ABSTRACT: In Serbia, Biomedically Assisted Fertilization is regulated by the Act on Treatment of Infertility with Biomedically Assisted Fertilization Procedures from 2009, and by the Family Act from 2005, the provisions on the family status of the child. In European context, the principles of the application of biology and medicine are regulated by the Council of Europe Convention from 1997 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). In this paper, Serbian law is compared with European law as well as the stands of Christian Orthodox Church which represents the dominant religion in Serbia.

Comparison of principles stipulated in the Act and the Convention with the stands of the Christian Orthodox Church shows that domestic law, European law and stands of Christian Orthodox Church are based on similar grounds. It is the protection of human being, human dignity, and application of principle of medical justification. However, there is great difference of opinions when the question of acceptable and allowed procedures is raised. For example, there is an opinion that donor insemination is not in compliance with Christian Orthodox stands. On the contrary, positive law accepts donor insemination, both sperm and egg donations. As regards the surrogate motherhood, this is unacceptable for Orthodox Church and it is still not allowed in Serbia, but de lege ferenda it might be permitted in Serbia, as the Draft of Civil Code proposes that surrogate motherhood should be permitted and regulated by a new law.

KEYWORDS: Biomedically assisted fertilization, Serbian law, Convention, Orthodox Church
INTRODUCTION

Artificial reproduction technologies (ART) are regulated in Serbia by the Act on Treatment of Infertility with Biomedically Assisted Fertilization Procedures and by the Family Act (provisions on family status of the child). In European context, the principles of the application of biology and medicine are regulated by the Convention of the Council of Europe 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).

In this paper the principles of ART are compared in Serbian and European laws with the stands of Christian Orthodox Church.

PRINCIPLES OF THE SERBIAN ACT ON INFERTILITY TREATMENT BY BIO-MEDICALLY ASSISTED FERTILIZATION

The Act on Infertility Treatment by Bio-Medically Assisted Fertilization contains principles on which ART are based. The first principle is the principle of medical justification, Article 4. The principle of medical justification of BMAF implies the application of the BMAF procedure for infertility treatment in cases when other methods of infertility treatment are not possible or indicate a significantly lower chance of success, providing that the procedure is not an unacceptable risk to the health, life and safety of a mother or a child. It is stipulated that spouses or common-law partners are entitled to BMAF procedure in situations when other medical procedures for infertility treatment are impossible or when contemporary standards of medical science and practice indicate that the conception and birth of the child cannot be achieved by sexual intercourse. As an exception, the spouses or common-law partners are entitled to BMAF procedure in case when this kind of conception can prevent the transmission of a serious genetic disease to the child, Article 27.

According to Serbian law, ART can be used only as a method of treating infertility; the implementation of ART is not allowed in cases which are not medically justified. Subsequently, ART is, for instance, not a solution for a woman without a partner and who, for this reason, wants AID (artificial insemination by donor) procedure to be performed. If AID is performed in such a case, a child would have one legal parent – the mother. Biological father of the child is the sperm donor, but the donor is never considered a legal father by the law. Contemporary family law recognizes, at least, the interest of a child to have both parents, but not the right of a child to have both parents. If the law would allow the woman without a partner to have access to AID, the interest of the child to have both parents would not be respected. On the other hand, recognition of the...
The right to have AID is the right of the woman without a partner to reproduction. The right to free decision making about having children is a constitutional right in Serbia [Kovaček Stanić 2011; Pajvančić 2010]. In addition, the fact is that today a significant number of children grow up in a one-parent family as a consequence of parental divorce or because the child has been born out of wedlock. As with a number of other family law issues, the solution depends on the interest (right) which should be given the priority. In this case, the Act on Treatment of Infertility with Biomedically Assisted Fertilization Procedures gives priority to the interest of the child to have both parents. Serbian Act, as an exception, allows the woman without a partner access to ART, but only if justified reasons are provided. Which reasons can be considered as exceptionally justified is left to two ministers to decide (Minister for Health and Minister for Family Affairs). Medically justified reasons should normally exist. Thus, the fact that a woman does not have a partner or that she is a lesbian should not be considered as justified.4 Comparative law allows the woman without a partner to use ART in Spain, Russia, and some states in the USA [Kovaček-Stanić 2010; Kovaček-Stanić 2008]. However, this procedure is forbidden in Sweden [Saldeen 2004], France [Rubellin-Deviči 1994], and Austria [Bernat and Vranes 1996].

The second principle is the principle of human being protection. This principle implies that the BMAF procedure can be implemented to protect the human being individuality and the integrity of the embryo or fetus, Article 5. The third principle is the principle of public interests. The principle of public interests is achieved by performing BMAF procedure for the benefit of the person, the family or the whole society, including the BMAF research, and providing the application of appropriate measures to protect human health, safety, dignity, fairness and basic human rights, Article 6. The forth principle is the principle related to the protection of the rights of children and persons involved in BMAF. It is achieved by giving the priority in decision-making about BMAF to the health, welfare and protection of the child’s rights and rights of other persons in BMAF procedure, particularly to a woman undergoing a BMAF and the child to be born under the procedure, Article 7. The fifth principle is the principle of equality. This principle is achieved by providing equal opportunities for both men and women in the treatment of infertility by BMAF procedure, Article 8. The sixth principle is the principle of free decision-making. This principle is achieved by guaranteeing the right to free decision-making and by providing a free consent of all individuals subjected to the BMAF infertility treatment, Article 9. According to Serbian Act, the consent has to be provided for each BMAF procedure and may be withdrawn in writing until the sperm, unfertilized eggs or early embryos are implemented into the woman’s body, Article 37/3. If the consent is withdrawn, the BMAF procedure has to be suspended. Prior to inserting sperm, unfertilized eggs or early embryos, the responsible physician should confirm the existence of consent or its withdrawal, Article 38/2,3.

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4 In some countries ART for the woman who lives in a homosexual partnership is allowed. In that case a woman who delivers a child is legal mother and her woman partner is considered as legal parent of the child (Sweden, UK).
In case of Evans v. United Kingdom, European court for human rights made a decision on the issue of withdrawal of consent. The particularities of the case are as follows:

‘Ms. Evans decided to have some of her eggs removed prior to the cancer treatment, and fertilized 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 decided that he no longer wanted to have a family with her. He requested the couple’s embryos to 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 to be allowed to reduce the role of men to that of mere fertilization’ [Deech and Smajdor 2007].

In short, the Court was of the following opinion:

Private life (Article 8 of the Convention on Human Rights) incorporates the right to respect the decision to become or not to become a parent.... The dilemma central to the case was that it involved a conflict relating to the Article 8, the rights of two private individuals: the applicant and J. Moreover, each person’s interest was entirely irreconcilable with the other’s because 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, it would result in the interests of one of the parties being entirely disregarded. 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 in the IVF treatment, underlay the legislature’s decision to enact provisions according to which no exception would be permitted and which would ensure that every person donating gametes for the purpose of the IVF treatment knows in advance that his or her genetic material would not be used 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.’5

In comparative context, there are two groups of legislations regarding the withdrawal of the consent. The first group includes laws which permit with-

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drawal of the consent at any moment before the implantation of the embryo in the woman’s body (e.g. laws in: Denmark, France, Greece, Switzerland, etc). The second group of laws permits withdrawal of the consent only prior to fertilization, after that the woman may decide on her own about the continuation of the process (e.g. Austria, Estonia, Italy). As already mentioned, the consent in Serbia may be withdrawn until implantation.

Further principle is the principle of human dignity protection. It is achieved by implementing the procedure of infertility treatment by BMAF while preserving the human dignity, the right of privacy and health protection, welfare and rights of the child to be born, Article 10. The Act regulates the principle of privacy protection. It is achieved by storing all the information on individuals who are taking part in a BMAF, donors and relevant medical documentation, in accordance with the law on regulating the conditions for collecting and processing personal data, Article 11. Another principle is the principle which regulates safety. It is achieved by performing a BMAF procedure in accordance with the achievements and development of medical science and by applying the highest professional standards and codes of professional ethics, as well as medical and ethical principles based on safety practices of BMAF, Article 12.

Finally, it is important to emphasize that the Act regulates the right to object on the basis of conscience. Health care providers and other individuals have the right to refuse to participate in the BMAF procedure emphasizing their ethical, moral or religious beliefs – based on their conscientious objection. Furthermore, they cannot bear any consequences for submitting the conscientious objection. In exceptional circumstances, they are obliged to participate in the BMAF procedure if it is urgent until another health care provider or an individual authorized to conduct BMAF procedure replaces them, Article 35.

PRINCIPLES OF THE CONVENTION ON HUMAN RIGHTS AND BIOMEDICINE

The fundamental intention of the Convention is to ensure the dignity of the human being and to protect human dignity from misuse of biology and medicine. To achieve this, the need to respect the human being both as an individual and as a member of the human species is recognized. The progress in biology and medicine should be used for the benefit of present and future generations (Preamble of the Convention).

The purpose and objective of the Convention on Human Rights and Biomedicine are defined in Article 1:

‘Parties to this Convention shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedom with regard to the application of biology and medicine. Each Party shall take in its internal law the necessary measures to give effect to the provisions of this Convention.’

One of the principles of this Convention is the primacy of the human being, Article 2:

‘The interests and welfare of the human being shall prevail over the sole interest of society or science.’
Another principle is the principle of the equitable access to health care, Article 3:

‘Parties, taking into account health needs and available resources, shall take appropriate measures with a view to providing, within their jurisdiction, equitable access to health care of appropriate quality.’

In Article 4, the principle of the professional standards is stipulated:

‘Any intervention in the health field, including research, must be carried out in accordance with relevant professional obligations and standards.’

The principle of free consent is stipulated in Article 5:

‘An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.’

This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks. The person concerned may freely withdraw consent at any time.

If the adult person is not capable of giving consent because of mental disability, a disease or for similar reasons, the intervention may only be carried out with the authorization of his or her representative or an authority or a person or body provided for by law, Article 6/3. The previously expressed wishes relating to a medical intervention by a patient who is not, at the time of the intervention, in a state to express his or her wishes shall be taken into account, Article 9.

With regard to medically assisted procreation it is stated that the use of techniques of medically assisted procreation shall not be allowed for the purpose of choosing a future child’s sex, except where serious hereditary sex-related disease is to be avoided, Article 14. Where the law allows research on embryos in vitro, it shall ensure adequate protection of the embryo. According to Article 18, the creation of human embryos for research purposes is prohibited. The important issues relating to the research and human embryos analyzed in the literature are: ethical justification of clinical trials [Živojinović 2012], the issue of spare embryos [Kovaček-Stanić 2008].

STANDS OF CHRISTIAN ORTHODOX CHURCH ON ART

In Serbia, Christian Orthodox religion is predominant, as 84.6% of total population have declared themselves as Christian Orthodox. In the table it could be seen the proportion of the Serbian population concerning the particular religion.

Here, the stands of Christian Orthodox Church on ART are presented since the population is predominantly Christian Orthodox. Professor Zdravko Pena, PhD, explains:


8 The interview with Professor Zdravko Pena, PhD, Chair for Christian ethics and comparative theology, Faculty of theology, East Sarajevo, Bosnia & Herzegovina, Pravoslavlje (Orthodoxy), No 1027–1028.
‘Due to the fact that on the issues of cloning, in vitro fertilization, birth of children with selected features, ‘creation’ of new organisms, transplantation of human organs and other biotechnological advances, there are no explicit testimonies in the Bible, nor in the works of the Fathers of the Church, it is necessary to resort to general criteria with biblical foundation. At the same time, these criteria must have a foundation in the sacramental life of the Church, where the entire life of its members is performing.’

In addition: ‘Contemporary theology should help not by intruding the strict solutions, suggesting dogmatic principles or prohibiting practices, but in calling upon the people to see life from the perspective of the Church, and in that way to examine the man, and then in the light of biblical anthropology to examine existential dimensions of biotechnological research...The issue of artificial insemination should not be viewed only from the perspective of biology and idealization of law of nature... Favoring natural conception is certainly justified in all those situations where fertilization may occur in this way, or when for some irrational reason that relationship is being avoided. If the artificial insemination is the only solution to obtain offspring, the omission of this possibility, with the excuse that this practice disturbs the natural relationship between the spouses is completely unjustified, not only from biological, but also from a theological point of view... Artificial insemination imitates the natural laws and tries to substitute them if they do not exist or if they are not active.’ In his opinion, the destruction of the so-called spare embryos has to be avoided, and also their usage for the research.\(^9\)

Author Harakas, in his book *Contemporary moral issues facing the Orthodox Christian* [Harakas 1982] explains the stands of the Orthodox Christian

\(^9\) *Id.*
on embryo fertilization outside the womb. He states the following concerning the artificial insemination:

‘The sacramental unity of marriage and the family...excludes all intrusions...also when an outside party contributing genetic material (whether semen or ovum) towards the creation of a child who ought to belong genetically to not one but both marriage partners...This means the egg must come from the wife’s own ovaries, and that the sperm must be the husband’s own; for a donor, whether male or female, would constitute the intrusion of a third party into the marriage tantamount to adultery.’

Concerning the in vitro fertilization (test tube babies), he explains:

‘Serious objection is raised here to the fact that more eggs are fertilized than necessary; those which are not used are discarded... As an act which dehumanizes life and separates so dramatically personal relations of a married couple from child-bearing is very suspect...It would seem that the Orthodox Church should not encourage its members to become involved in in vitro fertilization procedures, nor does it seem that it would be wise for society in general to encourage this practice.’

His opinion on surrogate motherhood, for which he uses the term ’host mother’, is:

‘This procedure seems especially contrary to Orthodox Christian ethic in view of the special natural, spiritual and emotional relationship which exists between mother and a baby during pregnancy.’

Russian Orthodox Church has declared its stands on surrogate motherhood. According to the Document issued by the Synod of the Russian Orthodox Church, parents of the child born by surrogate mother have to remorse before they are able to baptize the child, or the child would be baptized when reaches the majority age and decides by him/herself. Russian Orthodox Church is of the opinion that surrogate motherhood is humiliating practice to woman’s dignity, as her body serves as a sort of incubator.10

CONCLUSION

Comparison of principles stipulated in the Serbian Act on BMAF with the principles stipulated in the Convention on Human Rights and Biomedicine, and with the stands of the Christian Orthodox Church shows that religious stands, Serbian and European law are based on similar grounds – protection of human being, human dignity, and application of principle of medical justification. However, there is great difference of opinions whether particular procedures should be allowed or not. There is an opinion that donor insemination and in vitro procedure are not in compliance with Christian Orthodox Church stands. On the contrary, Serbian and European laws allow these procedures. Surrogate motherhood is still not allowed in Serbia, and it is also unacceptable for Christian Orthodox Church, but de lege ferenda it might be

10 B92 < December 26, 2013>Source: Tanjug
permitted in Serbia, as the Draft of Civil Code proposes that surrogate motherhood should be permitted by Serbian law.

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НАЧЕЛА ПОТПОМОГНУТЕ ОПЛОЂЕЊЕ У ДОМАЋЕМ И ЕВРОПСКОМ ПРАВУ, И СТАВОВИ ПРАВОСЛАВНЕ ЦРКВЕ О ТОМЕ

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Упоређујући начела која су предвиђена у Закону и у Конвенцији са ставовима Православне цркве може се приметити да се домаће право, европско право и ставови Православне цркве базирају на сличним основама. Полази се од заштите људског бића, штити се људско достојанство, примењује се начело медицинске оправданости. Међутим, велике разлике постоје у схватањима који се поступци сматрају прихватљивим и дозвољеним. Тако, изражено је мишљење да донор инсеминација није у складу са ставовима Православне цркве, за разлику од позитивног законодавства по коме је донор инсеминација дозвољена и то и донација семених ћелија и донација јајних ћелија. Што се тиче сурогат материнства, ова пракса је неприхватљива за Православну цркву, у овом моменту није дозвољена ни у Србији, али de lege ferenda, Преднацрт Грађанског законика предлаже да се сурогат материнство дозволи и регулише посебним законом.

КЉУЧНЕ РЕЧИ: Биомедицински потпомогнутото оплођење, српско право, Конвенција, Православна црква