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AUTONOMY OF THE CHILD IN CONTEMPORARY FAMILY LAW

Abstract: *This paper deals with the autonomy of the child comparing Serbian family law and laws of European countries. The Commission on European Family Law defines Principles of European Family Law Regarding Parental Responsibilities in 2007, including the principle regarding rights of the child. These are: the best interest of the child, the autonomy of the child, the non-discrimination of the child, child's right to be heard, the conflict of interests. The child as an autonomous individual, having particular rights including the right to participation was for the first time seen in the UN Convention on the Rights of the Child 1989.*

According to Serbian Family Act 2005 the child at the certain age has got some specific rights. For instance, at the age of fifteen if the child is able to reason has these rights: to change a personal name, to get the information on his/her origins, to decide with which parent he/she will live, on maintaining personal contact with the parent he/she does not live with, the right to give consent to medical procedures, to decide which secondary school he/she will attend. The child has the right to freely express his or her opinion if the child is capable of forming an opinion. When reaches ten years of age the child has the right to freely and directly express his/her opinion. The Family Act of Serbia 2005 has introduced a special court proceeding in disputes for the protection of the child's rights.

Key words: *autonomy, child, right, opinion, consent, origins, education, medical issues, European laws*

1. Introduction

In contemporary family law the child is an active participant in family law relations. In previous historical periods, the focus in family law was on the rights and obligations of parents towards children. The next step in family law

was a theory of the existence of a correlative relationship between the rights and obligations of parents and the rights of the child. In contemporary family law the child becomes the holder of independent rights, but also has a right to participate in the decision-making in important matters concerning him/her. Obtaining independent rights is an important step in the position of the child in family law. But, to declare that the child has independent rights is just a beginning in strengthening the position of the child in family law. The next step should be the issue of how these rights should be exercised. It could be said that the evolutionary trend in family law concerning the position of the child would be the matter of increasing the degree of the exercise of his/her rights in practise.

The Convention on the Rights of the Child, adopted in 1989, was the first binding document for signatory states related exclusively to the rights of the child.¹ Furthermore, with respect to the rights of the child in general, on the international level, also of great importance is the European Convention on the Exercise of Children's Rights 1996, adopted by the Council of Europe. The goal of this Convention is "in the best interest of children, to promote their rights, to grant them procedural rights and to facilitate the exercise of these rights by ensuring that children are themselves, or through other persons or bodies, informed and allowed to participate in the proceedings affecting them before a judicial authority".²

In Serbian family law, the rights of the child are expressly regulated in the Family Act 2005, for the first time under a separate chapter consisting of eight articles.³ The same regulation exists in the laws of other Eastern European countries, such as Russia and Croatia, for example. The Family Act 2005 regulates the following rights: the right of the child to know who his or her parents are, to live with his or her parents, to maintain personal relations with parents and other persons close to him/her, the right to a proper and full development, the right to education, the right to an opinion, as well as the obligations of the child, (Arts. 59-66). Beside providing a broad scope of child's rights, the Family Act 2005 also ensures the its exercise. The child can exercise his/her rights independently at a certain age.

¹ It was adopted by the Resolution of the United Nations General Assembly of 20 November 1989 and was ratified by Yugoslavia in 1990, *Official Journal of the Socialist Federal Republic of Yugoslavia-International Contracts*, No. 15/1990.

² More in: Geraldine Van Bueren, Annual Review of International Family Law, *The International Survey of Family Law*, A. Bainham (ed.), The Hague, Boston, London, 1995, pp. 5-8.

³ The Family Act, *Official Journal of the Republic of Serbia* 18/2005 of 24 February 2005, entered into force 8 days after publishing, implemented from 1 July 2005. The Draft of the Family Act was prepared by a Draft Team with Professor Marija Draškić as a coordinator and me as one of the members. More in: Marija Draškić, Gordana Kovaček Stanić, *The New Family Act of Serbia*, *The International Survey of Family Law*, A. Bainham (ed.), Bristol, Family Law, 2006, pp. 357-374.

According to Serbian Family Act, parental rights are derived from the obligations of the parents and exist only to the extent necessary for the protection of the personality, rights and interests of the child, (Art. 67).⁴ Parental rights consist of the rights and obligations of the parent to care for the child, and covers the following: protection, education, upbringing, representation, and support, as well as managing and disposing of the child's property, (Arts. 67-74). The Family Act 2005 expressly provides that parents have the right to receive all information about the child from educational and healthcare institutions, (Art. 68/3). This provision is extremely important as getting the information is the first step in enabling the parents to exercise their rights.

2. Family law principles regarding the child

The Family Act 2005 stipulates principles regarding the child as such: the best interest of the child principle, the principle of equating the rights of the child born out of wedlock with the rights of the child born in wedlock, the principle of equating the rights of the adopted child towards adopters with the rights of the child towards parents. The second and third principle are in fact the concretization of the non-discrimination of the child principle in general. The Family Act stipulates obligations of the state concerning the child. These are: to undertake all necessary measures to protect the child from neglect, physical, sexual and emotional abuse and every form of exploitation; to respect, protect and promote the rights of the child and to provide the child without parental care with protection in a family environment whenever possible (Art. 6).

The Commission on European Family Law defines principles regarding rights of the child. These are: the best interest of the child, the autonomy of the child, the non-discrimination of the child, child's right to be heard, the conflict of interests.⁵

⁴ In the comparative family law, Swedish legislation was one of the first to take a step further in the development of regulations in parent-child relations accentuating the rights and obligations of the child, as well as considering that parental obligations serve to enable the exercise of the child's rights, Parents, Guardians and Children Act after the amendments of 1983. In contemporary French law, pursuant to the Act of March 2002 on parental authority, parental authority has been redefined. It consists of "a set of rights and duties having as their purpose the interest of the child". The final sub-paragraph of Art 371-1, by which, „parents take decisions affecting the child in association with him, taking account of his age and the degree of maturity“. Sylvie Ferré-André, Adeline Gouttenoire-Cornut, Hugues Fulchiron, Work in Hand for the Reform of French Family Law, *The International Survey of Family Law*, A. Bainham (ed.), Bristol, Family Law, 2003, pp. 174-175.

⁵ K. Boele-Woelki, F. Ferrand, C. Gonzales Beilfuss, M. Jänterä-Jareborg, N. Lowe, D. Martiny, W. Pintens, *Principles of European Family Law Regarding Parental Responsibilities*, Intersentia, Antwerpen - Oxford, 2007. Chapter II contents the principles regarding rights of the child.

2.1. *The best interest of the child*

The best interest of the child is universally accepted as a principle in contemporary family law. The UN Convention on the Rights of the Child is the first international document which stipulated this principle. In Article 3 of the Convention it is provided that the best interests of the child will be the primary consideration in all actions concerning children, regardless of which institutions or organs are undertaking such activities.

The Commission on European Family Law states:

„In all matters concerning parental responsibilities the best interests of the child should be the primary consideration.“

The Commission explained that this principle places the best interests of the child as the ultimate, decisive consideration. The wording used in the Principles of European Family Law, as the Commission noted, is stronger than in the Convention on the Rights of the Child, since the Commission used the article *the* as opposed to the article *a* used in the Convention. The Commission observed:

“It is not a primary consideration, to be taken into account among other important concerns, but the decisive criterion.“⁶

This principle is explicitly formulated in the Family Act 2005 for the first time in Serbian family law. It is stated:

“Everyone is under the obligation to act in the best interest of the child in all activities related to the child“, (Art. 6/1 Family Act 2005).

This principle is the only one concerning activities towards children stipulated in the basic provisions of the Family Act. Stipulated in such a way, the best interest principle has acquired paramount importance. It could be concluded that the Serbian solution is similar to the solution of the Principles of European Family Law, which found the best interest principle as the decisive criterion.

International documents, as well as national statutory texts, including the Family Act 2005, do not offer a definition of the best interests principle. Thus, this principle could be marked as a legal standard. The content of the best interests principle depends on a particular legal and social system, as well as on a particular child.

Another important issue is the question who is obliged to respect the best interest principle. The Convention refers to actions undertaken by public or private bodies. The Commission on European Family Law comments: “The principle refers to all matters concerning parental responsibilities. Matters is a broader concept aimed to cover not only measures taken by competent authori-

⁶ Op. cit. Principles pp. 34-38.

ties, but also agreements between the holders of parental responsibilities as well as daily decisions by the parents related to child care.⁷ The Serbian concept seems similar to the concept adopted in the Principles of European Family law, as it stipulates the obligation of *everyone* to act in the best interest of the child.

2.2. *The non-discrimination principle*

The non-discrimination principle is one of the constitutional principles in Serbian law. The discrimination is forbidden (direct or indirect) on any grounds, in particular: sex, race, nationality, social origin, birth, religion, political or other opinion, economic status, culture, language, old age, mental and physical dissability, (Art. 21 Constitution of Serbia 2006). The non-discrimination principle is applicable to children likewise.

The most important concretization of the non-discrimination principle concerning children is equating children born within or out of wedlock (Art. 64/4 Constitution of Serbia 2006, Art. 6/4 Family Act 2005). The discrimination based on birth existed in the past. Non-marital children entered into a legal relationship primarily with the mother.⁸ The principle of equating children born within or out of wedlock was introduced into the national legal system with the Constitution of Yugoslavia 1946.⁹ The equating of children born out of wedlock and those born in marriage was not full at first. A difference existed depending on the fact whether fatherhood was established voluntarily or against the father's will. Thus, a child born out of wedlock entered into a legal relationship with the mother and her relatives, while if the father acknowledged the child, he/she also entered into a relationship with him and his relatives. However, if the fatherhood was established through the court proceedings, the child only entered into a legal relationship with the father and not with his relatives. In jurisprudence there was a position that the child acquires rights and obligations with respect to the father's relatives if the father accepts the child following a court decision. Full equality was introduced with the Constitution of the Republic of Yugoslavia 1974.¹⁰ Today, children born out of wedlock have the same rights and obligations as those born in marriage, i.e. they enter into a legal relationship with the mother, her relatives and with the father and his relatives. A difference exists, however, in the manner in which fatherhood is established.

⁷ Op. cit. Principles p. 38.

⁸ The Civil Code of the Kingdom of Serbia of 1844 states that the mother is responsible for upbringing and following down the path of faith and law and happiness of the child born out of wedlock (bastard), equally as with a child born in marriage, (Para. 129)

⁹ Constitution of the Federal People's Republic of Yugoslavia 1946.

¹⁰ Constitution of the Republic of Yugoslavia, *Official Journal of the Socialist Federal Republic of Yugoslavia* 9/1974.

This is important since the legal relationship between the father and the child is determined as a consequence of the previously established fatherhood. Marital fatherhood is established based on the legal presumption that the mother's husband is the father of the child (*pater is est quem nuptiae demonstrant*), while non-marital fatherhood is established with the acknowledgement of the father or through court proceedings. In other words, marital fatherhood is established *ex lege*, while non-marital fatherhood must be established legally, with the acknowledgement of the father or through court proceedings.

The equality of male and female children represents another concretization of the non-discrimination principle. This principle was introduced into the domestic legal system through the Constitution of Yugoslavia 1946. Historically, in Serbian law prior to World War II, female children had a considerably narrower set of rights than male children (pursuant to the Civil Code of the Kingdom of Serbia 1844, for example, female children did not have any inheritance rights).

The Family Act expressly stipulates the principle of equating adoption with parentage (Arts. 6/5 and 7/4 Family Act 2005). It is provided that an adopted child has equal rights with respect to its adopters as a child has towards its parents, while the adopters have the same legal status as parents. This is achieved by providing for only one form of adoption, in contrast to the previous act - Law on Marriage and Family Relations 1980 which recognized two forms of adoption, full and partial.¹¹

The Commission on European Family law formulated the non-discrimination principle on these grounds: sex, race, colour, language, religion, political or other preference, national, ethnic or social origin, sexual orientation, disability, property, birth or other status; irrespective of whether these grounds refer to the child or to the holders of parental responsibilities. The Commission focuses on two grounds for unequal treatment, i.e., the effect of the child's birth within wedlock or the child's birth out of wedlock on the attribution of parental responsibilities, and second, the effect of homosexuality of the parent's partner on his or her prospects of acquiring parental responsibilities. In all national jurisdictions (which contributed to this project) the distinction between children born within wedlock or children born out of wedlock has been abandoned. Nevertheless, the different rules continue to apply to the attribution of parental responsi-

¹¹ The Law on Marriage and Family Relations 1980, *Official Journal of the Republic of Serbia* 22/1980, with amendments 22/1993, 35/1994, 29/2001. In partial adoption, the adoptee did not have the same rights with respect to his/her adopters, as the child has towards his/her parents, it was possible to limit the inheritance rights of the adopted child and to retain his/her birth surname; in addition, the adopted child did not enter into legal relationship with the adopter's relatives.

bilities following the birth of the child, depending on whether the parents are (or have been) married to one another.

The similar situation is in Serbian law. The children born out of wedlock have the same rights as children born in wedlock, but the paternity of the children born out of wedlock must be established legally.

In regard to homosexuality, the Commission finds that “in the majority of the jurisdictions homosexual couples do not enjoy the same rights regarding parental responsibilities as do (married) heterosexual couples“. In many of the countries same-sex partners are excluded from adoption (Austria, The Czech Republic, Italy, Lithuania and Portugal). Countries that place homosexual couples on an equal footing regarding parental responsibilities are in minority (Belgium, The Netherlands and Sweden).¹² In Serbia, there is still no law on homosexual couples. Same-sex partners are excluded from adoption, as only spouses or cohabitantes (heterosexual) may adopt together. A single person may adopt only as an exception, if there are particularly justified reasons for doing so, by getting a permission from the Minister responsible for family protection (Art. 101 Family Act).

2.3. The child's right to be heard

The participational rights are now broadly accepted in family law. The right of the child to express an opinion in any matter or procedure affecting the child is stipulated in the Convention on the rights of the child in Art. 12. The child who is capable of forming his or her own views has the right to express those views freely, giving them due weight with the age and maturity of the child. The child's right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kind (Art. 13).

The Family Act of Serbia 2005 governs the child's right to express an opinion in Art. 65. The child has the right to freely express his/her opinion if the child is capable of forming an opinion. A prerequisite for the formation of an opinion is being informed, whereby the Family Act of Serbia 2005 provides that the child has the right to be duly informed. The child's opinion must be given due consideration in all matters and procedures regarding his or her rights, in accordance with age and maturity of the child. In addition, the Family Act obligates state organs, administrative organs and courts to establish the child's opinion. A child's opinion is established under a special procedure deemed suitable for the child and with the assistance of a school psychologist, guardianship authority, family counseling center or some other institution specialized in mediating family relations, and in the presence of persons the child chooses him or

¹² Op. cit. Principles p. 47.

herself. It is explicitly stipulated that the child at the age of ten can freely and directly express his or her opinion in any judicial or administrative proceedings in which his or her rights are decided upon. The child can independently or through some other person or institution address the court or the administrative organ and request assistance in the exercise of his or her right to freely express an opinion.

The child's right to be heard, as a European Family Law principle, is formulated in the following way:

“Having regard to the child's age and maturity, the child should have the right to be informed, consulted and to express his or her opinion in all matters concerning the child, with due weight given to the views expressed by him or her.”¹³

The Commission comments that this principle is well established in all jurisdictions surveyed by the Commission, it recognized the child as an autonomous individual. The principle distinguishes explicitly between the child's right to receive information, the child's right to be consulted and the child's right to express his or her opinion. This principle follows Convention of the Rights of the Child; although, unlike Convention, it is not limited to proceedings in a competent authority. Giving the child these rights, as Commission comments, is an obligatory point of departure and not at the discretion of the competent authority or parents (or other holders of parental responsibilities).

3. Autonomy of the child

In Article 1 of the Convention on the Rights of the Child 1989, a child is defined:

„For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.“

In Serbian family law, majority is achieved at the age of eighteen, whereby the above definition is suitable, (Art. 11 Family Act). With majority in turn, one obtains full legal capacity. Full legal capacity can also be obtained prior to the age of eighteen (emancipation) in two ways. Both ways are connected to family relations and restricted to the minimum age of sixteen. The first is to enter into marriage, while the other is parenthood (Art. 11/2,3). If the minor obtains full legal capacity through marriage, this capacity remains intact even if, for example, the marriage ends prior to the person becoming eighteen. Family Act 2005 introduces the possibility for a minor parent to obtain full legal capacity, which advances his/her position. By obtaining full legal capacity, the minor parent

¹³ Op. cit. Principles p. 49.

obtains the right and obligation to independently care for him/herselves and his/her child. It is the court which gives the permission for marriage to a minor and decides if the minor parent should obtain full legal capacity based on parenthood. The proceeding is non-contentious. It is required for the minor who wants to get married to have the physical and mental maturity necessary to exercise the rights and obligations of marriage and for the minor parent to have the physical and mental maturity necessary to independently care for oneself, one's rights and interests.

The child as an autonomous individual, having particular rights including the right to participation was for the first time seen in the Convention on the Rights of the Child 1989. Autonomy of the child as one of the European Family Law principles is formulated in a following way:

“The child's autonomy should be respected in accordance with the developing ability and need for the child to act independently.”

The Commission stresses that this principle is addressed to both competent authorities and the holders of parental responsibilities.

In spite of the autonomy of the child as one of the principles in child law, the need for protection of the child as a vulnerable individual still exists. The Commission has found the balance between the different concerns by emphasizing the child's age and maturity:

„A younger and less mature child needs more care and protection than an older and more mature child who may enjoy the rights of participation in a decision concerning him or her and who may also, within certain limits, take decisions and act independently on his or her own.”¹⁴

In Serbian family law, rights of the child are stipulated in Family Act in general, but some are stipulated in other branches of law. According to the Family Act the child is given limited legal capacity concerning legal affairs at the age of fourteen (senior minor), which means that the child of fourteen may undertake legal operations with the prior or subsequent consent of his/her parents, as well as legal operations whereby he/she acquires exclusive rights, or does not acquire either rights or obligations and legal operations of small significance, (Art. 64/2).

In addition, the Serbian concept provides the child with specific rights at a certain age. Beside the age as a condition, there is another condition which has to be met in order for the child to acquire a specific right. In most cases this condition is stipulated as the ability to reason. In other words, a child of a certain age has specific right if able to reason. There is no statutory definition of this notion. In the jurisprudence there is a broadly accepted opinion that the

¹⁴ Op. cit. Principles p. 40.

inability to reason exists if the person is not able to understand the importance, meanings and consequences of certain legal act.

The parents have the right and obligation to represent the child in all legal affairs and procedures outside the scope of the child's legal and procedural capacity (legal representation). In other words, parents always represent the child when he/she does not have a specific right in accordance with his/her age. In addition, parents have the right and obligation to represent the child in all legal affairs within the scope of legal and procedural capacity of the child, unless otherwise provided by the law, (Art. 7/1,2 Family Act). Here the child does have the right to undertake a certain legal affair or procedural action, which is based on his or her voluntary consent to be represented by the parents (voluntary representation).

Comparatively, there are two main approaches to the child's autonomy in the legislation in different European countries. One concept, similar to the Serbian solution, requires a certain age for acquiring the limited legal capacity (for instance, at the age of fourteen in Hungary, Russia, Lithuania, Bulgaria, Spain, at the age of fifteen in Finland). In other jurisdictions, the law fixes no generally adopted applicable age requirement, but the child's right to act independently depends on the nature of the issue and an assessment of whether the child has reached a sufficient age and maturity to understand the consequences of his or her actions (Czech Republic, England and Wales, France, The Netherlands and Portugal).¹⁵

In Serbian family law a child obtains most rights at the age of fifteen, but some rights are obtained earlier, at the age of ten or fourteen, and some later, at the age of sixteen.

3.1. Child of the age of ten

3.1.1. Name

A child has the right to a personal name. The Family Act 2005 states that the right to a personal name is acquired at birth, (Art. 13/2). At the age of ten child who is able to reason has the right to give consent to change his or her personal name, (Art. 346).

The personal name consists of the name and surname, (Art. 342/2). The personal name of the child is determined by the parents. Parents have the right to freely determine the child's name. They cannot, however, give the child a defamatory name, a name that insults the morality or a name that is contrary to the customs and opinions of the community. Except in the official language, parents also have the right to have the child's name entered into the Birth Regis-

¹⁵ Op. cit Principles pp. 41-42.

ter in the mother tongue and in the alphabet of one or both parents. The child's surname is chosen according to the surname of either one or both parents. Parents cannot give their common children different surnames. If the parents are not living, or they are unknown, the child's name and surname are chosen by the guardianship authority. In addition, if the parents did not determine the name in the time limit established by law, they could not agree on the child's name or they have given a defamatory name, a name that insults the morality or a name that is contrary to the customs and views of the community, the name is chosen by the guardianship authority (Art. 344, 345).

3.1.2. Adoption, fostering, guardianship

At the age of ten the child who is able to reason gives consent to adoption (Art. 98), to fostering (Art. 116) and has the right to propose the person who will be appointed his/her guardian (Art. 127). Furthermore, the appointment of a collision guardian or a temporary representative can be requested by a child of the age of ten who is able to reason, by himself or through some other person or institution, (Art. 265).

3.2. Child of the age of fourteen

A child over the age of fourteen (older minor) can undertake all legal affairs with the prior or later consent of the parents. For some affairs it is necessary to have the consent of the guardianship authority (the disposal of immovable or movable property of greater value). A child who has not yet reached the age of fourteen (younger minor) can undertake legal affairs through which he/she exclusively obtains rights (e.g. gift contract), legal affairs by which he/she does not attain neither rights nor obligations and legal affairs of minor importance (e.g. purchasing of daily necessities).

3.3. Child of the age of fifteen

3.3.1. Personal name

The right to change a personal name is attained by the child at the age of fifteen if he/she is able to reason. This right was first introduced into the national family law with the Family Act 2005.

3.3.2. Origin

A child who has reached the age of fifteen and who is able to reason has the right to inspect the Birth Register and other documentation related to his or her origin, (Art. 59/3 Family Act).

Recent family law theory and practice has focused significantly on the right of a person to discover one's biological origin. Three basic interests with respect to discovering one's genetic origin can be singled out: medical interest, psychological interest and an interest to have blood relations, which can be not only psychological in character, but also financially motivated.¹⁶ Medical interest is particularly important with respect to establishing a family, because of possible serious genetic defects which a future child could inherit. Furthermore, this interest is important for harmonizing lifestyles with potential inheritable diseases that have already been manifested in a certain family, which can possibly prevent the manifestation of the disease or contribute to its future emergence or manifestation in a more benign form. Information about medical history and treatment results of a relative can be useful to doctors. The psychological interest manifests itself through the desire and need to know one's origin. This interest is most significant during the teenage period, when a person is forming his or her personality. The third interest, financial, is manifested through the right to support and the child's right to an inheritance with respect to parents and other relatives. It could be said that medical and financial interests are of primarily rational nature, while the psychological may in many ways be considered as irrational, but is no less important for the child.

The issue of the child's right to know his or her origin has become even more current with the adoption of the Convention on the Rights of the Child in 1989. Article 7/1 states:

“The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, if possible, the right to know and be cared for by his or her parents.”

For the first time, the Family Act 2005 has introduced a provision that governs the child's right to know his or her biological origin. A child, regardless of his or her age, has the right to know who his or her parents are, (Art. 59).

The right to know one's origin can be viewed in the person's different family situations: natural birth, bio-medically assisted birth and adoption.¹⁷ For natural birth, the important provisions have to do with establishing and contesting motherhood and fatherhood. The Family Act 2005 abolishes time limits for starting the procedure for establishing and contesting parenthood in cases where the child is acting as the plaintiff. This is an advancement contributing to the exercise of the child's right to know his or her origin.

¹⁶ Katherine O'Donovan, A Right to Know One's Parentage?, *International Journal of Law and the Family* 2 (1988).

¹⁷ More in Gordana Kovaček Stanić, *The Right of the Child to Know his/her Origins* (in Serbian), Pravni fakultet, Novi Sad 1997.

In relation to a bio-medically assisted conception, domestic legislation adopts the principle of the donor's anonymity (Act on Healing Sterility by Bio-medically assisted Conception 2009).¹⁸ The child conceived by a donor's reproductive cells has the right to obtain information regarding the donor only for medical reasons. For obtaining such information the person must have a full legal capacity, (Art. 64/1,2).

In relation to adoption, the child has the right to access the Birth Register, (Art. 326/2 Family Act 2005). A very important advancement in the Family Act 2005 is introducing psycho-social counseling for the child prior to the access to the Birth Register, (Art. 326/3). The exercise of the right of an adopted child to know his or her biological origin is dependent on the prior awareness of the fact that he/she is adopted. During the adoption procedure, it is advised to the adopters to inform the adoptee about the adoption as early as possible, (Art. 322/1 Family Act 2005).¹⁹ It is considered desirable for the adopted child to grow up with the knowledge that he/she is adopted.

It could be said that the majority of the individual rights are tied to their holder. However, the right to know one's origin is related to the rights of other persons, biological parents and/or social parents. The biological parent, as the semen or egg donor, has the right, within the framework of the right to privacy, to a non-disclosure of information about how the child was conceived with the person's genetic material. The biological parent may be interested in remaining anonymous with respect to the child, in case the child has been given up for adoption. The social (legal) parents have the right to maintain their family stability and integrity. In contemporary legal systems, the knowledge about one's biological origin as an element of a person's identity is considered very important. But, it is accepted that this is not an absolute right. However, legal science, legislation and jurisprudence differ in many ways with regard to the degree to which this right should be exercised. Currently, there is an evident conflict between the right to know one's origin and other rights, the right to privacy of biological parents and family security of the social family.

A possible approach to this problem would be to try to eliminate the conflict between these rights. However, such a solution presupposes a radical change in the social and individual attitudes regarding parentage, whereby it would be necessary to accept the idea that a child can have more than two parents with different roles (biological or genetic parents, social or legal parents). In family law theory, John Eekelaar comments:

¹⁸ Act on Healing Sterility by Bio-medically assisted Conception, *Official Journal of the Republic of Serbia* 72/2009.

¹⁹ In the Croatian Family Act 2003, it is provided that the center for social care should advise the adopters to inform the child that she is adopted by the age of seven at the latest or immediately following adoption if the child over this age is adopted, (Art. 124/2).

“If we think that a child is likely to have wanted her genetic parentage established in a way which did not, however, disrupt the social parentage he/she was enjoying as a child, we might favor routine establishment of legal parentage in such circumstances, without any implications for the exercise of the social parentage. And if we were to consider the *parent's* claims, we might find that these coincided with those of the child.”²⁰

From a comparative standpoint, the right to know one’s origin is a constitutional right in some legal systems, as well as in Serbia.²¹ The right to know one’s origin has also been introduced through laws to reproductive medicine in a number of countries.²²

3.3.3. *Living with parents*

In Serbian law a child has the right to live with his or her parents and the right to be taken care of by his or her parents, in preference to all others. The right of a child to live with his or her parents may be limited only by a court decision, if that is in the best interest of the child. A court may decide to separate a child from his or her parents if there are reasons for the parent to be fully or partially deprived of his or her parental rights, or in the case of domestic violence (Art. 60/1,2,3 Family Act 2005). A different question is whether the child, besides the right, has the obligation to live with the parents. This might occur in the situation of a minor who has become financially independent

²⁰ John Eekelaar, Parenthood, Social Engineering and Rights, in Derek Morgan & Gillian Douglas (eds), *Constituting Families: A Study in Governance*, Archiv für Rechts und Sozialphilosophie vl. 57, Franz Steiner Verlag, 1994, pp. 94-95.

²¹ Art. 64/2 Constitution of Serbia. Pursuant to the Constitution of Switzerland, every person is guaranteed the right to access information about his or her ancestors (1992), Olivier Guilloid, Switzerland: Everyone Has the Right to Know His or Her Origins!, 32 *U. Louisville J. Fam. L.* 465, 1993-1994. In 1989, the German Constitutional Court in a case having to do with the child’s right to contest parentage took the position that, in principle, the child does have the right to know who his mother and father are, Bundesverfassungsgericht, Neue juristische wochenschrift 1989, p. 891. Rainer Frank, Germany: Blood versus ‘Mere’ Social Ties, 32 *U. Louisville J. Fam. L.* 335, 1993-94.

²² The trend of abolishing the principle of donor anonymity in artificial insemination began in Sweden, with the 1984 amendment of the Insemination Act (1984:1140) which introduced the possibility for the child to find out about the donor and thereby the truth about his or her biological origin. In addition, the Secrecy Act provides for the possibility of accessing information regarding biological parents (1994), Åke Saldeen, The Rights of Children to Speak for Themselves and Obtain Access to Information Concerning Their Biological Origins etc, *The International Survey of Family Law*, A. Bainham (ed.), The Hague, Boston, London, 1994, p. 443, Government proposal 1993/94,165, Secrecy Act Chapter 4. Sweden allows egg donation since 2002, while the child has the right to find out information about the female donor, just like it does with respect to the donor semen, Åke Saldeen, The Children’s Ombudsman, Adoption by Homosexual Partners and Assisted Reproduction, *The International Survey of Family Law*, A. Bainham (ed.), Bristol, Family Law, 2004.

through employment, thus establishes the conditions for an autonomous life. The parental rights exist, as a rule, until the child reaches the age of eighteen. According to the current statutory phrasing, a separate living can only ensue if it is required by justifiable interests of the child. In the case of a dispute the court should decide in this matter.

Concerning living with parents if parents do not live together, the child has the opportunity to decide with whom he/she wants to live. The Family Act of Serbia 2005 introduces the right of the child of the age of fifteen to decide with which parent he/she wants to live (Art. 60/4).

3.3.4. Medical decisions

“A child has the right to be provided with the best living and health conditions for his or her proper and full development“, (Art. 62/1 Family Act 2005).

The protection of life and health of the child in contemporary conditions has to a great extent become a function of healthcare institutions. The role of the parents, however, is no less important. Beside the direct care for the life and health of the child, it also covers giving consent to any medical procedures being carried out on the child. In contemporary law, an older child has the right to independently decide about any medical procedures. The Family Act of Serbia 2005 is in line with this approach. The child of the age of fifteen who is able to reason can give consent to any medical intervention, (Art. 62/2).

The child can exercise this right, but is not obliged to do so. It is possible that the child transfers decision making to his/her parents. But, the problem might be in the situation when the child refuses intervention, contrary to the opinion of his/her parents. The solution to resolve the conflict might be to start the special court procedure for protection of child's right.

In English law the situation of the child who refuses to consent to medical intervention might be solved by getting the consent from the child's parents. As Penny Both explains: “Until a child has attained the status of adulthood at 18, although they may consent to treatment on their own behalf, under the Family Law Reform Act 1969, parental consent will still be effective and can therefore override the 16 or 17 year olds refusal to consent.“²³

3.3.5. Personal relations

At the international level the contacts between children and parents (and other persons) are governed by the Council of Europe Convention on Contact concern-

²³ Re W (a minor) (medical treatment) (1992) 4 A11 ER 627 in P. Both, Age as an Issue of Consent and Responsibility – too Young or too Old, *Pravni život* 10/2008, p. 275. The Family Law Reform Act 1969, s 8 (3) states: “Nothing in this section shall be construed as making ineffective any consent which would have been effective if this section had not been enacted“.

ing Children 2003.²⁴ The goals of the Convention are as follows: to determine general principles to be applied to contact orders; to fix appropriate safeguards and guarantees to ensure the proper exercise of contact and the immediate return of children at the end of the period of contact; to establish co-operation between central authorities, judicial authorities and other bodies in order to promote and improve contact between children and their parents, and other persons having family ties with children (Art. 1).

From a traditional standpoint, the maintaining of personal relations is considered as the right of the parent who does not live with a child. In recent times, as the focus in family law is on the child, it is considered as a right of the child to maintain personal relations with parents (and other persons). The Family Act of Serbia 2005 explicitly states that the child has the right to maintain personal relations with the parent he/she does not live with, thereby explicitly specifying the child as the holder of this right. However, it is provided that the parent who does not exercise parental rights has the right and obligation to maintain personal relations with the child, (Art. 78/3). Therefore, the holder of this right is not only the child but also the parent, with the caveat that maintaining personal relations with the child is not only a right, but also an obligation. In order for personal relations to be maintained, in many situations it is necessary for the parent with whom the child does live with to enable such relations to be maintained (e.g. if the child is small, maintaining personal relations is impossible without the active participation of the parent with whom the child lives with). The legal nature of maintaining personal relations can be defined as the right of the child and parents, but also the obligation of the parent with whom the child does not live with to maintain personal relations with the child, as well as the obligation of the parent with whom the child live with to enable this maintenance of personal relations.

The Family Act 2005 has expanded the rights of the child with respect to the maintenance of personal relations by providing that a child who is fifteen years of age and able to reason can decide on his or her own about maintaining personal relations with the parent he/she does not live with, (Art. 61/4). For the first time, Serbian family law recognizes the importance of maintaining personal relationship not only with parents but with other persons as well. Thus, a child has the right to maintain personal relations with relatives and other persons he/she is particularly close with, if that right has not been limited by a court decision, (Art. 61/5). Serbian legislation has expanded to the maximum extent the category of people with whom the child has the right to maintain personal relations. Therefore, this encompasses not only relatives, but also other

²⁴ Convention on Contact concerning Children, Strasbourg, 15. V 2003, Explanatory Report, *European Treaty Decrees*, No 192.

persons close to him or her. Regarding relatives, it is important for brothers and sisters who do not live together to maintain personal relations, as well as grandchildren with grandparents. It can happen, for example, that the parent does not permit the maintenance of personal relations between the child and his or her grandparents after the death of the other parent or divorce. Personal relations can be maintained with in-laws, for example a stepchild with a stepparent. Other persons with whom the child is particularly close can be, for example, foster parents who have cared for the child. The Family Act 2005 has altered the authority of organs to decide on personal relations. It is now exclusively the court (pursuant to the earlier Law on Marriage and Family Relations 1980 it was the guardianship authority that had competence) that decides.

The Family Act 2005 has significantly made the obligations of parents more strict with respect to the maintenance of personal relations with the child. The most severe family law measure with respect to the parents, deprivation of parental rights, can be implemented against those parents who fail to maintain a personal contact with the child or prevent the maintenance of contact between the parent with whom the child does not live with. Additionally, preventing the implementation of a decision on personal relations represents a criminal act (the Criminal Code of Serbia Art. 191/2).²⁵

3.3.5. *Upbringing and education*

The Family Act of Serbia 2005 defines the upbringing of the child as a component of care for the child, as well defining the manner in which the child's upbringing is to be carried out. It is stipulated that parents have the right and obligation to develop relations with the child based on love, trust and mutual respect, as well guiding the child to adopting and respecting the values of emotional, ethical and national identity of his or her family and society, (Art. 70). In a previous version of this provision in the Draft of the Family Act 2005, the Commission proposed a more general formulation, but this text was amended during the enactment procedure in the Assembly. The previous formulation provided that the parents have the right and obligation to develop relations with the child based on love, trust and mutual respect, as well as guiding the child to adopting and respecting values of a universal character, (Art. 70 of the Draft). The previous Law on Marriage and Family Relations 1980 very explicitly set ideological guidelines by defining the obligation of parents in the upbringing of their children. It was provided that parents have to guide their children

²⁵ Art. 191/2: "Whoever prevents the implementation of a decision of a competent organ which proscribes the manner in which personal relations of a minor are to be maintained with his or her parent or relative, shall be fined or imprisoned for up to one year." The Criminal Code 2005, *Official Journal of the Republic of Serbia* 85/2005.

towards adopting familial and social values inherent to the norms of socialist morality, (Art. 115).

The child's education, in contrast to his/her upbringing, which in many respects falls within the scope of the family, is carried out in schools as institutions. The Serbian Constitution provides for the obligation to elementary schooling, (Art. 71/2). The child's education, as a component of the parental care, encompasses the obligation of the parents to provide elementary schooling for the child, while further education of the child is obligatory, and it is to be provided in accordance with their abilities. The parents have the right to provide education for the child in accordance with their religious and ethical beliefs (Art. 71). The parallel existence of private and state-owned schools offers the parents and child a broader choice of schooling.²⁶ Religious education in Serbia has been introduced into secular schools in 2001 as an option for parents and children. However, the wide scope of possibilities for religious schools to be opened where religion is taught, as well as the fact that religious education is predominantly organized by representatives of the governing religion, whereby other religions are in a less advantageous position, brings up the question whether religion has any place in secular schools.

A child has the right to education in accordance with his/her abilities, preferences and inclinations. The Family Act 2005 introduces a right of the child who has reached the age of fifteen and who is able to reason to decide which secondary school he/she will attend (Art. 63).

3.3.6. Property

The regime of property management and disposal of the child's property depends on how the property is acquired. If it is acquired through the child's employment, the child has the right to manage and dispose of this property if he/she is fifteen years of age or older (Art. 192/1, Art. 193/1, Art. 64/3 Family Act).

The child has certain obligations if he/she acquires income or has property revenue. The child is obligated to cover the expenses of his/her own support, as well as the maintenance of parents or minor siblings under the conditions as provided by law, (Art. 66/2 Family Act). The obligation of the minor child to partially fulfill his/her own support is subsidiary in relation to the same obligation of parents and blood relatives, (Art. 154/3 Family Act).

²⁶ In Serbia, private schooling has been legalized with the Public Services Act 1991, *Official Journal of the Republic of Serbia* 42/91. Disappointment with respect to the schooling system (particularly the state-run system), during the 1970s in the United States, resulted in various forms of self-help, even home-schooling of children, despite the fact that only the state of Mississippi, as is mentioned in literature, has legalized this form of schooling. John Naisbitt, *Megatrendovi*, Zagreb, 1985, pp. 150-153.

The disposing of immovable and movable property of great value can be carried out only with the prior or later consent of the guardianship authority, (Art. 193/3 Family Act). In deciding whether to approve the disposing of the child's property, the guardianship authority should take the child's best interests into account, (Art. 6/1 Family Act).

3.3.7. Inheritance Law

The child's rights are stipulated in other branches of law as well. So, pursuant to the Inheritance Act 1995, (Art. 79) a person who is fifteen years old has active testamentary capacity, which means he/she can put together a will.

3.3.8. Labor Law

Pursuant to the Labor Act 2005, a person of the age of fifteen has the right to enter into employment relations but "...with the written consent of the parents, adopter or guardian, if such employment will not endanger the health, morals or education of the child, or if the employment is not otherwise prohibited by law" (Arts. 24/1, 25/1).²⁷

3.4. Child of the age of sixteen

3.4.1. Parentage

A child who is sixteen years of age and able to reason can acknowledge fatherhood (Art. 46 Family Act). Also, a mother and a child who is sixteen years of age and able to reason, give consent to the acknowledgement of fatherhood, as the consent of the mother and a child are conditions for the acknowledgement of fatherhood (Art. 48,49 Family Act).

3.4.2. Permission to marry

A child who is sixteen years of age and able to reason can request a permission to marry. A court may, for justified reasons, permit a minor who has reached sixteen years of age, and who has reached the physical and mental maturity necessary to perform the rights and duties of marriage, to conclude a marriage, (Art. 23 Family Act).

3.4.3. Abortion

A pregnant woman who is sixteen years of age has the right to independently request for an abortion.²⁸

²⁷ Inheritance Act 1995, *Official Journal of the Republic of Serbia of Serbia* No. 46/1995; Labor Act 2005, *Official Journal of the Republic of Serbia* No. 24/2005.

²⁸ Cessation of Pregnancy in a Healthcare Institution Act of 1995, *Official Journal of the Republic of Serbia* No. 16/1995.

4. Procedure for the protection of the child's rights

The Family Act 2005 constitutes the special procedure for the protection of the child's rights. In such disputes the courts are obliged to be governed by the child's best interests. The court is provided by special powers in order to fully protect the child's rights. So, for example, it is required to appoint a temporary representative if it finds that the child, as a party to the proceedings, is not represented properly. In addition, if the court determines that a child is capable of forming his/her own opinion, it is obligated to:

1. ensure that the child duly receives all necessary information;
2. to allow the child to directly express his/her opinion and to devote due attention to this opinion in accordance with the age and maturity of the child;
3. to establish the opinion of the child in a manner and place which is in accordance with his or her age and maturity, except where this would obviously be in conflict with the child's best interests, (Art. 266).

Furthermore, the collision guardian (or temporary representative) when representing the child who is able to form his or her own opinion is obliged to:

1. ensure that the child duly receives all necessary information;
2. to offer the child an explanation as to the possible consequences of an action he/she is undertaking;
3. to relay the opinion of the child to the courts, if the child should not be capable of directly expressing his or her own opinion before the court, except where this would obviously be in conflict with the child's best interests, (Art. 267).

The procedure for the protection of the child's rights are particularly urgent. The first hearing is to be scheduled within eight days from the filing of the action to the court, while court of appeal is obliged to render a decision within fifteen days following the day the appeal was delivered to the court, (Art. 269 Family Act 2005).

An investigative principle is applied in this procedure, while in general contentious proceedings the dispositive principle is applied. The investigative principle means that the courts can establish facts even when they are not disputed between the parties and can even independently investigate facts which none of the parties have presented, (Art. 205). The investigative principle is provided for in proceedings relating to family relations because of their importance and particularly for the protection of the child's interests.

In contrast to the general contentious proceedings which are public, proceedings in family relations are closed to the public, bearing in mind that the issues are of personal nature. In this way, their privacy is protected. Apart from this, the Family Act 2005 provides that information from court transcripts are considered as confidential and are to be kept secret by all parties to the proceedings who have access to such information, (Art. 206).

5. Conclusion

Contemporary family law has moved from a paternalistic approach towards the child to the approach that the child is an autonomous individual in the family relationship and family proceedings. In Serbia the child is given limited legal capacity at a certain age, but in most cases only if the child has the maturity to act. The child's maturity is defined in Family Act as being able to reason. The certain age depends on the issue concerned. In most cases it is the age of fifteen, but also the younger child (at the age of ten) has certain rights, and some rights he/she acquires at the age of fourteen or sixteen.

The child's capacity to act independently is an issue that has to be established in a particular case. The assessment whether the child in particular case is "able to reason" or if the child is "capable of forming his/her own opinion", are issues inevitably influenced by court discretion. This might cause the potential risk of continuation of paternalistic approach in court practice, hidden in the assessment if the child in a particular case is (or rather is not) able to reason, or capable of forming his/her own opinion.

The Family Act 2005 introduces specialization of judges. It is stipulated that judges must have special knowledge in the field of children's rights, while lay-judges must be chosen among professionals who have experience in working with children and young persons, (Art. 203/2, 3, 4). In family proceedings guardianship authority or other competent institution are active participants. The court is under the obligation to ask for the expert opinion of the guardianship authority, a family counseling service or another institution specialized in mediating family relations in the proceedings on the protection of a child's rights (Art. 270).

Specialization of judges and active participation of guardianship authority or other competent institution in family proceedings are measures introduced to provide for implementing legal standards in the field of children rights, based on modern standards not only in law, but in other relevant disciplines, such as child psychology. The specialization of judges should hopefully prevent continuation of paternalistic approach in court practice and enable children to become autonomous individuals in family law.

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Autonomija deteta u savremenom porodičnom pravu

Sažetak

U ovom radu se proučava princip autonomije deteta sa komparativnog aspekta, upoređujući porodično pravo Srbije sa pravom evropskih država. Komisija za evropsko porodično pravo definisala je Principe evropskog porodičnog prava vezane za roditeljsku odgovornost 2007. godine, uključujući i principe o pravima deteta. To su: najbolji interes deteta, autonomija deteta, zabrana diskriminacije deteta, pravo deteta da bude saslušano, konflikt interesa. Dete kao autonomna individua ima određena prava uključujući pravo na participaciju koje je prvi put regulisano u Konvenciji o pravima deteta UN 1989. godine.

Prema Porodičnom zakonu Srbije iz 2005. godine dete u određenom uzrastu dobija specifična prava. Tako, na primer, u uzrastu od 15 godina, ako je sposobno za rasuđivanje, ima sledeća prava: na promenu ličnog imena, na dobijanje informacija o svom poreklu, na odlučivanje sa kojim roditeljem će živeti, na davanje saglasnosti na medicinske intervencije, na odlučivanje koju će srednju školu upisati. Dete ima pravo da slobodno iskaže svoje mišljenje, ako je sposobno za formiranje mišljenja. Sa napunjenih 10 godina dete stiče pravo da slobodno i direktno iskaže svoje mišljenje. Osim toga, Porodični zakon Srbije iz 2005. godine uveo je novi sudski postupak za zaštitu prava deteta.

Ključne reči: autonomija, dete, pravo, mišljenje, saglasnost, poreklo, obrazovanje, medicinska pitanja, evropska prava