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## Surrogacy and Heterologous Fertilisation on the move

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### Summary

Since the day when the first child was born with the aid of assisted reproduction (Louise Brown), the scientific community has always been interested in the implementation and the application of assisted reproduction methods. Although these methods help people around the globe to become parents, they may cause serious health risks, raising at the same time crucial legal and ethical issues. Moreover, the aforementioned issues deepen further due to the development of "reproductive tourism" since people travel to countries where the law permits the application of methods that are prohibited in their home country, thus circumventing the law. This situation can be perilous for the parties involved and evoke serious social and legal issues. Most major issues will be outlined by this comparative study of Greek and German legislation by examining surrogacy and heterologous fertilisation, a field where most delicate situations arise. Last but not least, the need of a common European legal framework, which will protect the public health and the rights of children and parents, is undeniable.

## Παρένθετη Μητρότητα και Ετερόλογη Γονιμοποίηση σε Κίνηση

Αντώνης Τσαλίδης

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### Περίληψη

Από τη γέννηση του πρώτου παιδιού με υποβοηθούμενη αναπαραγωγή (της Louise Brown) πριν από 37 χρόνια, η εφαρμογή των μεθόδων της υποβοηθούμενης αναπαραγωγής παραμένει στο επίκεντρο των συζητήσεων της επιστημονικής κοινότητας. Παρ' όλο που αυτές οι μέθοδοι βοηθούν ανθρώπους σε όλο τον κόσμο να γίνουν γονείς, συνδέονται με υψηλούς κινδύνους και εγείρουν κρίσιμα νομικά και ηθικά ζητήματα. Τα προαναφερθέντα προβλήματα εντείνονται ακόμα περισσότερο με την ανάπτυξη του «αναπαραγωγικού τουρισμού». Οι ενδιαφερόμενοι ταξιδεύουν σε χώρες όπου η νομοθεσία επιτρέπει μεθόδους που απαγορεύονται στη χώρα τους, καταστρατηγώντας με αυτόν τον τρόπο το νόμο. Αυτό μπορεί να είναι επιζήμιο για τα εμπλεκόμενα μέρη και μπορεί να προκαλέσει σοβαρά κοινωνικά και νομικά προβλήματα. Τα σημαντικότερα από αυτά τα προβλήματα θα αναλυθούν μέσα από τα παραδείγματα της παρένθετης μητρότητας και της ετερόλογης γονιμοποίησης, όπου ανακύπτουν οι πιο περίπλοκες καταστάσεις σε μία συγκριτική μελέτη μεταξύ γερμανικού και ελληνικού δικαίου. Η ανάγκη ενός κοινού ευρωπαϊκού νομικού πλαισίου που θα διασφαλίζει τα δικαιώματα του παιδιού και των ανθρώπων που επιθυμούν να γίνουν γονείς καθώς και τη δημόσια υγεία είναι εμφανής.

## A. Introduction

Since the day when the first child was born with the use of assisted reproduction (Louise Brown), the scientific community has always been interested in the implementation and the application of assisted reproduction methods. Although these methods lead to the birth of a new life, for they help people around the globe to become parents, at the same, they may cause serious health risks. Moreover, the child's and mother's health may be endangered, family relationships may be put at stake and crucial legal and ethical issues may be raised. Furthermore, they affect the economy of each country as the high cost of assisted reproduction affects the national health services' budgets, since most countries cover some of the expenses related to the implementation of those methods. The aforementioned issues are deepened further by the development of "reproductive tourism" or more accurately "cross border assisted reproduction".<sup>1</sup> People travel to countries where the law does not prohibit the implementation of methods that are prohibited in their home country, thus circumventing the law. This situation may be perilous and may evoke serious legal and social issues. The most concerning issues in regard to MAR<sup>2</sup> are the inequalities in granting access to those methods, the regulation of affinity and legal status of the child born along with citizenship issues. These issues will be outlined in this paper by a comparative study of Greek and German legislation by examining surrogacy and heterolo-

gous fertilisation, a field where most delicate situations arise. German and Greek legislations were deliberately chosen to be studied comparatively, due to their different characteristics. Consequently, the emerging issues that surface due to law divergences from cross border MAR will be analysed in a systematic way. Nevertheless, this could encourage lawmakers to take initiative towards this direction.

## B. Mobility within Europe

The reasons behind the rise of "cross border assisted reproduction" are manifold. The most common is law evasion, especially in countries with restrictive legislation (e.g. in Germany, where egg donation and surrogacy are prohibited). Furthermore, people choose to cross the borders of their respective countries, when treatment is unavailable or associated with long waiting times in their home country (e.g. in United Kingdom, where, in the past, due to a lack of oocyte donors, many decided to travel abroad in order to become parents), when they wish to undergo treatment confidentially and when treatment is more affordable or of higher quality in another country.<sup>3</sup> Finally, nowadays, people may move easier to other European countries to become parents, since low travel expenses and the Schengen Zone have rendered mobility in Europe more accessible.

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<sup>1</sup> According to ESHRE's good practice guide for cross-border reproductive care for centres and practitioners, "Cross-border reproductive care (CBRC) refers to a widespread phenomenon where infertile patients or collaborators (such as egg donors or potential surrogates) cross international borders in order to obtain or provide reproductive treatment outside their home country". <http://www.eshre.eu/~media/emagic%20files/Task%20Forces/Cross%20Border/Good%20practice.pdf>.

<sup>2</sup> Medically Assisted Reproduction.

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<sup>3</sup> Blyt E. Fertility patients' experiences of cross-border reproductive care. *Fertil Steril* 2010, 94: e11-15, Inhorn MC, Patrizio P. Rethinking reproductive "tourism" as reproductive "exile", *Fertil Steril* 2009, 92: 904-906; Thorn P. Reproduktives Reisen - eine Expertise für den Pro Familia Bundesverband, 2008: 8-10; Thorn P. Cross border medically assisted reproduction from a psychosocial perspective - legal challenges and the welfare of the child. In: *Assisted Reproduction in Europe: social, ethical and legal issues*. Publications of Medical Law and Bioethics, 2015, 20I: 444 *et seq.*

### C. Different legal systems

As it was stated above, the main reasons that encourage mobility within Europe, are the differences between restrictive and permissive national legislations in regard to assisted reproduction. These divergences, which are associated with the existing legislation of each country, lead to discriminations in regard to access to MAR when the legislation is applied or missing. Consequently, the fundamental right of reproduction that is recognised by the ECtHR<sup>4</sup> as an expression of the right to private and family life and enshrined in the Article 8 of ECHR, is violated. Taking the example of a rather controversial method of MAR that is said to violate the surrogate's dignity, the surrogacy method, it should be underlined that this method is still prohibited in countries such as Austria, Germany, France, Switzerland, Italy and Norway. In other countries such as Ireland and Sweden it is not regulated, whilst in Great Britain, Greece, Netherlands, and Denmark it is permitted.<sup>5</sup> Different regulations apply likewise in heterologous fertilisation, since egg donation is still prohibited in countries such as Germany and Austria, whilst in others it is permitted. The present analysis will focus on the regulation of surrogacy, heterologous fertilisation and donor anonymity in the German and Greek legislations.

#### i. Surrogacy

The “German Embryo Protection Act” of 1990 (*Embryonenschutzgesetz*) is rather restrictive in comparison to the Greek Law 3089/2002, which is rather permissive. According to section 1 par. 1 of the German law, “anyone who (1) transfers an unfertilised egg of a woman into another woman, (2) attempts

to fertilise artificially an egg for any purpose other than achieving pregnancy for the woman for whom the egg is originated, (...) or (7) attempts to carry out an artificial fertilisation of a woman who has agreed to give up her child permanently after its birth (surrogate mother) or to transfer a human embryo into her, will be punished with up to three years of imprisonment or a fine”. Nevertheless, the woman from whom the donated egg cell or embryo originates and likewise the woman into whom this ovule or embryo is transferred, are not subjected to punishment.<sup>6</sup> Apart from the “German Embryo Protection Act”, surrogacy arrangements are equally prohibited by the German Civil Code. According to § 134 and 138 of the civil Code (BGB), contracts concerning such prohibited surrogacy techniques are void, since they violate a statutory prohibition of German law and contradict with German public policy.<sup>7</sup>

The Greek legislation of 2002 permitted surrogacy arrangements under strict condi-

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<sup>6</sup> Section 1 par. 3 of Embryo Protection Act. Cf. section 13c of the Adoption Placement Act (*Adoptionsvermittlungsgesetz*), where it is stated that it is a criminal offence to intermediate surrogate mothers. Furthermore, according to section 14b par. 1 and 2, anyone who operates an intermediate surrogacy agency, receives or accepts pecuniary benefits for providing surrogate mothers, is punished with a maximum imprisonment of 2 years or a fine. <sup>7</sup> Cf. Local Court (*Amtsgericht*) of Hamm, ruling of 22 February 2011, Ref. no. XVI 192/08, BeckRS 2011, 25140. See also section 134 of the German Civil Code (CC) that states: “A legal transaction which violates a statutory prohibition is void, unless the statute leads to a different conclusion”. According to section 138 par. 1 CC, a “legal transaction which is contrary to public policy is void”, too. See also Müller-Terpitz R. Surrogacy and post mortem reproduction - Legal situation and recent discussion in Germany. In: Assisted Reproduction in Europe: social, ethical and legal issues, Publications of Medical Law and Bioethics, 2015, 20I: 106-107, VG Berlin v. 15/4/2011, IPRax 2012: 548 *et seq*, VG Köln of 20/2/2013, Az. 10 K 6710/11, Openjur Datenbank, openJur 2013: 16678.

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<sup>4</sup> ECtHR, Dickson v. United Kingdom, 4.12.2007.

<sup>5</sup> Tsalidis A. Surrogacy and abortion (in Greek). In: Assisted Reproduction and alternative family forms, Publications of Medical Law and Bioethics, 2014: 60-61, where the innovative character of the Greek Law is highlighted, when, in 2002, it permitted almost every form of MAR.

tions.<sup>8</sup> According to Article 1458 of the Greek Civil Code, surrogacy is allowed when the intended mother is unable to conceive naturally and there is a formal written agreement between the intended mother or couple and the surrogate mother. The surrogate must also be suitable for pregnancy, whilst there must be no financial profit. The Greek law also states that judicial permission is indispensable for the transfer of the fertilised egg in the surrogate's body.<sup>9</sup> The utmost condition is that either the applicant (intended mother) or the woman who will bear the child is a permanent or temporary resident of Greece.<sup>10</sup>

## ii. Heterologous fertilisation

Heterologous fertilisation<sup>11</sup> is allowed both in Germany and Greece. The only difference is

<sup>8</sup> For the conditions see Tsalidis A. op.cit., Surrogacy and abortion: 59-60 with further references.

<sup>9</sup> See Article 1458 cc- "The transfer of fertilised ova that do not belong to the woman's body where they are transferred and ensuing pregnancy permitted by court authorisation that is granted before the transfer, provided there is a formal written and free of financial benefits agreement between the parties wishing to have a child, the surrogate mother and her spouse, if the latter happens to be married. Such court authorisation is granted following a petition by the woman wishing to have a child, under condition it is proved that she is medically incapable of carrying out a pregnancy and that the surrogate mother, in view of her overall health condition, is capable of doing so".

<sup>10</sup> This condition was changed by Article 17 of Law 4272/2014: "Articles 1458 and 1464 of the Civil Code are applicable only in the case that the applicant or the woman who will bear the child is a permanent or temporary resident of Greece". The previous law stated that both the intended and the surrogate mother should reside in Greece. This recent change was criticized for it was perceived as a way of promoting reproductive tourism in Greece.

<sup>11</sup> The ECtHR dealt with heterologous fertilisation in its decision *S.H. and Others v. Austria*, 3.11.2011. The ECtHR, in a majority decision, stated that the prohibition of the heterologous fertilisation method in Austria did not violate the

that Germany allows only sperm donation, whilst Greece permits both sperm and egg donation. The reason behind this prohibition in Germany is that egg donation offends human dignity of women since it causes excessive health strain. Furthermore, the German law wants to avoid split motherhood with the implementation of this restriction. Nevertheless, if Germany allows sperm donation and forbids egg donation, this is considered an unacceptable discrimination against women (or generally against couples who need egg donation and, therefore, they have a clear disadvantage in comparison to the couples who only need a sperm donation to procreate). Moreover, it is contradictory that the donation of fertilised eggs is permitted, although this situation leads equally to split motherhood. In other words, Greek legislation permits every form of heterologous fertilisation, while egg donation is a criminal offence according to the German law.<sup>12</sup>

## iii. Donor Anonymity

Another major issue as far is heterologous fertilisation concerned, is the access to donors' identity, since national legislations have different regulations in regard to this issue. In Greece, when the progressive Law 3089/2002 for assisted reproduction was introduced, the model of donors' anonymity was adopted, in

ECHR. This ruling was issued in reference to the wide margin of appreciation of Austria on matters related to ethical issues, since, by the end of the 90's, there was no European consensus on this matter. Nevertheless, when the judgement was rendered, heterologous fertilisation was prohibited only in three countries (Italy, Lithuania and Turkey).

<sup>12</sup> Egg donation is punished with up to three years imprisonment or a fine (§ 1 sect. 1 no. 1 EPA). See Kentenich H, Pietzner K. Überlegungen zur gesetzlichen Nachbesserung in der Reproduktionsmedizin. In: Reproduktionsmedizin-Rechtliche Fragestellungen. Düsseldorf University Press, 2010: 67, Gunning J. Oocyte donation: the legislative framework in Western Europe. *HumRep* 1998, 13(2): 101.

order to consolidate social affinity.<sup>13</sup> The Greek Law chose the system of anonymity of donors and is therefore stated in Article 1460 of the Civil Code that individuals wishing to have children with genetic material of third party are not allowed to have access to the donor's identity. This is likewise the case for the child to be born, only with the exception of the recognition of access in donor's records for health related reasons. Equally, the donor does not have the right to obtain information on the identity of the child that was born with the genetic material of the donor and its parents. Furthermore, the provision of the Article 1471 (2) (2) of the Greek Civil Code, where it is stated that nobody can contest the paternity of a child that was born with heterologous fertilisation,<sup>14</sup> is of great importance, whilst the

Article 1479 (2) of the Greek Civil Code precluded judicial recognition of paternity even if the donors' identity is known.<sup>15</sup> The reason behind these regulations is that social relations are of greater importance than blood bonds. Furthermore, it is considered that the method of heterologous fertilisation and the people involved into it are better safeguarded, for the bonds created are clear and irreversible.

However, other jurisdictions, i.e. the German one, recognise the children's right to know their biological parents. According to the German Civil Code, the child who is born

<sup>13</sup> According to Article 1460 of Greek Civil Code "the identity of third parties who have offered their gametes or fertilised eggs is not revealed to individuals wishing to have a child. Medical information concerning donors' identity are kept confidentially. The access to those files is allowed only to the child and for reasons related to health. The identity of the child and its parents is not disclosed to the donors of gametes or fertilised eggs", see also Kounougeri - Manoledaki E. Family Law II (in Greek), 2012: 83 *et seq.*, by the same author. Assisted Reproduction and Family Law (in Greek), 2005: 97 *et seq.*, Georgiadis Ap. Handbook of Family Law (in Greek), 2014: 322; Spyridakis IS. The new regulation of assisted reproduction and affinity (in Greek), 2003: 36, by the same author. Family Law (in Greek), 2006: 419; Vrettou Ch. In: Karakostas I. Civil Code, Interpretation-Comments-Jurisprudence (in Greek), 2011, 8A: 639 *et seq.*, Perakis. In Ap. Georgiadis SEAK (in Greek), 2013, II: 752 *et seq.*, Papachristou Th. Family Law (in Greek), 2014: 222, Vathrakokilis V. Interpretation-Jurisprudence of Civil Code. Vol. E. Family Law (in Greek), 2004: 580 *seq.*, Stampelelou Ch. In: Georgiadis A, Stathopoulos M. Civil Code. Family Law (in Greek), 2007: 660 *et seq.*

<sup>14</sup> Kounougeri-Manoledaki E. *op. cit.*, Family Law: 138 *et seq.*, by the same author. *op. cit.*, Assisted Reproduction and Family Law: 125-129 *et seq.*, Georgiadis A. *op. cit.*: 364-365, Papazissi Th. In: Georgiadis A, Stathopoulos M. Civil Code. Family Law (in Greek), 2007: 827 *et seq.*, Spyridakis IS.

*op. cit.*, The new regulation of assisted reproduction and affinity, 2003: 44, 55, where reference to the preamble of the Greek law 3089/2002 is made and in which it is highlighted that the prohibition to contest paternity is an expression of social affinity, by the same author. *op. cit.*, Family Law: 424; Proiou M. In: Karakostas I. Civil Code, Interpretation-Comments-Jurisprudence (in Greek), 2011, 8A: 822 *et seq.*, Pournaras V. In: Georgiadis A. SEAK (in Greek), 2013, II: 780-781, Papachristou Th. *op. cit.*, Family Law: 286, Vathrakokilis V. *op. cit.*, Interpretation-Jurisprudence of Civil Code: 649-650, Filios P. Family Law (in Greek), 2011: 231. See also relevant Greek Court Decisions: (Greek Supreme Court 715/2006-ΑΠ 715/2006, ΝοΒ 2008, 88, Court of Appeal of Athens (ΕφΑθ)1098/2009, Periodical Journal "Applications of the Greek Civil Law" (ΕφΑΔ) 2012, 596). The contestation of paternity is also prohibited by Article 281 of Greek Civil Code (abuse of rights), see Papadopoulou-Klamari D. The affinity (in Greek), 2010: 132, Pournaras V. *op. cit.*: 782.

<sup>15</sup> Kounougeri-Manoledaki E. *op. cit.*, Family Law: 140-144, 210-214, by the same author. In: Georgiadis A, Stathopoulos M. Civil Code Family. Law (in Greek), 2007: 895-897, by the same author. *op. cit.* Assisted Reproduction and Family Law: 135-139, Georgiadis A. *op. cit.*: 368-369, Spyridakis IS. *op. cit.* The new regulation of assisted reproduction and affinity, 2003: 52, 55, by the same author. *op. cit.* Family Law: 422, Proiou M. *op. cit.*: 946 *et seq.*, Pournaras V. *op. cit.*: 798, Papachristou Th. *op. cit.* Family Law: 300, Vathrakokilis V. *op. cit.* Interpretation-Jurisprudence of Civil Code: 687-688, where it is highlighted that in any case, the donor can recognise the child with a notarial document that proves the consent of the mother.

with the genetic material of a donor has the right to contest paternity according to § 1600 section 1 and 5 of the German Civil Code (BGB) and to be legally connected with his biological father,<sup>16</sup> namely the donor, acquiring, in case of successful contestation of paternity, maintenance and inheritance rights from the donor. In Germany, not only it is possible to discover the donor's identity, as this right was recognized by the decisions of 18.01.1988 and 31.1.1989 by the Supreme Constitutional Court,<sup>17</sup> but also to contest paternity, which means a total overthrow of the established legal affinity with the social father.<sup>18</sup>

<sup>16</sup> Coester-Waltjen D. Familienrechtliche Überlegungen zur Rolle des Samenspenders-Die drei kritischen Us (Unterlagen-Unterhalt-Umgang). In: Spendersamenbehandlung in Deutschland-Alles was recht ist?! 2014: 86, Ratzel R. Beschränkung des Rechts auf Fortpflanzung durch das ärztliche Berufsrecht. In: Reproduktionsmedizin- Rechtliche Fragestellungen, 2010: 52-53.

<sup>17</sup> As regards court decisions BVerfG 18.1.1988, NJW 1988, 3010 and BVerfG 31.1.1989, NJW 1989, 891.

<sup>18</sup> In fact, the child should rather be informed by his mother and his social father that it was born with the reproductive material of a donor, while it is also necessary that the doctor has preserved the relevant files with donor's identity. The lack, however, of a national database of donors combined with the frequent occurrence of inadequate record-keeping by doctors, although they are obliged to keep records of donors for at least 30 years, makes it finally rather impossible for the child to find the identity of its biological father. This, of course, would be even more difficult to happen if the donor was citizen of another country and when private international law issues would also interfere. Therefore, this case resides on a theoretical level with little practical application until today. The obligation to keep medical records for at least 30 years is stipulated in § 10 MBO (Muster-Berufsordnung für die deutschen Ärztinnen und Ärzte) as well as in § 13a and 16a of TPG (Transplantationsgesetz). See Ratzel R. *op.cit.*: 53-54. See also Thorn P, Wischmann T. German guidelines for psychosocial counselling in the area of gamete donation, Human Fertility, 2009, 12(2): 77, (Muster) Richtlinie zur Durchführung der

In the same direction moves the German jurisprudence. Consequently, recent judgments of the German courts are in favour of the child's right to know its origin, without taking into account any problems that arise in regard to legal affinity. Furthermore, in the case of OLG Hamm 6.2.2013,<sup>19</sup> the court concluded that the child, who is born from the sperm of a donor, has the right to know the identity of the biological father and any contract between the doctor and the child's parents for non-disclosure of the donor's identity is invalid.<sup>20</sup> In a more recent judgment of the German Supreme Court BGH,<sup>21</sup> the Court recognised the right of children to know their biological parents, without requiring the completion of a minimum age limit to request and access this information. Last but not least, the court even acknowledged entitlement of access to donor's

assistierten Reproduktion. Bundesärztekammer, Novelle 2006, Deutsches Ärzteblatt, Jg.103, Heft 20, 19 Mai 2006, s. A1402, where it is highlighted that if doctors do not adhere to the prescribed obligation by the guidelines of the German Medical Association, the child cannot ultimately find the identity of the biological father. A number of academics in Germany, argue that, until today, no problems have been encountered because, previously, doctors did not have any obligation to keep records of donors and was therefore absolutely impossible to find any evidence of identity. Nowadays, however, this obligation exists, and given this fact, some of the doctors, if not all, will adhere to the rules and will keep the data as it is expected. That's why there is fear that, in the near future, many legal problems may arise. Most problems may also arise especially in cases of single women and homosexual couples, where the absence of social father means that if the donor's identity is found, it is now certain that the contestation of paternity will succeed.

<sup>19</sup> OLG Hamm of 06.02.2013, NJW 2013, 1167.

<sup>20</sup> See European Parliament. A Comparative Study on the Regime of Surrogacy in EU Member States, 2013: 269.

[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOL-JURI\\_ET\(2013\)474403\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf).

<sup>21</sup> BGH of 28. 01. 2015 - XII ZR 201/13, openJur 2015, 5945.

identity to the parents in order to inform the child, even at a time shortly after the child's birth.

#### D. Problems of law divergences and mobility

After this brief analysis of the Greek and German law, it goes without saying why individuals wishing to become parents from countries such as Germany, where legislation is very restrictive, choose to move to countries where they are able to use all the possibilities offered by modern biotechnology. As far as this situation is concerned, the unequal treatment of European citizens is a major issue. Furthermore, individuals wishing to become parents are not always aware of the legal consequences that will have to face, when they will return in their home country. For this reason, this chapter focuses on inequalities in the field of MAR, the impact of mobility in the affinity and the legal status of the child and finally the legal issues in regard to citizenship.

##### i. Inequalities among European citizens

As it was previously stated, the ECtHR, through its settled jurisprudence, has included the right to assisted reproduction in the fundamental human rights, which are enshrined in the ECHR and more specifically, in the right to private and family life (Article 8); a right which is also enshrined in the Article 7 of the Charter of Fundamental Rights of the European Union. Therefore, the crucial question that lawmakers should answer is *when and why people should not be allowed to use assisted reproduction technology*, if they want to have a child.<sup>22</sup> In other words, according to the ECtHR's jurisprudence, restrictions should be

justified and they must be mandatory in a democratic society.

Unequal access to MAR is also linked to discrimination due to gender and sexual orientation. In many countries, legislators of MAR do not prohibit the use of these methods for heterosexual married couples or heterosexual couples with a stable relationship. However, the access to MAR for homosexual individuals and couples who wish to become parents is either not regulated by law, as it is the case in Germany,<sup>23</sup> or it is regulated with restrictions. The latter happens in Greece, where the Greek law permits MAR only for heterosexual couples and single women, excluding homosexual couples and single men.<sup>24</sup> Nonetheless, in

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<sup>23</sup> In Germany access to MAR is prohibited for homosexual individuals and couples only by the guidelines of the Federal Medical Council, which are not binding, as law is. See (Muster) Richtlinie zur Durchführung der assistierten Reproduktion. Bundesärztekammer Novelle 2006, Deutsches Ärzteblatt, Jg.103, Heft 20, 19 Mai 2006: A1395. However, in a recent proposal of law for a new legislation for MAR, in § 3 it is stated that everyone has the right to access MAR "Jeder hat das Recht, ein Verfahren der medizinisch unterstützen Fortpflanzung in Anspruch zu nehmen". See. ref. Gassner U, Kersten J, Krüger M, Lindner JF, Rosenau H, Schroth U. Fortpflanzungsmedizinengesetz, - Augsburg-Münchener-Entwurf (AMFMedG), 2013: 48-49.

<sup>24</sup> In Greek Civil Code, the law refers only to heterosexual couples and only in Art. 1456 par. 1 sect. 2, is stated that also a single woman can have access to MAR. On a theoretical level, it is argued that, although the law states nothing about single men, the same right should be extended (with the use of an analogy) to men too, because this inequality appears unconstitutional. It is important to note that two court decisions (Court of First Instance of Athens 2827/2008, Nomos and Court of First Instance of Thessaloniki 13707/2009, Nomos) acknowledged this right to two single men who wanted to have a child via surrogacy. The first of these decisions was withdrawn by the decision of Court of Appeal of Athens 3357/2010, Nomos, after the appeal of the Prosecutor. Consequently, it will be interesting to observe how the future jurisprudence will be formed.

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<sup>22</sup> Cf. Robertson J. Procreative liberty and harm to offspring in assisted reproduction. American Journal of Law and Medicine 2004: 24, Trokanas Th. Human reproduction. Private autonomy and its limits. Publications of Medical law and bioethics. Sakkoulas Publications, 2011,13: 156 *et seq.*



Germany, access to MAR for single men and male-couples is prohibited implicitly since surrogacy is prohibited, and also for women who either cannot give birth to a child without a surrogate or do not have their own eggs. The problems of mobility in such cases can be often much more complicated,<sup>25</sup> as far as the issue of legal affinity is concerned.

Such restrictions are in contrast with the welfare of the child, since its legal status is often questioned. The situation appears even grimmer since legislators do not regulate what will happen, in cases homosexual individuals and couples acquire a child via MAR by violating the law. Moreover, restrictions in parenthood for homosexuals constitute an unjustifiable discrimination. Nowadays, many societies have accepted all alternative family forms and therefore such inequalities are obsolete.<sup>26</sup> Nonetheless, the ECtHR has recognised, in particular, that the protection of the rights of homosexual individuals falls within the protective scope of Article 8 of the ECHR, highlighting that, denying adequate protection for any family form in regard to homosexual individuals, constitutes an unjustified discrimination.<sup>27</sup> Furthermore, it recognises that stable cohabitation between individuals of the same sex falls within the concept of family life, as the symbiosis between a woman and a man<sup>28</sup> does.

## ii. Affinity and legal status of the child born

<sup>25</sup> Cf. Federal Court of Justice, ruling of 10 December 2014, Ref. no. XII ZB 463/13, where a male same-sex couple, which gave birth to a child in California via surrogacy, were recognised as legal parents of the child.

<sup>26</sup> Besides, there is no scientific evidence, that children brought up in alternative family forms have any disadvantage compared to children born in a family with heterosexual parents. See Golombok S., *Modern Families: Parents and Children in New Family Forms*, 2015.

<sup>27</sup> ECtHR, *Karner v. Austria*, 24.10.2003.

<sup>28</sup> ECtHR, *Schalk and Kopf v. Austria*, 22.11.2010. Cf. also *E.B. v. France*, 22.1.2008, *X and Others v. Austria*, 19.2.2013, *Vallianatos and others v. Greece*, 7.11.2013.

As far as affinity is concerned, the German Law introduced the section 1591 into its Civil Code in 1998. This provision states that “the mother of a child is the woman who gave birth to it”. The same provision exists equally in the Greek Civil Code in Article 1463. There is however an exception to this rule in Article 1464(1) of the Greek Civil Code, where it is stated that, especially in the case of surrogacy, “the mother of the child is the woman who took the judicial permission to carry out surrogacy”, namely the social mother, notwithstanding the Roman law principle “mater semper certa est”. The rule for paternity in both jurisdictions is that the father of a child is the man, who is married to the woman giving birth to the child. In Greece however, according to Article 1471(2) (2) of the Civil Code, “no one can contest the paternity of a child born with heterologous fertilisation”. This means that the Greek Law aims to strengthen social affinity, thus ensuring peace in the family. In the same direction, the Greek Law prohibited the access to donor’s identity in contrast to the German Law that recognised the children’s right to know their origin. The latter means that a total overthrow of the established (i.e. according to the Greek law) affinity may occur, when the intended parents go back to their home country (i.e. in Germany) and attempt to be legally connected to their child. In fact, a German child born with the aid of heterologous fertilisation by the sperm of a donor in Germany has the right to know its origin, in contrast with a German child born in Greece with the sperm of a donor, where donor anonymity is protected. Therefore, could such differences and inequalities be justified, given that the European Court of Human Rights has recognised more than once the right to create a family according to the Article 8 of the ECHR?

The current situation allows the exploitation of vulnerable parties, that is to say, the children conceived with the use of those methods, the donors and the surrogates. The lack of a common European legislation concerning MAR creates delicate situations, because the

application of the private international law of each country gives multiple solutions.<sup>29</sup> This means that the established family bonds may not be acknowledged in another country, thus threatening the child's legal status. Last but not least, the most apparent problems are the intense commercialisation of surrogates, unequal access to reproductive services for EU citizens, absence of legal protection for the donor, deprivation of children or even worse, children of the same nationality enjoying different rights.

Taking into consideration the following case study, the problems that arise due to mobility can be examined more thoroughly: a German couple (A and B, both of German nationality) wants to have a child. The sole chance is to use surrogacy and for this reason they travel to Greece to find a Greek surrogate mother. Then, they sign an agreement, and following the procedures of Greek law, they acquire a child. The intended (social) mother gave the egg that was fertilised by the sperm of a third party donor and afterwards it was transferred into the surrogate's body. After the birth of the child, the couple returns back to Germany with the child. On the one hand, if the German Law is applied, that would mean that the mother of the child is the surrogate mother who gave birth to it and the father of the child is the surrogate's husband. As far as maternity is concerned in German law, the only possibility for the intended mother to acquire legal maternity is through adoption of the child that was born, provided that the necessary conditions for adoption are fulfilled.<sup>30</sup>

As far as paternity is concerned, when the sperm of a donor is used, the intended father must adopt the child that is born, whilst, in case he is also the genetic father, he has to acknowledge paternity (after contestation of the paternity of surrogate's husband) and consequently become its legal father. On the other hand, if the Greek law is applied (law of the surrogate's country) according to private international law, the German woman would be directly acknowledged as mother of the child and her husband as father of the child, because, according to Article 1464(1) of the Greek Civil Code, "the mother of the child is the woman who took the judicial permission to carry out surrogacy" and father the man, who is married to the intended mother, after having granted his consent for this action.

Consequently, it would be a matter of recognition of the Greek court decision, which establishes social affinity, in Germany. Nevertheless, it is rather controversial, whether a foreign (court) decision that establishes legal parenthood based on a surrogacy agreement, has to be recognised in Germany or whether such an agreement is compatible with the German public order. The German Federal Court of Justice, in its latest landmark decision in regard to surrogacy, recognised that in cases in which an intended parent is genetically related to the child born by a surrogate mother, the recognition of a foreign court decision attributing parenthood to the intended parents does not violate the German public order and thus it may be recognised in Germany.<sup>31</sup> However, legal theory is divided and many academics are not in favour of this idea.<sup>32</sup> On the

<sup>29</sup> Grammatikaki-Alexiou A. International Uniform Law (in Greek), Collection of lesson material, 2010: 2.

<sup>30</sup> Cf. Federal Court of Justice, ruling of 10 December 2014, Ref. no. XII ZB 463/13, recital 35; Mayer C. Ordre public und Anerkennung der rechtlichen Elternschaft in internationalen Leihmutterschaftsfällen. *RabelsZ* 2014, 78: 551 (555 *et seq.*), Helms T. Leihmutterschaft - ein rechtsvergleichender Überblick. *StAZ* 2013: 114, Diel A. Leihmutterschaft und

Reproduktionstourismus. Wolfgang Metzner Verlag Frankfurt am Main 2013: 137.

<sup>31</sup> Cf. Federal Court of Justice, ruling of 10 December 2014, Ref. no. XII ZB 463/13, recital 34 and 53, Müller-Terpitz R. *op.cit.*, Surrogacy and post mortem reproduction - Legal situation and recent discussion in Germany: 110-111.

<sup>32</sup> Witzleb N. In: Witzleb N, Ellger R, Mankowski P, Merkt H, Remien O (eds.). *Festschrift für Dieter Martiny zum 70. Geburtstag*, Mohr Siebeck Tübingen 2014: 203 (234) for same-sex intended

contrary, a different opinion acknowledges notably the compatibility of surrogacy arrangements with the German public order.<sup>33</sup>

Some more issues may also emerge, in case the intended parents want to terminate pregnancy and the surrogate mother does not agree or in case the surrogate mother wants to keep the child and does not want to hand it to the intended parents or even when the intended parents do not want to take and bring up the child, if, for example, it is born with medical problems.<sup>34</sup> In such situations, private international law may suggest various solutions, depending each time on the applicable law. Moreover, family law may regulate differently such matters from country to country. This means that if the applicable law is not always the same, as it is often the case, many different situations may arise causing legal uncertainty for the parties involved.

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parents, Engel M. Internationale Leihmutterschaft und Kindeswohl. ZEuP 2014: 538 (558). See also Administrative Court (Verwaltungsgericht) of Berlin, ruling of 5 September 2012, Ref. no. 23 L 283/12, FamRZ 2013, 738.

<sup>33</sup> Sturm F. In: Baur JF, Sandrock O, Scholtka B, Sapira A (eds.). Festschrift für Gunther Kühne zum 70. Geburtstag, Recht und Wirtschaft Frankfurt am Main 2009: 919 (931 *et seq.*), Dethloff N. Leihmütter. Wunscheltern und ihre Kinder, JZ 2014: 922 (926), Mayer C. Ordre public und Anerkennung der rechtlichen Elternschaft in internationalen Leihmutterschaftsfällen. RabelsZ 2014, 78: 551 (570 *et seq.*), Diel A. Leihmutterschaft und Reproduktionstourismus. Wolfgang Metzner Verlag Frankfurt am Main 2013: 169 *et seq.* Müller-Terpitz R. *op.cit.* Surrogacy and post mortem reproduction - Legal situation and recent discussion in Germany: 110-111. See also Local Court (Amtsgericht) of Neuss, ruling of 14 May 2013, Ref. no. 45 F 74/13, FamRZ 2014: 1127, Local Court (Amtsgericht) of Friedberg, ruling of 1 March 2013, Ref. no. 700 F 1142/12, FamRZ 2013: 1994.

<sup>34</sup> This was the case with Gammy, a child born by a Thai surrogate mother for an Australian couple, which abandoned the baby after they discovered that he had Down syndrome. International media covered this case extensively.

<http://repro.law.auth.gr/en/news/59>.

### iii. Citizenship Issues

Last but not least, various issues with children's citizenship surface quite often. According to sections 1, 3 and 4 of Citizenship Act (Staatsangehörigkeitgesetz), German Citizenship may be acquired by birth, under condition that at least one of the parents has the German nationality.<sup>35</sup> In the above case study, where a German couple made a surrogacy arrangement with a Greek surrogate mother, who is married with a Greek man, the Greek individuals are considered legal parents of the child, according to the German law. As a consequence, the child cannot acquire the German citizenship by birth. In this case, the child may acquire the German citizenship only through adoption by the intended German parents.<sup>36</sup> On the contrary, if the non-German surrogate mother is not married and the child has been conceived via sperm of the intended German father, the latter can acknowledge paternity, and the child will acquire directly German citizenship. The issue of citizenship is very important, since the intended parents, very often, cannot return in their home country (in this case, in Germany)

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<sup>35</sup> Cf. German Citizenship Act: “ § 1 Deutscher im Sinne dieses Gesetzes ist, wer die deutsche Staatsangehörigkeit besitzt. § 3 Die Staatsangehörigkeit wird erworben 1.durch Geburt (§ 4)..., § 4 (1) Durch die Geburt erwirbt ein Kind die deutsche Staatsangehörigkeit, wenn ein Elternteil die deutsche Staatsangehörigkeit besitzt. Ist bei der Geburt des Kindes nur der Vater deutscher Staatsangehöriger und ist zur Begründung der Abstammung nach den deutschen Gesetzen die Anerkennung oder Feststellung der Vaterschaft erforderlich, so bedarf es zur Geltendmachung des Erwerbs einer nach den deutschen Gesetzen wirksamen Anerkennung oder Feststellung der Vaterschaft; die Anerkennungserklärung muß abgegeben oder das Feststellungsverfahren muß eingeleitet sein, bevor das Kind das 23. Lebensjahr vollendet hat”.

<sup>36</sup> See Higher Regional Court of Stuttgart, ruling of 7 February 2012, Ref. no. 8 W 46/12, FamRZ 2012: 1740.

with the child that was born, as they cannot issue a passport.<sup>37</sup>

All in all, private international law has the disadvantage that it may provide conflicting solutions as it can often indicate more than a competent court and different applicable laws. Consequently, attempts in order to solve the problems of mobility with the use of private international laws are not always effective. On the contrary, a common legislation would bridge the existing gap that is caused by the simultaneous coexistence of several legal systems. For example, if a common legislation existed, in the above case study parenthood and German citizenship of the child born would be granted on its birth, regardless of where the process took place. Besides, if surrogacy was allowed in Germany, cross border reproductive care would not be a popular option for individuals wishing to become parents, since they could undergo treatment in their country. In fact, in areas of law such as family, inheritance and assisted reproduction, there is a reluctance of common regulation by the member states of the EU. Therefore, a desired convergence cannot be achieved effortlessly due to issues that reflect particular national, social, moral and religious beliefs.<sup>38</sup>

### E. Conclusion-Proposal

The lack of a common European legal framework results to numerous issues, notably because the future parents may not always be able to be legally connected to the child, due to the legislation of their home country. Consequently, the resulting situation is in contrast to the welfare of the child and it deprives it from

its rights, thus leading to its social exclusion. In this paper, the issues related to surrogacy and heterologous fertilisations were mostly examined, but there are also numerous issues concerning the procedures of MAR that should be regulated on a European level. The need of a common European legal framework that will protect children's rights, public health and will provide equal access for everyone to MAR, is undeniable. Consequently, as a first step, the adoption of common guidelines regarding assisted reproduction by the World Health Organization in collaboration with IFFS and ESHRE, is suggested. As a result, the consolidation of the guidelines from the medical world would open the path for the signing of an International Convention or a Regulation by EU.<sup>39</sup>

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<sup>39</sup> Cf. however, Gassner U, Kersten J, Krüger M, Lindner JF, Rosenau H, Schroth U. Fortpflanzungsmedizinengesetz, Augsburg-Münchener-Entwurf (AME-FMedG), 2013: 25, where it is stated that EU is not competent neither for regulating MAR nor for the harmonisation of the laws and regulations of the Member States. It could, however, be argued that although it is disputed if EU is competent to issue a Directive concerning MAR, the harmonisation of the legislation of MAR could be achieved by a Regulation by EU. For documentation about EU's competency cf. Medically Assisted Reproduction: Proposal for a common European policy: 10-12, 251 *et seq* ([http://repro.law.auth.gr/resources/files/research\\_content/proposals/proposals\\_eng.pdf](http://repro.law.auth.gr/resources/files/research_content/proposals/proposals_eng.pdf)). See also Article 168(5) of the Treaty on the Functioning of the European Union: "5. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, may also adopt incentive measures designed to protect and improve human health and in particular to combat the major cross-border health scourges, measures concerning monitoring, early warning of and combating serious cross-border threats to health, and measures which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol, excluding any harmonisation of the laws and regulations of the Member States".

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<sup>37</sup> See Passport Act (Passgesetz), Federal Law Gazette 1986-I: 537 *et seq*. If the child does not possess the German citizenship, it will not receive a passport, which is necessary to travel to Germany with its intended parents., Müller-Terpitz R. *op.cit.* Surrogacy and post mortem reproduction - Legal situation and recent discussion in Germany: 112-113.

<sup>38</sup> Grammatikaki-Alexiou A. *op.cit.*, International Uniform Law: 2-3,6.

Concluding,<sup>40</sup> it is undeniable that the application of MAR is closely connected to the birth of a new human being. At the same time, individuals who want to have a child via MAR are being exploited quite often. These are the main reasons -in addition to the existing ones that support the frequent use of these methods- which show that, now, a *common European legislation* could provide equal and safe access to MAR for every European citizen and therefore is imperative. The *fundamental basis* of a common legislation is that MAR -as an another interpretation of the right to family enshrined in the Article 8 of the ECHR- should be accessible to every person and restrictions should be applied only under very special circumstances. This common legislation should mainly guarantee that:

- All European citizens will have *unconditioned access to MAR* in Europe.<sup>41</sup>
- Special restrictions in regard to the *age of the prospective parents*<sup>42</sup> and the *surrogate mother* will be applied.
- Access for *single persons* and *homosexual couples* to MAR will be acknowledged.
- Altruistic *egg donation* should be allowed, because legislative restrictions cause major social issues and lead to a total commercialisation of the reproductive material

since many individuals tend to violate the law and eventually, they purchase the necessary reproductive material in order to procreate, thus putting their health and the health of the child to be born in great danger.

- *Donor's anonymity should be protected*, as the biological truth becomes less and less important for the establishment of modern families. This will help to establish strong family bonds. Nevertheless, their identity could be known to the relevant national authority only in order to protect the child from possible future medical problems.
- Altruistic *surrogacy* with at least partial replacement should also be allowed and regulated under strict conditions such as those in the Article 1458 of the Greek Civil Code.<sup>43</sup>

<sup>40</sup> The conclusion is part the official proposal of the research team “Assisted Reproduction and Protection of the Embryo in vitro” of Aristotle University of Thessaloniki with coordinators Prof. Symeonidou-Kastanidou E, Tarlatzis B. and researchers: Kipouridou K, Milapidou M, Fragkou R, Chortara Th, Dimopoulos N, Sachinidou Ch, Tsalidis A, Vasileiou M.

[http://repro.law.auth.gr/resources/files/research\\_content/proposals/proposals\\_eng.pdf](http://repro.law.auth.gr/resources/files/research_content/proposals/proposals_eng.pdf).

<sup>41</sup> According to ECtHR, restrictions on this right should be justified in detail, when applied.

<sup>42</sup> Age limits should be set in order to guarantee the safety of woman’s health and the welfare of the child. For the proposed age limits and relevant documentation, cf. Medically Assisted Reproduction: Proposal for a common European policy: 15-16, 69 *et seq.*

[http://repro.law.auth.gr/resources/files/research\\_content/proposals/proposals\\_eng.pdf](http://repro.law.auth.gr/resources/files/research_content/proposals/proposals_eng.pdf).

<sup>43</sup> For the proposed conditions of surrogacy, cf. Medically Assisted Reproduction: Proposal for a common European policy: 34-39, 163 *et seq.* [http://repro.law.auth.gr/resources/files/research\\_content/proposals/proposals\\_eng.pdf](http://repro.law.auth.gr/resources/files/research_content/proposals/proposals_eng.pdf).