Family Autonomy in Contemporary Parent-Child Relations

1. Introduction

Family autonomy as one of the principles in family law could be analyzed in different fields of parent-child relations. In some, parties have a possibility to express their will in constituting mutual rights and duties; on the other hand, there are areas where free will is limited. It could be observed that private initiative of the parties is broadened in contemporary family law. Self-determination gains in importance regarding custody of the child, parental rights and duties, rights of the child. In the field of filiation, establishing and contesting maternity and paternity, free will is limited by the principle of establishing biological truth in court proceedings. On the contrary, if the child is conceived by means of medically assisted conception, the will of the parties is crucial in establishing legal maternity and paternity. This is so concerning surrogate motherhood and artificial insemination by donor.

2. Family Autonomy: Parental Rights and Duties

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In Serbian law, according to Family Act 2005, parents have parental right towards their children. Parental right is derived from the duties of the parents and it exists only to the extent necessary for the protection of the personality, rights and interests of the child (Article 67 FA). Parents have the right and duty to take care of the child. Taking care of the child includes protection, raising, upbringing, education, representation, and support of the child and management and disposal of the child’s property. Parents have the right to receive all information about their child from educational and medical institutions, (Article 68 FA). The Serbian Family Act has preserved the term “parental right”, but it is underlined that the parental right derives from the parent’s duty and with an intention to confirm the right of a child to have a parent taking care of him or her - before anybody else - (Article 67 FA). The term “parental right” was preserved due to the fact that in Serbian language the term “parental responsibility” could create confusion in relation to the parents’ liability for a damage caused by the child to third parties, as the same word in Serbian language it is used for responsibility and liability. The parents are obliged to act in the best interest of their child. The principle of the best interest of the child is explicitly formulated in the Family Act 2005 for the first time, (Art. 6/1 FA). It is stated that:

“Everyone is under the obligation to act in the best interest of the child in all activities related to the child.”

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2 The Serbian Family Act was adopted by the National Assembly on 17 February 2005 and entered into force eight days after publishing, but its implementation began on 1 July 2005, hereinafter referred as FA, Official Journal of the Republic of Serbia 18/2005. The draft of the Family Act was prepared by a drafting committee with Professor Marija Draškić as the coordinator, and myself as one of the members of this committee.
4 Some legal documents in the comparative law have substituted the term “parental right” with a term “parental responsibility”. See, for example Article 2-4 of the English Children Act of 1989 and Article 163 paragraph 1 of the German Civil Code. The UN Convention on the Rights of the Child took over the concept of responsibility (Article 18 paragraph 1).
The parental autonomy regarding their rights and duties toward the upbringing and education of the child is limited. One example of this limitation is a provision which forbids humiliating actions and punishments that insult the child’s human dignity. Parents have the duty to protect the child from such actions by other persons, (Article 69/2 FA). On the contrary, in the historical perspective, pursuant to the Serbian Civil Code 1844, for example, the parents had the right to “... punish immoral and insubordinate children with a moderate domestic punishment”. The possibility of imprisoning children for up to ten days, existed pursuant to criminal law.

The provisions to the protection from the family violence have been included in the text of the Family Act for the first time. This constitutes civil law protection from family violence. Family violence is defined as the behavior by which one family member endangers the physical integrity, mental health or tranquility of another family member, (Article 197/1 FA). There is also criminal law protection, as family violence is a criminal offence according to the Serbian Criminal Code.5 The Family Act stipulates measures against the offender, such as: prohibition to approach the family member, prohibition to enter the space close to the family member’s place of residence or place of work, prohibition of further harassment and issuing an order for moving in or leaving the family apartment or house regardless of the fact who is the owner of the family apartment or house, (Article 198 FA). These measures have the aim to prevent the offender to repeat the act of violence and to protect the physical integrity, moral health and tranquility of the family members. Due to the fact that this is a completely new phenomenon in Serbian law, a special civil procedure for the protection from family violence has been introduced, (Articles 283-289 FA).

5 Criminal Code, Official Journal of the Republic of Serbia 85/05, Article 194.
Serbian Family Act directly limits parental autonomy regarding upbringing the child by the provision which forbids parents to leave a child of pre-school age unsupervised (Article 69/3) and by the provision which regulates to whom the parents may entrust the child temporarily. It has to be the person who meets the requirements for being a guardian (Article 69/4).

2.2. Family Autonomy: Exercise of the Parental Right

Parents have autonomy in decision-making and arranging their relationship with a minor child not only during marriage or partnership, but also after divorce or separation.

The Serbian Family Act has introduced joint exercise of the parental right as a form of shared parenting in a situation when parents do not lead a mutual life. The same is applied to married and unmarried parents. The joint exercise of the parental right should be granted only if the parents agree to this type of the parent-child relationship. An agreement on the joint exercise of the parental right must include an agreement that parents jointly and with each other’s consent exercise the parental right in the best interest of the child. Included in the agreement on the joint exercise of the parental right, there must be an agreement on what is considered to be the domicile of the child.

Joint exercise of the parental right is not a legal presumption, but merely one of the options for parents. Courts have the power to examine the agreement and to decide whether to accept it or not. The divorce court will accept it if it deems this agreement to be in the best interest of the child. The agreement thus becomes an integral part of the judgment decree.
In comparative family law, especially in legal systems where joint parenting has existed longer, the concept differs. For example, in Swedish legislation, courts have the option to award joint custody when parents do not agree on this type of custody after divorce or separation (Bill 1998). According to the Bill, however, the power to order joint custody in a case where a parent opposes joint custody should be used with great caution and sensitivity.6 In France, the judge has the ability to order, even if the parents are not in agreement, that the child’s residence should alternate between the homes of each of the parents. In brief, in Swedish legislation, courts have the option to award joint custody when parents do not agree concerning this type of custody after divorce or separation.7

Another form of exercise of the parental right is independent exercise. The parents could make an agreement on the independent exercise of the parental right, so this is another way of realizing family autonomy. This agreement must include the parents’ agreement on entrusting the common child to one parent, an agreement on the amount of contribution for child support from the other parent, and an agreement on the manner of maintaining the child’s personal contact with the other parent.

Family autonomy might be realized as there is a possibility for parents to take part in mediation proceedings. Mediation shall ordinarily be a part of matrimonial dispute procedure and it includes procedures for attempts at reconciliation and procedures for settlement. The purpose of settlement is to resolve the disturbed relationship between the spouses without contention after divorce or marriage annulment. The court or the institution entrusted with the mediation proceedings shall endeavor that the spouses reach an agreement on the exercise of the parental right, Article 249-246.

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3. Family Autonomy: Child’s Rights

In contemporary family law the important principle is autonomy of the child. Child is an active participant in family law relations. The UN Convention on the Rights of the Child was the first binding document for signatory states related exclusively to the rights of the child. 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”.

The Commission on European Family Law has defined principles regarding rights of the child in the Principles of European Family Law Regarding Parental Responsibilities in 2007. These are: the best interest of the child, the autonomy of the child, the non-discrimination of the child, the child’s right to be heard, the conflict of interests. Autonomy of the child as one of the European Family Law principles is formulated in the 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, make decisions and act independently on his or her own.”

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. The same regulation exists in the laws of other Eastern European countries, such as Russia and Croatia, for example.9 The Family Act 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. Besides providing a broad scope of child's rights, the Family Act also ensures its exercise. The child can exercise his/her rights independently at a certain age.

At the age of ten the child who is able to reason has the right to give consent to change his or her personal name, gives consent to adoption, to fostering and has the right to propose the

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person who will be appointed his/her guardian. 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. At the age of ten child
who is able to reason can freely and directly express his or her opinion in any judicial or
administrative proceedings in which his or her rights are being upon and 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, Articles 346,
98, 116, 127, 265.

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).

At the age of fifteen, if he/she is able to reason, a child has a right to change a personal name
(Article 346/1), the right to inspect the Birth Register and other documentation related to his
or her origin (Article 59/3), to decide with which parent he/she wants to live (Article 60/4), to
give consent to any medical intervention (Article 62/2), he/she can decide on his or her own
about maintaining personal relations with the parent he/she does not live with. For the first
time (Article 61/4), Serbian family law recognizes the importance of maintaining a personal
relationship not only with parents but with relatives or other persons. Thus, the child has the
right to maintain personal relations with relatives and other persons he/she is particularly
close with (Article 61/5). The child who has reached the age of fifteen and who is able to reason has the right to decide which secondary school he/she will attend (Article 63/2). If the property is acquired through child’s employment, the child has the right to manage and dispose of this property (Article 193/1). According to Inheritance Act 1995, a person who is fifteen years old has active testamentary capacity, which means he/she can put together a will. According to 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”.10

A child who is sixteen years of age and able to reason can acknowledge fatherhood, and a mother and a child give consent to the acknowledgement of fatherhood, as the consent of the mother and a child are conditions for the acknowledgement of fatherhood, Articles 46,48,49. A child who is sixteen years of age and able to reason can request a permission to marry, Article 23. A court will, 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. A pregnant woman who is sixteen years of age has the right to independently request an abortion.11

The child has certain obligations. These are: to help parents in accordance with his/her age and maturity and if a child who earns wages or has income from property is under the

obligation to partially finance the needs of his/her maintenance or the maintenance of a parent or minor brother or sister, (Art. 66 FA).

The Family Act 2005 constitutes a 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.

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 the second instance is obliged to render a decision within fifteen days following the day the appeal was delivered to the court. The Family Act 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. The specialization of judges should hopefully prevent continuation of paternalistic approach in court practice and enable children to become autonomous individuals in family law.

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 continuing 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.

4. Family Autonomy: Filiation

4.1. Maternity

For a long time in legal history the maternity issue was not raised. The principle from ancient Roman law *mater semper certa est etiam si vulgo conceperit* was broadly accepted. The mother was a woman who gave birth to the child.

In the contemporary family law, a provision which regulates who is the mother of the child is introduced as an explicit provision in family acts. This is so in Serbian family law. The Family Act contains the provision explicitly stating that a woman who gave birth to a child is to be considered as a child’s mother, (Article 42). In addition, the maternity can be established by the court decision in the exceptional situation if a woman who gave birth to a child was not

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13 *Digesta*, 2,4,5 (Paul. 4. ed.): *Quia semper certa est, etiam si vulgo conceperit; pater vero is quem nuptiae demonstrat.*
entered into the Birth Register as a child’s mother. The child and the woman claiming to be the child's mother have the right to establish maternity. A child may initiate action to establish maternity regardless of the time limit. A woman claiming to be a child’s mother may initiate action to establish her maternity within one year from the day of learning that she gave birth to a particular child, and no later than ten years from the birth of the child, (Article 249). The maternity can be contested too. This procedure is necessary in cases when the wrong data of a child’s mother have been entered into the register, in case of default or substitution of children, or the use of somebody else’s health identification card in a delivery hospital.14 The child, the woman entered in the register of births as the child’s mother, the woman claiming to be the mother, if she, by the same action, requests the establishment of her maternity, and the man, considered to be the father of the child, have the right to contest maternity. A child may initiate action to contest maternity regardless of the time limit. A woman entered in the register of births as a child’s mother may initiate action to contest her maternity within one year from the day of learning that she did not give birth to that child, and no later than ten years from the birth of the child. A woman who claims to be a child’s mother may initiate action to contest the maternity of the women entered in the register of births as the child’s mother within one year from the day of learning that she gave birth to that child, and no later than ten years from the birth of the child. A man considered to be the child's father under this Act may initiate action to contest maternity within one year from the day of learning that the women entered in the register of births as the child’s mother did not give birth to the child, and no later than ten years from the birth of the child (Article 250). There are restrictions for contesting maternity. Maternity may not be contested if established by a final court judgment, after the adoption of the child and after the death of the child, (Article 44).

14 In a number of cases false documents are used in the hospital because the mother does not have medical insurance and is not aware of the fact that giving birth is free, regardless of insurance. Although, in such cases there is no dispute as to maternity, court proceedings must be initiated so that maternity can be properly established.
The Family Act has regulated the issues concerning establishment and contesting maternity of a child who is conceived with biomedical assistance, stating similarly that a woman who gave birth to a child is always considered a child’s mother (Article 57/1,2). This rule implicitly prohibits the surrogate motherhood (Article 58/1,2). In addition, there is a provision which states that the maternity of a woman who donated the ovum cannot be established (Article 57/2 and Article 58/5).

In Serbia the Act on Curing Infertility by Biomedically Assisted Conception is adopted recently.\textsuperscript{15} The possibility of free access to biomedically assisted conception \textit{in vitro} for the couples of less than 40 years of age is introduced as well. Similarly to the solutions of Family Act, the ABMAC has a provision that stipulates that a woman who gave birth to a child is to be considered as the child’s mother, (Article 65/2). The ABMAC also forbids establishment of the donor’s maternity, (Article 65/4). In addition, the ABMAC explicitly establishes who is the mother of the fetus, stating that the mother is a woman who is carrying the fetus, or was carrying the fetus as the result of an implantation of the embryo or sperm or ovum in her body / womb in the process of a biomedically assisted conception, (Article 65/1). It might be said that this kind of solution is unusual in comparative law. It is questionable what was the reason for incorporating this provision in the ABMAC by the Serbian legislator. In addition, the ABMAC forbids contesting maternity in the situation of BMAC using ovum of the same woman (or early embryo), if she gave consent to this procedure, (Article 65/3). This provision seems unnecessary, if the ovum of the same woman is used for the conception, this woman is the mother, both genetical and gestational, and she does not have any interest to contest maternity. It would be logical to forbid contesting maternity if the ovum of the other woman

\textsuperscript{15} The Act on Curing Infertility by Biomedically Assisted Conception. \textit{Official Journal of the Republic of Serbia} 72/2009, entered into force eight days after publishing, but its implementation began on 1 January 2010, hereinafter referred as ABMAC.
(donor) is used, so if the woman who gives birth to the child consented to the use of donor ova, she should not have a right to contest biological (genetical) maternity. The Serbian legislator failed to regulate this situation, however. This Act explicitly forbids surrogate motherhood (Article 6/25).

Comparatively, in the United Kingdom there are two acts concerning surrogate motherhood: Surrogacy Arrangements Act 1985 and Human Fertilization and Embryology Act 2008 (earlier HFEA 1990). Section 30 provides circumstances in which “parental order” in respect of gamete donors can be sought.16 “Where a woman, a ‘surrogate mother’, has carried a child on behalf of another couple who were either: (i) both that child’s genetic parents (full surrogacy) or (ii) where one of the couple is the child’s genetic parent, having donated sperm or an egg, they may apply for an order to be treated as legally the child’s parents.

In Israel the Surrogacy Agreements (Approval of Agreement and Status of the Child) was passed in 1996. Regarding status of the child Rhona Schuz states:

“Within 24 hours of the delivery, notification of the birth should be given to the Welfare Officer who is deemed to be the sole guardian of the child until a Court order is made. As soon as possible after the birth the baby is to be handed over in the presence of the Welfare Officer to the prospective parents who have the custody of the child and owe him/her parental duties and responsibility. Within seven days of the birth, an application for a Parental Order must be submitted to the Court. The Court must grant this application unless it considers, after reading the report of the Welfare Officer, that such an order would be contrary to the welfare of the child. The effect of the Parental Order is to transfer full and exclusive guardianship to

the prospective parents, who are then treated as the natural parents for all purposes... Until the Parental Order has been made, the surrogate mother can seek to renegotiate the agreement and request the child. However, the Court will not allow this unless, in the light of the Welfare Officer’s report, it finds that there has been a change in the circumstances justifying her change of mind and that would not harm the welfare of the child.” 17

In Greece in 2002 the Law 3089/2002 on medically assisted reproduction is adopted and it has been incorporated into the Greek Civil Code. 18 This law permits surrogate motherhood. Efie Kounougeri-Manoledaki explains:

”...the mother of the child is presumed to be the woman who wanted the child and sought and received the judicial permission mentioned in CC art 1458, provided that the conditions laid down in this latter article have been met.”

In Russia, according to Family Code 1995, spouses who gave their consent to the implantation of the embryo to the other woman who gestates and gives birth to the child, have a possibility to enter their data as parents into the birth register. The consent of the woman who gives birth to the child (surrogate mother) is necessary, (Article 51/4). After the registration of the birth in the birth register, neither spouses nor the surrogate mother can contest maternity or paternity referring to these circumstances. 19

Besides surrogate motherhood, autonomy of the mother could be exercised in the case of anonymous birth, situation allowed in a few European countries (e.g. France, Czech

Republic, Italy, Luxemburg). In the French Civil Code in 1993 was introduced the right of a woman to give birth anonymously, as the law provides a ground for the rejection of the action to determine maternity, (Article 341, para 1.). This solution already exists under the Code de la famille et de l’aide sociale (Article 47). The possibility to give birth anonymously is a controversial solution in French theory. Jacqueline Rubellin-Devichi explains:

"Some justifiably consider this freedom is of benefit to both mother and child, for it avoids abortion, infanticide and abuse. Others invoke the need for the individual, at the time he is developing his personality, to know genetic parents, without recognising that the individual in question will have largely passed the age of development when he starts his search for his origins. "In addition she is of the opinion that “...it is wrong to allege that this text is contrary to Article 7 of the United Nations Convention on the rights of the Child. In fact, the mother’s right to remain anonymous makes it specifically impossible for the child to know his parents.“21 The status of the child is improved in France by the Law on access to origins for adopted persons and wards of the state 2002 which “... does not allow access to identity of a mother who has required secrecy, but facilitates the lifting of secrecy by encouraging the mother to give information which could be passed on to the child and by setting up the National Council for Access to Origins, whose aim is to assist with the provision of information to origins, when a case arises.”22

Having in mind provisions which regulate maternity, it could be said that family autonomy concerning maternity is limited by the obligation to respect and establish the truth of

biological origin of the child in court proceedings. In Serbia the possibility to establish and contest maternity in the court proceedings is the right given to all persons involved and particularly to the child which has no time limit to initiate the proceedings, these provisions are in favor of family autonomy. On the other hand, the prohibition of surrogate motherhood limits family autonomy, as there is no possibility to consider woman who does not deliver the child as a mother, as a consequence of surrogacy agreement. Where surrogate motherhood is permissible it is the way to express family autonomy, as family members (spouses or partners) can express their will that the legal mother will not be the woman who gives birth to the child. In countries where anonymous birth is allowed, autonomy of the mother exists, as she is able to prevent her maternity as biological mother to be established in law.

4.2. Paternity

A common rule which regulates who is considered the father of the child born in a marriage states that the husband of the child’s mother is to be considered the father. This presumption is rebuttable. In Serbian law the husband of the child's mother is to be considered the father if a child was born within three hundred days after the termination of marriage, but only if the marriage was terminated due to the death of the husband and if the mother does not conclude another marriage in this period. The husband from the new marriage of the child's mother is to be considered the father of the child born in that marriage, regardless of the time when marriage is concluded after the termination of the prior marriage (Article 45/1-3 FA). In comparison to prior Act23, there is a novelty in Family Act concerning the presumption of the

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23 Law on Marriage and Family Relations, *Official Journal of Republic of Serbia* 22/80, 24/84, 11/88, 22/93, 25/93, 35/94. In a situation in which the child has been born after the termination of a marriage (within 300 days) the husband of child’s mother is to be considered as a child’s father. If mother got married before that, than the husband from the prior marriage is considered a father if the child was born in the period of 270 days after termination of marriage, unless the mother’s husband from the subsequent marriage acknowledges his paternity, Article 86.
paternity of the mother’s husband. This presumption has been limited. In a situation in which
the child has been born after the termination of a marriage (within 300 days) the husband of
the child’s mother is to be considered as a child’s father only if the marriage ended by
husband’s death and if mother did not get married in that period. The limitation of the \textit{pater
est} presumption is introduced into law in order to establish biological truth.

The novelty introduced by the Family Act concerning the status of the child is the provision
that states that a child has the right to know who his/her parents are (Article 59 FA). The
deadline in which the child can take a legal action in maternity and paternity lawsuits to
contest or establish maternity or paternity has been abandoned. The prior Act limits this right
until the child reaches 25 years of age, (Articles 98/2, 104/2, 109/2). The new provision
enables the child to exercise the right to know who his/her parents are, (Article 249/1, 250/1,
251/1, 252/1). Therefore, the right of a child to learn about his or her origin, which is
guaranteed by Article 7 paragraph 1 of the Convention on the Rights of the Child has been
directly implemented.24 This is an example of the existence of the autonomy of the child in
the issues of filiation as well.

If a child was born out-of-wedlock, the paternity has to be established by acknowledgment or
by a court judgment, (Article 45/4 FA). A man who has reached sixteen years of age and who
is able to reason may acknowledge paternity, (Article 46 FA). Paternity may be acknowledged
only if the child is alive at the moment of acknowledgment. Exceptionally, acknowledgment
of paternity before childbirth is effective if the child is born alive, (Article 47 FA). The
acknowledgement becomes lawful if mother and a child give consent to father’s
acknowledgment. Mother and a child can consent if they are sixteen years of age and able to

24 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."
reason, (Article 48/1, 49/1 FA). If the mother or the child cannot give consent, the consent of the other one is sufficient, (Article 48/2, 49/2 FA). If neither the mother nor the child can give their consent, the consent to the acknowledgment of paternity gives the child’s guardian, with prior consent of the guardianship authority, (Article 50 FA). Thus, the acknowledgement is not a unilateral act, as consent of the mother and the child is required. Concerning the principle of family autonomy in connection with the rules of acknowledgement, it could be said that family autonomy is extensive in the situation of the acknowledgment. The acknowledgment depends almost entirely on the will of the parties concerned. If the man acknowledges his paternity and mother consents (and a child older than 16), this man is considered a father. The biological truth is not examined.

In Serbian law the paternity can be contested. This possibility exists concerning the paternity of the child born in wedlock, but also the paternity of the child born out of wedlock. The paternity of a man entered in the register of births as the child’s father, on the presumption of the mother’s husband, can be contested. The child, the mother, the mother’s husband, and the man claiming to be the father, if he, by the same action, requests the establishment of his paternity, have the right to contest paternity. The man who claims to be the father is not limited in contesting and establishing his paternity, on the contrary to the law before 2005. This novelty enables the biological truth to be established. In the court proceedings for contesting paternity, the court is obliged to determine biological truth concerning paternity. The DNA and other biomedical techniques enable the court to discover who is the biological father of the child. It could be said that the family autonomy is limited by the principle of establishing the biological truth.
When adopting the Family Act, the legislator decided to synchronize the deadlines in all the maternity and paternity disputes by providing all the parties, except the child, with a subjective deadline of one year from learning of the relevant facts and the objective deadline of ten years from the child’s birth. This kind of synchronization has cut the deadline for some of the parties. Nevertheless, this does not mean that the options to initiate the procedure after the deadline are exhausted. The deadline for the child is unlimited, so if it is in the interest of the child to initiate the procedure before he or she reaches the legal age, the procedure will be initiated by his or her legal representative and after reaching the legal age - by the child himself. If the child’s interests are in the collision with the interests of his legal representative, the guardianship authority will appoint a so-called collision guardian to the child, (Article 132/2 item 3 and Article 265 FA).

The Family Act has regulated the issues concerning establishment and contestation of the paternity of a child who is conceived with biomedical assistance stating that the mother’s husband, or the mother’s cohabitee, is to be considered the father of a child conceived through biomedical assistance, provided he has granted written consent to the procedure of biomedically assisted fertilization. Paternity established in this way may not be contested, the possibility to contest paternity exists only if the child was not conceived through the procedure of biomedically assisted fertilization. If a child is conceived through biomedical assistance by donated sperm, the paternity of the man who donated the sperm may not be established, (Article 58 FA). In other words, the mother’s husband can contest paternity if he has not granted written consent to the procedure of biomedically assisted fertilization by donated sperm.
The ABMAC stipulates that the father of the child conceived by BMAC is the mother’s husband or partner if he has consented in writing to the procedure in which his sperm be used. In addition, the ABMAC forbids establishing the paternity of the donor if the donor’s sperm is used in the procedure, (Article 66/1,3). The ABMAC forbids contesting paternity in the situation of BMAC using sperm of the mother’s husband or partner, unless there is a reasonable doubt that he is not the father, as in the BMAC his sperm was not used, (Article 66/2). The ABMAC, though, omits to regulate the situation when the mother’s husband or partner consents in writing to the procedure in which donor’s sperm would be used. There is no article which would forbid contesting paternity in this situation. This omission enables mother’s husband or partner to change his mind regarding AID and initiate court proceedings for contesting his paternity leaving the child fatherless, as the Act forbids establishing the donor’s paternity. Unfortunately, Serbian legislator shows a lack of understanding of family law relations which might arise from the AID. It would be much easier and much clearer if legislator referred to the relevant articles of Family Act and not tried to regulate paternity, as this attempt was not successful.

5. Conclusion

In ancient Roman law *pater familias* had *ius vitae ac necis* towards his children (and other persons in his *patria potestas*). Nevertheless, *patria potestas* was limited by the rule that states:

”*Patria potestas in pietate non in atrocitate consistere debet.*”25

In historical perspective in Serbia, pursuant to the Serbian Civil Code 1844, the parents had the right to “... punish immoral and insubordinate children with a moderate domestic punishment”. In contemporary Serbian family law humiliating actions and punishments which insult the child’s human dignity are forbidden. The issue of corporal punishment of the children is in focus in Serbia these days, as the suggestion that corporal punishment has to be explicitly forbidden in the family law is raised.

In contemporary family law parents have the autonomy to decision-making and arranging their relationship with a minor child not only during the marriage or partnership, but also after divorce or separation. Shared parenting in the form of joint custody or joint exercise of the parental right (Serbian term) extends parental autonomy.

Autonomy of the child is an important principle in modern family law. This principle is realized by broadening the independent rights of the child. 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 and has a right to participate in the decision-making in important matters concerning him/her as well. 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 evolitional 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 practice.25
Regarding filiation, on one hand the limitation of the parties’ autonomy could be seen. This is due to the principle of establishing biological truth in proceedings of establishing and contesting maternity and paternity. The DNA test enables the biological truth to be established. In contemporary family law, the right of the child to know who are his/her parents is of great importance. On the other hand, if the child is conceived by bio-medical assistance with a donor’s sperm, the paternity depends on the will of the parties, as the mother’s husband or partner would be legal father of the child. If he consented to the procedure, he is not able to contest his paternity, regardless of the fact that the biological father is a sperm donor. If the child is conceived with the use of donor’s ova, the mother of the child is the woman who gave birth to the child. In the jurisdictions were surrogate motherhood is allowed, the maternity depends on the will of the parties, and established by court decision. Thus, it could be seen that family autonomy is extensive in establishing maternity and paternity if the child is conceived by biomedical assistance.