the ban on *post mortem* embryo transfer and insemination, the ban on MAR for single women who do not need medical help,⁴³ and the ban on the contestation of parenthood in court proceedings if the child is conceived by donor gametes or embryos. Further, an answer to the question of when

39 | In addition to expenses guaranteed by the MAR Act, some municipalities co-finance further medically assisted reproduction attempts in the amounts of 40 to 80% of the entire costs; these financial supports are provided to increase the birth rate.

40 | Art. 10, paras. 4 and 5 of the MAR Act.

41 | Before carrying out all procedures of medically assisted fertilization, a doctor, holder of a Master of Biology, or other authorized health worker is obliged to explain the details of the procedure, the chances of success, and the possible consequences and dangers of the procedures for the woman, man, and child (Art. 12, para. 2 of the MAR Act).

42 | For example, Art. 14 of the Constitution of Croatia: 'All persons in the Republic of Croatia shall enjoy rights and freedoms, regardless of race, colour, gender, language, religion, political or other opinion, national or social origin, property, birth, education, social status or other status.'

43 | Older academic legal sources contain critical arguments for why a single woman may seek MAR, such as the idea that the child would serve as a kind of compensation for the woman's infertility and loneliness. However, such solutions deprive the child of a father. In addition to such a psychosocial disadvantage, such solutions would also reduce the child's property rights as the child does not have the right to alimony and inheritance from his father. Additionally, legally allowing a woman without a male partner to have a child with MAR would violate the constitutional principle of equality between men and women as a man without a female partner cannot similarly become a parent. Cf. Alinčić, 2006; Zupančić, 2001; Hrabar, 2020.

life begins may lead to a ban on the cryopreservation of embryos or the destruction of cryopreserved embryos.

Posthumous fertilisation is not allowed because 'marriage or an extra-marital union must exist at the time of placing sexual cells or embryos into a woman's body'⁴⁴. If the person who has provided and stored sex cells or tissues dies, the health institution must destroy the person's sex cells or tissues within 30 days of its knowledge of the person's death⁴⁵. Indeed, the child's interest in enjoying the care of both parents is prioritized over a surviving female partner's desire to give birth. However, the problem of stored embryos is complex.

The protection of the human dignity of the child led to the ban on experiments on human embryos. According to Art. 36 of the MAR Act, it is forbidden to enable the extra-corporeal development of an embryo that is older than six days, fertilize a female egg with a seminal cell of any species other than the seminal cell of a human or an animal egg by the seminal cell of a human, change the embryo by transplanting other human or animal embryos, introduce human sex cells or human embryos into the animal, introduce animal sex cells or animal embryos into a woman, create human embryos for scientific or research purposes, or perform scientific or research work on an embryo.

Types of MAR can be further specified as follows: intrauterine insemination, *in vitro* insemination, intracytoplasmic, intracytoplasmic sperm injection, cryopreservation of gametes or embryos, *in vitro* fertilisation-embryo transfer, gamete intra-fallopian transfer, zygote intra-fallopian transfer, frozen embryo transfer, and preimplantation genetic diagnostics.⁴⁶

In MAR, homologous fertilisation using a couple's own sex cells is preferred. The number of eggs stimulated during the procedure should not exceed 12. All 12 eggs can be fertilised to avoid exposing the woman to the risks associated with hormonal overstimulation. To avoid multiple pregnancies, a maximum of two embryos can be transferred to the woman's womb (three if a woman is over 38 years old, has adverse ovarian reserve tests, has repeatedly failed to experience a successful treatment, or is an oncology patient or if the problem is due to a severe form of male infertility). Spouses or common law spouses are obliged to declare in writing before initiating MAR proceedings whether they want the fertilisation of up to two or more eggs. This is important because the remaining embryos and/or eggs are cryopreserved⁴⁷, which can result in many problems (surplus embryos, deciding on future of non wanted embryos etc.). In homologous treatment, the couple is not obliged to undergo psychological or psychotherapeutic counselling. However, problems may emerge regarding the content of the couple's informed consent for the cryopreservation of embryos and their destiny (*vide infra*).

For heterologous techniques, the MAR Act requires prospective parents to complete compulsory psychological or psychotherapeutic counselling. Medical clinics are also obliged to provide legal counselling⁴⁸ due to the consequences of heterologous techniques in family law (ban on contesting parenthood, *vide infra*).

44 | Art. 11, para. 1 of the MAR Act.

45 | Art. 33, para. 3 of the MAR Act.

46 | Art. 9 of the MAR Act.

47 | Art. 7 of the MAR Act.

48 | Art. 13 of the MAR Act.

Donations of sperm, eggs, and embryos are allowed; however, donors must undergo medical and psychological screening. According to Art. 15 of the MAR Act, a person conceived and born with the help of MAR by a donated seminal cell, egg, or embryo has the right, upon reaching the age of 18 years, to access the register of data on fertilisation and all data on his or her genetic origin, including the identity of the seminal cell donor or the donor of the egg (i.e. the embryo donors). These data are stored in the State Register of Medically Assisted Reproduction by the Ministry of Health. Furthermore, parents are obliged to inform a person conceived and born with the help of donor(s) of how he or she was conceived no later than the age of 18.

The empirical approach argues that knowledge of one's genetic origins is essential for one's physical and psychosocial well-being and that a lack of access to this information constitutes harm. For example, children without such knowledge may experience medical and health disparities. Furthermore, when parents chose not to disclose to their children that they were conceived with the help of a donor, these children may make false assumptions about the unknown half of their genetic history and are thus likely to make uninformed medical decisions.⁴⁹

49 | Cf. Ravitsky, 2017; Ishii and Beriain, 2022. Points 2 and 3 of Recommendation 2156 (2019) on 'Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children's state:

'In recent decades, there has been movement towards the recognition of a right to know one's origins, connected to the right to an identity and to personal development: in international human rights law, through its inclusion in the United Nations Convention on the Rights of the Child as a 'stand-alone' right for children, and in European human rights law through the case law of the European Court of Human Rights, which has recognized this right as an integral part of the right to respect for private life. This right includes the right to access information that would make it possible to trace one's roots, to know the circumstances of one's birth, and to have access to certainty of parental filiation....However, this right is not absolute and must thus be balanced with the interests of the other parties involved in sperm and oocyte donation: principally those of the donor(s) and the legal parent(s), but also those of clinics and service providers, as well as the interests of society and the obligations of the State.'

The Parliamentary Assembly invited the Committee of Ministers to propose a legally binding instrument based on the following principles:

'7.1. anonymity should be waived for all future gamete donations in Council of Europe member States, and the use of anonymously donated sperm and oocytes should be prohibited. This would mean that (except in exceptional cases, when the donation is from a close relative or friend) the donor's identity would not be revealed to the family at the time of the donation, but to the donor-conceived child upon their 16th or 18th birthday. The donor-conceived child would be informed at that time (ideally by the State) of the existence of supplementary information on the circumstances of their birth....;

7.2. the waiving of anonymity should have no legal consequences for filiation: the donor should be protected from any request to determine parentage or from an inheritance or parenting claim....The donor should have no right to contact a child born from donation, but the donor-conceived child should be given the option to contact the donor, as well as possible half-siblings, after their 16th or 18th birthday – subject to certain conditions being met;

7.3. Council of Europe member States that permit sperm and oocyte donation should set up and run a national donor and donor-conceived person register with a view to facilitating the sharing of information, as stipulated in paras. 7.1 and 7.2, but also with a view to enforcing an upper limit on the number of possible donations by the same donor, ensuring that close relations cannot marry and tracing donors if the medical need should arise. Clinics and service providers should be required to keep and share adequate records with the register,

Parents' violation of this duty to inform their child of the circumstances of his or her origin is not punished with sanctions under the MAR Act.⁵⁰ Instead, their sense of responsibility to inform their child may arise from general civil obligations regarding the importance of a child's right to know his or her origin.

More specifically, Art. 7 of the Convention on the Rights of the Child suggests that children have the right to know their origins.⁵¹ Paradoxically, due to the right of the child to know the identity of the donor, there is no donor programme; thus, no children whose rights could be breached can be conceived in Croatia.

Notably, this approach clearly prohibits *post mortem* embryo transfer and insemination. In the event of the death of a person whose gametes or sexual tissues are stored, the medical clinic must destroy the stored sexual cells and sexual tissues within 30 days of the date of knowledge of the death of the person from whom the sexual cells or sexual tissues originated.⁵² Although some widows requested that the National Medical Commission allows *post mortem* transfer based on the argument that their deceased husbands' wanted to conceive a child, such requests were not approved. As such, a decision would be *contra legem*.

It is extremely interesting to consider what would happen if an embryo were stored at the time of death of a child's ancestor or relative and the child was later born. Can the *nasciturus* rule apply to cryopreserved embryos if the child is born alive? This should not necessarily be connected to the prohibition of *post mortem* transfers. Consider a scenario in which a grandmother leaves a will that appoints all her grandchildren as heirs. What if a cryopreserved embryo was later born as one of her grandchildren? In this case, because inheritance is opened at the time of her death, all inheritance rights should be reconsidered. While this would lead to legal uncertainty, it would preserve inheritance rights. The answer may be in the medical definition of 'conception' – is this the moment of fertilisation or the moment of nidation? Prolonged implementation of *nasciturus* rule would cause legal uncertainty but would combat discrimination against children who are descendants.

Croatian legislator scrutinised cryopreserved embryos, outlining that in the event of the death of one or both persons from whom the stored embryos originated, the embryos

and a mechanism should be established to provide for cross-border exchanges of information between national registers;

7.4. the anonymity of gamete donors should not be lifted retrospectively where anonymity was promised at the time of the donation, except for medical reasons or where the donor has consented to the lifting of the anonymity and thus inclusion on the donor and donor-conceived person register....;

7.5. these principles should be applied without prejudice to the overriding consideration that gamete donation must remain a voluntary and altruistic gesture with the sole aim of helping others, and thus without any financial gain or comparable advantage for the donor.'

50 | Ibid.

51 | Such an approach was criticized by some academics, pointing out that Art. 7 of the Convention on the Rights of the child does not specifically promote the child's right to know his/her origin. Hence, the Committee on the Rights of the Child has interpreted the right of the child in this manner. Cf. Fortin, 2009; for a comparative review, see Lind, 2019, who argues that the Implementation Handbook for the Convention on the Rights of the Child (1998) was also unclear, as it made this right 'soft' in 1998, taking into account the rights of donors, p. 105.

52 | Art. 33 of the MAR Act.

may be donated to another beneficiary with the right to MAR.⁵³ Considering how such a case may be analogous to a case of adoption, it may be situated as an embryo adoption due to *pro life* tendency. Abandoned embryos, instead to be destroyed, might be offered to another intended parent(s). Hence, according to medical standards, an embryo cannot be donated if the donors (genetic parents) do not undergo appropriate medical examinations. This provision prohibits the use of frozen embryos in the vast majority of cases (parents-to-be are not required to undergo serious medical examinations as donors), so idea to give them to 'adoption' failed. Furthermore, while it is formally possible to donate an embryo, it is not possible for a widow to use it for her own pregnancy, even though the widow physically contributed with her egg to the creation of the embryo.

Cryopreserved embryos cause significant moral and political problems. Currently, there are allegedly 10,000 cryopreserved embryos in Croatia's fertility clinics. While the exact number of frozen embryos is unknown, a large number were unselectively frozen and thus have no chance of survival.

The MAR Act prescribes that embryos be cryopreserved for five years and that the state pays for their cryopreservation. If a couple wants to cryopreserve their embryos for longer than five years, they have to do so at their own cost. Notably, the MAR Act, which was written in a *pro life spirit*, does not mention destroying embryos. If one spouse does not consent to the transfer, the other parent cannot use it for pregnancy (the embryo is in some ways 'co-owned'); however, it remains unclear what can be done with the embryo in such a case. Furthermore, these embryos cannot be donated because the original creators of the embryo did not undergo the strict health checks necessary for embryo donors. Meanwhile, some couples want to destroy their surplus embryos when they have their desired number of children. However, health clinics do not dare destroy these embryos; the MAR Act is not clear on this matter and the clinics are afraid of public condemnation.

Further, surrogate motherhood is not permitted.⁵⁴ In the Republic of Croatia, 'contracts, agreements and other legal transactions of bearing children for another (surrogate gestational motherhood) and handing over a child after a fertility treatment, with or without a pecuniary remuneration, are null and void'.⁵⁵

A donor of gametes for a heterologous MAR procedure must be of legal age and legally capable of consenting to donation.

53 | Art. 33, para. 4 of the MAR Act.

54 | Art. 31 of the MAR Act.

55 | Art. 31, para. 3 of the MAR Act. In 2011, the EU Parliament adopted the Resolution that 'condemns the practice of surrogacy, which undermines the human dignity of the woman since her body and its reproductive functions are treated as commodity; considers that the practice of gestational surrogacy which involves reproductive exploitation and use of the human body for financial or other gain, in particular in the case of vulnerable women in developing countries, shall be prohibited and treated as a matter of urgency in human rights instruments.'

Para. 114 of the Annual Report on Human Rights and Democracy in the World 2014 and the EU Policy on the Matter European Parliament Resolution of 17 December 2015 on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's Policy on the Matter (2015/2229(INI)). In the year of 2021, the European Parliament stated that it 'acknowledged that sexual exploitation for surrogacy and reproductive purposes...is unacceptable and a violation of human dignity and human rights'. Para. 32 The EU Strategy for Gender Equality, European Parliament Resolution of 21 January 2021 on the EU Strategy for Gender Equality (2019/2169(INI)).

According to the most recent census in 2021, Croatia is a small country with only 3.9 million inhabitants; therefore, the possibility of having half-siblings may be quite real, so there might be a danger that individuals get know half-sibling without being aware of this. To prevent the uncontrollable donation of gametes, donors can donate only ova or seminal cells to one of the health institutions authorised to perform heterologous procedures. Furthermore, the health institution authorised to perform heterologous fertilisation is obliged to establish a system for verifying the donation of gametes or embryos in the State Register of Institutions authorised to perform heterologous procedures.⁵⁶

Embryos available for donation are allowed to be created in a homologous fertilisation procedure. Embryo donors are married or extramarital spouses who donate their embryos to another infertile married or common-law couple to help them achieve pregnancy and childbirth.⁵⁷ The donors may no longer want their embryos for several reasons; for example, as noted above, they may have already had their desired number of children. It is important to observe that embryos may only be donated with the explicit consent of the involved spouses.⁵⁸ This also means that embryos from donated gametes cannot be produced from donating embryos alone. Embryo donors must simultaneously give certified consent for their embryo to be used for procreation by other marital or extra-marital spouses or by a woman.⁵⁹ Donors do not have the right to know the identity of the woman or the identity of the child for whom their genetic material was used. Further, they do not have any legal obligations or rights to the child conceived using their donated gametes or embryos. However, donors do have the right to obtain information regarding medical procedures and legal consequences when their genetic material is used. A donor may withdraw consent until the donated gametes or embryos are transferred to the sexual organs of a woman.⁶⁰

Donations should not be done for economic gain. Accordingly, monetary gain (compensation or any other benefit) from a donation is forbidden. However, gamete and embryo donors shall be entitled to reimbursement for necessary expenses. It is also forbidden to conclude a contract, agreement, or other form of written or oral agreement on the donation of sex cells or embryos between the donors and one or both spouses or common-law partners undergoing the MAR procedure.⁶¹

Medical institutions must be licenced to use MAR by the Ministry of Health. They are obliged to keep records on MAR procedures; the personal and health data of the persons to be assisted and the gamete and embryo donors; the types of procedures; the consultations conducted; certified written consent for a particular procedure; withdrawal of certified consent; data on the course and duration of procedures; circumstances related to pregnancy and childbirth; healthy and non-healthy participants in a procedure; stored gametes, tissues, and embryos; and data necessary for tracing gametes, tissues, and embryos at all stages. Health institutions that keep data in their records are obliged to

56 | Art. 20, paras. 1 and 3 of the MAR Act.

57 | Art. 5, para. 1, points 7 and 8 of the MAR Act.

58 | Art. 8, para. 2 of the MAR Act.

59 | Art. 18 of the MAR Act.

60 | Art. 19 of the MAR Act.

61 | Art. 21 of the MAR Act.

maintain them permanently.⁶² Medical institutions are obliged to submit data to state registers for safekeeping. All data are classified as professional secrets.

In practice, it is difficult to figure out the best method for collecting accurate data on treatment success rates – medical clinics treat patients with varying levels of severity using different methodologies. In the future, more consistent criteria for MAR success will be drafted and implemented.

2.2.3. Family law regulations

The main provisions regulating the family status of children conceived by the MAR were included in the Family Act.⁶³ Separate chapters set rules for establishing motherhood and fatherhood. Following the ban on surrogate motherhood, the Family Act rules *praesumptio iuris et de iure* that the mother of a child conceived by a donated gamete or embryo is the woman who gave birth to the child.⁶⁴

Such a stipulation sends a clear message regarding maternity in the case of a breach of the prohibition of surrogacy. To date, no surrogacy agreements have been reported in Croatia. Notably, the Ministry of Health refused to allow maternity leave for a woman whose pregnancy was not recorded because she became a mother abroad; however, her motherhood remained unquestioned. Some Croatian citizens use surrogacy services abroad, and most remain confidential.⁶⁵ The main reason for this is that a child comes to Croatia with a temporary birth certificate, usually issued by a Croatian consulate in Ukraine; thus, the secret of his or her origin remains unveiled. Birth certificates contain data according to the certificate issued by the hospital, on which the intended parents are listed as biological parents.⁶⁶

Furthermore, the recent jurisprudence of the ECtHR imposes a duty on a contracting state to provide the possibility of recognising the legal relationship between a child born through a surrogacy arrangement abroad and the man who was the biological father.⁶⁷ According to the Family Act, as explained above, the mother of the child is always the woman who gives birth to the child if all the required consent has been given before conception. Presumption of the fatherhood of the mother's husband applies if the mother was married when the child was born or if the child was born 300 days after the termination

62 | The personal and health data of persons undergoing MAR procedures, including data on the types of procedures they undergo, must be entered in the register. Furthermore, data are also recorded on medical products and medical devices; the donors and parents of the donors; the dates of donation, storage, and use of sex cells and embryo; the dates of storage and use of sexual tissues; the results of examinations and examinations of the donor and his sex cells, data on the birth of a child conceived by MAR with donated sex cells (i.e. a donated embryo), and data on failed pregnancies. Ordinance on the operation of the State Register on Medically Assisted Reproduction and the Assignment of a Unique Identification Number, (Pravilnik o načinu rada Državnog registra o medicinski pomognutoj oplodnji i dodjeli jedinstvenog identifikacijskog broja) Official Gazette No. 70/13.

63 | The Family Act (Obiteljski zakon), Official Gazette 103/15, 98/19, 47/20, 49/23.

64 | Art. 82, para. 1 of the Family Act.

65 | One of these stories was exposed in the media: Moju kćer rodila je surogat mama iz Ukrajine. Nisam jedina u Hrvatskoj, ali sam prva koja govori za medije (Zemunović, 2017).

66 | *Amplius*: ECtHR, *Paradiso and Campanelli v. Italy*, Grand Chamber Judgment of 24 January 2017; Korać Graovac, 2022, pp. 48–49; Hrabar, 2020; Preložnjak, 2020, and Margaletić, Preložnjak and Šimović, 2019.

67 | *C v. Italy*, Application No. 47196/21, Judgment of 31 August 2023.

of the marriage. An additional request is that the husband provide consent in accordance with the MAR Act.⁶⁸

In heterologous MAR proceedings, it is clear that the genetic parenthood of (at least) one parent is a legal fiction. In homologous proceedings, children are the offspring of their parents. Therefore, it is not possible to contest the maternity or paternity of a child conceived by MAR techniques if the donor's consent and the consent of all participants are provided.⁶⁹

To protect the free will and the private and family lives of all participants, a woman registered as a child's mother or a woman who considers herself to be a child's mother is entitled to challenge maternity if she did not give the required consent to the MAR within six months of learning of the child and before the child's seventh birthday.⁷⁰ A woman who considers herself to be the child's mother must, in the same lawsuit, request the establishment of her maternity.⁷¹ Meanwhile, the man registered as the child's father or the man who considers himself to be the child's father may challenge paternity if the relevant consent has not been given. At the same time, a man who considers himself the child's father must request that his paternity be established.⁷² The time limits are the same as those used for contesting motherhood.

In the eventual contestation proceedings, the preliminary question is whether the child was conceived in step with the MAR proceedings. If the child was conceived by MAR without the required consent, he or she cannot contest his or her maternal or paternal origins – even when the necessary consent of the beneficiaries of the procedure has not been obtained. The child is in a similar position as an adopted child, but is not allowed to contest his or her origin.

3. Complaints on legislation

The biggest NGO advocating female patients' rights in MAR proceedings is Parents in Action (RODA). In a shadow report⁷³ sent to the UN High Commissioner for Human Rights in 2018, RODA complained that women who do not have a partner (married or common-law) are only entitled to assisted reproduction if they can prove that they are infertile (as noted above, the law provides that MAR is only available to heterosexual couples and single women; e.g. not available to lesbian couples); that the consent form is not signed in hospitals but must be authorized by a public notary; that there are (as of 2018) no reliable statistics available on the success of MAR treatments in Croatia; that the statistics that are known for public MAR clinics in Croatia are far below European averages; that women are being exposed to invasive treatments that are out of step with quality care and that may involve over-treatment; and that women undergoing egg retrieval procedures as part of

68 | Art. 83, para. 1 of the Family Act.

69 | Art. 82, para. 2 and Art. 83, para. 3 of the Family Act.

70 | Art. 82, para. 3 of the Family Act.

71 | Art. 82, para. 3 and Art. 395 of the Family Act.

72 | Arts. 83 and 401–403 of the Family Act.

73 | United Nations High Commissioner for Human Rights, 2018.

their MAR treatment are often not offered or denied anaesthesia for these treatments, resulting in undue suffering and psychological trauma.

Furthermore, in 2021, RODA initiated lawsuits on behalf of women whose embryos had been cryopreserved but that, due to unclear legislation, MAR clinics refused to destroy. RODA announced that it planned certain legal procedures to secure the right to the free disposal of cryopreserved embryos.

There are also complaints that heterologous techniques (donating gametes or embryos) are not performed due to a lack of donors and are thus facilitated by seeking medical help abroad (paid for by the Croatian Institute for Public Health)—usually in the Czech Republic and the Northern Republic of Macedonia. However, in financing such medical help, the state breaks its own commitment to the child's right to know his or her origin.

4. Concluding remarks

Every state is free to regulate its own sensitive, complex legal, ethical, sociological, anthropological, psychological, and interdisciplinary issues. Regarding MAR, Croatia's relevant legislation is balanced and relatively strong in the context of the broader European region. Notably, issues related to medically assisted reproduction were regulated by the MAR Act for over a decade. In practice, the greatest issues on this topic in Croatia include the possibility of comparing the professional success of clinics performing MAR, the lack of donors, and the resolution of the destiny of excessively cryopreserved embryos. *Pro future* a lot may be accomplished by establishing a strong concept of 'informed consent'. Additionally, some obstacles have notably been relieved by enabling medical treatments abroad. Additionally, it is also worth noting the presence of public discussions regarding the accessibility of MAR technology for single women and same-sex partners as well as the acknowledgement of surrogacy agreements concluded abroad. Meanwhile, this paper observes that the best interests of the child are well protected: the child has the right to know his or her origin and safeguards are present to ensure he or she will be cared for by both parents. Moving forward, advancements in human reproductive medicine and better understandings of what values should be protected will provoke the need for new national legislation. Such legislation will be constantly challenged by international influences and parents' freedom to seek MAR procedures abroad. However, at the moment, it seems that the grass is for most intended parents sufficiently green on Croatian side.

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ASSISTED REPRODUCTION TECHNOLOGIES: LEGAL CHALLENGES

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ABSTRACT

In this article the author analyses particular techniques of assisted reproduction technologies which are received differently in various legislation. The primary issues addressed in this article include regulation of posthumous fertilisation, egg donation, legal status of the so-called spare (surplus) embryos and genetic material in Serbian law and comparatively in European countries. These issues are examined in light of relevant court practices, both international and domestic, including recent cases of posthumous fertilisation in Serbia.

KEYWORDS

*assisted reproduction technologies
posthumous fertilisation
egg donation
spare embryos
genetic material*

1. Introduction

Assisted reproductive technologies (ART) include *in vivo* fertilisation and *in vitro* fertilisation with embryo transfer. These technologies also involve insemination by donor sperm (AID), egg donation, embryo donation, posthumous fertilisation and surrogate motherhood. For some time now, the realm of ART has raised numerous controversial issues, prompting certain state legislations to make serious efforts to provide appropriate legal responses. Conception through biomedicine is no longer considered an innovation, as various ART methods have been in use for over half a century. Nevertheless, both international and national law continue to face new issues, while some long-standing matters remain inadequately addressed.

Considering some states prohibit particular ART procedures, infertile couples sometimes travel to the state where the desired procedures (e.g. egg donation, embryo donation, posthumous fertilisation, surrogate motherhood) are permitted or more accessible.

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Therefore, cross-border reproductive medicine has become a pathway for some people to get necessary ART procedures.

2. Posthumous Fertilisation

The possibility of freezing genetic material, such as creating embryos *in vitro*, has led to new forms of assisted reproduction. Today, genetic material can be used even after the death of the person from whom it originated. The significance of sperm cells freezing increased in 1953 when scientists Bunge and Sherman discovered that human sperm cells could be frozen and then thawed for fertilisation, resulting in the birth of healthy children.² Similarly, once conditions allowed for the creation of embryos *in vitro*, it also became possible to freeze them for future use, and this procedure is now performed almost nearly as routinely as sperm freezing.

There are several potential cases of posthumous fertilisation. The first involves a scenario where the couple was already involved in an *in vitro* fertilisation process, frozen embryos are available, and there is explicit consent from the deceased partner for the use of this genetic material in the event of death. This situation represents a straightforward case that generally does not raise concerns, assuming posthumous fertilisation is permitted in the relevant jurisdiction. Another case arises when the partners, when undergoing assisted reproduction techniques, do not explicitly state their position on posthumous fertilisation, but their genetic material was frozen as part of the procedure. In this situation, the surviving partner may request permission the frozen material for posthumous fertilisation. The third, and most controversial, case involves posthumous fertilisation where there is no pre-frozen genetic material. Here, the surviving partner requests the collection of fertilised cells from the deceased partner after death. This scenario raises the most ethical dilemmas due to its complexity and the sensitive nature of the issue involved, making it difficult to arrive at a definitive answer. In this scenario, two possibilities arise: the first, where there is clear evidence that the deceased partner explicitly expressed a desire to have children even after his death, and the second, where only the surviving partner attests to the couple's mutual desire to have children. If posthumous fertilisation is permitted, it would be advisable to establish a specific waiting period before the procedure can begin, accompanied by a simultaneous requirement for psychosocial counselling.

The decision to use frozen genetic material must rest solely with the surviving partner, and never with third parties, such as the parents of the deceased. However, if there is no written consent regarding the posthumous use of frozen genetic material, a distinction should be made between frozen embryos and frozen reproductive cells. Specifically, in the case of sperm cells, the absence of consent should prevent their use. The so-called opt-out model, or the presumed consent model, which assumes that all persons consent to the posthumous fertilisation unless they expressly opposed it during their lifetime, would not be acceptable. However, when it comes to embryos, if the legislation does not contain an explicit prohibition on posthumous fertilisation, some authors are

2 | Benshushan and Schenker, 1998, p.1407.

of the opinion the decision of the surviving partner should be respected.³ Posthumous reproduction is an exception and should be treated as such, so there no justification for posthumous extraction of fertile egg cells. A more permissive stance would seriously undermine the values in the field of reproduction, which cannot be reduced solely to the benefit of the person who wants to become a parent.

There are arguments both in favour and against posthumous fertilisation. Some countries accepted practice of posthumous fertilisation, while others explicitly forbid it. Furthermore, some countries lack clear regulations, making it difficult to determine at first glance whether this practice is permitted. For instance, this procedure is allowed in United Kingdom, Spain, Belgium, Greece, North Macedonia. However, it is forbidden in France, Italy, and other states of the region of former Yugoslavia (except North Macedonia). In Serbia, posthumous fertilisation is neither explicitly forbidden nor allowed.

One of the arguments against posthumous fertilisation is that a child born under these circumstances would lack a father in a *de facto* sense. *De iure*, the father is mother's husband or partner. This raises concern about the child's need for two parents who can provide care, which is the reason why some countries do not allow posthumous fertilisation. Meanwhile, one of the arguments in favour of posthumous fertilisation is the respect of the woman's reproductive right to have a child, regardless of her husband's or partner's death.

Countries that allow posthumous fertilisation stipulate conditions that should be met for its implementation. For instance, in Greece, assisted reproduction after the death of the husband or partner is permitted with court approval only if certain conditions are met. These conditions include: husband or partner being ill in a way that could impact conception or could endanger his life; the husband or partner having provided consent to *post mortem* conception, with the document certified by public notary and assisted reproduction not being allowed before six months after his death and more than two years after his death.⁴

The Serbian Law on Biomedical Assisted Fertilisation 2017 (hereinafter referred to as 'LBMAF') defines bio-medical assisted fertilisation (hereinafter referred to as 'BMAF') as a controlled procedure of female fertilisation conducted in compliance with current standards of medical science, different from sexual intercourse.⁵

This Law does not explicitly state whether posthumous fertilisation is permitted or forbidden. Thus, it is essential to consider relevant articles within this Act. Mutual life together at the time of performing assisted reproductive technologies is one of the conditions for these procedures.⁶ Another condition is obtaining written consent from all persons are involved in the procedure, especially before starting each step.⁷ Consent may be withdrawn in writing until the sperm, unfertilised eggs or early embryos are transferred into the woman's body. Before inserting sperm, unfertilised eggs or early

3 | Robertson, 1993, p.1047.

4 | Art. 1457 of the Act 3089 on Medically assisted human reproduction. Law 3089/2002, Translation of the Law to Serbian in: Kovaček Stanić, 2008, p. 211. Kovaček Stanić, 2014, pp. 151–169.

5 | Art. 3/1 of the LBMAF. Law on Biomedical Assisted Fertilisation, Official Gazette of Republic of Serbia 40/2017 (Zakon o biomedicinski potpomognutoj oplodnji).

6 | Art. 25/1 of the LBMAF.

7 | Art. 27 of the LBMAF.

embryos, the responsible physician should verify whether the consent exists or has been withdrawn.⁸

Additionally, there is another provision which should be mentioned in the context of posthumous fertilisation. This provision states that in the BMAF process, the use of reproductive cells and embryos from living donors is allowed.⁹ Although, the Act refers to donors in this provision, it is unclear why donors must be alive. It can be very challenging, or even impossible to determine whether the donor is alive, especially if the donor donated cells or embryo prior to the procedure and the bank lacks record on the donor's status. It is conceivable that the lawmakers were considering posthumous fertilisation in the case of husband's or partner's cells or embryos.

In Serbian law, apart from married or heterosexual partners who are considered as eligible participants for medically assisted fertilisation procedures, exceptionally, an adult and legally capable woman living alone is exceptionally entitled to the bio-medical assisted fertilisation procedure, provided able to perform parental duties in the best interest of the child.¹⁰ Donor insemination (AID) of the woman without a partner results in a family law consequence whereby the born child would not have a father, as it is not allowed to establish paternity of a donor. The child would have just one parent, the mother. From a family law perspective, the interests or rights of the child to have both parents should be considered. If a single woman has access to AID, the interest or right of the child may be compromised. Meanwhile, one can argue that a single woman has reproductive rights, including the right to AID. This situation bears some similarities with posthumous fertilisation. In both cases, the child will not have father *de facto*; she/he will have only one parent: the mother. However, in *de iure*, in the case of posthumous fertilisation the child will have a father, as the father is the mother's husband or partner. Therefore, the argument that the child will not have a father to take care of him/her in the situation of posthumous fertilisation is not justified, as this is the same for a single woman undergoing the process. Given that Serbian law allows single woman to access assisted reproduction procedures, this could be argument for allowing posthumous fertilisation in Serbian law *de lege ferenda*.

In case of posthumous conception involving a female partner using the fertilised cells of the deceased spouse/partner, the father of the child is regarded as the man whose sperm cells were used for fertilisation and who is also the biological father, provided that he consented to this type of fertilisation.¹¹ However, Serbian succession law does not recognise posthumously conceived children as descendants of their deceased biological parents.¹² We argue that the child should have the right to inherit from their biological parents. Therefore, we believe it is necessary for the legislator to take appropriate action to amend the existing law to guarantee the right of the born child to inherit from their deceased parent and relatives if posthumous fertilisation is permitted Serbian law *de lege ferenda*.¹³

8 | Art. 28 of the LBMAF.

9 | Art. 41 of the LBMAF.

10 | Art. 25 of the LBMAF.

11 | Kovaček Stanić, 2010, pp. 147–161. Kovaček Stanić, 2021.

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

13 | Kovaček Stanić, Vidić-Trninić and Samardžić, 2017, pp. 63–79.

As a comparative example, the United Kingdom's approach to the posthumous fertilisation is examined. Since 2008, UK family law stipulates that the man whose sperm is used for the child's conception is legally recognised as the father. Consent is required for posthumous fertilisation by his sperm; as well as transferring of the embryo using his sperm before his death. Additionally, he must consent to placing the embryo in the woman after his death and to being recognised as the father of any resulting child. This consent cannot be withdrawn. Furthermore, the woman must provide written notice, no later than the end of the period of 42 days after the child's birth, for the man to be recognised as the father of the child. In addition, it is necessary that no-one else is recognised as the father of the child. In addition, it is necessary that no-one else is recognised as the parent of the child or as a parent if the child is adopted.¹⁴

However, according to earlier UK legislation (Human Fertilisation and Embryology Act 1990) it was stipulated that, 'where the sperm of a man, or any embryo the creation of which was brought about with his sperm, was used after his death, he is not to be treated as a father of the child'.¹⁵

Additionally, this provision is inserted, as the Warnock report recommended,

to ensure that estates can be administered with some degree of finality and to give effect to Warnock's expressed desire that fertilisation of a woman following the death of her partner (or husband as Warnock would have limited it) should be actively discouraged. This they recommended because it may give rise to profound psychological problems for the child and the mother.¹⁶

Eventually, after 18 years, this stipulation is abandoned and replaced with the rule that the man could be considered as the legal father of the child conceived after his death.

| 2.1. Posthumous Fertilisation: Court Practice

The first case involving posthumous fertilisation in Europe was the famous case *Parpalaix c. Centre d'étude et de Conservation du Sperme* in 1984. Following her husband's death, Mrs. Parpalaix requested his sperm from CECOS (*Centre d'étude et de Conservation du Sperme*) for the purpose of insemination. CECOS refused, claiming that no law mandated the return of the sperm. Mrs. Parpalaix went to court, suing for possession of the sperm. The Court ordered CECOS to turn the sperm over to Mrs. Parpalaix and her doctor for insemination or destruction. Mrs. Parpalaix went abroad for fertilisation, as French law does not permit posthumous fertilisation; however, the fertilisation was not successful.¹⁷

In Serbia, two cases involving posthumous fertilisation have occurred in 2022. First case is a case of a married couple Prizrenac. They entered the BMAF procedure after the husband was diagnosed with testicular cancer. Ten healthy embryos were created, but the husband died in the meantime. The husband made a last will in which he bequeathed the use of the embryos to the wife.¹⁸

14 | Sec. 39 of the Human Fertilisation and Embryology Act of 2008.

15 | Sec. 28 (6) (b) of the Human Fertilisation and Embryology Act of 2008.

16 | Morgan and Lee, 1991 pp. 156–160. Kovaček Stanić, 2014.

17 | More in: Jones, 1988, pp. 525–545. Kovaček Stanić, 2014.

18 | Case Prizrenac.

The second case is a case of a couple from Belgrade who wanted a second child.¹⁹ Since both had already entered the period of reduced reproductive capacity, they decided to undergo *in vitro* fertilisation. Five embryos were created, two of which were returned to the uterus, where they did not survive, while three were frozen. However, the husband died as a consequence of the COVID-19 in January 2020. The clinic refused the wife's request to continue the *in vitro* procedure and denied her request to transfer the embryos to another institution as well. The Primary Court (Osnovni sud) in Belgrade (P. 462/22) denied the wife's petition to obtain the frozen embryos from the clinic. The wife claimed she has a right to access the embryos based on inheritance decision. The Higher Court in Belgrade overturned the Primary Court's judgment and returned the case for retrial to the Primary Court.

The first-instance court found that the plaintiff's claim was completely unfounded on the ground of the Law on the Basis of Ownership and Property Relations. The court stated that in this case, the first condition stipulated in Art. 37/2 the Law on the Basis of Ownership and Property Relations, which stated that the owner must prove that he/she has the right of ownership to the items whose return he/she is seeking, was not met. Additionally, the court stated that the decision on inheritance has a declaratory and not a constitutive character, implying that the court does not determine the right of ownership of the decedent's property, but rather the property that constitutes his/her inheritance. In this particular case, the legally binding decision is notary's public decision UPP: 615-2021 dated 9 November 2021. According to this decision, the heir is the wife of the deceased. She inherits the rights and obligations of the deceased from IVF/ISCI-ET Consent for the procedure LP OBR-1087 dated 17.11.2020, Consent for embryo transfer LP OBR--1088 dated 20.11.2020, Certificates for the embryo freezing procedure LP OBR-1158 dated 22.11.2020. The notary public references to the last will of the deceased. However, it is important to emphasise that an analysis is needed to determine whether the statements in the last will possess a legal nature that qualifies for inheritance under the inheritance law.

The court stated that based on this decision, the wife did not inherit the right of ownership of the embryos in question. Instead, she inherits only the rights and obligations arising from the inheritance documents. According to the opinion of the first-instance court, the inheritance decision cannot grant the plaintiff more rights than those explicitly outlined in the agreements themselves. Since the contents of the agreements do not confer any rights that the plaintiff can exercise independently, all the agreements were signed jointly by plaintiff and her late husband. Furthermore, the agreements did not indicate that the plaintiff's late husband ever consented to her using and disposing of the embryos independently, including transferring them between institutions. Thus, any disposition, use, or transfer of embryos would contravene her husband's wishes and violate Art. 49 par. 1 item 1 Law on Biomedical Assisted Fertilisation which prohibits the donation and use of embryos without the written consent of the donor. This aligns with the principle of freedom of decision, which guarantees an individual's right to free choice, including the necessity of obtaining free consent in the BMAF procedure.²⁰ Thus, the inheritance decision cannot replace her husband's consent. In addition, the previously mentioned agreement regarding the embryo freezing indicates that the plaintiff and her husband

19 | Case Marković, Gž. 4356/23 Higher Court Belgrade. The decision in this case is not final in this moment.

20 | Arts. 9 and 27 of the LBMAF.

agreed that, in the event of divorce, an accident or other unforeseen circumstances, the embryos will be destroyed through standard procedure.

The Higher Court believes that the first instance court's conclusion – that the wife has no right to request the transfer of embryos from one institution to another for BMAF – is unclear. According to the provisions of Art. 52 Law on Biomedical Assisted Fertilisation the persons from whom the stored reproductive cells, tissues or embryos originate may, for justified reasons, request their transfer to another institution within the Republic of Serbia that is registered to perform BMAF procedures for their own assisted insemination. The Higher Court asserts that, since the plaintiff has inherited her husband's rights and obligations from the aforementioned agreement and confirmation, she has acquired the right to make all decisions regarding the disputed embryos. Accordingly, the plaintiff has the right to request their transfer to another institution licensed for BMAF for justified reasons.

In addition, the Higher Court believes that the agreement between the wife and her husband regarding the destruction of embryos during divorce process, accident or other unforeseen circumstances, is irrelevant. Specifically, the contract for biomedical assistance is established between the potential parents as one party and obstetrician-gynaecologist as the other. The contract is contract of adhesion, that is, it has pre-prepared content where the clinic offers the potential parents possibilities, and it is up to them to fit into such an offer. Considering this, such contracts should be interpreted subjectively, reflecting the true intent of the parties. Furthermore, determining the legal status of the embryo in the event of one of the potential parents' deaths should be a crucial aspect of the contract for biomedical assistance, including as a specific provision for consent. This is especially important since this issue is not regulated by the law of Serbia, including the Law on Biomedical Assisted Fertilisation nor any other laws or bylaws. Consequently, the Higher Court, as the court of second instance, believes that the death of one of the potential parents cannot be considered as unfortunate event or other unforeseen circumstance. Thus, the destruction of the embryo due to the death of a potential parent must have been explicitly outlined in the contract.

In its decision, the Higher Court believed that an embryo results from the voluntary genetic contribution of two individuals. Legally, it can be viewed as a type of property under the civil law, over which a man and a woman have a form of a co-ownership. However, since the embryo represents a *sui generis* entity – meaning it is a special kind of a thing – it cannot be completely subsumed under the rules that govern property in civil law. In this regard, the conclusion of the court of first instance, which stated that the conditions prescribed by Art. 37 of the Law on the Basis of Ownership and Property Relations should apply, is not acceptable. This article asserts that the owner can sue the holder for the return of an individually determined thing, whereby the latter must prove that he has the right of ownership and that this thing is in the actual possession of the defendant. The conclusion of the court of first instance cannot be accepted as correct because the embryos cannot be in the actual possession of the potential parents or third parties, but only in the Laboratory for cryo procedure.

According to Art. 41 and Art. 49 par.1item 1 of the Law on Biomedical Assisted Fertilisation, which the first-instance court references, the BMAF procedure permits the use of reproductive cells that is embryos of living donors.²¹ It is forbidden to give and use

21 | Art. 41 of the LBMAF.

reproductive cells – embryos – without the consent of the donors.²² As follows from the quoted provisions of the Act, they apply to women and men who donate their reproductive cells, embryos to assist in the medical fertilisation of third parties. Therefore, the first-instance court's reference to these provisions is unclear. The plaintiff's appeal raises doubts regarding the conclusion of the first-instance court that any disposal or transfer of embryos from one institution to another would violate the will of the plaintiff's late husband and contradict Art. 49 par. 1 item 1, which prohibits giving up or using embryos without the donor's consent, considering that the husband is not actually a donor. The Higher Court believed that the plaintiff's argument is valid. In our view, the High Court correctly concluded that this case does not involve embryo donation, so the provision of Art. 9 par. 1 item 1 of the Law on Biomedical Assisted Fertilisation does not apply here.

In inheritance law, the rule is that things and rights can be inherited; however, we believe that an embryo does not fit into these categories, due to its potential to develop into a human being. The inheritance comprises all inheritable rights that belonged to the testator at the time of death.²³ In our opinion, the will expressed in the agreements which constitutes certain entitlements, are not heritable, as these rights are of personal nature. Only rights and obligations with a property nature are inheritable. In fact, consent represents an expressed will rather than a true right.

3. Egg Donation

ART procedure which involves egg donation has not been universally accepted. Some countries expressed doubts about egg donation.

However, Serbian law allows egg donation. Law on Biomedical Assisted Fertilisation of 2017 stipulates that donated female egg cells may be used in BMAF procedures when current standards of medical science and practice do not indicate that conception could occur with the use of female spouse's or partner's sex cells, in cases where previous BMAF procedures have been unsuccessful, or when this is necessary to prevent the transmission of serious genetic disorders to the child.²⁴ The reproductive cells of a single donor can be used in BMAF procedure until the birth of a child or children. A particular donor's reproductive cells or embryos can be used for the birth of a child or children for only one couple or one single woman.²⁵

The BMAF procedure using donated reproductive cells is performed upon the recommendation of a medical doctor specialising in gynaecology and obstetrics. An expert advisory commission, appointed at the BMAF's centre, evaluates the specialist's proposal. The commission comprises a doctor of medicine, a specialist in gynaecology and obstetrics with a sub-specialisation in fertility and sterility, an embryologist, a graduate psychologist and a graduate lawyer appointed by the director of the authorised health

22 | Art. 49 par. 1 item 1 of the LBMAF.

23 | Art. 1/2 Law on Inheritance.

24 | Art. 29 of the LBMAF.

25 | Art. 30 of the LBMAF.

service. A doctor of medicine cannot serve as a member of the expert committee when an opinion must be provided on his/her proposal.²⁶

The Serbian Family Act defines legal motherhood in the context of egg donation. The mother of a child conceived through biomedical assistance is the woman who gave birth to the child. If a child is conceived through biomedical assistance by a donated egg, the maternity of the woman who donated the egg may not be established.²⁷

In comparative law, in French bio-ethical laws²⁸ regulating egg donations stipulate that a woman aged 18 to 37, with or without children, can donate her egg (or eggs) to married or single women who cannot conceive. The donation is made in a hospital and is free and anonymous.²⁹

Italian Act of 2004 forbids sperm and egg donation. However, on 9 April 2014, the Constitutional Court declared these articles as unconstitutional, implying that sperm and egg donation should become permitted procedures in Italy in the future. This change suggested that Italian couples will no longer need to seek cross-border medical solutions for gamete donation.³⁰

Some legislations, for instance, Austrian do not permit IVF in combination with gamete donation. IVF is permitted only using gamete from the couple involved in the procedure. The case of *S. H. and Others v. Austria* concerns the prohibition of gamete donation.³¹

The applicants were two married couples. As they were infertile, they sought to have recourse to medically assisted procreation. The only means by which they could have a child of which one of them was the genetic parent was in vitro fertilisation (IVF) using sperm from a donor (in the case of the first couple) or eggs (in the case of the second couple). Both methods were illegal under the Austrian Artificial Procreation Act, which prohibited the use of sperm from a donor for IVF treatment and egg donation in general. That Act did, however, allow other methods of assisted procreation, in particular IVF using eggs and sperm from persons married to each other or living together as man and wife (homologous procreation techniques) and, in exceptional circumstances, sperm donation for in utero fertilisation. The applicants lodged an application with the Constitutional Court, which held that there had been an interference with their right to respect for their family life, but that this was justified because it was designed to preclude both the creation of unusual family relationships (a child with two mothers, one the biological mother and the other a 'surrogate' mother) and the exploitation of women.³²

European Court for Human Rights has concluded that:

26 | Art. 31 of the LBMAF.

27 | Art. 57 of the LBMAF. Family Act, Official Gazette of Serbia no. 18/2005, 72/2011, 6/2015.

28 | Bioethics Act No. 2004-800 of 6 August 2004 as amended in 2011 and 2021.

29 | *Ce que dit la loi de bioéthique qui encadre le don d'ovocytes*, 2021. Donation of eggs (oocytes), 2022.

30 | B92 news 9 April 2014. Italian Act – No 40/2004, (Norms on medically assisted procreation), Italian Official Journal No 45/2004, translation to Serbian in Kovaček Stanić, 2008, p. 223. More in: Miranda, 2007, p. 270.

31 | Artificial Procreation Act 1992, Information Note on the Court's case-law No. 146. Amendments Gesamte Rechtsvorschrift für Fortpflanzungsmedizingesetz, Fassung vom 04.09.2023. (*S.H. and Others v. Austria* Application no. 57813/00) Judgment 03/11/2011, Hudoc.

32 | *Ibid.*

Neither in respect of the prohibition of egg donation for the purposes of artificial procreation nor in respect of the prohibition of sperm donation for *in vitro* fertilisation under section 3 of the Artificial Procreation Act had the Austrian legislature exceeded the margin of appreciation afforded to it at the relevant time. Since the use of IVF treatment had given rise then and continued to give rise today to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touched on areas where there was not yet clear common ground amongst the member States, the Court considered that the margin of appreciation to be afforded to the respondent State must be a wide one.³³

The Austrian Parliament had not thus far undertaken a thorough review of the rules governing artificial procreation, taking into account the relevant dynamic developments in science and society. The Austrian Constitutional Court had observed that medical science at the time and the consensus existing in society were subject to developments that the legislature would have to take into account in future. Although the Court had concluded that there had been no violation of Art. 8 in the present case, it observed that the area in question, in which the law appeared to be continuously evolving and which was subject to particularly dynamic scientific and legal developments, needed to be kept under constant review by the Contracting States.³⁴

In a meantime Austrian law has changed, allowing the use of egg cells for a third party if this woman is unable to conceive and if she has not reached 45 years of age.³⁵

One particular ART procedure results in the situation where a child could have two genetical mothers. This procedure involves removing the nucleus from mother's fertilised egg and inserting it into an empty egg cell donated by another woman – a technique known as mitochondrial transfer, also referred to as *in vitro* fertilisation with three parents. The procedure aims to avoid genetic abnormalities in the mother's mitochondrial DNA.³⁶

4. Spare (Surplus) Embryos

Spare embryos are embryos that have been preserved by cryopreservation because they will not be used for immediate treatment. The use and storage of the spare embryos are important issues in comparative law and court practice.

| 4.1. Spare Embryos: Use

Spare embryos can be used in several ways, including: subsequent fertilisation of the couple from the initial procedure if pregnancy and childbirth did not occur in the previous attempt or for the birth of a second child; posthumous fertilisation, i.e. the fertilisation of a woman after the death of her spouse or non-marital partner from whose sperm cells the

33 | Ibid.

34 | Ibid.

35 | Gesamte Rechtsvorschrift für Fortpflanzungsmedizingesetz, Fassung vom 04.09.2023, §3 (3).

36 | Deech and Smajdor, 2007, p. 159.

embryo was created; fertilisation of the second couple (donation) and use for embryonic research.

All consulted laws permit subsequent fertilisation of the couple from the initial procedure. Some allow post-mortem fertilisation (e.g. United Kingdom, Spain, Belgium, Greece, North Macedonia), while others allow fertilisation of another couple (e.g. United Kingdom, France, Greece), and some allow use for embryonic research (e.g. United Kingdom, Greece, Switzerland, France).

Authors Ruth Deech and Anna Smajdor have explained the situation regarding changed circumstances in relationship of the couple and the eventual consequences for the frozen embryos and gametes in United Kingdom.

... becoming a parent is one of the most life-changing events one can experience. Because of this, people often find that their assumptions or values change. In these circumstances, consent given prior to treatment for the disposition of embryos or gametes may no longer seem valid... If a couple splits up, either party can withdraw consent to the storage or use of embryos that have been created during the course of relationship. This can cause terrible distress for those whose only chance of having a child may be thwarted by an ex-partner... The consent provisions of the HFE Act are designed to circumvent this kind of problem by specifying, as far as possible, every eventuality. This is one reason why ongoing consent is required, rather than consent given at the time of treatment or storage simply being regarded as binding over time. Patients consenting to the storage of gametes or embryos must also specify the length of the storage period (within the legal ten-year maximum period). Patients must also state what is to be done with the gametes or embryos if either partner dies or becomes incapacitated... For adults in this situation, leaving their embryos unclaimed in clinics may be preferable to the idea 'their' child would go into the world in circumstances beyond their control on being donated to another couple. Donating embryos for research is also a difficult choice. It is perhaps not surprising that potential donors, feeling caught between two unappealing options, sometimes disappear from clinics's records, leaving spare embryos unclaimed. In 1996, this problem came to the fore when a large number of embryos created in 1991 reached the end of the five-year storage period consented to by their progenitors. Many of the former IVF patients simply could not be traced, leaving the embryos in a legal limbo. Further storage was illegal without specific consent, as was donation to research or to other couples. Embryos abandoned in this way were allowed to perish. There is something very sad about this when many people desperately long for children. In these cases, as in most aspects of fertility treatment, parental consent has prevalence over any moral interest which the embryos might be thought to have (eg to be 'adopted' by another parent) or any interests their scientists or society at large might have. This is something which may in itself be questionable.³⁷

According to French law, an embryo can be conceived *in vitro* only for the purpose of medically assisted procreation. It can be conceived only if it originates from the gametes of at least one of the spouses. Considering the level of medical techniques, both spouses can make a written decision regarding the fertilisation of a number of egg cells. The spouses can agree in writing to transfer the stored embryos to another couple. In the event of the death of one spouse, the surviving spouse is consulted in writing as to whether he/

she agrees to transfer the stored embryos to another couple.³⁸ The transferred embryo, in exceptional cases, can be given to a married couple who meet the legal requirements, provided that medically assisted procreation has not been successfully completed in their case (except for instances involving a third donor). The court makes a decision on embryo transfer. The judge determines whether the married couple requesting the embryo has met the stipulated conditions and accesses if this couple is able to offer to the child born the necessary familial, educational, and psychological conditions. The couple accepting the embryo and the couple donating the embryo cannot know each other. In the case of the need for treatment, the doctor will be able to access the medical data concerning the couple who donated the embryo, but not the data that could be used to identify them. No payments can be made to the couple who donated the embryo. Embryo acceptance is subject to sanitary safety rules. These rules include, first and foremost, tests for the detection of infectious diseases.³⁹ The *in vitro* conception of human embryos for the purposes of studies, research or experiments is prohibited, as well as the carrying out of experiments on embryos. However, in exceptional cases, a couple can allow studies performed on their embryos, which must have a medical character and must not endanger the embryo itself. Approval must be provided in writing. Studies can be undertaken only after the commission gives a positive opinion according to the conditions defined by the decision of the State Council. The commission is obliged to publish a list every year of institutions where these studies can be conducted, as well as their subject.⁴⁰

In Greece, embryo donation to another couple is permitted, as is donation for scientific research, depending on the wishes of the couple from whom the reproductive material originates. The law requires that individuals undergoing assisted reproduction should jointly decide and express their will in writing, instructing the doctor of the fertility clinic before starting the relevant treatment. They must specify whether the reproductive material that has been preserved through cryopreservation, which will not be used for their treatment (spare embryos) should be: donated for the fertilisation of other individuals according to the decision of the doctor or clinic, used for research for therapeutic purposes or should be destroyed. After a storage period of 5 years, the material can either be used for research or therapeutic purposes or it can be destroyed.⁴¹

In Switzerland, research on spare embryos is permitted. The couple from whom the embryo originates must give consent before the embryo can be used for research purposes.

In contrast, for example in Austria, embryos could only be used for assisted reproduction. Scientific research on embryos is not allowed, nor is the use of embryos for fertilisation of another couple.

Under Serbian law, the donation of the spare embryos is permitted, as is scientific research on embryos.⁴²

38 | Art. L. 152-4. Bio-ethical laws.

39 | Art. L. 152-5. Bio-ethical laws.

40 | Art. L. 152-8. Bio-ethical laws.

41 | Art. 1459 Act 3089 on Medically assisted human reproduction.

42 | Arts. 35/2, 51/6 of the LBMAF.

| 4.2. *Spare Embryos: Storage*

According to Serbian Law, early embryos are stored for the period specified in the written consent given by spouses or non-marital partners involved in the BMAF procedure, but for no longer than five years from the date of their storage. The storage time of early embryos can be extended by a maximum of five years for medical reasons, upon a written request by the person from whom the unused early embryos originate. At the end of the term, the early embryos spontaneously decompose and are destroyed.⁴³

In comparative law, for instance in United Kingdom the spare embryos may be frozen for use in later cycles if more embryos are created than can safely or legally be transferred into the mother. By law, no more than two embryos can be transferred per cycle, although, in patients over 40, this limit may occasionally be extended to three. In certain cases, longer period may be appropriate, such as when a young person, usually a man, requires treatments which may render him sterile, and where he (and his partner) may wish to store sperm for future use. This situation could arise in treatments for Hodgkin's disease or testicular cancer. If patients consent to the storage of embryos, they must specify how long they want embryo to be stored within the legal time limit, which is 10 years for gametes and five years for embryos. An embryo created from stored gametes may itself be stored for the full length of the applicable storage period. Thus, an embryo created from gametes stored for, for instance, eight or nine years, or right up to the ten-year limit, may then be frozen and stored for the maximum period up to 15 years after the egg or sperm from which it derives was donated.⁴⁴

According to French law, the embryos can be preserved for up to five years to fulfil the parental request of the couple. Both spouses are consulted annually during this five-year period to confirm whether they still wish to pursue parentage.⁴⁵

In Italy, the cryopreservation of the embryo is permitted only when transferring the embryo into the uterus is not feasible due to a serious and documented case of *vis major* related to woman's health, which could not have been predicted at the time of fertilisation. The cryopreservation of the embryo is permitted until the date of the transfer, which should occur as soon as possible.⁴⁶

In Greece, the law specifies that cryopreservation can last for a maximum of five years (in case there is no joint declaration of the persons concerned).⁴⁷

| 4.3. *Spare Embryos: Court Practice*

The European Court for Human Rights addressed the issue of consent withdrawal in the case of *Evans v. United Kingdom*. These are facts of this case:

Ms Evans decided to have some of her eggs removed prior to the cancer treatment and fertilised with her partner's sperm. The embryos were kept in storage while she underwent her treatment. However, the relationship broke down, and Ms Evans' partner

43 | Art. 51/1,3,4 of the LBMAF.

44 | Morgan and Lee, 1991, p. 115.

45 | Austria: Federal law on medical conception (FMedG), Civil code, Law on marriage, norms on the jurisdiction (No.: GP XVIII RV 216 AB 490 p. 69. BR: AB 4255 p. 553.) StF: BGBl. no. 275/1992. Ammandements BGBl. I no. 98/2001 (No. GP XXI RV 621 AB 704 p. 75. BR: 6389 AB 6424 p. 679.) BGBl. I no. 163/2004 (No. GP XXII RV 678 AB 741 p. 90BR: AB 7167 p. 717), par. 17.

46 | Italy: Law from 19 February 2004, no. 40, Norms on medically assisted procreation, Official Journal no. 45, from 24 February 2004, Art. 3.

47 | Greece: Law 3089 Medically assisted human reproduction, Official Journal 327/2002, Art. 1459.

decided that he no longer wanted to have a family with her. He requested that the couple's embryos be destroyed. Ms Evans embarked on a lengthy court battle to save her embryos, and her right to implant them. At each successive turn, she was turned down, despite the sympathy that judges had with her case. In April 2007, her final appeal was rejected. For many, the judgment was welcomed as an indication that fatherhood is taken as seriously as motherhood and that reproductive technology is not allowed to reduce the role of men to mere fertilisation.⁴⁸

In short, Court was of the opinion:

Private life (Art. 8 of the Convention on human's rights) incorporated the right to respect for both the decisions to become and not to become a parent.... The dilemma central to the case was that it involved a conflict between the Art. 8 rights of two private individuals: the applicant and J. Moreover, each person's interest was entirely irreconcilable with the other's, since if the applicant was permitted to use the embryos, J. would be forced to become a father, whereas if J.'s refusal or withdrawal of consent was upheld, the applicant would be denied the opportunity of becoming a genetic parent. In the difficult circumstances of the case, whatever solution the national authorities might adopt would result in the interests of one of the parties being wholly frustrated. The legislation also served a number of wider, public interests, such as upholding the principle of the primacy of consent and promoting legal clarity and certainty. Respect for human dignity and free will, as well as a desire to ensure a fair balance between the parties to IVF treatment, underlay the legislature's decision to enact provisions permitting of no exception to ensure that every person donating gametes for the purpose of IVF treatment would know in advance that no use could be made of his or her genetic material without his or her continuing consent. In addition to the principle at stake, the absolute nature of the rule served to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case by case basis, what had been described by the domestic courts as 'entirely incommensurable' interests....including the lack of any European consensus on the point, the Court did not consider that the applicant's right to respect for the decision to become a parent in the genetic sense should be accorded greater weight than J.'s right to respect for his decision not to have a genetically-related child with her.

In a comparative context, there are two categories of legislations regarding withdrawal of the consent. The first group consists of laws that allow consent to be withdrawn at any point before the embryo is planted in the woman's body (e.g. Denmark, France, Greece, Switzerland etc.). The second group comprises laws that permit withdrawal of the consent only up until fertilisation, after that, the woman alone may decide whether to continue the process (e.g. Estonia, Italy). Previously, in Austria, men could withdraw consent only until fertilisation, but following amendments, it is now possible to withdraw consent up until the implantation of the cells in the woman's body.⁴⁹ As mentioned earlier, in Serbia, consent may be withdrawn until implantation.

48 | Case of Evans v. The United Kingdom, No. 6339/05 od 10/04/2007. Court decided that there is no violation of Art. 8 (thirteen votes to four).

49 | Gesamte Rechtsvorschrift für Fortpflanzungsmedizingesetz, Fassung vom 04.09.2023.

5. Concluding Remarks

The advancement in biomedicine and new technologies trigger parallel advancement in the social sciences, especially in law, because legal frameworks inevitably adapt to scientific breakthroughs. In the process of establishing whether some new technology should be permitted and how, lawmakers must consider the development of social circumstances within a certain society. In its practice involving the IVF procedure, the European Court for Human Rights determined that the margin of appreciation afforded to the respondent State must be a wide one, having in mind '...sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touched on areas where there was not yet clear common ground amongst the member States'.⁵⁰

The existing differences in the comparative law regarding posthumous fertilisation, egg donation, legal status of the so-called spare (surplus) embryos, and genetic material are acceptable as long as they are consequence of different social circumstances in particular country. The role of the comparative family law is to find legal answers to family situations that arise from ART, keeping the best interests of the child as the top priority.

50 | In its decision involving child born as a result of the surrogate motherhood the Court has respected the wide margin of appreciation of each country, as well. *Paradiso and Campanelli v. Italy* [GC] – 25358/12 Judgment 24, 1, 2017.

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THE MANAGEMENT AND DISPOSAL WITH CHILD'S PROPERTY – ESPECIALLY IN LIGHT OF KIDFLUENCERS

Suzana Kraljić¹

ABSTRACT

A child's property refers to all the properties of the child, which may include money, movable property, and immovable property. Because the child is a minor and lacks business capacity, parents usually manage the child's property. However, when a child is placed under guardianship, the child's property is managed by a parent or a guardian, who has the right and obligation to manage their child's property in the child's best interests. At age 15, the child acquires certain autonomy under Slovenian law concerning the disposition of their property. However, certain limitations still exist, mainly for their own benefit. Indeed, a child's property can play an important role in planning the child's financial future, both in the short and long term, that is, after the age of the majority. The latter is particularly unsettled today, both in Slovenia and other countries, regarding the so-called kidfluencers and the property they generate. The lack of proper regulations can expose kidfluencers to violations of their rights.

KEYWORDS

property
legal standard
best interest
salary
kidfluencers

1. Introduction

The Constitution of the Republic of Slovenia² (CRS) guarantees the right to private property and inheritance in Article 33 and further provides in Article 67 that the law shall

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2 | Constitution of the Republic of Slovenia (Slovene Ustava Republike Slovenije) (CRS): Uradni list RS, not. 33/91-I, 42/97 – UZS68, 66/00 – UZ80, 24/03 – UZ3a, 47, 68, 69/04 – UZ14, 69/04 – UZ43, 69/04 – UZ50, 68/06 – UZ121, 140, 143, 47/13 – UZ148, 47/13 – UZ90, 97, 99, 75/16 – UZ70a, 92/21 – UZ62a.



determine how property may be acquired and enjoyed in such a way as to ensure its economic, social, and ecological functions. This law determines the method and conditions of inheritance. Article 33 of the CRS aims to secure the holder of fundamental rights and the freedom to act in the sphere of property, thus enabling him to shape his life responsibly.³ Article 37(1) of the Law of Property Code⁴ (hereafter LPC) defines the right to property as the right to possess, use, enjoy, and dispose of an object in the most extensive manner.⁵ However, only the law can impose restrictions on the use, enjoyment, and disposal⁶.

Based on the above-mentioned constitutional and statutory provisions, the question immediately arises as to what happens to the freedom to act in the area of property if the child is the owner of the property. As a rule, at the age of 18, a child acquires full business capacity, defined as the capacity of a natural person to enter into legal transactions independently and, hence, the capacity to acquire rights and bind themselves. Since a child acquires business capacity only at 18 but can acquire property even earlier, this raises many questions about the management and disposal of the child's property. The latter is particularly interesting from the perspective of the children of influencers (kidfluencers) and the wealth they create in the process.

2. Child's property

A child acquires legal capacity at birth and thus becomes a holder of rights and obligations. This means that although the child lacks business capacity, they can also have a right to property and, thus, to own property. According to Article 39 of the LPC, the right to property may be acquired by legal transactions (e.g. gift agreement, contract of sale), succession (e.g. intestate and testate inheritance), law (e.g. possession), or a decision of a public authority (e.g. denationalisation). A child may also acquire the following property constituting their estate in any of the aforementioned ways:

- a) real estate (e.g. house, dwelling);
- b) movable property (e.g. toys, phones, pets, bicycles, jewellery, cars)
- c) money (e.g. cash or in a bank account);
- d) securities (e.g. shares, bonds);
- e) property rights (e.g. material copyright);
- f) investments (e.g. investments in various financial instruments and mutual funds);
- i) intellectual property rights (e.g. copyright, patents, trademarks);

3 | Virant and Šturm, 2002.

4 | Law of Property Code (Slovene Stvarnopravni zakonik) (LPC): Uradni list RS, no. 87/02, 91/13, 23/20.

5 | Comp. also Article 17 of the EU Charter of Fundamental Rights (Official Journal of the European Union C 303/17, 14 December 2007):

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

6 | Article 37(1) of the LPC.

- j) business property (e.g. share or ownership in a business);
- k) other financial investments (e.g. cryptocurrencies, raw materials, works of art).⁷

Therefore, a child may own property despite being a minor, although parents manage the property under parental responsibility.

| 2.1. *Managing the child's property*

Article 136(1) of the Family Code⁸ (FC) explicitly mentions the right and obligation of parents to manage their children's property, falling within the scope of parental responsibility. Additionally, Article 147 of the FC states that a child's property should be managed by the child's parents for the child's benefit.

The scope of this paper pertains to children under 15 years of age or those with no capacity to conduct a business. This paper does not address children with some capacity to enter legal transactions, including managing their own property, provided that the legal transactions do not significantly affect their lives.⁹

Parents are free to manage their children's property but must comply with the fundamental principles of obligation. Their management must respect the principles of good faith and fair dealing.¹⁰ They must also act as stewards. According to Article 6(1) of the OC, parties to a contractual relationship must, in performing their obligations, act with the care required by the law for the relevant type of contractual relationship (the duty of a good steward). This is the legal standard applicable to parties in a contractual relationship that have the status of a layman. Good stewardship standards compare a layperson's conduct with that of another person with the same characteristics and acting in the same circumstances.¹¹ Good stewardship is a legal standard that the court must fulfil substantively. In this case, the criterion is of an objective nature.¹²

To assess whether a parent's behaviour qualifies as good stewardship, their education, skill, ability, responsiveness, age, and other qualities are considered.¹³ The environment in which the parents lived is also considered. An objective criterion is established for any person with the same characteristics as the parent who is judged as to whether they have acted as a good steward in the management of the child's property. Parents may also be liable for damages caused to a child by inadequate conduct in managing the child's property, and children are entitled to compensation.¹⁴ To ensure the protection of children and their rights, limitation periods do not run as long as parental responsibility lasts.¹⁵ The general limitation period of five years for the establishment of liability for

7 | Vagner-Ličenoski, 2006, p. 14.

8 | Family Code (Slovene Družinski zakonik) (FC): Uradni list RS, no. 15/17, 21/18 – ZNOrg, 22/19, 67/19 – ZMatR-C, 200/20 – ZOOMTVI, 94/22 – odločba US, 94/22 – odločba US, 5/23.

9 | Article 146 of the FC.

10 | Article 5(1) of the Obligation Code, hereafter referred to as OC. Obligations Code (Slovene Obligacijski zakonik) (OC): Uradni list RS, no. 97/07 – official consolidated text, 64/16 – odl. US, 20/18 – OROZ631.

11 | Plavšak, Juhart and Vrenčur, 2009, p. 141.

12 | VSK sodba Cp 402/2008, 18 June 2008.

13 | Cigoj, 1989, p. 185.

14 | Matefi, 2016, p. 188; Draškić, 2016, p. 322.

15 | Article 358(2) of the OC.

damages of a parent who, by improper conduct in the management of the child's property, has caused damage to the child, will generally start to run when the child reaches the age of the majority. That is, the child reaches the age of 18.¹⁶

For example, many children have savings accounts into which their parents or other relatives (e.g. grandparents, godparents) transfer money on various occasions (e.g. birthdays, christenings, Christmas). Additionally, children have property that they have inherited (e.g., dwellings, bonds) and toys, clothes, bicycles, and pets given to them as gifts. Parents manage these assets for their children. As a starting point and rule, parents have a duty of care as good stewards of their children's property. If possible, they should also seek to increase it (e.g. by claiming damages, selling fruits, or renting out the dwelling). The rent fee, interest, dividends, and money received from the sale of fruits can be then used to increase children's assets.¹⁷

Since responsibility belongs to both parents,¹⁸ the management of the child's property is also carried out by both parents by mutual agreement and in the child's best interests.¹⁹ However, when parents cannot agree with the management or are of opposing views, the social work centre may assist them or, if they wish, by a mediator.²⁰ However, if the parents still cannot reach an agreement, the Court decides in proceedings concerning the dispute over the exercise of parental responsibility.²¹

When managing a child's property, parents must also consider the child's wishes, provided that the child can express them and understand the meaning of their expressed wishes and the consequences that may arise from them. However, while the child's wishes should help parents make the right decisions in managing the child's property, the child's best interests must remain the guiding principle.²²

| 2.2. Revenue from the child's property

Revenue can be both natural and civil. The LPC provides that fruits are the direct product of things that, until separation, are constituent parts of the thing, but which, upon separation, become independent things.²³ Natural fruits (e.g. products of the earth or animals) are thus the direct and natural (biological or physical) products of the parent thing, which are produced periodically without impairing the substance of the parent thing.²⁴ A civil fruit (e.g. interest, dividends, rents, lease payments²⁵, on the other hand, is a property return in which a legal relationship replaces the natural (biological or physical) yield of the object, the thing of which is a fruit-bearing entity (real, such as movable or immovable property, or ideal, such as a right), and the direct legal consequence of which is the periodic and pre-determined giving of a property benefit, a generic return, usually money.²⁶

16 | *VSK sklep I Ip 9/2014*, 21 January 2014; *VSL sklep II Ip 307/2017*, 25 April 2017.

17 | Novak, 2019, p. 459.

18 | Article 6(1) of the FC.

19 | Article 147 of the FC.

20 | Article 151(1) of the FC.

21 | Article 151(4) of the FC.

22 | *VSL sklep IV Cp 1871/2021*, 22 December 2021.

23 | Article 20(1) of the LPC.

24 | *VSRs sodba in sklep II Ips 291/2008*, 14 October 2009.

25 | Novak, 2019, p. 463.

26 | *VSRs sklep II Ips 15/2022*, 30 June 2022.

Parents may use the revenue from their children's property primarily for the child's maintenance, upbringing, and education, and, if they do not have sufficient resources themselves, for the urgent needs of the family community.²⁷ Thus, parents may use revenue from their children's property in justified cases.

A distinction must be made between two circumstances:

- a) In the first case, parents can use the revenue from their child's property primarily for the child's maintenance,²⁸ upbringing, and education. It is also possible to cover other (non-urgent) needs that are necessary to ensure the child's development.²⁹ Parents may, therefore, use revenue from the child's property to provide all that the child needs for harmonious physical and mental development, which the parents would otherwise be unable to provide or at least would be unable to provide to a satisfactory level.³⁰ Similarly, the use of the word 'primarily' shows the additional breadth of this provision. Since the primarity for the child's needs in the context of maintenance, education, and upbringing is given, it is still possible to use the revenues from the child's property for other needs if the circumstances so impose (e.g. to provide for the child's health), even for the provision of an above-standard standard of living.³¹
- b) In the second case, parents may also use the revenue from the child's property for the family's immediate (urgent) needs. Following the principle of family solidarity, which obliges family members to help each other (financially) before applying for social assistance from the state, revenue from the child's property may also be used in exceptional cases for the medical treatment of the child's parents or siblings but only if it is not used for the maintenance, upbringing, or education of the child owing the property.³² The use of revenue from the child's property for the family's needs will therefore only be possible if two conditions are cumulatively fulfilled, namely, that the parents themselves do not have sufficient resources and that it is to cover the immediate (urgent) needs of the family community.³³

However, parents cannot represent both themselves and their children in a legal transaction. In such a case, the child must be represented by the other parent or a conflict guardian must be appointed, who needs the authorisation of the social work centre to

27 | Article 148 of the FC.

28 | *VSM sklep III Cp 365/2018*, 10 May 2018:

...the Court of First Instance, starting from the judgment awarding custody of the child to the grandparents and ordering the father to pay maintenance for his daughter, correctly found that the child's needs amounted to at least EUR 374,00 per month. Since the father is obliged to pay maintenance for the child in the amount of EUR 200,00 per month, it is necessary to provide for the child's maintenance for at least EUR 174,00 from the child's own resources (pension). Having made such a finding, the Court of First Instance was correct in deciding that EUR 174,00 per month should be transferred from the child's care account to the TRR of the child's grandmother, with whom the child lives, for the maintenance of the child.

29 | Cf. Article 149(1) of the FC.

30 | *VSL sklep III Cp 2855/2010*, 6 October 2010.

31 | Novak, 2019, p. 464.

32 | Alinčić et al., 2007, pp. 439 and 443.

33 | Kraljić, 2019, pp. 505–506.

dispose of the child's immovable or movable property of a higher value, or to dispose of property rights of a higher value.³⁴

Considering all the above, we can summarize:

- a) As part of their parental responsibility, parents are obliged to bear the primary costs of their children's needs. This follows from their obligation to maintain their children.³⁵
- b) If parents cannot meet the costs related to the child's needs, they can rely on the child's revenue, that is, civil and natural fruit. They may also have recourse to these in case of immediate (urgent) needs of the family community.
- c) Only if the parents' resources are insufficient to cover the child's needs within their means and not the revenues from the child's property, will the parents be able to interfere with the substance of the child's property.³⁶

| 2.3. Disposals and encumbrances of things from child's property

Innovations were introduced in the FC regarding the disposal of children's property. Since April 2019, parents no longer need the consent of the social work centre if they want to sell their child's property and use the funds for their child's life or education. Parents exercise parental responsibility jointly, through mutual agreement, and in the child's best interests. However, when legal transactions are concluded (especially when it is necessary to act quickly, e.g. due to a fall in the value of shares), the child must be represented by only one of their parents.

As parental responsibility belongs to both parents jointly, they are consequently responsible for providing for the child's maintenance, upbringing, and education. Parents are primarily expected to provide their own resources to cover their child's needs; however, they are also allowed to use the child's property to meet the child's needs. Parents may dispose or encumber things on their child's property only for the child's maintenance, upbringing, and education, or if their child's best interests require it.³⁷ However, suppose there is a risk that parents will jeopardise their child's best interests by disposing of or encumbering their child's property. In this case, the court must impose the measures provided in the FC to protect the best interests of the child.³⁸ To protect the child's best interests, the Court may, *inter alia*, decide to prohibit parents from disposing of or encumbering the child's property.³⁹

On the one hand, parents' resources will not be sufficient to cover the child's maintenance or educational needs and other benefits, and on the other hand, if the child has their own property, the parents may dispose of or encumber the child's property. This need does not merely meet the child's minimum or essential needs. Nevertheless, parents may use the child's property to provide all that the child needs for harmonious physical and mental development, which the parents would otherwise be unable to provide or at least would be unable to provide satisfactorily. When assessing which needs are in the child's best interests, the court must consider all relevant circumstances. In doing so, it

34 | Article 248(1) of the FC. Kraljić and Križnik, 2021, pp. 289–390.

35 | Cf. Article 140 of the FC.

36 | Novak, 2019, p. 465.

37 | Article 149(1) of the FC.

38 | Article 146(2) of the FC.

39 | Article 171(2) of the FC. VSL sklep IV Cp 113/2021, 17 February 2021.

will have to consider the child's personality, circumstances and conditions in which they live, and the fact that the child's best interests are of primary importance to their parents' interests. The needs and interests of the child will not be evaluated in subjective terms, that is, as a projection of their subjective aspirations. However, they must be considered as objectively recognised values in the case of concrete circumstances.⁴⁰

Although parents may dispose of or encumber things from the child's property to provide for non-urgent needs, they must exercise due care and diligence (the good stewardship standard) and their actions must not cause harm to the child.

The question is whether parents can dispose or encumber things from their children's property, including the purposes of the family community. A comparison of Articles 148 and 149 of the FC, which relate to the child's property, reveals fundamental differences. Parents may also use revenue from the child's property to meet the needs of the family community in the event of a lack of their own resources or assets. The revenues from the child's property may 'only be used for the family community's immediate (urgent) needs'⁴¹. However, the disposal or encumbrance of the child's property is only permitted for the child's maintenance, upbringing, education, or other interests.⁴² This implies that only the use of revenue from the child's property is for the immediate (urgent) needs of the family community, as provided for in Article 148 of the FC.

On the other hand, the content of Article 149(1) of the FC indicates the impossibility of disposing or encumbering a child's property for the needs of the family community. Namely, it allows for encumbering or disposing of only the child's maintenance, upbringing, and education, or if other best interests require it. However, the wording of the article 'or if their other interests so require' indicates that the child's property may also be encumbered or disposed of for the urgent needs of the family community. Indeed, the satisfaction of the family's immediate needs may also be reflected in the satisfaction of the child's needs (e.g. the payment of overheads) and, thus, in the child's best interests.

| 2.4. Disposition with salary

Under Slovenian law, children acquire partial business capacity when they reach the age of 15. Before the age of 15 years, they are entirely business-incapable, making the contract they would have entered absolutely invalid, that is, null and void. The child's upbringing should also include preparing the child to handle money independently and responsibly.⁴³ The 'financial upbringing' may start at a very early age by involving the child in different financial situations in which they learn to handle money (e.g. pocket money or money received for a birthday). Children need to learn social rules regarding the private ownership of money to be able to integrate into the society of their peers and the wider society.⁴⁴

Determining an employment contract on your own is undoubtedly a big step towards a child's independence before the age of the majority. The provision of Article 150 of the

40 | *VSL sklep III Cp 2855/2010*, 6 October 2010.

41 | Article 148 of the FC.

42 | Article 149(1) of the FC.

43 | Dethloff, 2015, p. 413.

44 | Blake and Harris, 2009, p. 133.

FC is thus also in line with Article 21 of the Employment Relationship Act⁴⁵ (ERA-1), which provides that a person who has reached age 15 may conclude an employment contract. However, if an employment contract is concluded by a child under the age of 15, it is null and void.⁴⁶

A child who reaches the age of 15 and is employed can dispose of their salary. To raise the child and thus prepare them for independence after the age of 18, the child must contribute to their maintenance and education. However, parents are obliged to maintain and provide education until the age of 18 or 26. This legal norm is essential for minors, as it has an educational and social character. The aim is to encourage minors to acquire their own resources and work and take responsibility for their own actions and existence, especially once they have reached the age of majority, become fully capable of working, and have reached the age of legal emancipation.⁴⁷ Should a conflict of interest arise between the parents, as the child's legal representatives, and the child in the aforementioned relationship, the appointment of a conflicting guardian may be required.⁴⁸

| 2.5. The specifics of child's property care when the child is placed under guardianship

The guardian is the legal representative of the minor. Whether a natural or legal person has been appointed as guardian is irrelevant. The guardian's obligation of representation is subsidiary in nature since the child's primary legal representatives are the parents, which is particularly relevant when the parents are subject to a measure that limits parental responsibility under Article 171 of the FC. Only if a child has no parents or is not cared for by their parents will the court place the child under guardianship for children and appoint a guardian who becomes the child's full legal representative.

One of the most important obligations of a guardian is to look after the ward's property. When a child is placed under guardianship and if the minor ward has property, the court or the social work centre shall immediately order that it be inventoried, valued, and handed over to the guardian for management.⁴⁹ The fundamental purpose of the inventory was to ensure protection of the ward's property rights. The property inventory is governed by the 'Rules on the inventory and assessment of the property of persons under guardianship and on the drawing-up and content of the guardian's reports'.⁵⁰ The property inventory implements the principle of separation of property, as it is the only way to ensure the delimitation of guardians' and wards' assets. The separation of property is also provided for parents and children, but there is no need for inventory or valuation of property. However, an exception is made where a court prohibits one or both parents from exercising the individual rights of parental responsibility. This will be given if the

45 | Employment Relationship Act (Slovene Zakon o delovnih razmerjih) (ERA-1): Uradni list RS, no. 21/13, 78/13 – popr., 47/15 – ZZSDT, 33/16 – PZ-F, 52/16, 15/17 – odl. US, 22/19 – ZPosS, 81/19, 203/20 – ZIUPOPDVE, 119/21 – ZČmIS-A, 202/21 – odl. US, 15/22, 54/22 – ZUPŠ-1.

46 | Kraljić and Križnik, 2021, p. 271.

47 | Draškić, 2005, p. 417.

48 | Article 269(1) of the FC.

49 | Article 246(1) of the FC.

50 | Rules on the inventory and assessment of the property of persons under guardianship and on the drawing-up and content of the guardian's reports (Slovene Pravilnik o popisu in ocenitvi premoženja oseb pod skrbništvom in o sestavi in vsebini skrbniškega poročila): Uradni list RS, no. 22/19.

child is found to be at risk but the best interests of the child could have been sufficiently protected by a measure limiting parental responsibility, considering the circumstances of the case.⁵¹ Following Article 157(2), a child is at risk if they have suffered or are likely to suffer harm, and that harm, or the likelihood of harm, is the result of an act or omission of a parent or psychosocial problems manifested by behavioural, emotional, learning, or other difficulties in the child's upbringing. Damage includes damage to the child's physical or mental health and development, or the child's property.⁵²

To protect the child's best interests, the court may decide that the parents have the status of guardians concerning the management of the child's property. The court may prohibit parents from managing the child's maintenance and other property, or only from disposing of or encumbering the child's property. Depending on the circumstances of the case, the court may decide that the social work centre supervises the exercise of parental responsibility and determines the manner of such supervision. When imposing this measure, the court shall place the child under guardianship for representation to the extent that it limits parents' rights under parental responsibility and shall appoint a guardian. The measure of the restriction of parental responsibility is of limited duration, as it may last for a maximum of one year. However, if the court has decided on the measure of restriction of parental responsibility together with the measure of removal of the child from the parents or the measure of placement of the child in an institution, the measure of restriction of parental responsibility may last for a maximum of three years.⁵³

The guardian carries out the regular business and management of the ward's property independently, in its name, and on behalf of the ward. In doing so, the best interests of minor wards must be the primary consideration. The guardian must also consult the minority ward and consider their opinion if the minority ward has expressed it and is capable of understanding its meaning and consequences.⁵⁴

The guardian may not do anything that goes beyond the ordinary course of business (e.g. taking out ordinary property insurance constitutes ordinary business, but taking out extra-standard property insurance goes beyond the ordinary course) or the management of the ward's property (e.g. the sale of perishable fruit constitutes the regular framework, but the sale of all 100 heads of small livestock exceeds the regular framework).⁵⁵ The purpose of such an arrangement is to provide an additional safeguard for the work of the guardian, the aim of which is (in this case) to protect minor wards and their property.⁵⁶

The guardian may only act with respect to the ward's property with the authorisation of the social work centre:

- a) Disposal (e.g. gift) or encumbrance (e.g. mortgage, easement) of the ward's immovable property;
- b) Disposal (e.g. gift, sale) from the ward's movable property of greater value or disposal of property rights of greater value;

51 | Article 171(1) of the FC. Kraljić, 2019, p. 565.

52 | Article 157(3) of the FC. Kraljić, 2019, p. 534; Novak, 2019, p. 486.

53 | Kraljić and Križnik, 2021, p. 248.

54 | Article 247(1–2) of the FC.

55 | Article 247(3) of the FC.

56 | Kraljić, 2019, p. 1030.

- c) Renouncing the inheritance, legacy, or refusing a gift.⁵⁷ The renunciations of succession apply not only to an inheritance that the heir acquires *ipso jure*, without a specific request, at the moment of the deceased's death. It also covers the waiver of exercising the ward's right to a forced share.⁵⁸

To manage and dispose of a minor ward's property, a guardian must act with the care of a good steward. If the social work centre itself is appointed as a guardian and the representation is carried out under the authority of a professional employee of the social work centre, the standard of care of a good professional applies. The guardian shall ensure that the ward's property is preserved and if possible, increased. Managing and disposing of the ward's property includes collecting fruits, safeguarding the property, paying obligations (e.g. taxes, house bills), taking care of debts (e.g. paying rent, collecting unpaid maintenance), and bringing court actions for damages.⁵⁹ The exercise of guardianship of children also entails certain costs. The costs may also be covered in the following order: I) the ward's revenues, II) funds obtained from parents who are obliged to maintain the child, III) the ward's property, and IV) the budget of the Republic of Slovenia.⁶⁰

Article 259 of the FC further stipulates that the guardian's authorisation is required for the conclusion of legal transactions of such importance as having a significant impact on the child's life before or after the age of the majority. The validity of a legal transaction entered into by a child without the guardian's authorisation is judged according to the rules of the law of obligations. The problem is statutory wording: 'legal transactions which have a significant impact on the child's life before or after the age of majority'. This is the legal standard that the court must fulfil on a case-by-case basis. The starting point may be the obligations incurred by the minor ward as a result of the transaction, their general financial situation, whether the acquisition (e.g. of a motorbike) can be expected to result in additional costs immediately or in the future (e.g. insurance, repairs, registration), or whether the acquired object entails a risk for the minor ward (e.g. riding a motorbike).⁶¹

3. Outstanding selected property issues related to kidfluencers

| 3.1. General

Today, the disposition of property acquired by children through work raises many questions, including about the security of children and their assets. In particular, if we consider the fact that we have a child under the age of 15 who cannot independently and legally dispose of their property under Slovenian law, but who, on the other hand, has the

57 | Article 248(1) of the FC.

58 | *VSRŠ sklep II Ips 32/2020*, 28 August 2020.

59 | Mitić, 1980, pp. 485–486.

60 | Article 279(1) of the FC.

61 | Brus, 2011, p. 176.

capacity and maturity to acquire it.⁶² Examples of such include child film actors, singers, and models.

Today, many aspects of our lives occur in a digital environment. The digital environment has had an impact on our everyday personal and professional lives, and it has had a particular impact on the lives of children. It is therefore not surprising that some parents have recognised and quickly moved 'children and their lives' into the digital environment.⁶³ The so-called 'Kid Influencers', or kidfluencers, represent a new digital phenomenon. Kidfluencers are children whose posts are viewed on various social media platforms. They have numerous viewers and followers and often earn money for sponsored content.⁶⁴ Today, these children make a sizeable fortune by appearing in videos posted by their parents on platforms such as YouTube or TikTok. Since children are usually still very young, some of them even infants, they are left to their parents to post discoveries and to manage and dispose of these assets.

Problems already arise when signing up to social media platforms. Some platforms (e.g. Instagram and YouTube) require users to be 13 years or older to create accounts on their websites. However, there are no guidelines preventing parents from posting videos featuring their children. Therefore, it is not surprising that account holders on social media platforms are mostly the parents of kidfluencers. Parents also manage these accounts to maintain their online presence.⁶⁵

Problems are evident in inadequate legislation for protecting children, their property, and other rights. This is because children's activities are not considered 'work' since they do not establish an employer-employee relationship. Advocates (mainly parents) see these activities as children doing everyday activities (e.g., playing, opening boxes or gifts, eating (so-called unboxing videos), dressing) in front of a camera, and children are not playing a show.⁶⁶ However, parents deliberately publish videos of their children. It is often not spontaneous reactions or free play of children but carefully planned and organised activities and encouragement from parents. Parents choose the setting and the children's clothes, write the script, and, in the end, produce, professionally edit, and 'embellish' videos. What appears to be a few minutes of footage can result from days of work. In this way, children's interests and rights are forgotten. Because such video posts can bring a lot of money to the child and, thus, to the entire family, children can also be victims of financial abuse by their parents.⁶⁷

We have already mentioned that Article 147 of the Slovene FC provides that the child's property shall be administered by their parents for their benefit. Parents are expected to manage their child's property conscientiously until the child reaches the majority age. At this point, they are able to manage them independently. Kidsfluencers gain considerable properties from their work.

The children earn money from companies that pay them to advertise their products. Social media platforms also sell advertisement spaces on the kidfluencer channels.⁶⁸

62 | Hranjec, 2022.

63 | Van der Hof et al., 2020, p. 846.

64 | Masterson, 2020, p. 579.

65 | Cordeiro, 2021.

66 | Wong, 2019.

67 | Van der Hof et al., 2020, p. 846.

68 | Masterson, 2020, p. 579.

Children's property is often negligently managed by their parents; parents squander their children's property, which may result in the children having little to nothing when they reach adulthood. As a result, many legal questions have arisen, which select countries are already seriously and actively addressing.

| **3.2. The US has taken significant steps**

In the USA, the first case of negligent management of a child's assets was linked to child actor Jackie Coogan, who starred in various Charlie Chaplin films (e.g. 'The Kid'). Jackie Coogan's 20-year film career gave him immense wealth. However, when Jackie Coogan turned 21, he realised that his parents had spent most of the money he had earned from his film career. Under Californian law at the time, all property acquired by a child before the age of the majority became his parents' property. Jackie Coogan could not accept that his assets were being squandered. He took action against his mother and the head of the company. This court case led in 1939 to the adoption of the so-called 'California Child Actor's Bill' (also known as 'Coogan's Law'), which sought to protect the income of child entertainers who had made high incomes during their careers but who were left to the film industry on the one hand and their parents on the other.⁶⁹

Coogan's Law underwent several amendments. In 2003, it was stipulated that parents must set up a trust in the State of California and notify their employer within ten days of signing the employment contract, who must then make payments to the trust. If parents fail to do so, 15 percent of the child's income must be paid to the Actor's Fund of America's (AFA) account, which acts as a trust. The child then receives the money when they reach the age of 18 or become legally independent from their parents. The arrangement cannot be seen as positive in any way, since 85 percent of the child's earned money is still unsecured and left to the parents' discretion and free spending, over which the child has no influence.⁷⁰ Indeed, the parents can use the remaining 85 percent of the money that is their child's property to raise and care for the child, whether to buy a house, cover the child's expenses, or even pay their own salary to manage the child's career.⁷¹

| **3.3. France as an example of good practice in the EU**

France has also recognised the problem of kidney influencers. France, therefore, adopted a new law in 2020 to strengthen protection further in general, and in particular with regard to kidfluencers.⁷² This phenomenon often has significant economic and financial consequences, either for children's families, who usually generate significant income from it or for brands that use these videos as a new form of advertising. However, most consequences are observed in under-aged children. The activity of kidfluencers was thus not covered by French labour law, since the money earned by children could not be deposited in the 'Caisse des dépôts et consignations' until they reached the age of majority. Thus, money is paid directly to the owners of the channel, who are usually their parents.⁷³

69 | Reardon, 2022, p. 171; Masterson, 2020, p. 579; Cordeiro, 2021; Walker, 2022.

70 | Hranjec, 2022.

71 | Wong, 2019.

72 | Blocman, 2020.

73 | Blocman, 2020.

The change in labour law has had the effect that kidfluencers, whose activities do not constitute an employment relationship and, therefore, do not benefit from the protection of Article 7124-1 of the French Labour Code,⁷⁴ are now also protected. The new regulation,⁷⁵ which came into force in 2021, placed kidfluencers on an equal stage with child models, children working in the entertainment industry, and child advertising models in terms of legal protection, thus contributing to equal protection under the French Labour Code. Before filming their children or distributing their videos, parents must apply if they exceed certain thresholds in terms of the length and number of videos produced or the income generated and apply to the authorities for a specific licence or authorisation for the income generated by their distribution. Their children's rights and the consequences of publishing their images online are explained to them. Parents also have a new financial obligation and must deposit part of the income earned by their child with the 'Caisse des dépôts et consignations' (the so-called child's nest egg account) until the child reaches the age of sixteen or is emancipated, as is already the case for children in the entertainment industry. This prevents the entire family from relying solely on the child's income from social networks. Parents are sanctioned to keep money for their own use. If parents have not obtained permission or authorisation, the authorities may take the matter to court (Article 6-2 of the Law on Confidence in the Digital Economy⁷⁶).⁷⁷ The new law also introduced the right to erase or be forgotten, allowing children to remove content from social media platforms at their direct request. However, parental consent is not required.⁷⁸

3.4. *Quo vadis Slovenia?*

3.4.1. *Legislative framework*

The Slovenian ERA-1 stipulates that the work of children under the age of 15 years is prohibited.⁷⁹ However, a child under the age of 15 may, exceptionally, participate in remuneration in the making of films, the preparation and performance of artistic, scenic, and other works in the field of cultural, artistic, sporting, and advertising activities.⁸⁰ A child who has reached the age of 13 may also perform light work for a maximum of 30 days in any calendar year during school holidays in other activities, in the manner to the extent and provided that the work to be performed does not endanger their safety, health, morals, education, and development.⁸¹

74 | Labour Code (French Code du Travail) [Online]. Available at: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006072050/ (Accessed: 23 October 2023).

75 | Law regulating the commercial exploitation of the image of children under the age of sixteen on online platforms (French LOI n° 2020-1266 du 19 Octobre 2020 visant à encadrer l'exploitation commerciale de l'image d'enfants de moins de seize ans sur les plateformes en ligne) [Online]. Available at: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042439054> (Accessed: 23 October 2023).

76 | Law on Confidence in the Digital Economy (French Loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique [Online]. Available at: <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000801164> (Available: 23 October 2023).

77 | Blocman, 2020.

78 | Weiss, 2021; Blocman, 2020; Krischick and Müller-Röme, 2021.

79 | Article 211(1) of the ERA-1.

80 | Article 211(2) of the ERA-1.

81 | Article 211(3) of the ERA-1.

Work under Article 211(2-33) of the ERA-1 may only be carried out by a child if a prior permit has been obtained from the Labour Inspector. The prior permit is granted based on an application by the legal representative, that is, the parent or guardian.⁸² The procedure and conditions for granting a permit by the Labour Inspector are set out in more detail in the 'Rules on issuing work permits for children under 15 years of age'⁸³ (hereafter: Rules 2018).

The working hours of children under 15 years of age performing light work during school holidays may not exceed seven hours per day and 35 hours per week. However, work performed by a child outside school hours during the school year may not exceed two hours per day or twelve hours per week.⁸⁴ In any event, children are prohibited from night work between 8 p.m. and 6 a.m. They must also be guaranteed a daily rest period of at least 14 consecutive hours in each 24-hour period.⁸⁵ It should be noted that the Slovenian ERA-1 does not directly address child labour by kidfluencers, but it can be indirectly linked to the parts mentioned in Article 211(2) of the ERA.

3.4.2. Work Permits for Children

A work permit for a child under fifteen years of age is granted: I) for participation in the making of films, the preparation and performance of artistic, scenic and other works in the field of cultural, artistic, sporting, and advertising activities; and II) if the child has attained the age of thirteen years, for the performance of light work as defined in the 'Rules on protection of health at work of children, adolescents and young persons'⁸⁶ (hereafter: Rules 2015).⁸⁷

Article 3 of the Rules 2015 sets out what constitutes light work that can be carried out under certain conditions by a child who has reached the age of 13 years. Light work is work which, by its nature and with regard to the working conditions in which it is carried out: I) is not detrimental to the safety, health, and development of the child; and II) does not adversely affect the child's attendance at school, their enrolment in vocational guidance or training programs approved by the competent authority, or their ability to make positive use of the education received. Examples of light work considered in the guidelines for the approval of work for a child who has reached the age of 13 years do not include the recording of videos that parents would then post online.

82 | Article 211(4) of the ERA-1.

83 | Rules on issuing work permits for children under 15 years of age (Slovene Pravilnik o izdaji dovoljenj za delo otrok, mlajših od 15 let) (Rules 2018): Uradni list RS, no. 24/18.

84 | Article 212(1) of the ERA-1.

85 | Article 212(2-3) of the ERA-1.

86 | Rules on protection of health at work of children, adolescents and young persons (Slovene Pravilnik o varovanju zdravja pri delu otrok, mladostnikov in mladih oseb) (Rules 2015): Uradni list RS, no. 62/15.

87 | Article 2(2) of the Rules 2018.

The Labour Inspector issues a work permit⁸⁸ for a child based on an application from the legal representative, that is, the parent or guardian.⁸⁹ In the application for a child work permit, the applicant must provide all prescribed and required information relating to the child's work: I) information on the applicant, II) information on the child, III) information on the employer, iv) information on the person who will be responsible for the child during working hours with the employer, V) information on the type of work the child will perform, VI) a detailed description of the work the child will perform, and VII) information on the time and place where the work will be performed. The application for a child work permit must be accompanied by a signed copy of the contract under which the child will work.⁹⁰

Before authorising a child to work, the Labour Inspector assesses whether the work to be carried out by the child is likely to endanger the child's safety, health, morals, education, and development. Before issuing a child work permit, the Labour Inspector may, at their discretion, visit the employer where the child will be working under the child work permit, depending on the work circumstances.⁹¹ Where the Labour Inspector cannot visit the employer, they shall request an opinion from the competent social work centre, the school advisory service, or other competent organisations before authorising the child to work.⁹²

A child work permit is issued for the child to work for the employer for whom the work will be carried out. The Labour Inspector shall also send the decision issued in the child work permit procedure to the employer.⁹³ The employer must notify the Labour Inspectorate of the exact start of the work (date, time) at least 24 hours before the event or on the last working day before the event.⁹⁴ The employer must keep a daily record of the child's arrival and departure for work or the time of attendance during the recording.⁹⁵ A child work permit under the Rules 2018 is issued for no more than one year. A child work permit shall be valid as long as the conditions based on which it was issued continue to exist. The conditions based on which the child work permit was issued are verified by the Labour Inspector.⁹⁶

In November 2022, the Slovenian Labour Inspectorate imposed a fine of 1,500 EUR on two Slovenian influencers who 'used' their children in their videos. The Labor Inspectorate considered the videos to be illegal child labour and issued a misdemeanour decision imposing a fine of 1,500 EUR. The parents of the kidfluencers had not previously filled out an application for a work permit for a child under 15 years of age. Consequently, they also had not obtained a work permit for a person under the age of 15 years.⁹⁷

88 | Slovene Labour Inspectorate issued in the year 2021 505 permits for child work (in year 2019 – 649 and in 2018 – 530 permits). Most of the permits concerned child labour in the filming of advertisement, commercials and films (Inšpektorat Republike Slovenije za delo, 2021, pp. 25 and 28).

89 | Article 3 of the Rules 2018.

90 | Article 5 of the Rules 2018.

91 | Article 5(1) of the Rules 2018.

92 | Article 7 of the Rules 2018.

93 | Article 8 of the Rules 2018.

94 | Article 9 of the Rules 2018.

95 | Article 10 of the Rules.

96 | Article 11 of the Rules 2018.

97 | STA, 2022; Savič, 2023.

This also raises the question of whether child labour was actually involved in this case. Under Slovenian law, a child under the age of 15 may participate in remuneration for the making of films, and the preparation and performance of artistic, scenic, and other works of cultural, artistic, sporting, and advertising activities. However, this requires an *a priori* permit from the Labour Inspector. The Inspector must be satisfied that the work to be carried out by the child does not endanger their safety, health, morals, education, or development. In this case, no application, verification, or prior permit was not given. Because of this, the Labour Inspector believed that infringement had occurred. First, the best interests of children were established. The latter is dictated by Slovenian law and the Convention on the Rights of the Child^{98 99}).

Kidfluencers' activities cannot be characterised as free play, as they are often not spontaneous. Parents conduct business deals, prepare scripts for videos, edit them, and distribute them on social networks. However, we can quickly find out that this is not just play. The contracts entered into by parents on behalf of their children dictate certain activities expected of the kidfluencers (e.g. posting certain content during a certain period).¹⁰⁰

From the above, we can conclude that the arrangement of children's work was adequate. However, this still leaves open questions regarding kidfluencers, since they usually do not enter into an employment relationship with their employers. Parents are the ones who take care of their recordings and post on social networks. As a result, Slovenian legislation has not yet provided satisfactory regulations or legal protection for these children.¹⁰¹ In particular, the legal aspects of children's earnings and the management of this property are not defined anywhere.

98 | Convention on the Rights of the Child: Uradni list RS – MP no. 9/92 [Online]. Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child> (Accessed: 23 October 2023).

99 | See Article 32 of the CRC:

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development. 2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular: (a) Provide for a minimum age or minimum ages for admission to employment; (b) Provide for appropriate regulation of the hours and conditions of employment; (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

100 | Savič, 2023.

101 | Wong (2019) states that kidfluencers can be subject to human rights violations, and in particular, children's rights (e.g., loss of privacy, child labour, child exploitation, deprivation of education and other opportunities such as play with friends, leisure). Damage could be caused to child's physical and psychological health, which can be manifested in the short term (fatigue) as well as in the long term (alcohol dependence, other addictions, suicidality). Without appropriate labour legislation or work permits, these children are subjected to endless working hours without any regulations on their well-being or their rest and recreation time; they are also subjected to long working hours without any rules on their well-being or their rest and recreation time.

4. Final Thoughts

We believe that Slovenia has adequate legislation on children's property and related property issues. By abolishing the authorisation to encumber and alienate a child's property, the legislator places trust in parents to manage and dispose of the child's property for the child's benefit. The case law in this area also does not point to certain open, recurring problems. However, the area of concern is all the more problematic regarding the activities of kidfluencers and the property and labour relations arising from their activities. Many countries, including Slovenia, have not yet adopted appropriate legislation to protect children's and property rights. Apart from labour law protection, there is not a single provision in Slovenian legislation that addresses property issues related to kidfluencers.

In February 2023, two questions were addressed to the European Parliament: I) Does the Commission believe that all Member States should have similar kidfluencer laws?; II) Does the Commission plan to propose legislation on kidfluencers?¹⁰² The idea of the uniform regulation of kidsfluencers at the European Union level is welcomed to achieve a uniform and transparent regulation. The latter is all the more important, given that social networks are not limited to the country of origin but can also have a global reach. Therefore, it is important and necessary to strive for regulations that would also offer adequate regulation and protection of children's property and other rights in this area.

102 | European Parliament, 2023.

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VULNERABILITY AND FAMILY SOLIDARITY IN CZECH LAW

Zdeňka Králíčková¹

ABSTRACT

Human life unfolds in stages, in which the degree of dependence on the family gradually changes. Further, every human life has periods of vulnerability – being a minor child, a person with a disability, or an elderly person – which is expressed by the universal vulnerability thesis. In addition to this general thesis, the doctrine expresses the specific vulnerability thesis regarding refugees, both types of homelessness, and minorities. The law previously focused its attention on the protection of these vulnerable persons. However, this paternalistic paradigm is currently complemented by the demand to strengthen respect for the autonomy of the will of vulnerable persons. Therefore, the Czech Civil Code provides vulnerable persons with both the protection and the space for a dignified expression of their will. This extends beyond representation to include respect, assistance and support. This approach strengthens the material equality between people and the balance in private-law relations. Finally, the role of the family and family solidarity is gaining importance.

KEYWORDS

family law
vulnerability
autonomy of will
respect
support
protection
family solidarity

1. Introduction

Vulnerability and family solidarity are interdependent. Therefore, any family members may be vulnerable. This depends on factors like age, health, and family living circumstances in everyday life.

If a minor child is at risk, his or her parents and the family of his or her origin shall provide the child with care, protection, support, and maintenance, especially within the

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concept of parental responsibility and according to other family law provisions reflecting respect for the child's autonomy of will and his or her participatory rights.² However, regarding adults as vulnerable people, there are many family law instruments and other special civil law concepts provided for those people who need protection as well as assistance, support, and respect for their autonomy and participatory rights. If a vulnerable adult is in crisis, his or her family members shall provide him or her with general protection and maintenance and become supporting persons or guardians with respect for the autonomy of will and the right to participate of these vulnerable persons. It is, therefore, not just a question of protection, but above all, of respect for previously expressed wishes or continuing powers of attorney.³

It may appear that the protection of other persons is unrelated to this topic. However, in addition to the abovementioned categories of vulnerable people, there are other family members who can be identified: an unwed mother of a child of tender age, an abandoned, divorced, or widowed spouse or partner, or a cohabitee. The term 'vulnerability' is generally not used in these situations. However, in the case of vulnerable persons, it is not only a matter of age or health – vulnerability in the strict sense of the word – but also of life situations, adverse circumstances, and so on.⁴ In this context, the right to maintenance, fair property settlement, and the division of community property and family housing after abandonment, separation, or divorce, for example, become more important and deserving of protection.⁵

The following sections are devoted to the many aspects of vulnerability: special instruments, supportive and protective measures, and application of the principles of family solidarity.

2. Human rights concepts of vulnerability, family and family solidarity

Every human life unfolds in stages and has periods of dependence on the family or vulnerability, for example, being a minor child, a person with a disability, or an elderly person. This is expressed in the universal vulnerability thesis. In addition to this general thesis, the doctrine discusses the concept of a specific vulnerability regarding refugees, both types of homelessness, and minorities.⁶ It is common knowledge that anyone can become vulnerable due to his or her life story, position in a family, and social ties.

Thus, there are many legal sources devoted to vulnerability, family and family solidarity. First, the discussion must be foregrounded with an introduction to two of the most

2 | Králíčková, 2022a, pp. 73–104.

3 | Králíčková et al., 2023.

4 | Králíčková, 2011, pp. 362–377.

5 | Králíčková, 2021a, pp. 77–109.

6 | Šimáčková, 2019, pp. 24 ff.

important special international covenants⁷ protecting the most vulnerable groups: minor children and adults with disabilities.

The United Nations Convention on the Rights of the Child⁸ states in the Preamble with reference to the Declaration of the Rights of the Child, that

The child, by reason of his or her physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth', that 'the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding' and that 'the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.

Regarding autonomy of will and participatory rights of the child, it is stated that

1. State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The United Nations Convention on the Rights of Persons with Disabilities⁹ is the first international, legally binding instrument that sets minimum standards for the rights of people with disabilities. It provides the purpose of the Convention, which is

To promote, protect and ensure the full enjoyment of all human rights and fundamental freedoms by all persons with disabilities. People with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others,

and the general principles of the Convention are

...of respect for dignity; non-discrimination; participation and inclusion; respect for difference; equality of opportunity; accessibility; equality between men and women; and respect for children.

7 | Additionally, according to the Constitution of the Czech Republic, Promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than that which a statute provides, the treaty shall apply (Article 10 of Act No 1/1993 Sb. on the Constitution of the Czech Republic, as amended).

8 | In Czechia published under No 104/1991 Sb.

9 | In Czechia published under No 10/2010 Sb. m. s.

It must be stressed that the Convention is devoted to all persons with disabilities; however, the special provisions focus on women and children. Additionally, the Convention pays special attention to family life in that

people with disabilities have the right to marry and to found a family. Countries must provide effective and appropriate support to people with disabilities in bringing up children, and provide alternative care to children with disabilities where the immediate family is unable to care for.

However, the crux of the Convention is the provision that guarantees equal recognition before the law which is associated with respect for the autonomy of the will of vulnerable persons and a full range of support measures. This is a move away from limiting their autonomy and merely representing them. It is stated that,

States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life', that 'States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity' and that 'States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

Mentioned in the literature, 'the problem is not limited to the protection of those suffering from lifelong or other learning disabilities ... it concerns us all, in the medium or short term.'¹⁰

Next, there is the universal human rights convention protecting European human rights values, life, and vulnerability in general, freedom, the right to marry, and especially the right to respect for private and family life without specifying it. The Convention for the Protection of Human Rights and Freedoms¹¹ constitutes the key starting point for the conception, regulation, and protection of families in the Czech Republic, as it protects the right to respect for the private and family life of everyone. The case law of the European Court of Human Rights describes the Convention as 'a living' instrument and provides protection for all forms of families and all models of family life.

We can say that the inner Charter of Fundamental Rights and Freedoms (Constitutional Act No 2/1993 Sb., as amended, further mainly 'Charter') is fully in harmony with the above-mentioned wide concept of protection of vulnerability in the broadest sense and family life guaranteed by international instruments. With reference to the above human rights conventions and their standards, it must be added that the Charter of Fundamental Rights and Freedoms recognises the inviolability of the natural rights of an individual, develops the universally shared values of humanity and equality of people in

10 | Frimstone et al., 2015, p. xi.

11 | In Czechia published under No 209/1992 Sb.

dignity and their rights, and stipulates that fundamental rights and freedoms are inherent, inalienable, not subject to a statute of limitations, and irrevocable. Further, everyone has the capacity to have rights (cf., in particular, the introductory articles, Charter). In addition to articles devoted to the protection of private and family life and parenthood and family, the Charter also stipulates that everyone has the right to the protection of their health, and that persons with a disability are entitled to special protection of their social rights. The right to judicial and other legal protection is enshrined in other provisions of the Charter.

Within the recodification of civil law in the new Civil Code, the aim of the new concept was to provide the individual with complex protection in all aspects of private life (Act No 89/2012 Sb., Civil Code, as amended, 'CC'). The introductory provisions of the Civil Code provide that

Private law protects the dignity and freedom of an individual and one's natural right to pursue happiness for oneself and one's family or people close to the individual in a manner that does not cause unjustified harm to others.

It further provides that 'everyone has a right to the protection of one's life and health, as well as freedom, honour, dignity, and privacy' and that 'no person may suffer unjustified harm due to insufficient age, mental state or due to dependence'.

The Civil Code also regulates the protection of personal rights quite extensively, including the right to mental and physical integrity, special provisions regulating the rights of persons admitted to a healthcare facility without their consent, and the rules on the disposal of parts of a human body. The primary aim of the authors of the Civil Code was to ensure that all individuals could exercise their rights in relation to the key principles of private law: the autonomy of will and freedom of contract. Simultaneously, they intended for the provisions of the Civil Code to provide comprehensive protection for the private rights of persons who find themselves vulnerable due to insufficient age, mental state, or dependence, especially those who are the weaker party. This protection is reflected in Book One – General Part, as well as in the special parts such as Book Two – Family Law of the Civil Code.

Notwithstanding the above human rights dimension, there are many provisions in the Czech Civil Code that provide broad and detailed protection to vulnerable people in many spheres. The individual provisions are based on and fully respect the principle of autonomy of will and family solidarity as universally recognised, unwritten, traditional, and fundamental bases of Czech Family and Civil Law.¹²

It must be stressed that there is no definition of family and family members in Book One – General Part or Book Two – Family Law of the Civil Code. The fact that the Civil Code provides explicit protection to the family established by marriage does not change the matter. Same sex status relationships are the subject of special legislation by the Act on the Registered Partnership (Act No 115/2006 Sb., as amended, further 'ARP'). In addition, there are explicit provisions in the Civil Code that apply to registered partners, or provisions that place registered partners in the same position as spouses or former spouses. And as a novelty, there have currently been changes in this area which will come into force on 1 January 2025. Same-sex partnerships will be regulated in the Civil Code, like

12 | Králíčková, 2010, pp. 10 ff.

marriage for opposite-sex couples, and a separate law will be partially repealed. The Civil Code, as amended, will provide that a partnership is a permanent union of two people of the same sex, which is concluded in the same way as marriage (Act No 123/2024 Sb.).

However, comprehensive legal protection for cohabiting persons – *de facto* unions – is lacking in the Civil Code.¹³ This is especially true because persons of different sexes can conclude a marriage, and persons of the same sex can enter into a registered partnership. The Civil Code and the Act on Registered Partnerships attach a number of rights and obligations to these status relationships. If some persons ‘refuse’ to enter these statutorily protected status forms, it is necessary for them to regulate their relationships contractually, as the Civil Code does not provide for any catalogue of mutual rights and obligations of cohabitants *de facto*. In this context, the Czech legal order does not discriminate in any way between children born in and out of wedlock; nor does it use the term ‘illegitimate child’.¹⁴ Regardless of whether a child is born in wedlock or not, the legal order guarantees the equal status of the child and his or her parents – reflected in terms of status and property.¹⁵

The principle of family solidarity can be considered alongside the principles of protection of a weaker party or vulnerable person and the autonomy of will – a fundamental principle of Czech Family and Civil Law.¹⁶ The concept of the autonomy of the individual will is central to human rights protection and a pillar of private law. Thus, the Civil Code emphasises the autonomy of the will in the broadest sense as the right to self-determination. It provides that everyone has the right to take charge of his or her own happiness and the happiness of his or her family or close people. The Civil Code regulates according to the principle that, unless expressly prohibited by the law, persons may agree upon rights and duties differently from the law. Only agreements contravening ‘good manners, public order or rights relating to the status of persons including right to protection of personality’ are prohibited. However, for the principle of the autonomy of the will to be fully realised, people must be equal. The Civil Code develops this constitutional idea and provides that no one may suffer unjustifiable harm because of his or her age, intellect, or dependence on his or her position, nor may anyone take unjustified advantage of his or her incapacity to the detriment of others. As mentioned in the literature, ‘The problem is not limited to the protection of those suffering from lifelong or other learning disabilities ... it concerns us all, in the medium or short term.’¹⁷

The balancing exercise is necessary in law (see the regulation for parental responsibility and supporting measures below) and in application practice using the principles and proportionality test – in particular, the test of liberty and decency. The principle of protecting the weaker party or vulnerable person follows from the above. This principle is reflected in several articles, in contract law, and in the emphasis on the general categories of good morals and public order. Anyone can become a weaker party or a vulnerable person; everyone has been a minor child at some time and anyone can be injured or become ill. However, privileging or positive discrimination against certain groups must not lead to self-serving privileges for those who are denied or those who are intended

13 | Králíčková, 2021a, pp. 77–109.

14 | Králíčková, 2022c, pp. 109–120.

15 | Králíčková, 2021b, pp. 83–100.

16 | Králíčková, Hrušáková and Westphalová, 2022, p. 26.

17 | Frimston et al., 2015, p. xi.

to benefit. This would constitute an intolerable restriction. The principle of solidarity permeates family law. If someone is legally (or *de facto*) attached to someone else, it is legitimate for them to endure various legal restrictions, such as sharing, especially in the property sphere. Thus, the purpose of many family law provisions is thus to limit the autonomy of the will and to limit the right of ownership (use or disposition) in favour of a third party – usually referred to as a weaker party. This may include a child dependent on personal care and maintenance, or a spouse unable to support himself or herself due to many years of all-day care for a common dependent child. This principle is thus closely related to the general principle of protecting the weaker party. The protection of family members takes precedence over the interests of the individual.¹⁸

3. On the protection of children

Significantly, the human rights dimension of family law was considered when preparing the Civil Code in the Czech Republic. The main authors of the Civil Code reflected on the ideas and guiding principles of the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, the Convention for the Protection of Human Rights and Freedoms, and academic initiatives – the Principles of European Family Law regarding Parental Responsibilities (hereinafter ‘Principles regarding Parental Responsibility’)¹⁹ by the Commission on European Family Law (hereinafter the CEFL).²⁰ That is why minor children are protected primarily through the concept of parental responsibility regulated by the Civil Code.²¹ It should be emphasised that a minor child is not a passive object of parental responsibility or the property of his or her parent. The minor child has participation rights guaranteed by the Convention on the Rights of the Child. However, his or her actual vulnerability must not be forgotten. Therefore, a minor child enjoys comprehensive protection in the entire legal system, especially in the sphere of the socio-legal protection of children, as well as in court proceedings in which he or she has a specific position. Experts discuss child-friendly justice.²²

There are a few essential pieces of information regarding parental responsibility. The concept, or the scope of parental responsibility has extended from the previous legal regulation, to bring more balance, protection, and security to family ties.²³ The Civil Code provides that the parental responsibility includes, in reverse order, ‘duties and rights’ of parents consisting of (a) caring for the child – including care for his or her health, physical, emotional, intellectual, and moral development; (b) protecting the child; (c) maintaining personal contact with the child; (d) ensuring his or her upbringing and education; (e) determining the place of his or her residence; (f) representing him or her and (g) administering his or her assets and liabilities, or property. Additionally, the Civil Code identifies which issues are the most important – where the consent of both the

18 | Scherpe, 2016, pp. 132–133.

19 | Boele-Woelki et al., 2007.

20 | For more see: Commission on European Family Law, no date.

21 | Králíčková, 2021b, pp. 85–98.

22 | Šimáčková, 2019, pp. 23–24.

23 | Králíčková, 2022a, pp. 73–104.

child's parents is necessary. The list of the child's significant matters is demonstrative and includes: (a) non-routine medical and similar interventions; (b) the determination of the child's place of residence and (c) the child's choice of education and employment. Additionally, the duty and the right to decide on these matters 'extends' the content of parental responsibility.²⁴ It is very important that parental responsibility arises from, and belongs (only) to, both the legally established parents of the minor child – without any discrimination based on gender or sexual orientation. The duties and rights of the child's parents are equal regardless of whether they are married, divorced, or separated. The parents must jointly exercise their duties and rights belonging to parental responsibility and in harmony with the best interests of the child and his or her welfare, well-being, and participation rights.

If the child is at risk, for instance, the child's parents are not able to exercise their duties and rights properly because of objective reasons (they are minors, do not have full legal capacity, or are in a coma) or even subjective reasons (they are socially immature or inadapted, drug addicted, or violent), the Civil Code also provides special rules for solving difficult life situations. Many provisions are applied by the operation of law (*ex lege*) and many articles give the state administrative authorities and the courts rights, and duties, to intervene to the family ties with a wide range of measures and remedies, or sanctions.²⁵ In this context, the family is understood in the broader sense of the word – in particular, the grandparents of the minor child or his or her older adult siblings – who often become the *de facto* caregivers of the child in crisis, as they take him or her personally and voluntarily fulfil the duty of maintenance towards him or her. The State or its state authorities, in the best interests of the child and in relation to the child's rights of participation, often respect this facticity and appoint family members as foster parents or guardians.²⁶ Statistical data have long shown that unmediated kinship in foster care between grandparents and minor children is far more widespread than state-mediated foster care between strangers and minor children.²⁷

The legal provisions regarding parental responsibility anchored in the Civil Code protect minor children and their parents. Anyone can be in the position of a weaker party, for example, a minor or not-fully capable parent, a single mother, a putative father, a left-behind parent (in the case of international child abduction, or inter-country unlawful relocation of a child). Therefore, vulnerability is reflected in the Civil Code in the broadest sense. The general protection of the family and family life according to the wishes, choices, preferences, and special needs of family members is guaranteed in relation to constitutional law and human rights conventions.²⁸

In addition to the concept of parental responsibility and other protecting provisions, the most detailed regulation is devoted to the maintenance duty of parents and grandparents towards children. The maintenance duty of parents towards children has not been traditionally part of parental responsibility as both parents have a duty to maintain and support their child until he or she is independent. Even adult children have the right to maintenance. The scope of maintenance is intended to be within the extent of the same

24 | Šínová, Westphalová and Králíčková, 2016, pp. 98 ff.

25 | Radvanová, 2015, pp. 15 ff.

26 | Králíčková, 2022b, pp. 83–100.

27 | Ministry of Labour and Social Affairs data, see: Kyzlinková, 2023.

28 | Králíčková, 2014, pp. 71–95.

standard of living as the family including the option of saving the maintenance. Thus, the Civil Code fully respects the principles of solidarity and the non-consumption aspect of maintenance. However, in practice, it is sometimes difficult to determine maintenance. Therefore, the Civil Code introduced the legal presumption of the income of the liable parent (or grandparent) to improve the child's position. The law states that a parent must prove his or her income in court by submitting documents necessary for the evaluation of his or her property situation and must enable the court to discover other facts necessary to make decisions by making the data protected by special acts accessible. If a parent fails to fulfil this duty, his or her average monthly earning shall be presumed to amount to the 25-multiple of the life minimum required for ensuring the maintenance and other fundamental personal needs of such a parent pursuant to a special law (Act No 110/2006 Sb., on Living and Subsistence Level, as amended). In contrast, as an expression of the principle of solidarity, the law stipulates that children are to provide decent maintenance to their parents in need and necessary maintenance to other relatives in the direct line.²⁹

Children in specific situations are considered a special group of vulnerable children.³⁰ These include, for example, unwanted and abandoned children; children who are neglected, abused, or who witness domestic violence; Roma children, and children of various minorities or refugee children. These children, in specific vulnerable situations, are given special attention in the legal order, in particular, social and legal protection. Many measures for the protection and realisation of their rights can be applied by state powers, even against the will of the parents of these children.³¹

4. On the protection of an unwed mother of a child of tender age

It is common knowledge that in the Czech Republic, as in other developed countries, many children are born out of wedlock. Sometimes, these children are born into unmarried *de facto* cohabitation, and sometimes to women who live alone and find themselves in difficult life situations. In the spirit of the tenet 'If I protect the mother, I protect her child', the Civil Code regulates the special property rights of unmarried women under the title 'Maintenance and support, and provision for the payment of certain costs for an unmarried mother'.³²

It is provided that,

If the child's mother is not married to the child's father, the child's father shall provide her with maintenance for two years from the birth of the child and provide her with a reasonable contribution to cover the costs associated with pregnancy and childbirth.

Regarding property rights of a pregnant woman, the law states that,

29 | Králíčková, Hrušáková and Westphalová, 2020, pp. 958 ff.

30 | Šimáčková, 2019, p. 24 and literature there listed.

31 | Králíčková, 2022b, pp. 95–97.

32 | Králíčková, 2009, pp. 281–291.

A court may, on the application of a pregnant woman, order the man whose paternity is probable to provide an amount needed for maintenance and a contribution to cover the costs associated with pregnancy and childbirth in advance. A court may, on the application of a pregnant woman, also order the man whose paternity is probable to provide in advance an amount needed for the maintenance of the child for a period for which the woman would be entitled to maternity leave as an employee under another legal regulation.³³

These provisions are often used in practice, as statistics show that almost 50% of children are born to unwed mothers.³⁴ Regarding the amount of the maintenance obligation of 'illegitimate' fathers towards their children, or the content and exercise of their parental responsibility, the law does not put these children at any disadvantage compared to children born into marriage.

However, when the unwed mother of the child or the pregnant woman is vulnerable (not only poor), proceedings in property matters can only be initiated at her request. In the relevant court proceedings, she bears the burden of proof of the financial circumstances of the obligated father of the child, which is typical in contested proceedings. Her procedural situation in this respect is similar to that of women seeking maintenance between spouses or divorced spouses through the courts.

5. On the protection of spouses, registered partners and *de facto* cohabitantes as weaker parties

As an expression of respect for the principle of solidarity, the Civil Code provides in particular that the spouses are obliged to respect each other, to live together, to be faithful, to mutually respect their dignity, to support each other, to maintain the family union, to create a healthy family environment, to jointly take care of their children, to represent each other, and to jointly manage the issues of the family. The law states that either spouse has the right to be told by the other about his or her income and the state of his or her property, as well as the existing and planned work, studies, and similar activities. Further, either spouse is obliged, when choosing work, studies and similar activities, to consider the interests of the family, of the other spouse and of the minors who have not yet attained full legal capacity and who live with the spouses in the family household, and, potentially, the interests of other members of the family.³⁵

Concerning the property aspects of marriage, the Civil Code first states that each spouse contributes to the needs of the family and the family household according to each person's personal and property conditions, abilities, and possibilities, so that the standard of living of all members of the family is the same. Providing property is as important as providing personal care for the family and its members. In addition to the duty to contribute to the needs of the family, the law also establishes the mutual maintenance duty of the

33 | It would be 28 weeks, in case of siblings or more children 37 weeks. For details see the Act No 262/2006 Sb., the Labour Code (Art. 195, para. 1).

34 | For more see Czech Statistical Office, 2022.

35 | Králíčková, Kornel and Zavadilová, 2019, pp. 122–159.

spouses to the extent of having a right to the same living standard. Further, the Civil Code regulates the concept of things forming the usual equipment of the family household. It is established that regardless of the ownership of things that fulfil the necessary life needs of the family, a spouse needs the consent of the other when dealing with them; this does not apply if the thing is of negligible value. A spouse may claim invalidity of a legal act if the spouse managed the usual equipment of the family household without his or her consent.

Next, there is a special regulation for a family enterprise. It is defined as an enterprise in which the spouses work together, or at least with one of the spouses work with their relatives to the third degree, or persons related to the spouses by marriage up to the second degree; and the enterprise is owned by one of these persons. Those who permanently work for the family, or the family enterprise are considered members of the family who participate in the operation of the family enterprise. These people also participate in its profits and in the things gained out of those profits, as well as in the growth of the enterprise, to the extent that it corresponds to the amount and kind of their work. This right may only be waived by a person with full legal capacity making a personal declaration. If the family enterprise is to be divided, a member participating in its operation has a pre-emptive right to it.

Finally, special attention is paid to the regulation of community property as a key concept of Czech Marital Property Law.³⁶ As in other jurisdictions, this concept can be viewed as family property law.³⁷

For many reasons, the legal regime for community property is regulated first. It includes what one of the spouses has gained or what both spouses have gained in the course of their marriage except for: (a) what serves the personal needs of one of the spouses, (b) what only one of the spouses has gained by gift, succession or bequest unless the donor or the testator in the will expressed a different intention, (c) what one of the spouses has gained as compensation for a non-proprietary infringement of his or her natural rights, (d) what one of the spouses has gained by legal dealings relating to his or her separate property, (e) what one of the spouses has gained as compensation for damage to or loss of separate property. Additionally, community property includes profit from what is separate property of one of the spouses. It does not include an interest of a spouse in a company or a cooperative if that spouse has become a member of the company or the cooperative during the marriage, except for housing cooperative. Community property also includes debts assumed in the course of the marriage unless: (a) the debts concern the separate property of one of the spouses – to the extent of the profit from that property, or (b) only one of the spouses has assumed them without the other spouse's consent and it was not within the fulfilment of everyday or common needs of the family.

However, the Civil Code enables modifications of the legal regime of community property and the creation of the agreed regime and establishing of the regime of separated property. As an innovation, it is possible to conclude arrangements for the case of termination of marriage due to divorce or death by making a contract of succession. Both would-be spouses and spouses may do so at any time before entering the marriage, as well as during the marriage. In this way, the lawmaker fully respects the principle of autonomy of the will to create a wedding contract, which was completely curbed by communist legal

36 | For details see Psutka, 2015, pp. 1–9.

37 | Barzó, 2021, pp. 23 ff.

regulations. The parties to the contract are required to keep the formality of a public deed. A record in the public list is optional.

The protection of a weaker spouse and third person is expressly established in the Civil Code in a separate provision. It is regulated that a wedding contract of marital property regime may not, due to its consequences, exclude the spouse's ability to maintain the family and may not affect, by its content or purpose, rights of a third person unless the third person agrees with it; the contract made without the third party's consent has no legal effects for such a party.

The law further establishes that, if during the existence of community property, a debt has arisen for one of the spouses, the creditor may achieve satisfaction in the execution of the judgement recovering the debt from the community property. If a debt has arisen only for one of the spouses against the will of the other spouse (who communicated his or her disagreement to the creditor without unnecessary delay after becoming aware of the debt), the community property may be affected only up to the amount which would be the share of the debtor if the community property were cancelled and divided. This also applies in the case of the spouse's duty to pay maintenance or if the debt comes from an illegal act of one of the spouses, or in the case of the debt of one of the spouses having arisen before entering the marriage.

The Civil Code regulates special protecting provisions according to a regime established by a court decision, to protect the weaker party. In the case of serious reasons, a court shall, on the application of a spouse, cancel community property or reduce its scope. A serious reason means that a spouse's creditor requires his or her claim to be secured in an amount that exceeds the value of what belongs exclusively to that spouse, that a spouse may be considered prodigal, or that the spouse constantly or repeatedly takes unreasonable risks. The fact that a spouse has started pursuing business activities or become a partner of a legal person with unlimited liability may also be a serious reason. Finally, a court decision may not exclude or amend provisions governing the concept of things that form the usual equipment of a family household. Further, the consequences of a court decision on the change, cancellation or renewal of community property must not exclude the ability of a spouse to provide for the family, and its content or purpose may not affect the rights of a third person, unless the third person has consented to the decision.

There are also special rules regarding family dwellings. If the family house or apartment belongs to the community property of the spouses, their position is equal, and protection is provided by the regulations analysed above. If not, the situation of the economically weaker spouse is addressed in the Civil Code by defining the so-called derived legal reason for housing (family dwelling). The law establishes that if the spouses' dwelling is a house or an apartment in which one of the spouses has an exclusive right to live, and if it is a different right from the contractual one, the other spouse obtains the right to housing by entering into marriage. If one of the spouses has an exclusive contractual right to the house or the apartment, especially the lease right, both spouses obtain jointly the lease right ensuring the equality of rights and duties by entering marriage. Nevertheless, it may be contractually agreed in a different way, which is fully in harmony with the principle of autonomy of will. This can be accomplished within the scope of a wedding contract.

Additionally, the Civil Code law regulates the prohibition of the disposal of the family dwelling following similar principles to the rules relating to the equipment of the family household. If at least one of the spouses has the right to dispose of the house or the

apartment in which the family household is situated and the house or the apartment is necessary for the dwelling of the spouses and the family, that spouse must refrain from and prevent anything that may endanger the dwelling or make living in it impossible. A spouse cannot, without the consent of the other spouse, misappropriate such a house or apartment or create a right to the house, to part or the whole of an apartment, the exercise of which is incompatible with the dwelling of the spouse or the family, unless he or she arranges a similar dwelling of the same standard for the other spouse or family. Further, if a spouse acts without consent of the other spouse contrary to this rule, the other spouse may claim invalidity of such legal conduct. And finally, if the spouses have a joint right to a house or an apartment in which the family household of the spouses or of the family is situated, the above-mentioned prohibition applies similarly.³⁸

It is noteworthy that many provisions of the Civil Code mentioned above find their application, particularly in the 'pathological' phase of marriage: in the phase of the *de facto* separation of the spouses, in the period before the dissolution of the marriage, at a time when the content of pre-divorce property agreements and after divorce property contracts are being negotiated, or in the period when one of the spouses resists the divorce in the manner provided for by law.

Regarding divorce, the legal regulations are based on the irretrievable breakdown of marriage which has been the only reason for divorce since 1963. The Civil Code sets forth that marriage may be dissolved if the joint life of the spouses is deeply, permanently and irretrievably broken down and its recovery cannot be expected.³⁹ Unfortunately, the concept of divorce suggested by the Principles of European Family Law regarding Divorce and Maintenance Between Former Spouses⁴⁰ created by the Commission on European Family Law was not considered when preparing the draft Civil Code.⁴¹

If the spouses have agreed about the divorce, or the other spouse has joined the petition for divorce, the court does not examine reasons for the breakdown when the statements of the spouses about the breakdown of their marriage and about their intent to achieve divorce are identical and true.⁴² The following requirements for an uncontested (agreed) divorce must be met: (a) on the day of the commencement of the divorce proceedings, the marriage has lasted for at least one year, and the spouses have not lived together for more than six months; (b) the spouses, who are parents of a minor child without full legal capacity, have agreed on arrangements for the child for the period after the divorce, and the court has approved their agreement;⁴³ (c) the spouses have agreed on the arrangement of their property, their housing, and, if necessary, the maintenance for the period after the divorce. The pre-divorce property agreement must be in writing with officially authenticated signatures, comply with the general requirements for a contract, and respect the special provisions on the division of the matrimonial property aimed at protecting third parties. The settlement of assets and liabilities must not affect any right of a third person. If the rights of a third person have been affected by a settlement, the

38 | Králíčková, Hrušáková and Westphalová, 2022, pp. 107 ff.

39 | Králíčková, Hrušáková and Westphalová, 2020, pp. 426 ff.

40 | Boele-Woelki et al., 2004.

41 | Králíčková, 2021b, pp. 85–98.

42 | The Czech legal regulation does not recognise the 'divorce on the basis of agreement', i.e. consensual divorce unlike the Principles of European Family Law. For more Boele-Woelki et al., 2004.

43 | There should be changes presented earlier, see Králíčková, 2022b, pp. 83–100.

third person may claim that the court declared that the settlement was ineffective with respect to this third person. This means that settlement of debts is effective between spouses only. As the autonomy of the will of the divorcing spouses is paramount, the court deciding on the divorce reviews it, but does not approve it. The contract must be made by notarial deed with a clause of direct enforceability.

However, if one of the spouses does not agree with the divorce, or property and housing settlement, the court must examine the reality of irretrievable breakdown of marriage, and the reasons leading to it. Then, this divorce 'option' must be seen only a 'status solution' – the spouses will be divorced by the court, but there will be neither division nor settlement of their joint property and housing, nor determination of post-divorce alimony. This concept is particularly disadvantageous for the weaker party, namely the economically dependent spouse.

It should be added that since 1998, there have been '*clauses against harshness*' which have not been used very often in practice.⁴⁴ The first protects one of the spouses – the weaker party. The law sets forth that despite the irretrievable breakdown of their living the marriage cannot be dissolved if it is against the interest of the spouse who was not predominantly involved in the breach of marital duties and who would suffer an especially serious harm by the divorce and there are extraordinary circumstances supporting the existence of marriage, unless the spouses have not lived together for three years at least.⁴⁵ The principle of family solidarity is applied in these cases. However, this 'divorce ban' is not absolute. After three years of *de facto* separation of the spouses, the court must make a divorce judgement.

Unless a property and housing agreement is reached soon after the divorce judgement becomes final, it will be the responsibility of the spouses to bring actions before the court in separate proceedings for both the settlement of community property, the regulation and adjustment of the use of the former family home, and where appropriate, maintenance for the period after the divorce. As mentioned regarding the unwed mother of the child or pregnant woman (see above), court proceedings in property matters can

44 | Haderka, 2000, pp. 119–130.

45 | There is another 'clause against harshness' that provides that the couple cannot be divorced due to the interest of a minor child of the spouses. This case requires special reasons. The court examines the child's interest in the existence of the marriage by inquiring of the custodian who is appointed by the court for the proceedings on the arrangement of the child's custody for the period of the divorce (Art. 755, para 2 of CC). This formal protection of children is not used in practise. It must be explained that if the spouses have a minor child, the court will not grant a divorce until the 'special' court dealing with the agenda on minors decides on the 'personal' custody and visiting rights of the child – and for the maintenance for the child – for the period after the divorce (Art. 755, Sub-Sec. 3 of CC). The court dealing with custody of the minor child may decide on or approve the agreement of the spouses in the matter of entrusting the minor child into individual (sole) custody of one parent, alternating (serial) custody or joint custody of the parents (Art. 907 of CC). It is necessary to emphasize that both the parents of the child are principally holders of rights and duties resulting from parental responsibility (Art. 865 and further of CC) and the decision on after-divorce custody only determines who the minor child will live in the common household with (besides the maintenance duty towards the child and visiting rights). However, there should be changes according to the pending drafts; these should make the divorce law simpler and favourable for those spouses who are able to reach mutual agreement in the best interests of the child. For more, see Králíčková, 2022b, pp. 83–100.

only be initiated upon request. In the relevant court proceedings, even a weaker party bears the burden of proof in contested proceedings.

Regarding the property aspects of marriage, if the marriage is terminated by divorce, it is first necessary, to settle and adjust the community property of the spouses. As a rule, the law prescribes agreements between the divorced spouses. When the agreement is not achieved, the court will decide, based on quantitative and qualitative criteria. These include: the interests of unsupported children or the extent to which a spouse was involved in achieving and maintaining the property values falling within the community property of the spouses. The principle of family solidarity applies especially in these cases. However, if no agreement is made within three years of the divorce or petition filed, a legal presumption will be applied. It provides that

If, within three years from reduction, cancellation or extinction of community property, no settlement of what was formerly part of the community property takes place, even by agreement, and no application for settlement by a court decision is filed, the spouses or former spouses are conclusively presumed to have settled as follows: (a) corporeal movable things are owned by the spouse who uses them exclusively as an owner for his own needs or the needs of his family or family household, (b) other corporeal movable things and immovable things are under undivided co-ownership of both spouses; their shares are equal, (c) other property rights, claims and debts belong to both spouses jointly; their shares are equal.

The spouses' dwellings after divorce depend on the legal basis of the marital housing. If the house or apartment used as a family dwelling was in the community property of the spouses, the clause above will be applied. If there is a joint lease of an apartment by the spouses, they may cancel it by rescinding the contract or having recourse to the court that will determine the manner of compensation for the loss of the right – also considering the situation of the unsupported children and the opinion of the lessor, among others. If one of the spouses is an exclusive owner of the house or apartment used for a family dwelling, the other spouse loses the 'derived legal reason' for housing in the divorce and the court may decide about his or her moving out.

Regarding the maintenance duty between divorced spouses, the Civil Code regulates the 'dependence on maintenance', or the incapacity to maintain oneself independently, as a basic prerequisite. Such an incapacity to maintain oneself independently must have its origin in the marriage or in connection with the marriage. In addition, a list of factors should be considered when deciding on maintenance. The court will consider how long the marriage lasted, how long it has been dissolved and whether: (a) the divorced spouse has remained unemployed while not being prevented from finding a job by serious reasons, (b) the divorced spouse could have ensured maintenance by properly managing his or her property, (c) the divorced spouse participated during the marriage in care of the family household, (d) the divorced spouse has not committed a criminal act towards the ex-spouse or his or her close person, or (e) whether there is another, similarly serious reason. The scope of maintenance is achieved through adequate maintenance. The right to maintenance for the period after the divorce terminates only when the beneficiary enters a new marriage or upon the death of the obligor or beneficiary. If a substantial change occurs, the court may decide to decrease, increase, or abolish the mutual duty of maintenance between the divorced spouses. Additionally, the Civil Code establishes an exceptional right to so-called sanctioning maintenance to ensure the same living

standards. The spouse who did not cause the divorce or did not agree to the divorce and who suffered serious harm due to the divorce may file a motion with the court to determine a maintenance duty on the former spouse to the extent that the ex-spouse can have the same living standard. The divorced spouse's right to maintenance may be justified for a period adequate to the situation and for, at most, three years after the divorce.⁴⁶

Registered partnerships among same-sex persons are regulated by the Act on Registered Partnerships. Some rights and duties of registered partners are similar to rights and duties of spouses, for example, mutual maintenance duty based on the same living standard, or former spouses, for example, mutual maintenance duty of the scope of adequate maintenance or the same living standard in the case of sanctioning maintenance. However, in many aspects the rights and duties of registered partners are identical to those living in informal unions, and *de facto* cohabitations.⁴⁷ Next, there is a special rule in the Civil Code that stipulates that 'The provisions of Book One, Book Three and Book Four on marriage and on the rights and duties of spouses apply by analogy to registered partnership and the rights and duties of partners'. In harmony with this special rule, the provision regulating Family Law in Book Two of the Civil Code does not apply to registered partners. This means that, for instance, there is no community property, no common lease of apartments by operation of law, no protection of family dwellings, and no protection by the provisions regulating things forming the usual equipment of the family household in a registered partnership. As mentioned above, there have currently been changes in this area which will come into force on 1 January 2025. Same-sex partnerships will be regulated in the Civil Code, like marriage for opposite-sex couples, and a separate law will be partially repealed. The Civil Code, as amended, will provide that a partnership is a permanent union of two people of the same sex, which is concluded in the same way as marriage. Unless the law or another legal regulation provides otherwise, the provisions on marriage, rights and obligations of spouses, widows and widowers apply *mutatis mutandis* to the partnership and the rights and obligations of the partners (Act No 123/2024 Sb.).

Regardless of how the Civil Code expressly protects the family established by marriage, informal relationships also enjoy protection in connection with the Convention for the Protection of Human Rights and Freedoms as they are guaranteed by the right to respect for private and family life. However, due to the limited concept of 'family' regulated in the Civil Code, there are no articles that establish mutual rights and duties between the cohabitees. For example, there is no duty to help one another, no community property, no protection of family dwellings and of a common household, and no mutual maintenance duty by operation of law.⁴⁸ Unfortunately, there are often no property contracts between cohabitees. This causes many problems for the 'weaker parties' upon the dissolution of the relationship *de facto*. Regarding the unwed mother of the child or the pregnant woman and the divorced spouse (see above), court proceedings in property matters can only be initiated upon request. In the relevant court proceedings, even the weaker party bears the burden of proof in contested proceedings.

However, there is no discrimination against children born out of wedlock. This is why the rights and duties of the parents of any child are equal. If an unmarried man and an

46 | Králíčková, 2009, pp. 281–291.

47 | Holub, 2006, pp. 313 ff.

48 | For a different concept, see Boele-Woelki et al., 2019.

unmarried woman 'have a child together', they both are principally holders of parental responsibility by operation of law without being discriminated against in comparison with married parents of a minor child. However, parenthood must be established legally. There are no differences between the children in the personal or property spheres in the Czech legal order.⁴⁹

6. On the protection of vulnerable adults and supportive measures

The main authors of the Civil Code included a comprehensive and detailed regulation for the protection of vulnerable persons based on universally recognised values and the development of human rights.⁵⁰ In harmony with the Convention on the Rights of Persons with Disabilities, the relevant provisions are included under the heading 'Supportive Measures for Cases where the Ability of an Adult to Make Legal Acts Is Impaired', followed by the provisions governing the 'Restriction of Legal Capacity' and the regulation of 'Representation and Guardianship'.

The Civil Code is based on the principle that every individual should be protected, and that it is necessary to protect the uniqueness, needs, and wishes of the individual. The key underlying principles in this specific area are the autonomy of will of individuals who anticipate their own incapacity to legally act (continuing power of attorney), the freedom of contract of individuals who have difficulties due to their mental disorder (assisted decision-making), as well as family solidarity (representation by a member of the household).

Legal regulations emphasise assisted decision-making, which involves the vulnerable person. As a result, 'Supportive measures for cases where the ability of an adult to make legal acts is impaired' must, as a rule, take precedence over the provisions on guardianship, or even restriction of legal capacity. Furthermore, 'Supportive measures for cases where the ability of an adult to make legal acts is impaired' must be preferred, in particular, over the restriction of legal capacity as a rather radical judicial decision that may be made – *inter alia* – only where less invasive and less restrictive measures would not suffice with respect to the interests of the vulnerable person who would otherwise be at risk of suffering significant harm. The legal capacity of a vulnerable person may be restricted only where such a measure is in the interest of the person and where the person suffers from a mental disorder, not only of a temporary nature, after the person has been seen by the court and always only for a fixed period.

Notably, the Czech legal regulation does not recognise the representation of a vulnerable person *ex lege*, only by operation of law. In all cases that the law provides for, a competent state body must decide on the representation by *ex offio*. Nevertheless, *ex lege* representation is regulated by the Civil Code in several cases. Besides *ex lege* mutual representation between spouses and registered same-sex partners in daily matters, there are representation rights belonging to the minor child's parents within the concept

49 | Králíčková, 2022c, pp. 109–120.

50 | Eliáš and Zuklínová, 2001; Eliáš and Zuklínová, 2005.

of parental responsibility. The parents represent their minor children without full legal capacity through the operation of law in all acts for which the children do not have legal capacity. Once children reach the age of majority, or acquire legal capacity, the parents' right to represent and parental responsibility ceases. Unfortunately, the law does not allow for the 'prolongation' of parental rights and duties belonging to parental responsibility (especially representation) of a child suffering from a serious mental disorder or illness when he or she reaches maturity.

With regard to NGOs, the Shadow Report for the UN Committee on the Rights of Persons with Disabilities⁵¹ critically noted that the appointment of a guardian (in the absence of legal capacity restrictions) is often considered as the only alternative to the restriction of legal capacity.⁵² In time, all supportive measures may be applied more frequently in decision-making in practice as a result of raising awareness of their benefits for vulnerable persons among professionals and the general public. However, when a vulnerable person's family is functioning, the family members take on the vulnerable person, becoming their guardians, supporters, and even personal caregivers in the family environment. They are usually the spouses, partners, children, and parents of vulnerable individuals. However, if family solidarity does not work, the state, municipalities, and other actors must step in and provide all-round care for vulnerable people in accordance with the above human rights standards.

7. Conclusion

The article is devoted to many aspects of vulnerability, special instruments, and supportive and protective measures, according to the Czech Civil Code, reflecting the principle of family solidarity as a universal principle. It is noteworthy that anyone can be a vulnerable person due to circumstances, and that vulnerability deserves special attention, not only in private law.⁵³ It is primarily family members who should provide vulnerable people with respect, assistance, support, and protection. However, the autonomy of the will of these vulnerable persons must always be respected and their best interests are of paramount consideration.

51 | See Česka Republika, 2011.

52 | Králíčková et al., 2023.

53 | Šimáčková, 2019, pp. 18–25.

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THE COMPLEX LEGAL FRAMEWORK OF ASSISTED REPRODUCTIVE TECHNIQUES AND ITS ROLE IN ADDRESSING DEMOGRAPHIC CHALLENGES: A HUNGARIAN PERSPECTIVE

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Edit Sápi¹

ABSTRACT

European society is ageing, as disclosed by many research papers and reports, and is marked by an increase in the number of older adults and a decrease in childbirth rate. Infertility is another related problem, with approximately 12-15% of couples unable to bear children. This has further decreased childbirth rates. However, current medical advancements can help infertile couples to bear child(ren), even if the success rate of medically assisted reproductive techniques (ART) is not 100%. The literature emphasises that as the age of childbearing increases, fertility tends to decrease. This tendency is also reflected in the success rate of ART, as 'despite the continuous technological improvements, ART cannot fully compensate for the age-related decline in female reproductive performance because the effectiveness of ART also declines with age'.² This article discusses the legal background of ART in the Hungarian legal environment, the acknowledged types and institutional background of ART, and the available state aids for ART. Focusing mainly on the Hungarian legal regime and legal framework, at some points, it also offers examples from other nations (mostly Central European countries).

KEYWORDS

assisted reproductive techniques
infertility
IVF procedure
infertility clinics
demographic challenges

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2 | Lazzari, 2023, p. 2.



1. Introductory thoughts

Grief is perhaps the deepest of human emotions. Several studies have shown that the psychological effect of infertility on an infertile person is similar to that of grief,³ which is therefore called ‘infertility grief’. The exact causes of infertility can be traced to a variety of diseases and disorders. Studies mention that infertility can occur in both men and women, and that the number of infertile persons and couples might further increase in the future.⁴ The reasons for infertility and approaches towards treating it are also significant. While somatic infertility can be detected by organ examination, idiopathic infertility is of unknown origin and cannot be detected by diagnostic means. This is compounded by trends caused by changes in modern lifestyles and family planning,⁵ with couples seeking to enjoy their independence and achieve financial security first before getting married at a later stage in life.⁶ In this context, it is worth pointing out that modern lifestyles and the need to have children later in life to achieve existential security produce their own demographic effects.⁷ Creating existential security by having children is understandably a cornerstone of couples’ lives. The family policy of the state in question also plays a major role in this choice in terms of the state encouraging childbearing by (partially) shouldering the financial burden that would otherwise delay the process of childbearing.⁸

The elimination and treatment of infertility depends on the medical reason for the infertility. If it is associated with an underlying condition that is causing the infertility, and this condition can be treated medically, then it is possible that the ‘collateral infertility’ can be eliminated. If the cause of infertility is not treatable, assisted reproductive techniques (ART) can help a couple bear children. Notwithstanding this, it must be pointed out, that with rising infertility rates reproductive techniques are becoming increasingly expensive and are rarely 100% successful.

This article focuses on the current Hungarian legal environment and institutional background of ART. A short introduction of the types of ART that are accepted and regulated in the Hungarian legal system is followed by outlining the legal background of ART. The complex legal environment of the abovementioned procedures, which contains both public and private law elements, is discussed next. In this regard, the substantive rules of the Family Law Book of Act V of 2013 on the Civil Code (hereinafter called the Civil Code),

3 | For complete details, see: Szijártó, 2023, pp. 111–144; Castro et al., 2021, pp. 1–13; Szigeti and Konkoly-Thege, 2012b, pp. 561–580, 713–731; Jarnagin, Thomas, and Herscher, 2023; McBain, 2019; Szigeti, Konkoly-Thege, and Lórinicz, 2014, pp. 406–414.

4 | Navratyil, 2011b, p. 110.

5 | Lenkovics, 2022, pp. 16–28.

6 | Navratyil, 2005b.

7 | Reports show that environmental and genetic influences can have an impact on infertility in both men and women:

In men, as reports point out, infections, smoking, and alcohol consumption all have a negative impact on the viability of sperm, which are already in short supply. The amount of sperm in young men today is only half that of young men half a century ago. The reasons for this are not fully understood, but the fashion of wearing jeans is considered to be an important environmental influence, as jeans keep the body warm all the time, which is the biggest enemy of sperm development. Other lifestyle influences and civilisation practices are also likely to play a role in this worrying process. (author’s translation) Kovács, 2020.

8 | For a more detailed discussion on the topic, see Barzó, 2023, pp. 23–41.

the regulations of Act CLIV of 1997 on health care (hereinafter the Healthcare Act),⁹ Act C of 2012 on the Criminal Code (hereinafter the Criminal Code), and further provisions of sectoral legislation are explained in depth.

The current article focuses not only on the legal aspects of ART, but also on their relationship with demographic issues and solutions. The introduction of the institutional background is vital, as the appropriateness of the institutional framework of a given area can promote the effectiveness of the whole system. According a report by the World Health Organization, 17.5% of the adult population faces infertility issues.¹⁰ Both national and international statistics show that use of ART is increasing worldwide. The success of ART has been instrumental in increasing the fertility rates. This article approaches the topic not only from a jurisprudential point of view – with the range of literature used not limited to legal literature – but also from sociological and medical perspectives. Further, interviews and announcements published on the Internet are used to shed light on the institutional and infrastructural background related to infertility treatment.

2. Types of assisted reproductive techniques (ART) acknowledged in the Hungarian legal system

The acknowledged, authorised assisted reproductive procedures in Hungary are mainly regulated by the Healthcare Act.¹¹ As a general condition, assisted reproduction may be performed by a healthcare service provider, which shall mean all healthcare activities may be carried out in possession of an operating license issued by the government healthcare administration body or upon registration by the government healthcare administration body.¹² The Act also adds, as a professional and institutional requirement, that assisted reproduction may be performed by duly licensed state-maintained healthcare service providers and clinical centres provided for in the Act on Public-benefit Trusts Carrying Out Public Service Functions, comprising a part of the integrated public healthcare system.¹³ If a doctor carries out such an intervention without a licence, this operation can lead to serious sanctions, including being charged with a criminal offence. Assisted reproduction may be performed on a heterosexual couple in a marital relationship or in de facto cohabitation, if their relationship is unlikely to produce a healthy child naturally due to health reasons (infertility) of either party.¹⁴ In the case of unmarried couples, assisted reproduction procedure may be performed only if neither one of them is married.¹⁵

The Hungarian legal system permits special procedures for assisted reproduction as follows:

9 | Healthcare Act, Art. 166.

10 | World Health Organization, 2023, p. V.

11 | Healthcare Act. For a detailed introduction of the authorised procedures in Hungary, see Fráter-Bihari, 2023.

12 | Healthcare Act, Art. 3 (e).

13 | Healthcare Act, Art. 169 (2).

14 | For details, see: Barzó, 2017, pp. 286–289.

15 | Healthcare Act, Art. 167 (1).

- a) artificial insemination with the gametes of the spouse or partner or with donated gametes,
- b) in vitro fertilisation and embryo implantation,
- c) in vitro fertilisation and embryo implantation with donated gametes,
- d) embryo implantation using donated embryos,
- e) other methods promoting fertilisation and fecundability of the female gamete, as well as the binding and development of the fertilised gamete.

The abovementioned list is an exclusive specification; hence, no other type of assisted reproduction can be performed. The legal literature emphasises that the exhaustive classification is rooted in the ethical and moral aspect of reproduction itself. Since technological developments are extremely rapid in this field, new procedures in practice may emerge; however, new procedures – besides the existing ones – can raise moral and ethical inconsistencies and issues. Therefore, any new procedures can be permitted only if they are morally acceptable and explicitly declared by the legislator.¹⁶ The last category mentioned in the abovementioned list, (point e), encompasses, for example, hormonal preparation prior to the procedures and genetic testing; therefore, it comprises the preparatory phase for the procedures listed.

Among the procedures, artificial insemination is the oldest and most commonly known procedure, which was earlier known as artificial reproduction. However, with the extended range of assisted reproductive procedures that was later developed, thanks to technological and medical advancements, artificial insemination became 'only' a sub-category of assisted reproductive technologies. In the case of artificial insemination, the egg is fertilised inside the woman's body. This procedure has currently two subtypes, depending on the source of the sperm. If the sperm is from the spouse or the de facto cohabitant partner, the procedure is called as artificial insemination by husband (AIH). The second subtype is Artificial Insemination by Donor (AID), which means that insemination is from a male donor. In opposition to in vitro fertilisation, artificial insemination is less invasive and therefore significantly less risky¹⁷ and less exhausting for the woman's body (and mind).

In vitro fertilisation procedure involves extracting the woman's ovum, fertilising the egg outside the body, and then transferring the fertilised egg back into the woman's uterus at around 6-8 weeks (embryo transfer). This procedure can be used to treat co-infertility of both members of the couple, infertility in either the man or the woman, couples with a serious hereditary genetic condition or disease in one or both of them, and if assisted reproduction with eggs or sperm has repeatedly failed. This procedure causes more stress for the woman because she has to be on hormone medication and should undergo other hormone therapies before the implantation. Other methods based on the diversity of medical solutions include homologous fertilisation and heterologous fertilisation. If the parties do not have a gamete, it is possible to use a donor.

The procedure of embryo implantation using donated embryos involves supernumerary embryos from an in vitro process. The original purpose of creating supernumerary embryos was that if for some reason the first transplantation does not result in pregnancy, the woman does not have to undergo repeated hormone treatment and in vitro

16 | Dósa, 2023.

17 | Dósa, 2023.

fertilisation before the next attempt; the previously created embryos are stored until a later date and then retransplanted. However, if the first attempt is successful, the couple are entitled to offer the embryo for re-implantation to another infertile couple.¹⁸

Within the framework of permitted ART, highlighting the exclusionary circumstances is also significant. The Healthcare Act provides rules regarding prohibited and restricted versions of medically assisted reproduction as well. A gamete from a dead body, or a cadaver, or from a dead foetus may not be used for assisted reproduction. Correspondingly, the Criminal Code also prohibits this action. 'Use of human gametes that are prohibited' is considered a felony as per the legal order of reproductive procedures listed in the Healthcare Act. The seriousness of the offence also justifies the sanctioning of its preparation.¹⁹

The Act also provides that assisted reproduction – if the female gamete has already been fertilised – may be continued after a marriage or de facto cohabitant partnership has ended for a woman, who has again become single. However, in the case of in vitro fertilisation where the embryo has not yet been transferred, the spouses (partners) shall, before the commencement of assisted reproduction, expressly exclude in advance the continuation of the procedure in a joint statement made according to Subsection (1) of Section 168 in the event of the spouse's (partner's) death.²⁰ This means that, if the man dies, the previously fertilised egg can be retransplanted – unless the parties have made a declaration of exclusion – but the deceased husband's or partner's gametes cannot be used. Notwithstanding the above rules, the legal literature refers to the fact that the lack of specification regarding the time limit and the use of frozen gametes and on what should be done with the gametes after the death of the depositor can be considered a shortcoming of the Healthcare Act in this area.²¹

In connection with ART, discussions on issues of surrogacy and nursing pregnancy (altruistic version of surrogacy) are unavoidable, as the practical aspects of medically assisted reproduction can lead to interpretations of surrogacy and nursing pregnancy. According to the ancient principle of 'Mater semper certa est', surrogacy is not accepted in Hungary.²² The law treated motherhood as a fact and not as a presumption for a long time. The Civil Code chooses between the biological mother and the genetic mother in accordance with international practice and considers the woman who gives birth to the child as the mother. Although the Civil Code does not regulate the recognition of maternity, it may be appropriate in case of lack of maternal status (e.g., if the mother of an exposed or found child demands for the child) if the mother demands for the child within six weeks and can prove beyond doubt that she is the real, biological mother of the child. Regarding surrogacy and nursing pregnancy, a woman who has asked another woman to carry an embryo derived from her ovum cannot be regarded as a mother.²³ In addition, a direct, public law prohibition for surrogacy can be found in the Criminal Code as well; the felony of 'Illegal Use of a Human Body' states as follows: 'Any person who illegally acquires, sells or trades for pecuniary gain human genes, cells, gametes, embryos, organs, tissues, or a cadaver or

18 | Navratyil, 2005a, p. 643.

19 | Official Justification of the Criminal Code.

20 | Healthcare Act, Art. 167 (2)–(3).

21 | Navratyil, 2011a, p. 367.

22 | Hungarian Civil Code, Art. 4:115.

23 | Barzó, 2021, p. 309.

part(s) of such, or a deceased fetus, is guilty of a felony punishable by imprisonment not exceeding three years'.²⁴

3. The legal background for artificial reproduction

| 3.1. *The complex regulations of the Healthcare Act, Civil Code, and Criminal Code*

In many cases, the legal status of these new methods was unclear; they were introduced and used effectively, but whether it was an experiment, a service, or a treatment was unclear for a long time. It was only in the last quarter of the 1900s that legislation began to take control: the first was the Australian legislation in 1984, pioneered in Europe by Swedish scientists.²⁵

In dealing with the legal background of medically assisted procreation, we are faced with a complex framework encompassing legal sources from higher level (acts) and sectoral legislation (mainly government decrees).

First, the abovementioned Healthcare Act provides for the most important concepts and the medical legal environment, conditions, and restrictions involved in assisted reproduction. The relevant provisions of the Act directly relate to the health, integrity, and status of embryos and fetuses. The maximum possible time for conducting specific procedures or research on embryos and human reproduction is defined and delineated in the regulatory framework.²⁶ A general requirement as per the Act for access to any assisted reproductive procedure is a joint request by a married or de facto cohabitant heterosexual couple, given that the reproductive procedure is intended to treat infertility fundamentally as a disease.

The Civil Code lists the legal facts generating the status in the order in which they are to be applied as, first, the marital status of the woman; second, the special procedures for medically assisted reproduction in the case of de facto partners; third, the acknowledgment of paternity by a legal statement; and, finally, the determination of paternity by a court decision. So long as paternity can be established on the basis of a presumption that is previous in the order, the later presumptions of paternity cannot be applied.²⁷ It is an exception from the general rule if the presumed time of conception – 300 days – has not lapsed between the time when the mother's previous marriage was terminated and the date when the child was born from a human reproduction procedure. In this case, it is not the spouse in the first place in the order, but the de facto partner of the mother who is considered the child's father. The same situation arises if, following a successful reproduction procedure between de facto cohabitants, the mother enters into marriage with another man before the birth of the child. This marriage also does not invoke the presumption of paternity in respect of the husband.²⁸ The system of presumptions of paternity is uniform, that is, they have the same legal consequences regardless of whether the child was born

24 | Criminal Code, Art. 175.

25 | Szijártó, 2023, p. 114; Navratyil, 2011b, p. 116.

26 | Official Justification of the Healthcare Act.

27 | Szeibert, 2013, p. 30.

28 | Civil Code, Art. 4:100 (2)–(3).

from marriage or out of wedlock. As mentioned above, the joint request of the de facto partner in a legal statement represents conclusive evidence, as the applicants accept that the family status of their child born in this way is exactly the same as that of a biological child.²⁹ However, in the case of de facto cohabitation, a reproduction procedure may be carried out only if neither of the de facto cohabitants is in a marital relationship. The reason for this is that the paternal status of a child born from the process of reproduction between spouses is based on the marriage of the mother; therefore, the reproduction procedure by itself creates paternal status only in the case of de facto partners. In sum, the reproductive process gives rise to a presumption of paternity only if the applicants are unmarried partners of opposite sex, neither of the applicants is married, the male partner is involved in the reproductive process, and the child's origin is a consequence of the reproductive process.³⁰ In the case of a single woman, the reproductive process can be carried out if, due to the woman's age or state of health (infertility), it is unlikely that she would be able to bear a child naturally.³¹ Consequently, the legislator also allows – in exceptional and justified cases – for a single woman to participate exclusively in the procedure. However, the possibility of participating in the procedure is related to the concept of infertility (if unprotected sexual relationship does not result in fertilisation for a year). To apply for the procedure as a single woman, she is obliged to provide a proven history of infertility, with two medical specialist opinions on infertility. Therefore, it may be inferred that the requirement of the infertility clause makes it almost impossible for single women to apply for the procedure, as in most cases a woman is single because she does not have a stable relationship, which includes a regular sexual relationship.

The Criminal Code also contains some felonies that can be interpreted in connection with medically assisted reproductive techniques. As the official justification of the Criminal Code refers to the abovementioned fact, the development of modern medicine has opened new horizons for biomedical research and genetics, which were unknown in former traditional medical practices. With the new developments, offences against medical intervention, medical research, and medical self-determination were introduced into the Criminal Code in 1998. The related felonies can be found in the Chapter XVI, under the title 'Medical procedures and criminal offenses against the order of research' and are listed as follows: Procedures on the Human Genome,³² Illegal Use of Human Gametes,³³ Violation of the Rules of Experimental Research with Embryos or Gametes,³⁴ Producing Genetically Identical Human Individuals,³⁵ and Illegal Use of a Human Body.³⁶

| 3.2. Sectoral legislation of specific issues

In terms of sectoral legislation, the following legal sources are to be mentioned:

- | Government Decree No. 96/2003 (VII 15) on the general conditions for the provision of health services and the procedure for granting of operating licences,

29 | Somfai, 2006, p. 11.

30 | Civil Code, Art. 4:100.

31 | Healthcare Act, Art. 167 (4).

32 | Criminal Code, Art. 168.

33 | Criminal Code, Art. 169.

34 | Criminal Code, Arts. 172–173.

35 | Criminal Code, Art. 174.

36 | Criminal Code, Art. 175.

- | ESzCsM Decree No. 60/2003 (X 20) on the minimum professional requirements for the provision of health services,
- | NM Decree No. 30/1998 (VI 24) on the detailed rules for conducting specific procedures for human reproduction and for the disposal of and frozen storage of gametes and embryos,
- | NM Decree No. 49/1997 (XII 17) on infertility treatment procedures available under compulsory health insurance,
- | Government Decree No. 339/2008 (XII 30) on the scope, manner, and place of publication, and the monitoring of the mandatory publication of performance data and statistics on human reproductive procedures,
- | Government Decision No. 1729/2019 (XII 19) on the National Human Reproduction Programme.

4. The institutional and financial background of assisted reproductive techniques in Hungary: from a demographic perspective

| 4.1. The institutional background

In 2019, the Government Decision on the National Human Reproduction Programme, Decision No. 1729/2019 (XII 19), was enacted, under which, the deadline for the establishment of a framework for the National Human Reproduction Programme was July 2020. The next year, Government Decision No. 1011/2020 (I 31) for the execution of the National Human Reproduction Programme was enacted. According to the objects of both Government Decisions, the priority goals to be achieved, as set by the legislator, was realising Hungary's demographic stability and ensuring equal access to human reproductive procedures, which led to the enactment of laws.

In terms of the institutional background, the National Laboratory for Human Reproduction, located in Pécs, is mentioned as the main research centre for assisted reproduction. In 2020, when the National Laboratory for Human Reproduction was established, reports pointed out that approximately between 100 and 150 thousand couples in the country suffer from infertility issues, which means 300 thousand missing children in terms of the average family size.³⁷ The fundamental objective of the National Laboratory for Human Reproduction is to contribute to increase the success rate of infertility treatment by increasing the effectiveness of ART and professionally manage ongoing theoretical and clinical research, tenders, and professional programmes in the field of human reproduction at the University of Pécs. Within the objectives of the Laboratory, developing research programmes, setting up research teams, and sharing knowledge within and outside the University of Pécs are mentioned.³⁸ With regard to the scientific history of the University of Pécs, the National Research Centre for Reproductive Methodology was established in the summer of 2023.³⁹ As of 1 January 2022, the Directorate of Human

37 | Kovács, 2020.

38 | Humán Reprodukció Nemzeti Laboratórium, 2024.

39 | Research Centre for National Reproductive Methodology to be established at UP, 2022.

Reproduction was established with the objective of developing treatment systems for fertility and reproductive disorders.⁴⁰

In terms of the institutional background, it is also important to focus not only on the research facilities, but also on the issue that institutions are currently entitled to carry out assisted reproduction procedures. On the one hand, as was mentioned earlier, the legislator stipulates that a medically assisted reproductive procedure can be carried out only on the recommendation of an appropriate medical specialist and a healthcare provider with an operating licence. However, in the past, a significant proportion of reproductive procedures had been carried out by privately owned healthcare providers; this situation changed significantly in 2021. As of 1 July 2022, couples who cannot have a child naturally for some reason will no longer be able to register privately in hospitals. Under the Government Decree of 2022, the government nationalised all private hospitals for reproductive procedures. Consequently, the previously privately run providers have been bought out by the state, citing the need to effectively halt population decline and make infertility treatment widely available as the aim of the measure. However, these measures have divided both public opinion and the health sector, considering that there are 12 infertility centres in the country, 7 in Budapest and 5 in rural areas. From the institutions in the capital, the Saint John's Hospital performs the most IVF implantations, approximately 1,500 per year.

| 4.2. *Financial framework for assisted reproductive procedures*

As mentioned earlier, ART are expensive procedures; not just the procedure itself, but the associated hormone treatments and medicines are also expensive. In Hungary, infertility centres offer free treatment methods considered medically necessary or compulsory, from the simplest to the most specialised, and the interventions are financed by the Health Insurance Fund. In parallel with the nationalisation of infertility clinics, full treatment and care is free of charge; therefore, under the current regulation, only state-run centres can provide assisted reproductive techniques, but the procedure is entirely free of charge.

In 2023, BM Decree 34/2023 (VIII 24) amended certain ministerial decrees: on health insurance: it amended Decree No. 30/1998 (VI 24) and NM Decree No. 49/1997 (XII 17) on infertility treatment procedures available under compulsory health insurance. Consequently, the currently effective text of NM Decree No. 49/1997 declares that special procedures for human reproduction may be provided free of charge only on medical indication by a healthcare provider financed for that purpose by the Health Insurance Fund. In practice, it means, that, according to 2 § of the NM Decree, stimulation for egg retrieval through medicine may be carried out in up to five procedures and insemination in up to six procedures. Within the framework of public care, up to the age of 45, five implantations are free of charge, and if at least one child is born, a further four implantations are funded by social security. Another element of the new regulation is the plan to set up a National Registry of Obstetric, Perinatal, and Human Reproduction, which will include real-time data on stimulation, implantation, live births and, later, the health of children born through an IVF procedure.⁴¹ The abovementioned Register would also be essential to

40 | A vágyott gyermekekért, 2024.

41 | Art. 16 of the BM Decree No. 70/2023 (XII 23) amends certain ministerial decrees on healthcare and health insurance relating to human reproduction procedures.

ensure transparency in the field, as in the last few years, almost no real data are available on the number and success rates of assisted reproductive procedures.

5. Summary

The topic of assisted reproductive techniques is sensitive, with connotations of moral-ethical, religious, and conscience issues besides legal ones. However, it is noteworthy that ART – and surrogacy in relation to them – also display international diversity, implying that their use is not restricted by national borders. Admittedly, several Central European countries – for instance Poland,⁴² the Czech Republic,⁴³ Slovenia,⁴⁴ Slovakia,⁴⁵ Serbia,⁴⁶ and Croatia⁴⁷ – have similar regulations on the main principles of assisted reproductive procedures and a mainly prohibitive focus on the issue of surrogacy because the number of people who use reproductive tourism is on the increase. Outside the European Union, many regions that follow permissive regulations and their health institutions provide this service in practice.⁴⁸

As mentioned earlier, the state takeover of private infertility clinics performing reproductive procedures started about two years ago, as a result of which it is no longer possible to apply for such a procedure at a privately owned institution in Hungary. The complete system conversion has made social security support available for the complete treatment, including medicines and hormone therapy. At the same time, it has been reported that this measure was not received with enthusiasm unanimously. Pro and con arguments regarding the transformation of the system began in public life. As was understood during the preparation of the legislation, the government's intention in nationalising the process was to promote childbirth in the country and to provide a more transparent framework and institutional background to the procedures. The financial assistance (making it free if the legal conditions are met) is clearly an advantage of the new system since these procedures could cost up to 1-2 million forints although their success rate was not 100%. Simultaneously, (considering both the pro and con arguments) the biggest advantage may actually be the source of disadvantage at the same time. Making something free is always a double-edged sword. The free service has led to long waiting lists, with people going to private hospitals of neighbouring countries (e.g., Slovakia and the Czech Republic), where they can avail care and fast treatment with shorter waiting times at about the same price as was earlier in Hungary. Additionally, there are groups that are completely deprived of free access, such as women over 45 or those who have already undergone five implantations. So, in principle, the intention and aim are certainly laudable, but the effectiveness cannot be measured in a matter of 1-2 years, as the IVF

42 | Andrzejewski, 2021, pp. 167–168.

43 | Králičková, 2021, pp. 94–99.

44 | Kraljić, 2021, pp. 276–281.

45 | Garayová, 2021, pp. 221–254.

46 | Kovaček Stanić, 2021a, pp. 203–207; Kovaček Stanić, 2013, pp. 35–57; Kovaček Stanić, 2014, pp. 151–169; Kovaček Stanić and Samardžić, 2019, pp. 235–250; Kovaček Stanić, 2021b, pp. 199–210.

47 | Korać Graovac, 2021, pp. 66–68; Korać Graovac, 1999, pp. 229–238.

48 | Navratyil, 2017, p. 105.

procedure itself takes time. Hopefully, the financial resources invested in the procedure will yield the expected results and the desired number of children will be born.

As Zoltán Navratyil highlights,

Human reproduction, parenthood and family are things that are defined by traditions deeply rooted in most people, traditions that are mostly based on the paradigm of the family as a fundamental element of society, in which childbearing takes place in the complementary community of man and woman, in its 'intimate mystery', from which all others are excluded.⁴⁹

The state can therefore contribute to increasing the success of the procedures through legal regulations, subsidies, and the establishment of an appropriate institutional system.

Regarding the complexity of the abovementioned issues, unfortunately, the topic of medically assisted reproductive techniques is taboo in many cases even under the current circumstances and within the advanced technological environment. The dilemma of choosing this approach can also result in negative psychological effects on couples who want to have children but cannot do so in the natural way. At the same time, with the number of infertile couples increasing, couples entitled to requiring IVF treatment are correspondingly increasing. Although the financial support by the state that couples can use for reproductive procedures is extremely helpful, it is not everything. Mental and spiritual balance, which is rooted in social attitude and acceptance, is also an important factor in the success rate of such procedures. As the leader of the Directorate of Human Reproduction stressed, compassion and acceptance play a key role here and in the assessment of infertility.⁵⁰

49 | Navratyil, 2005a, p. 641.

50 | Folyamatosan zajlik a meddőségi ellátórendszer kialakítása, 2023.

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GOVERNMENT SOCIAL PROGRAMMES TASKED WITH FULFILLING THE OBLIGATION OF PUBLIC AUTHORITIES TO PROVIDE SPECIAL ASSISTANCE TO WOMEN BEFORE AND AFTER CHILDBIRTH

Paweł Sobczyk¹

ABSTRACT

In Article 71(2) of the Constitution of the Republic of Poland of 2 April 1997, the Polish legislator addresses the mother's right to special assistance from public authorities before and after childbirth. However, the legislator did not concretise the forms and scope of this assistance to the mother but referred in this respect to the law.

The development of social programmes took place, especially in the middle of the second decade of the 21st century. The social pro-family programmes are implemented at different levels of public authority, including state and local government. This is a realisation of the constitutional obligation of public authorities to provide assistance while also facilitating the support and distribution of financial resources earmarked for this purpose.

The programmes have clearly had a positive impact on the financial situation of families, especially those with many children and who have been on the so-called 'poverty line' for many years.

KEYWORDS

*child
Constitution
mother
social programmes*

1. Introduction

In Article 71(2) of the Constitution of the Republic of Poland of 2 April 1997, the Polish legislator addresses the mother's right to special assistance from public authorities before and after childbirth. However, the legislator did not concretise the forms and scope of assistance to the mother before and after childbirth but referred in this respect

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to the law. The phrase 'a law' as indicated in the singular, does not necessarily refer to a single statute according to the jurisprudence of the Constitutional Tribunal and the views of representatives of the doctrine. On the contrary, the essence of the formula 'shall be determined by a law', which appears in many provisions of the Constitution, is first and foremost an indication of the rank of the normative act in which the issues in question are to be regulated. This also applies to the assistance provided by public authorities to the mother before and after childbirth. The lack of a single comprehensive law regulating these issues in Poland does not mean that the recommendation of the legislator² is not implemented. However, it is of key importance to state that:

the ordinary legislator has a wide discretion in specifying such assistance, both in terms of the choice of measures and in defining the scope of individual benefits. Nor is there any obstacle to the legislator differentiating the scope and forms of assistance depending on the material and social situation of the mother, as long as the general requirements deriving from the principle of equality are met. Finally, there is no obstacle to the legislator changing (also to the detriment of the mother) the scope of the aid, in particular if this is due to the public finance situation. Of course, vested rights must be respected, so the margin of interference in the benefits to which women who are already pregnant or who have already given birth are entitled is much narrower.³

In the context of the title issue, attention should also be drawn to the content of Article 68(3) of the Constitution of the Republic of Poland, in which the legislator formulated the obligation of public authorities to provide special health care to children, pregnant women, persons with disabilities and the elderly.⁴ As noted by the Constitutional Court, 'special health care *ex definitione* goes beyond the sphere of ordinary, universal health care, so it should be intensified, more intensive or more specialised, i.e. adapted to the specific needs characteristic of a given group of subjects'.⁵

This provision is an exception to the principle of equality in citizens' access to publicly financed health care services referred to in Article 68(2) of the Constitution. Nevertheless, supra-standard, privileged health care for, *inter alia*, pregnant women and children is understandable.⁶ In the opinion of the Constitutional Tribunal, the indicated subjects have, for obvious reasons, an increased need for health care services.⁷

Similarly, as in the case of Article 71(2) of the Constitution, the legislator did not indicate the forms and means of providing special health care but limited the definition to 'special health care', taking into account the recipients preferences in terms of receiving health care services preferences.

This article discusses the most important legal solutions of statutory rank, through which public authorities implement their constitutional obligation to provide special assistance to the mother before and after childbirth. A review of the programmes will

2 | Szczepaniak-Sienniak, 2015, p. 103.

3 | Garlicki and Derlatka, 2016.

4 | Dercz, 2016.

5 | Judgment of the Constitutional Tribunal of 22 July 2008, ref. no. K 24/07, Dz.U. 2008 no. 138 item 874.

6 | Dercz, 2016.

7 | Judgment of the Constitutional Tribunal of 22 July 2008, ref. no. K 24/07, Dz.U. 2008 no. 138 item 874.

make it possible to answer questions about the quality of the state's family policy in this area, to indicate the strengths and weaknesses of the system and, possibly, to formulate postulates *de lege ferenda*. Given the framework of this study and the fact that it is based on the norm stemming from Article 71(2) of the Constitution of the Republic of Poland and not Article 68, legal solutions concerning children with disabilities have not been included. These will be addressed in a separate study by the author.⁸

It follows from the provisions of the Constitution of the Republic of Poland that the purpose of all actions taken by the state to protect the family should be to create such conditions for its existence that it can fully perform the functions ascribed to it.⁹ Today, one of the main instruments of family policy is direct cash benefits provided for families. In recent years, several new monetary benefits for families have been introduced in Poland, primarily aimed at improving the material situation of large families.¹⁰

2. Family 500+ / Family 800+ programmes¹¹

The Family 500+ programme has been in force since 1 April 2016 and aims to improve the material situation of families. It is a monetary child-rearing benefit, the purpose of which is to partially cover expenses related to raising a child, including childcare and meeting the child's living needs. The funds are tax-free, do not count as income when determining entitlement to benefits from other support schemes and are exempt from bailiff enforcement. This is why the programme is referred to as the financial foundation of family support.¹²

According to data from April 2023, provided by the Ministry of Family and Social Policy, more than 6.5 million children benefit from the programme, and the cost of this support in 2023 amounted to PLN 40.2 billion.¹³ Since the programme's inception, more than PLN 223 billion has gone to families.¹⁴ Minister Marlena Małag stressed that:

We all need to understand that the welfare and security of Polish families is our common interest. There can be no future and no development if we do not invest in what is most important—in human capital, in the future of future generations. We understand this, we have changed social policy, and the symbolic beginning of these changes was the introduction of the Family 500+ programme.¹⁵

It should be noted that the programme is aimed at families with dependent children up to the age of 18. In 2016–2019, the benefit was available for each second and subsequent child regardless of family income, and for the first child if the income criterion was met. As of July 2019, the programme applies in a modified form, in that the benefit is available

8 | Mendecka, 2021, pp. 82–96.

9 | Maziarczuk, 2020, p. 60.

10 | Feja-Paszkiewicz, 2020, pp. 182–195.

11 | Ministry of Family, Labour and Social Policy, 2021.

12 | Gajewicz, 2018, pp. 76–86.

13 | Szarfenberg, 2016.

14 | Ministry of Family and Social Policy, 2021.

15 | Herbut, 2023.

for each child regardless of the income earned by the family. The marital status of the parents is irrelevant, which means that married parents, parents in informal relationships and single parents all receive the benefit.

In the case of divorced parents, entitlement to child benefit depends on the child custody arrangement. If the child resides exclusively with one parent, and the child's maintenance is the responsibility of that parent, then only that parent is entitled to child benefit. However, if a court has established alternating custody with both divorced, separated or non-cohabiting parents sharing custody for comparable and recurring periods, each parent is entitled to half of the benefit, which is typically PLN 250 per month.

Those eligible to apply for and receive the benefit include the child's mother or father; the child's *de facto* guardian (i.e. the person who takes care of the child and who has applied to the guardianship court to adopt the child), provided the child cohabits with and is dependent on the mother, father or factual guardian; the legal guardian of the child; directors of social welfare homes; foster families; persons running family-type children's homes and directors of care and educational institutions, regional care and therapeutic institutions and intervention pre-adoption centres. It should also be clarified that, in accordance with the act, the benefit is available to both Polish citizens and foreigners who meet the conditions indicated in the legislation.

As of 1 January 2022, the entity responsible for the implementation of the programme is the Social Insurance Institution (Zakład Ubezpieczeń Społecznych). Its task is to accept applications for child benefit, and then process and disburse this benefit. In addition, the voivode¹⁶ holds powers regarding child benefit in relation to the Republic of Poland's participation in the coordination of social security systems when individuals move between countries of the European Union, the European Economic Area, the Swiss Confederation and the United Kingdom of Great Britain and Ireland.¹⁷

Until 31 May 2022, these tasks were carried out by existing authorities: municipalities handled matters of child benefit districts handled matters of upbringing allowances for children in foster care, and voivodes addressed matters requiring decisions related to the coordination of social security systems. Until the end of 2023, the benefit amount was PLN 500.00, and from 1 January 2024, the amount has been increased to PLN 800.00 and is paid once a month. The right to the upbringing benefit is determined for an annual benefit period lasting from 1 June to 31 May of the following calendar year.

The application for the benefit can only be submitted online via the PUE ZUS portal, the Ministry of the Family *Emp@tia* portal or electronic banking. However, it is important to be aware of the deadlines in order to receive the funds for the entire period. Notably, the entire procedure is conducted electronically, and in the case of granting a benefit, no decision is required, and the funds are paid out to the bank account number indicated in the application.

16 | Administrative body in Poland. The voivode is a representative of the Council of Ministers in the voivodship and the head of the combined government administration in the voivodship. The organizational and legal position of the voivode is regulated by the Constitution of the Republic of Poland of 2 April 1997 (Article 152) and the Act of 23 January 2009 on the Voivode and Government Administration in the Voivodship (Dz.U. of 2023, item 190).

17 | See Article 16 of the Act of 11 February 2016 on State Aid in Upbringing of Children (Dz.U. of 2016, item 195).

The legal basis that determines the conditions for granting the benefit in question is the Act of 11 February 2016 on State Aid in Upbringing of Children,¹⁸ the Act of 17 September 2021 amending the Act on State Aid in Upbringing of Children and certain other acts¹⁹ and the Act of 7 July 2023 amending the Act on State Aid in Upbringing of Children.²⁰ Pursuant to the amendments introduced by the Act of 2023, payment of the accrued upbringing benefit in the amount resulting from the amendments introduced by Article 5(1) of the Act amended by Article 1 in the wording adopted by the Act shall be made by 29 February 2024 with compensation as of 1 January 2024.²¹

It should be emphasised that the Family 800+ programme plays a key role in realising important objectives of the state's family policy, notably by significantly boosting the birth rate, reducing poverty – especially among children – and serving as an investment in the family.²²

3. The 'Good Start' programme²³

The Good Start programme is a social programme that has been in force since July 2018. As indicated by the Ministry of Education, it is another component of the government's comprehensive and long-term family policy.²⁴ This programme aims to equalise the educational opportunities of children regardless of the cultural, social and material capital of their families. It is a cash benefit, which is a form of school uniform, independent of the 500+ benefit. The funds are tax-free, are not subject to seizure by a bailiff and do not count towards income when determining entitlement to benefits from other support schemes. Moreover, it is granted regardless of the family's earned income.

The programme is aimed at children studying at school until they reach the age of 20. The Good Start benefit does not apply to children attending kindergarten or completing annual kindergarten preparation in kindergarten pre-school in, and does not cover university students. In 2019, a change was introduced, which meant that pupils at post-secondary schools or adult schools could also benefit from the programme.²⁵

A parent can apply for the Good Start scheme if the child resides in a joint household with him or her. However, where alternating custody has been established by court decision, each parent is entitled to half the benefit. An application may also be filed by the child's actual guardian – someone who actually takes care of the child and has filed an application with the court for adoption – or the child's legal guardian to whom the court has entrusted custody. Additionally, a student, who is an adult pupil and who is not dependent on his or her parents either due to the parents death or established alimony, may file an application. In the case of children in foster care, the application is submitted by the

18 | Dz. U. of 2023, item 810.

19 | Dz. U. of 2021, item 1981.

20 | Dz. U. of 2023 item 1565.

21 | Sejm of the Republic of Poland, Ninth Legislature, Paper No. 3413, p. 2.

22 | Resztak, 2019, p. 87.

23 | Ministry of Family, Labour and Social Policy, 2019a.

24 | Ministry of Education, 2023.

25 | Mrozek, Pawka-Nowak and Rączka, 2018.

foster family, the person in charge of a children's home, directors of foster care centres, and regional foster care centres or learners who are independent persons.²⁶

As in the case of the 500+ benefit, the entity responsible for receiving applications for the Good Start benefit, processing them and granting and disbursing this benefit is the Social Insurance Institution (Zakład Ubezpieczeń Społecznych). The benefit from the Good Start programme is PLN 300.00, which is paid once a year for each child at the start of the school year, by transfer to the bank account number indicated in the application.²⁷

The procedure for granting the benefit in question is conducted electronically, which means that an application – as for any other benefit – can be submitted online via the Emp@tia information and service portal at <https://empatia.mpips.gov.pl/>, as well as via e-banking or the PUE ZUS portal.

The conditions for acquiring the right to the benefit and the rules for granting and paying this benefit are set out in the Ordinance of the Council of Ministers of 15 June 2021 which includes detailed conditions for the implementation of the Good Start programme²⁸ and the Act of 15 April 2021 amending the Act on family support and the system of foster care.²⁹ It should be noted that in the light of the provisions of the above-mentioned regulation, the establishment of the right to the Good Start benefit and its payment take place within 2 months from the date of the application with documents. In the case of applications for establishing the right to the benefit, applications submitted with documents in July or August will be paid out no later than 30 September.

Applications to establish the right to the Good Start benefit are accepted from 1 August to 30 November of a given year and, in the case of applications submitted electronically, from 1 July to 30 November of a given year. Applications submitted after the deadline are left without consideration.³⁰ The Good Start programme, as one of the government's programmes of support for families with children aims to equalise children's educational opportunities regardless of family income or social capital, covering both minors growing up in a family and those in foster care.

4. Family Care Capital³¹

The Family Care Capital, introduced in 2022, is a new benefit for families. It is one of the elements of Prime Minister Mateusz Morawiecki's 'Polish Deal' programme, relating to the section on 'Family and home at the centre of life'. As we read on the website of the Ministry of Family and Social Policy, it is an additional support instrument designed to facilitate the combination of parenthood and work, and reduce poverty among families with children. It is an investment in the family and its purpose is to strengthen social human capital.³² According to the Act, the purpose of the Family Care Capital is to par-

26 | Laskowska-Hulisz and Bodio, 2023.

27 | Mrozek, Pawka-Nowak and Rączka, 2018.

28 | Dz. U. of 2021, item 1092.

29 | Dz. U. of 2021, item 1006.

30 | Ossowska-Salamonowicz, 2019, p. 336.

31 | Ministry of Family, Labour and Social Policy, 2022.

32 | Ministry of Family, Labour and Social Policy, 2022.

tially cover the expenses of raising a child, including childcare and meeting the child's living needs.³³

The Family Care Capital is not enforceable, is not taxable and does not count as income. The benefit is available for each second and subsequent child in the family aged from the first day of the month in which the child turns 12 months old until the last day of the month in which the child turns 35 months old.

The persons entitled to apply for the benefit are either the mother or the father or the person who has adopted the child and has applied to the guardianship court to initiate adoption proceedings. The marital status of the parents is irrelevant, which means that married parents, parents in informal relationships and single parents are eligible to receive the benefit. Importantly, the age of the first child and the situation where the first child has died are also irrelevant.

As in the case of the benefits discussed above, the entity authorised to accept applications for the Family Care Capital, process them and grant and pay the benefit is the Social Insurance Institution (Zakład Ubezpieczeń Społecznych). In addition, the voivode holds powers regarding child benefit in relation to the Republic of Poland's participation in the coordination of social security systems when individuals move between countries of the European Union, the European Economic Area, the Swiss Confederation and the United Kingdom of Great Britain and Ireland³⁴.

A benefit of either PLN 500 or PLN 1,000 is paid monthly per child in the family, but the total cannot exceed PLN 12,000.00. It is up to the applicants to decide in what amount and over what period, i.e. 24 months or 12 months, the capital will be paid out. The procedure for granting the benefit is conducted electronically, which means that an application – as in the case of other benefits – can be submitted online via the Emp@tia information and service portal at <https://empatia.mpips.gov.pl/>, via electronic banking or the PUE ZUS portal. In the case of a capital award, a decision is not required.

The legal basis is the Act of 17 November 2021 on the Family Care Capital.³⁵ It is important to note that this benefit is available regardless of the parent's earned income. The funds for parents serve as support to make it easier to combine parenthood with work.

5. 'Toddler+' programme³⁶

The Toddler+ programme is a continuation in a revised format of the Toddler Programme, which was first implemented in 2012. The programme aims to develop childcare places. It is aimed specifically at municipalities where such care is not currently available. It will enable and facilitate access to this care in order to help parents and especially mothers return to the labour market.³⁷ Between 2012 and 2021, the programme organised

33 | Article 4 of the Act of 17 November 2021 on the Family Care Capital (Dz. U. of 2021, item 2270, as amended).

34 | Pietrzak, 2022.

35 | Dz. U. of 2021, item 2270, as amended.

36 | Ministry of Family, Labour and Social Policy, 2023a.

37 | Gajewski, 2014.

calls for grant applications for measures to develop childcare infrastructure for children up to the age of three, i.e. crèches, children's clubs and day carers.

The new version is a long-term programme running from 2022 to 2029. The programme has a uniform financing system, and the same rules are applicable for the whole of Poland. Moreover, the formal requirements for establishments are more flexible; for example, there is the possibility to extend the period of the project, and it is not necessary to have a title deed of the property intended for the project, etc. A budget of PLN 5.5 billion has been planned for the implementation of this programme.³⁸

However, the entity responsible for the implementation of the programme is the provincial governor with jurisdiction over the location of the municipality where the care will be provided. Municipalities are entitled to submit an application. Applications may be submitted by other entities, for example by the county. In such cases, the applications are directed to the relevant provincial offices. The entire process is carried out electronically.

The legal basis for the programme is the Act of 4 February 2011 on care of children up to the age of three.³⁹ This Act introduced changes in the organisation of crèches and also made it possible to create other forms of care for children up to the age of three. Crèches are now an element of social policy conducted by the Ministry of Family and Social Policy, and not an institution functioning within the health system, as was the case years ago.⁴⁰

It should be noted that funding can be used to create care places in crèches, children's clubs and day carers, including places for children with disabilities or who require special care.⁴¹

6. Care for children up to the age of three⁴²

Caring for a child up to the age of three requires special expertise and resources. To ensure that parents can be sure that their children are well cared for and have the opportunity to benefit from such care, regulations on how such care should be provided have been drawn up. Currently, the forms of care for children up to the age of three are the crèche, the children's club, the day care centre and the nanny.

However, the most important element directly supporting families is the subsidisation of the fees for a child's enrollment in a crèche, children's club or day care provider. The support was introduced in November 2021 by the government as part of the Polish Deal. Subsidies are available to parents, legal guardians, and other persons entrusted by a court with the care of a child, (including persons who are not Polish citizens) for a child attending a crèche, a children's club or day care and who are not using the Family Care Capital.

The subsidy is transferred to the bank account of an establishment running a crèche, a children's club, employing a day care worker, or the bank account of a day care worker

38 | Ministry of Family, Labour and Social Policy, 2023a.

39 | Dz. U. No. 45, item 235, as amended.

40 | Rościszewska-Woźniak, 2012, p. 7.

41 | Olszewski, 2019.

42 | Ministry of Family, Labour and Social Policy, 2018a.

running their own business for the purpose of reducing the parent's fee for the child's stay. The amount of the subsidy is a maximum of PLN 400.⁴³

As in the case of the previously discussed benefits, the Social Insurance Institution (ZUS) is responsible for accepting applications for funding, processing them and transferring funds. The application can only be submitted online, via the PUE ZUS portal, the Emp@tia portal or electronic banking.⁴⁴

The legal basis for the benefit is the Act of 17 November 2021 on Family Care Capital,⁴⁵ the Act of 4 February 2011 on the care of children up to the age of three,⁴⁶ the Regulation of the Minister of Labour and Social Policy of 10 July 2014 on the sanitary requirements to be met by the premises in which a crèche or a children's club is to be run,⁴⁷ and the Regulation of the Minister of Labour and Social Policy of 25 March 2011 on the training requirements for a carer in a crèche or a children's club or day carer.⁴⁸

It should be noted that of all the childcare facilities for children up to the age of three currently operating in Poland, almost 80% belong to the private sector. They are run by natural persons, limited liability companies or civil partnerships. Despite the fact that these institutions operate in municipalities, not all municipalities decide to subsidise them.⁴⁹

This is probably due to the fact that the delegation norm of Article 60(2) of the Act on the care of children up to the age of three is too general in nature, which may cause a number of interpretative doubts regarding the competencies of the municipal decision-making body and the executive body, which are expressed in supervisory and judicial rulings, the regulatory directive used in Article 60(2) of the Act in the form of the phrase: 'principles of determining subsidies' is interpreted *sensu stricto* by the majority of supervisory authorities and courts, which has the effect of 'prohibiting' the municipal council from specifying in the resolution any conditions (prerequisites) for granting a nursery subsidy.⁵⁰

7. Family benefits⁵¹

Family benefits are monies paid once certain criteria are met. They depend on the family's income and the situation in which the family finds itself.⁵² Among the benefits currently in place is the family allowance, which is intended to partially cover a child's living expenses. The amount of the allowance depends on the age of the children (PLN 95.00 for a child up to the age of 5; PLN 124.00 for a child over five up to the age of 18; PLN 135.00 for a child over 18 up to the age of 24).

43 | Olszewski, 2019.

44 | Olszewski, 2019.

45 | Dz. U. of 2021, item 2270, as amended.

46 | Dz. U. of 2022, item 1324, 1383.

47 | Dz. U. of 2014, item 925.

48 | Dz. U. of 2023, item 1998.

49 | Ostrowska, 2022, p.62.

50 | Ibid.

51 | Ministry of Family, Labour and Social Policy, 2018b.

52 | Makarowicz, 2005, p. 35.

The right to the family allowance is vested in the parents, one of the parents or the child's legal guardian; the child's de facto guardian (a person who actually cares for the child, if they have applied to a family court for adoption of the child); a learner (an adult learner who is not dependent on his/her parents due to their death or due to a court decision or court settlement establishing the right to alimony from their side).⁵³ Obtaining the benefit depends, *inter alia*, on meeting an income criterion. The benefit is available if the average monthly family income or the income of a learner does not exceed PLN 674.00. Since 1 January 2016, the so-called 'złoty for złoty' mechanism has been in force when determining the family income for entitlement to family benefits and allowances.

Another benefit is a family allowance supplement, which can only be claimed by a person entitled to a family allowance.⁵⁴ A number of allowances are provided, including an allowance for the beginning of the school year, of which an amount of PLN 100, is due once a year; an allowance of PLN 193.00 per month per child for single parents, but no more than PLN 386.00 for all children. However, it is due if a child maintenance payment has not been ordered for the child from the child's other parent because they are deceased; the child's father is unknown or an action to establish maintenance from the other parent has been dismissed. A person receiving a family allowance is also entitled to a one-off childbirth supplement of PLN 1,000. However, to receive the supplement, one must be under medical care no later than in the 10th week of pregnancy.⁵⁵

An allowance for raising a child in a large family amounts to PLN 95.00 per month and is granted for the third and further children entitled to family allowance. Family allowance recipients may also receive an allowance for childcare during parental leave of PLN 400, however, in this case, a number of exclusions apply. There is also an allowance for taking up education in a school outside the place of residence in the amount of PLN 69.00, which is paid for 10 months in a given school year.

Parents may also benefit from a one-off childbirth allowance or parental benefit. This allowance amounts to a one-off payment of PLN 1,000. The benefit depends on an income criterion, and an application for the allowance should be submitted within 12 months of the child's birth. The parental benefit of PLN 1,000 is available to persons caring for a child who, due to their professional situation, cannot benefit from maternity allowance or maternity pay. This support can be used, for example, by the unemployed, students or those working on a contract for work. It does not depend on an income criterion, and it is paid for 52 weeks in the case of the birth, adoption or custody of one child, 65 weeks in the case of multiple births or adoption or custody of two children, 67 weeks in the case of three children or 69 weeks in the case of four children and 71 weeks for five or more children.

Regarding family benefits, the Act of 28 November 2003 on family benefits,⁵⁶ which has been amended several times, is in force. This Act expands the list of income sources that qualify as family income for eligibility for family benefits. It also introduces measures to streamline the administration of child-rearing and family benefits by voivodes as part of the coordination of social security systems.⁵⁷ The legal basis is the Regulation

53 | Rozbicka-Ostrowska, 2015.

54 | Durasiewicz, 2014, p. 102.

55 | Szczepaniak-Sienniak, 2015, p. 103.

56 | Dz. U. of 2023, item 390, as amended.

57 | Cendrowicz, 2022, p. 39.

of the Minister of Family and Social Policy of 6 July 2023 on the manner and procedure in cases for granting family benefits and the scope of information to be included in the application and declarations for determining the right to family benefits.⁵⁸ the Regulation of the Council of Ministers of 13 August 2021 concerning the amount of family income or learner income constituting the basis for applying for family allowance and special care allowance, the amount of family benefits and the amount of allowance for a carer,⁵⁹ the Announcement of the Minister of Family and Social Policy of 1 November 2022 on the amount of nursing benefit in 2023,⁶⁰ the Announcement of the Minister of Family and Social Policy of 13 November 2023 on the amount of nursing benefit in 2024,⁶¹ Ordinance of the Minister of Health of 14 September 2010 on the form of medical care for a pregnant woman entitling her to an allowance for childbirth and the form of a certificate confirming remaining under such care, the Ordinance of the Minister of the Family, Labour and Social Policy of 28 September 2017 on material and financial reports regarding the implementation of tasks in the field of carers' allowances,⁶² the Regulation of the Minister of the Family, Labour and Social Policy of 28 September 2017 on material and financial reports on the performance of tasks in the field of guardian's allowances,⁶³ the Act of 4 April 2014 on the establishment and payment of benefits for guardians of a child,⁶⁴ the Announcement of the Minister of the Family and Social Policy of 28 July 2023 on the amount of income for the year 2022 from activities subject to taxation on the basis of the provisions on lump-sum income tax from some incomes generated by natural persons,⁶⁵ and the Announcement of the President of the Polish Central Statistical Office of 21 September 2023 on the amount of average labour income on individual farms per hectare in 2022.⁶⁶

8. Parental leave and benefits related to parenthood

Parental leave and benefits are governed by a number of legal norms and rules that make it easier for parents to have children, ensure a quick return to work, and then combine parenthood with work.⁶⁷ The forms of benefits and leave currently enjoyed by parents are maternity leave, leave in case of hospitalisation of a newborn child, reduced maternity leave, parental leave, working during parental leave, employment after returning from parental leave, parental leave, working during parental leave, paternity leave, flexible working schedules, employment relationship protection, as well as benefits related to the birth or upbringing of children.⁶⁸

58 | Dz. U. of 2023, item 1340.

59 | Dz. U. of 2021, item 1481.

60 | M.P. of 2022, item 1070.

61 | M.P. of 2023, item 1224.

62 | Dz. U. of 2017, item 1811.

63 | Dz. U. of 2017, item 1810.

64 | Dz. U. of 2020, item 1297, as amended.

65 | M.P. of 2023, item 775.

66 | M. P. of 2023 item 1030.

67 | Maniewska, 2024.

68 | Stecko, 2017, pp. 59–68.

The legal basis for the leave and benefits granted above is Articles 180(1), 182, 183, 186, 187, 188 of the Labour Code Act of 26 June 1974, Articles 8, 29, 31 of the Act of 25 June 1999 on monetary benefits from social insurance in the event of sickness and maternity, and Articles 53(1), 54, 55(1) of the Act of 28 November 2014 on Law on Civil Status Records.

It is worth noting that the regulation introduced in 2013 relating to parental leave as part of family-friendly policies is a response to the demographic problem that has been growing for many years.⁶⁹ To improve working conditions for employees who are parents or guardians, the legislator has introduced a number of changes to make it easier for them to reconcile work and family life. For example, according to the changes introduced in 2023, the total length of parental leave is now up to 41 days in the case of the birth of one child in a single birth or up to 43 weeks in the case of a multiple birth. A parent may also take unpaid care leave of 5 days once a year.⁷⁰

The State also protects the employment stability of an employee returning from parental leave. The employer may not terminate the employment of an employee whose position has been terminated, but should offer an equivalent position or another position, but one that corresponds to the employee's qualifications. The same applies to the financial situation of the employee returning to work, as it should not change to his/her disadvantage, regardless of whether he/she returns to his/her previous position or an equivalent one.

9. The Alimony Fund⁷¹

The Alimony Fund offers a benefit to persons who meet the conditions set out in the Act. Obtaining the benefit depends on an income criterion. It is paid upon application and for the benefit period, i.e. from 1 October to 30 September of the following calendar year.⁷²

With regard to benefits under the Alimony Fund, the Act of 7 September 2007 on Assistance to Persons Entitled to Alimony is in force,⁷³ the Announcement of the Minister of Family and Social Policy of 19 January 2023 on the amount of income criterion entitling to alimony fund benefits from 1 October 2023,⁷⁴ the Ordinance of the Minister of Family and Social Policy of 7 July 2023 on the manner and course of proceedings, the manner of determining income and the scope of information to be included in the application, certificates and declarations in cases concerning the establishment of the right to alimony fund benefits,⁷⁵ the Ordinance of the Minister of Labour and Social Policy of 23 March 2011 on the template of the alimony interview questionnaire and the template of the alimony debtor's asset declaration,⁷⁶ the Ordinance of the Minister of Family, Labour and Social Policy of 28 September 2017 on material and financial reports on the

69 | Majchrzak, 2015, p. 46.

70 | Czerniak-Swędzioł, 2016, pp. 49–62.

71 | Ministry of Family, Labour and Social Policy, 2019b.

72 | Durda, Mrozek and Pawka-Nowak, 2021.

73 | Dz. U. of 2023, item 581, as amended.

74 | M. P. of 2023, item 121.

75 | Dz. U. of 2023, item 1341.

76 | Dz. U. No. 73 item 395.

implementation of tasks provided for in the Act on Assistance to Persons Entitled to Alimony,⁷⁷ the Announcement of the Minister of Family and Social Policy of 29 July 2022 on the amount of income for the year 2021 from activities subject to taxation on the basis of the provisions on lump-sum income tax from some incomes generated by natural persons,⁷⁸ and the Announcement of the President of the Polish Central Statistical Office of 22 September 2023 on the amount of average labour income on individual farms per hectare in 2022.⁷⁹

Importantly, 'the granting of a benefit is not tantamount to assuming responsibility for the maintenance debtor or replacing him in the performance of his duty adequately to the needs of the person entitled to maintenance'.⁸⁰

In light of Article 27(1) of the 2007 Act, the maintenance debtor shall reimburse claims in the amount of the benefits paid from the maintenance fund, together with statutory interest for late payment, to the creditor's competent authority. This is due to the payment of benefits from the fund by this very authority. The revenue thus obtained by the municipality of the creditor's competent authority shall be used in particular to cover the costs of actions taken by local government bodies against maintenance debtors in order to force them to fulfil their alimony obligation.⁸¹

10. Pro-life programme

Based on the Act of 4 November 2016 on support for pregnant women and families, known as the 'Pro-life' Act, a comprehensive support programme for families was developed and adopted by the resolution of the Council of Ministers of 20 December 2016.⁸²

The legislator's aim is to comprehensively regulate support for pregnant women and families, with particular emphasis on women experiencing complicated pregnancies, obstetric failure, and children diagnosed with severe, irreversible disabilities or incurable life-threatening conditions arising during the prenatal period of the child's development or during childbirth.⁸³

The 'Pro-life' programme includes 31 planned actions, organized into six priority areas. One of the elements of the programme is a one-off benefit for parents who have a child born with a disability. The amount of the benefit is PLN 4 000.00.⁸⁴ In addition, the parents of such children are provided with, among other things, palliative, hospice and respite care.

The NIK (The Polish Supreme Audit Office) report shows that between 2017 and 2020, the programme was used to a small extent, but in 2023, the programme's funding was increased, and new activities were introduced. More money has been provided for institutions that prepare children with developmental problems to start school. In 2017,

77 | Dz. U. of 2017, item 1812.

78 | M. P. of 2022, item 726.

79 | M. P. of 2022, item 913.

80 | Sierpowska, 2022, p. 192.

81 | Mazurek, 2008, pp. 1–8.

82 | Ministry of Family, Labour and Social Policy, 2019c.

83 | Godlewska-Bujok, 2023, pp. 11–26.

84 | Kobak, 2021, pp. 26–39.

at the beginning of the programme, this amount was PLN 47 million, in 2022, it was more than PLN 97 million, and between 2024 and 2026, it will be PLN 110 million per year. In many districts, for example, Tarnów, Niemodlin and Poznań, comprehensive support for child development, offered mainly by pedagogical and psychological counselling centres, has already started. Therefore, it is worth knowing who can benefit from it and on what terms while remembering that a child with a disability certificate is also entitled to other rights.⁸⁵

The aforementioned issues are regulated in detail by the Act of 4 November 2016 on support for pregnant women and families Pro-life⁸⁶ and Resolution No. 160 of the Council of Ministers of 20 December 2016 on the programme of comprehensive support for families Pro-life.⁸⁷

11. Mother 4+ programme

The Mother 4+ Parental Supplementary Benefit is intended for people who, because they are bringing up at least four children, are unable to take up gainful employment or have given up such employment, and today live on the poverty line without being entitled to benefits even at the minimum level.⁸⁸ The Parental Supplementary Benefit is primarily intended to provide such families with the basic necessities of life.⁸⁹ Currently, the benefit amount is PLN 1,100 and, importantly, it will be subject to valorisation. In order to receive the benefit, an interested person must submit a relevant application to ZUS or KRUS.

The provisions defining the rules for granting and paying the benefit can be found in the Act of 31 January 2019 on Parental Supplementary Benefit. The benefit applies to persons covered by the general insurance system, as well as those who receive an agricultural pension benefit. The Parental Supplementary Benefit is available to a mother who has given birth to and raised at least four children and, in the event of the death of the child's mother or the abandonment of the children by the mother, to a father who has raised at least four children. The provision is a special non-contributory benefit, which will only supplement or substitute the risk of old age. The benefit can be claimed by persons of at least 60 years of age for women and 65 years of age for men.⁹⁰

12. Conclusions

Special support from public authorities for mothers before and after the birth of her child is regulated through various statutory legal acts.⁹¹ The development of these social

85 | Dązbłaż, 2022.

86 | Dz. U. of 2020, item 1329.

87 | M. P. item. 1250.

88 | Kumor-Jezińska, 2021, pp. 487–496.

89 | Ministry of Family, Labour and Social Policy, 2019d.

90 | Ministry of Agriculture and Rural Development, 2019.

91 | Garlicki and Derlatka, 2016.

programmes took place especially in the middle of the second decade of the 21st century, related on the one hand, to the change of the political majority in power in the state, and, on the other hand, from the perception of demographic problems that began to occur in Poland. Unfortunately, despite a number of financial programmes – including the flagship Family 500+ programme – it has not been possible to reverse demographic trends in the country, as confirmed by the latest data on the so-called negative rate of natural increase. The fundamental problem in Poland is still the low fertility rate. Over the long term, a declining birth rate could reduce the working-age population, posing risks to the stability of public finances, the labour market, the pension system and the social programmes supporting families, mothers and fertility. Therefore, a key objective of these benefits is also to strengthen the demographic potential.⁹²

It should be noted that the programmes presented in this research paper have clearly had a positive impact on the financial situation of families, especially those with many children and those who have been on the poverty line for many years. However, the positive assessment of the number and variety of programmes supporting not only mothers before and after childbirth, but especially families deserves criticism due to the lack of a single normative act (law) that would comprehensively regulate the titular issues. This is not about directly implementing the directive from Article 71(2) of the Constitution of the Republic of Poland (the law in the singular), but primarily about ensuring transparency, consistency and, above all, easy access to the presented programmes – especially for people with limited knowledge (often less educated members of society) about them.⁹³

The specified social pro-family programmes are implemented at different levels of public authority, including both the state and local government. This approach fulfils the constitutional obligation of public authorities (state and local government) to help, and also better organises the support and distribution of financial resources earmarked for this purpose.

The above analysis shows that most of the pro-family and social programmes were introduced between 2015 and 2023. Compared to the 2007-2014 period, not only did the number of these programmes, but several benefits were also enhanced, including a rise in the minimum wage and the introduction of family-friendly measures in the labour law, such as maternity and parental leave. Additionally, mention should be made of anti-violence measures, which are also intended to support safe motherhood⁹⁴. However, it should be pointed out that these measures have not contributed to an increase in fertility⁹⁵. Therefore, further work is needed to develop demographic policy, including family-friendly initiatives in housing, tax exemptions and support for private property, for example, following the Hungarian model.⁹⁶

Strengthening non-financial assistance, in the form of better access to family doctors and gynaecologists, and psychological and psychiatric assistance both before and after the birth of a child should also be advocated.⁹⁷

92 | Kucharski, 2020, pp. 68–74.

93 | Florczak-Wątor, 2023.

94 | Act of 30 April 2020 on amending the Act - Code of Civil Procedure and certain other acts, Dz.U. 2020 item 956; Act of 9 March 2023 on amending the Act on counteracting domestic violence and some other acts, Dz.U. 2023 item 535.

95 | Witkowska, 2023.

96 | Zdulski, 2016, pp. 383–385.

97 | Feja-Paszkiewicz, 2019.

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Design by

IDEA PLUS

Elemér Könczey

Kolozsvár / Cluj-Napoca (Romania)

Prepress

PÁTRIA PRINTING HOUSE CO.

Chief executive officer: Katalin Orgován

This publication was printed by CC Printing Kft. in Hungary.

Responsible manager: Áron Könczey