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Surrogacy and Legal Parenthood in Greece – One Size Fits (Almost) All[1]

ABSTRACT: *The Greek legal framework governing the application of surrogacy is strictly defined and derives from four specific laws: Nos. 3289/2002, 3305/2005, 4272/2014 and 4958/2022. In order to safeguard the assisted parent(s) as well as the surrogate and establish legal family bonds between the child and the social mother, the legislation sets out specific prerequisites, such as the inability of the social mother to carry a child, the existence of a prior judicial authorisation, a written agreement between the parties and the prohibition of using the surrogate's eggs. However, the (excellent for the creation of legal family bonds) existing legal framework in Greece silently denies surrogacy to single men and gay or lesbian couples, reserving it only for straight couples and single women. This is a real-life issue largely ignored in everyday practice, which results in the birth of children without any legal family bond with their parent(s). The analysis of the legislation has identified three key issues on single men's and gay or lesbian couples' access to assisted reproduction: (1) Greek legislation remains silent on the issue; (2) Greek case-law is scant in the cases of single men and non-existent in the cases of gay or lesbian couples; (3) Greek legislation needs to be amended so that single men and gay or lesbian couples have unambiguous access to surrogacy, medical specialists can provide unhindered services to them and, most importantly, children born that way share a legal bond with their parent(s). The consensus for an overall reform of the legal framework governing single men and gay or lesbian couples to medically assisted reproduction in Greece, granting equal access to it for everybody – regardless of their sex or their sexual orientation – is absolutely imperative*

KEYWORDS: *medically assisted reproduction, right to procreation, Greek law, single men, gay and lesbian couples, surrogacy*

1 For the needs of this paper, there is no distinction between trans or cis-gender men and women; the terms 'man' and 'woman' refer equally to trans and cis-gender men and women.

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1.
Introduction: The Greek Legislation on Methods of Assisted Reproduction (MAR)

Despite the fact that the majority of European countries had enacted legislation regarding MAR in a relatively short period from the implementation of these methods,[2] it took Greece 24 years from the birth of Louise Brown to establish, in 2002 and 2005, two laws related to the implementation of MAR. Specifically, these are Law No. 3289/2002 entitled Medical Assistance in Human Reproduction[3] and Law No. 3305/2005 regarding the Implementation of Medically Assisted Reproduction.[4] The first law focused on civil law issues, creating and incorporating into the Greek Civil Code an entirely new chapter dealing with the conditions for the permissibility of MAR for married couples as well as for partners living in a civil union and for single women. It also legislatively recognised posthumous assisted reproduction methods and surrogacy, ensured the anonymity of sperm and egg donors, and established the principle of social and emotional kinship in MAR. The second law pertained to criminal law and made the violation of the terms of MAR application punishable, aiming for their as safe as possible implementation. Additionally, it provided a detailed description of MAR methods and techniques, specifying potential risks associated with their application.

The aforementioned laws remained unchanged until 2014 when Law No. 4272/2014 was subjected to vote, focusing on the Adaptation to national law of Commission Implementing Directive 2012/25/EU of October 9, 2012 laying down information procedures for the exchange, between Member States, of human organs intended for transplantation - Regulations on Mental Health and Medically Assisted Reproduction and other provisions.[5] This law has brought changes to Article 8 of Law No. 3089/2002 (regarding the residence of the intended mother or the surrogate in the surrogacy process), Articles 7 to 9 (about the duration of cryopreservation, disposal and restriction of the disposal of reproductive material), Articles 16 and 17 (concerning the operation of MAR clinics and MAR units), and Articles 25 and 26 (regarding the operation of the National Authority for Assisted Reproduction and the imposition of criminal sanctions on the trade of reproductive material, respectively) of Law No. 3305/2005. The most recent changes have taken place under Law No. 4958/2022 on Reforms in Medically Assisted

2 The Human Fertilization and Embryology Act, which came into effect in the United Kingdom (UK) in 1990, the Embryo Protection Act (Embryonenschutzgesetz) of Germany, also enacted in 1990, and the Insemination Act of Sweden, which was implemented in 1984, are indicative examples.

3 Government Gazette A' 327/23.12.2002.

4 Government Gazette A' 17/27.01.2005.

5 Government Gazette A' 145/11.07.2014.

Reproduction and other urgent regulations. This law has introduced significant changes, such as the modification of the upper time limits for cryopreservation and the age of the assisted woman, the relaxation of the principle of donor anonymity with the introduction of a complex system of selection between two categories of donors (anonymous or not), the provision for the donation of reproductive material among relatives and for the creation and cryopreservation/storage of sperm and eggs independently of the existence of recipients, and social freezing, even without the consent of the spouse or partner. Subsequently, a substantial increase in the compensation amounts for donors was envisaged, to the extent that the compensatory nature of the said remuneration for donors was called into question.

> *1 When Rachel saw that she was not bearing Jacob any children, she became jealous of her sister. So she said to Jacob, "Give me children, or I'll die"! 2 Jacob became angry with her and said, "Am I in the place of God, who has kept you from having children?" 3 Then she said, "Here is Bilhah, my servant. Sleep with her so that she can bear children for me and I too can build a family through her." 4 So she gave him her servant Bilhah as a wife. Jacob slept with her, 5 and she became pregnant and bore him a son.**

> *Transferring fertilised eggs into the body of a woman (the eggs not belonging to her) and carrying the child is permitted only after judicial permission is granted before the transfer, as long as there is a written and free agreement between the persons seeking to have a child and the woman who will carry the child, including her spouse, if she is married. The said judicial permission is granted upon the application of the woman who wishes to have a child, as long as it is proven that she is medically unable to carry a child and that the surrogate woman is able to carry a child, in view of her health state.***

2.
The History behind Surrogacy

For centuries, the saying *mater semper certa est* (the mother is always known) was taken for granted. Even today, in numerous pieces of legislation, the legal mother

* Genesis 30:1-5
** Article 1458 of the Greek Civil Code (GCC).

of a child is considered the woman who gave birth to them.[6] However, the fact that the female body has been used throughout the ages as a means of procreating other human beings and that surrogacy (or otherwise, the 'split of biological motherhood'[7]) is not something unheard of in human history. The biblical reference to Jacob and Rachel is well-known – Rachel could not bear children and for this reason she gave her handmaid Bilhah to Jacob as a 'wife' to bear them a child. This story is the inspiration behind Margaret Atwood's dystopian novel entitled "The Handmaid's Tale", in which women of childbearing age are used as surrogate mothers giving birth to the children of the elite in the fictional Republic of Gilead. The law attempted to regulate these practices in as early as 1780 BC, when the Code of Hammurabi stipulated that if a woman could not provide children to her husband, he retained the right to acquire them through a slave, whom he could not subsequently sell.[8] In ancient Egypt, it was a common practice for Pharaohs to have children with their concubines to avoid intermarriage with their wives, who were usually close relatives. In ancient Rome, the practice of uterine borrowing was also common for patrician families, allowing them to have a child through another woman to avoid the risks and hardships of pregnancy and childbirth.[9]Cases of artificial insemination with the husband's sperm, as well as that of a third-party donor, were recorded already in the late 18th century and throughout the 19th century.[10]

Nowadays, surrogacy raises concerns about the potential degradation and commodification of pregnancy, the exploitation of the female body and the commercialisation of the child to be born, as well as about the risk of creating unresolved legal issues and the fear of a burgeoning surrogacy market. As a result, this specific method is viewed sceptically by most European legislators. In France and Italy, the practice is explicitly prohibited. In Ireland and Sweden, while not explicitly prohibited, there is no regulatory framework for its implementation, leading to its practical non-application. Finally, in Greece and the United Kingdom, surrogacy is explicitly allowed and practiced.[11]

6 For example, Section 33.1 of the UK Human Fertilization & Embryology Act defines the mother of the child exclusively as 'the woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman' and the Article 1571 of the German Civil Code states that 'the mother of a child is the woman who gave birth to them'.
7 Petousi-Douli, 2013, pp. 303 et seq.
8 Rodakis, 1982, p. 55.
9 Papachristou, 2003, p. 20.
10 Milapidou, 2011, pp. 10-11.
11 For a complete analysis, vide Gerber & O' Byrne, 2015.

3.
Liberation or Slavery of Women?

The fundamental philosophical issue regarding the permissibility of surrogacy – and what essentially has prevented many legal systems from adopting it – is the possibility of commodification of the female body,[12] either in the form of exploiting poor and marginalised women who will bear children due to economic hardship,[13] or by exploiting individuals who wish to have children through women who bear children as a "profession" and demand continuous payment to carry out the pregnancy.[14]

It is at least naive and hypocritical to pretend that women who have been granted legal permission to bear children as surrogate mothers are such good friends with the couple that desires to have a child, so that they agree to carry it for them without any compensation when, for the most part, they are foreigners, often from economically disadvantaged Eastern countries.[15] Furthermore, it has also been expressed that it is a per se unethical transaction that treats a child as an object of exchange.[16]

Essentially, the deeper issue raised here is to what extent our legal culture can accept the gestation and childbirth of a child on behalf of third parties as an expression of the autonomy of the surrogate woman. In other words, the issue at hand is nothing other than the "nature and extent of women's freedom: their freedom to control their bodies, their lives, their reproductive power, and to control the social use of their reproductive abilities".[17] From one perspective, this is impossible due to the broader exploitation that women undergo due to patriarchy,[18] and also due to the fact that surrogacy is such a heavy exploitation of women that none of them would choose it freely, in the same way that no one would choose freely to become a slave.[19] On the contrary, not allowing this choice to women "implies that women, due to their gender,

12 Kotzampassi, 2003, pp.48 et seq.
13 Kounougeri-Manoledaki, 2012, p. 48.
14 Grammatikaki-Alexiou, 2011, pp.56 et.seq and Kounougeri-Manoledaki, 2012, p.48.
15 Ravdas's research by Raptas P. (2012) on judicial decisions regarding surrogacy issued by the courts of Athens during the years 2010-2016 showed that in 217 out of 256 cases studied, foreign surrogate mothers (158) are almost twice as many as Greek ones (90), with the percentage being 61.2% and 35%, respectively. The countries of origin of the foreigners were mainly Bulgaria, Georgia, Poland, Albania, Romania, and Russia. The findings of a jurisprudential research conducted at the Thessaloniki Court of First Instance for the first quarter of 2017 are also categorical: in the twelve examined decisions (none of which were dismissive), only three pregnant women were of Greek origin, and of the rest, three were Albanian, two Russian, one Georgian, while there is no mention of the origin of the remaining two. For more, vide Vlachou-Vlachopoulou, 2017, pp. 1861-1870, but also Papadopoulou-Klamari, 2015, pp. 117-124.
16 Counter-argumentation in Kounougeri-Manoledaki, 2012, p. 48.
17 Shalev, 1989, p. 11.
18 Dodds & Jones, 1989, p. 13.
19 Hasan, 1999, pp. 101-121 and Overall, 1987.

are incapable of functioning as rational and ethical beings with regard to their own reproductive ability" – instead, women alone should decide[20] on issues concerning their reproductive capacity.[21]

4.
Full and Partial Surrogacy

Surrogacy is distinguished based on whether the surrogate's own egg is used, fertilised by the spouse/partner of the surrogate, the spouse/partner of the intended mother, or a third-party donor (full substitution), or whether the egg of the intended mother or of a third unknown donor is used, fertilised by the spouse/partner of the intended mother or by a third unknown donor (partial substitution).[22]

Full substitution has been criticised as a commodification of the child to be born and as an 'internal violation of the woman's personality',[23] undermining her right to self-determination. Additionally, concerns have been raised in the fear that it would be much more difficult for the surrogate to part with the child if they are biologically hers.[24] To avoid this possibility, Article 9 of the Greek Code of Ethics for Assisted Reproduction specifies that the surrogate mother must already have at least one child of her own, in accordance with the international data of the European Society of Human Reproduction and Embryology (ESHRE) and the American Society for Reproductive Medicine (ASRM).[25] Psychological support should also be provided to her during pregnancy and for a sufficient period after the child's birth.[26]

20 This decision is sealed by their consent, which takes place before the surrogacy. (Katz, 1986).
21 Shanley, 1995, pp. 164-179.
22 Kounougeri-Manoledaki, 2012, p. 47.
23 Kotzampassi, 2003, pp. 55-57.
24 It is worth mentioning, however, that there is no evidence to indicate such behaviors, even in countries that allow this practice, such as the United Kingdom. Research has shown that no couple refused to take the child from the surrogate (Van Den Akker, 1999, p. 264), and only 1% of surrogates ultimately changed their minds and decided to keep the child (Andrews, 1995, pp. 2343–2375).
25 http://eaiya.gov.gr/deltio-typou-19-04-2017/ (in Greek)
26 Papaligoura, 2011, p. 563.

5.
Greek Legal Requirements

Based on the above, the Greek legislator established partial substitution only, in a particularly liberal and innovative manner,[27] albeit under very strict conditions.[28] Specifically, in addition to the general conditions of Articles 1455 and 1456 of the Civil Code, it is required that:

5.1. The Woman Wishing to Have a Child must be Unable to Carry a Pregnancy and this must be Confirmed by Medical Opinions[29]

This should also include the case where the woman can conceive, but gestation poses the risk of transmitting a serious disease to the child.[30] Therefore, surrogacy is not considered for aesthetic and/or professional reasons (e.g. a woman working as a model or athlete).[31]

5.1.1. The Attempts of Jurisprudence to Circumvent the Upper Age Limit

Despite the requirement in Article 1455 of the GCC that a woman wishing to have a child must be of reproductive age (meaning she must not have exceeded 54 years of age at the time of the hearing of her case, as currently defined by law[32]), courts seem to be attempting to bypass the age limit using legal sophistry to grant permission for child acquisition through surrogacy. While exceeding the limit by only one and a half months may not seem to pose a significant problem,[33] considering that it could be due to the lack of hearings in a specific Court and it is unfair to punish the citizen for deficiencies in the Greek judicial system, the decision by the Court of Patras to

27 Skorini-Paparigopoulou, 2007, p. 141.
28 Grammatikaki-Alexiou, 2011, p. 62
29 The medical inability can be the result of either physical or psychological reasons – vide Papazissi, 2013, p. 78.
30 Panagos, 2023, p. 47. Counter-argumentation in Koutsouradis, 2006, p. 347, who considers this view to broaden the scope of surrogacy.
31 Kounougeri-Manoledaki, 2012, pp. 50-51, Skorini-Paparigopoulou, 2007, p. 144 Papaligoura, 2011, p. 561.
32 Thessaloniki Single-Member Court of First Instance 29288/2010 (NOMOS database).
33 Serres Multi-Member Court of First Instance 4/2018 (NOMOS database).

grant permission for child acquisition through surrogacy to a 54-year-old woman in its ruling No. 398/2018 is highly problematic.[34]

This decision is also extremely problematic because, in order to circumvent the provision of Article 4.1b of Law No. 3305/2005, which explicitly stated then that "*in the case that the assisted person is a woman, the age of natural reproductive ability is considered to be the fiftieth year*", it relies on the explanatory memorandum of Law No. 3305/2005, which states that the age of natural reproductive ability is defined as the fifty-fifth year. However, it is inconceivable for a Court to rely on an explanatory memorandum and not a legal provision to issue a decision.[35] It is also inconceivable for a law to be violated by invoking the Constitution, as the said judicial decision accepts that the constitutionally protected right to the free development of the personality of the applicant can only be satisfied if the upper age limit of 50 years provided by the absolutely clear Article 4.1b of Law No. 3305/2005 is raised to 54 years "*by teleological contraction of the aforementioned provision*".[36] Such decisions essentially mock the law and its conditions and should be strongly condemned by legal theory to prevent their repetition.

5.2. The Surrogate Mother must be in Good Health, Fit for Pregnancy, and this must be Confirmed by Medical Opinions[37]

This broad condition is specified in Article 13(2) and (3) of Law No. 3305/2005 and Article 9 of the Code of Ethics for Assisted Reproduction. The first one stipulates that the surrogate mother must undergo tests for HIV 1 and 2, hepatitis B and C and syphilis, as well as a thorough psychological evaluation.[38] The second one establishes that she must be between 25 and 45 years old, have already given birth to at least one child, and not have undergone more than two cesarean sections, presumably

34 (NOMOS database). Keep in mind that in 2018, the age limit of the intended mother was 50 years old.

35 A contrario the Heraclion Multi-Member Court of First Instance 14/2019 (NOMOS database), which rejected the application of a 58-year-old woman, ruling that Article 4.1b of Law 3305/2005 explicitly establishes an indisputable criterion regarding the maximum age limit for a woman's reproductive capability. Consequently, there is no legal vacuum justifying, through a teleological narrowing of the provision in paragraph b, the application of paragraph a of the same article, which would grant the right to resort to assisted reproductive methods, regardless of age.

36 Article 4.1 of Law 3305/2005

37 Vide the Thessaloniki single-Member Court of First Instance 838/2010 (NOMOS database), which postponed the issuance of a decision and ordered the resumption of the discussion to conduct the necessary medical examinations and obtain the relevant medical opinions so that the Court could form a 'definite legal conviction.'

38 For the need to monitor the surrogate mother by a psychologist, vide Papaligoura, 2011, pp. 562 et seq.

to ensure her maturity for making such a decision and her physical endurance for pregnancy and childbirth.

There is no specific age limit; instead, it is examined *in concreto* within the framework of the suitability of the surrogate for pregnancy.[39] This grants the Court the freedom to assess the age of the surrogate within the context of its capacity to judge her suitability for pregnancy within the legal framework. It should be noted that if the surrogate is a public servant, she is entitled to maternity leave, childbirth leave, and postpartum leave under Article 52.1 of the Code of Status of Public Civil Servants and Employees of Public Law Entities.[40]

5.3. The Applicant's or the Surrogate's residence/Temporary Stay in Greece

Law No. 3089/2002 initially required residence in Greece for both the intended mother and the surrogate. This was entirely justified, as it prevented Greece from becoming a destination for reproductive tourism[41] and reduced the likelihood of surrogates becoming victims of trafficking.[42] However, according to the amendment introduced by Article 17 of Law No. 4272/2014 to Article 8 of Law No. 3089/2002, temporary stay in Greece is currently sufficient, in order to avoid hindering "*the [freedom of movement of health services provided for by EU law*[43]*]*".

It would not be unreasonable to assume that this legislative choice – given its fragmentary nature – does not fit into a broader plan of exploiting medical tourism but simply eliminates an obstacle preventing the process and the consequent gain from the MAR Units.[44] This is also suggested by the publication of Law No. 4272/2014 on 11 July 2014, just a few days[45] after the publication of the *Mennesson*[46] and *Labas-*

39 Skorini-Paparigopoulou, 2007, p. 144.
40 'Female employees who are pregnant are granted maternity leave with full pay two (2) months before and three (3) months after childbirth. In the case of having more than one child beyond the third, maternity leave after childbirth is extended by two (2) months each time. Maternity leave due to pregnancy is granted upon certification from the attending physician regarding the anticipated childbirth date. In the case of a multiple pregnancy, maternity leave is increased by one (1) month for each child beyond the first one.'
41 Panagos, 2023, pp. 49 et seq. and Skorini-Paparigopoulou, 2007, p. 146.
42 Papazissi, 2013 pp. 81-82.
43 Koutsouradis, 2006, pp. 342 et seq.
44 Milapidou, 2014, 978 επ.
45 Kovacs, 2014.
46 http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145179.

sée[47] *v. France* ECHR decisions on 26 June 2014.[48] Briefly, both decisions concern two French couples who resorted to the ECHR after lengthy legal battles for the registration in French registries of the birth certificates of their children, born to surrogates in the United States.[49] The ECHR ruled that the refusal to recognise the parent-child relationship between the intending parents and the children born to a surrogate abroad constitutes a violation of Article 8 of the ECHR, thus protecting the children's privacy.[50] By all means, the different legal provisions of each European country on surrogacy has led to efforts for regulating cross-border surrogacy cases, such as Petra De Sutter's Motion for a Resolution to the EU Parliamentary Assembly on Children's rights related to surrogacy,[51] the Comparative Study on the Regime of Surrogacy in EU Member States of the European Parliament Policy Department C: Citizens' Rights and Constitutional Affairs[52] or even the Aristotle University of Thessaloniki project entitled "Assisted Reproduction and Protection of the Embryo *in vitro*" as part of the ARISTEIA II project, co-financed by the Greek Secretariat of Research and Technology and the EU,[53] suggesting a proposal for a European legislation on assisted reproduction in general, including surrogacy of course.

47 http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145180.

48 On July 21, 2016, the ECHR issued the judgments Foulon and Bouvet vs France (http://hudoc.echr.coe.int/eng?i=001-164968), with factual circumstances similar to those of Mennesson and Labassée. The court ruled that there was a violation of the right to respect for the private life of the children involved. For other ECHR judgements stating that the refusal to recognise legal bonds between the intended parent(s) and the child(ren) born via surrogacy violates the Article 8 of the ECHR, vide indicatively D.B. and Others vs Switzerland (https://hudoc.echr.coe.int/fre?i=002-13896), A.L. vs France (https://hudoc.echr.coe.int/fre-press?i=003-7305366-9961797), K.K. vs Denmark (https://hudoc.echr.coe.int/eng-press?i=003-7514285-10313040). For contra judgements, vide Paradiso & Campanelli vs. Italy case (https://hudoc.echr.coe.int/?i=001-170359) and the dissenting opinions, D. and Others vs Belgium (https://hudoc.echr.coe.int/eng-press?i=003-4865500-5943678) and C& E vs France (https://hudoc.echr.coe.int/eng?i=003-6589814-8731890), to name but a few.

49 In both cases, the appeals had been rejected by the French Court of Cassation in 2011, with the reasoning that a different judgment would legitimise a surrogacy agreement that is illegal under French law.

50 Commentary by Trokanas, 2015, pp. 207-216.

51 https://pace.coe.int/en/files/23015.

52 http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOLJURI_ET%282013%29474403_EN.pdf

53 http://repro.law.auth.gr/en.

In any case, if a European couple from a country where surrogacy is prohibited (such as France[54]) can now hope for the citizenship of their children born through surrogacy in a country where the practice is allowed, why not come to Greece to do so, where they can find high-quality medical services at a very low cost? The abolition of the residence requirement in Greece and its replacement with a temporary residence requirement seems very convenient in this direction. Decisions have already been issued *allowing foreigners temporarily residing in Greece* to have a child through surrogacy.[55]

Nevertheless, this choice indicates the tolerance – if not the intention – of the legislator to create a 'market' for surrogacy, where the incentive of solidarity is doubtful. "Because, if the legislator abolished the balance of Law No. 3089/2002 (which correctly introduced the term 'residence', strictly defining a very limited geographical scope for the application of the method precisely because it implied the motive of solidarity), it leaves the rest of the regulation of surrogacy entirely open to the development of a real 'market' at all levels."[56]

5.4. The Fertilised Eggs must Come Either from the Woman Desiring to Have a child or from an Egg Donor[57]

As a consequence of the issues raised in the Chapter on full and partial surrogacy, Article 1458 of the GCC explicitly states that the surrogate woman can never be the biological mother of the child to be born. This legal choice stems from the fact that the law cannot accept the case where a woman is deprived of a child who was conceived with her own eggs, as well as carried and laboured by herself, just for the sake of another woman. Such a scenario would be very constraining for her and would be

54 These ECHR judgements led to the French Court of Cessation requesting for an advisory opinion of the ECHR on the recognition in domestic law of a legal parent-child relationship between a child born abroad by a surrogate, using donor's eggs, and the intended mother, according to the provisions of the ECHR Protocol No 16 (also known as the "Protocole du dialogue"). The ECHR found (https://hudoc.echr.coe.int/eng-press?i=003-6380685-8364782.) that the establishment of legal motherhood is imperative in such a case, in order to ensure the child's right to private life, as stated in Article 8 of the European Convention of Human Rights – however, such recognition is not obligatory to take place according to the surrogacy details legally established abroad and another means may be used if necessary, such as adoption.

55 Vide the Athens Multi-Member Court of First Instance 693/2018 (NOMOS Database), the Athens Multi-Member Court of First Instance 465/2018 (NOMOS Database) και την Athens Multi-Member Court of First Instance (ISOCRATES Database), which granted permission for child acquisition through the method of surrogacy to a 47-year-old French woman, a 40-year-old English woman, and a 45-year-old Dutch woman, respectively.

56 Vidalis, 2015, p. 183.

57 Counter-argumentation in Koutsouradis, 2006, pp. 349 et seq., who argues that the eggs must belong to the surrogate mother.

socially unacceptable, according to Article 179 of the GCC.[58] In addition, that would be an adoption and not a surrogacy case.

5.5. Applicants must be Married Couples, Civil Union Partners or Single Women

This requirement, which excludes same-sex couples or single men, will be discussed at length in the following sub-chapter.

5.5.1. The Myth of Motherhood

The conviction that the desire for a child concerns exclusively women, an idea based on the 'maternal instinct' construct[59] seems to be deeply rooted in the collective subconscious. The 'maternal instinct' is defined as "*an inherent emotional and tender tendency of all women without any exceptions towards children, stemming from their reproductive capacity*" and is supposed to create the desire in all women to carry a child and become mothers, be they trans or cis-gender.[60] On the contrary, the paternal instinct is not considered as strong as the maternal one – actually, even its very existence is often questioned.[61] This view stems from the undeniable fact that the perpetuation of the human species takes place through pregnancy, childbirth, nursing (and breastfeeding, if one selects it), experiences of an exclusive female (in the biological sense of the word) nature[62,] and has led to the formation of social perceptions and policies on the role of the two sexes. Maternity is considered as the basic mission, the 'profession' and the integral element of the female nature, to the point where the term 'woman' is equated with the term 'mother'.[63]

This social model has been endlessly perpetuated, unchanged from generation to generation, defining the role of cis-gender women as mothers and teaching at the same time young children what the roles of adults in childbearing should be.[64] Thus, a biological feature has acquired a central character and has become the basis of the

58 'Actions contrary to good morals include especially those legal practices where a person's freedom is excessively constrained, or where someone exploits another's need, deafness, or inexperience to secure for themselves or a third party material benefits that are manifestly disproportionate to the service provided.'
59 Borgeaud, 2004, Badinter, 1982.
60 Wade, 2002.
61 Shields, 1984.
62 West, 1988; Firestone, 1979.
63 Constantinou, Varela & Buckby, 2021.
64 de Marneffe, 2019.

identity of the female gender.[65,66] In that way, societies have established the norms of education and work for the two sexes, justified all kinds of discrimination between sexes and patriarchy. Therefore, they have fixed both sexes in traditionally defined roles in a perfect harmony with their 'natural calling'. In this scenario, women are meant to become mothers and men are meant to become workers, each of them acting in the private and public sphere of action[67] respectively.[68] In other words, "women's self-identity, social role and 'human needs' have all been defined historically by their procreative capacities. Rather than having physiological and other 'needs', women are seen principally as physical 'beings' and are socially confined to reproductive and domestic roles".[69,] Obviously, gender ideology has impacted not only the cultural notions of reproduction, parenthood and family, with all women (single or not) being treated as would-be mothers, but also the medical provision and legal access to assisted reproduction.[70] As a result, single women must always have legal access to MAR, since they will inevitably want to have a child, even without a spouse or partner. On the contrary, men will never want to have a child on their own; the opposite is viewed as something paradoxical or as the exception to the rule, at best.

5.5.2. Surrogacy (and other MAR) for Gay and Lesbian Couples

In Greece, same-sex couples achieved legal recognition only in 2015 under Law No. 4356/2015, which extended the civil union status (but did not allow civil marriage) to them. This development sparked a storm of reactions from conservative circles in society.[71] This expansion was expected, especially after Greece's condemnation by the ECHR in the *Vallianatos and Others v. Greece*[72] case in which the ECHR ruled that the exclusion of same-sex couples from Law No. 3719/2008 regulating civil unions constituted a violation of the right to private and family life, as well as of the provisions prohibiting discrimination. However, this law does not regulate the possibility of obtaining a child through MAR, as natural reproduction is *de facto* not possible.

65 Rubin, 1975.
66 Irigaray, 1974.
67 Baraitser, 2014.
68 Kravaritou, 1996; Arendt, 1958; Pateman, 1988.
69 Priaulx, 2008, p. 182; Friedan, 1963, pp. 273–274.
70 Almeling, 2007, pp. 319–340, Remennick, 2000, pp. 821–841 and Waggoner, 2017.
71 The public consultation on extending the civil union to same-sex couples received 3,324 comments, with the majority being homophobic and vulgar. Some indicative comments, with preserved spelling, include: "ALL THIS IS UNACCEPTABLE!!! WE ARE RETURNING TO THE TIMES OF SODOM AND GOMORRAH!!!", "No to the civil union for homosexuals!!! We won't level everything! It's time to learn to distinguish between the abnormal and the normal!", "Disgrace! The bill of abnormality should be abolished."
72 https://hudoc.echr.coe.int/?i=001-128294 – commentary by Pervou, 2014.

Additionally, the law excludes same-sex couples from MAR, as Article 9 clearly intends to permit child acquisition only to opposite-sex couples entering into a cohabitation agreement: "the child born during the civil union or within three hundred (300) days from the dissolution or annulment of the agreement is deemed to have the man with whom the mother drafted the agreement as their father".[73]

This situation changed in Greece in 2024, when Greece regulated civil marriage between same-sex individuals with Law No. 5089/2024 on Equality in Civil Marriage, Amendment of the Civil Code and Other Provisions again amid a storm of reactions from conservative circles in society.[74] This was mainly because this law addressed, at least partially, the significant problem faced by same-sex couples who had children through assisted reproduction abroad[75] – the child would share a legal bond with one parent, but the other parent would legally be considered a third party to the child, with all the problems that could entail.

According to the provisions of Law No. 5089/2024, marriage is concluded between "persons of different or of same sex" (Article 3). If no declaration is made, the child's surname will not be that of the father but a combination of both parents' surnames, with the first surname being the one that comes first alphabetically (Article 4). Social security benefits and parental or maternity leave entitlements are extended to same-sex couples (Articles 6 to 8). Pre-existing same-sex marriages concluded

73 The bold and underline fonts belong to the writer.

74 According to the writer's opinion, the establishment of civil wedding for same-sex couples is just a matter of time for all Western societies. Moreover, for every judgement like the Greek Supreme Court (Areios Pagos) 1428/2017 (NOMOS Database), which deemed the civil marriage of two men invalid and "reflects the ethical and social values and traditions of the Greek people, who do not accept the establishment of marriage for same-sex couples" there will be a judgement like the Supreme Court of the United States Obergefell vs. Hodges (https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf), stating that the prohibition of marriage for same-sex couples violates human rights, with the notable conclusion of Justice Kennedy: 'no union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.'

75 For example, the decision 623/2021 of the Athens Court of Appeals (NOMOS database) rejected the application of a male couple, who had entered into a civil union abroad, to recognise in Greece a voluntary jurisdiction decision from a foreign court (specifically of South Africa) that had granted them permission to jointly have a child using a surrogate woman. The rejection was based on the grounds that men are excluded from surrogacy in Greece, and any adoption of the child by one part of the couple would be 'contrary to dominant social and moral principles and beliefs, and the legal consequences arising from this could cause a profound disruption to the Greek legal order.'

abroad are considered valid (Article 10), and parent-child relationships registered in public documents or court decisions from third countries are recognised in Greece, whether established through adoption or ART (Article 11). However, it is noted that there is no provision allowing married same-sex couples to jointly pursue surrogacy to have a child, which constitutes a discriminatory treatment against them. In other words, couples who have children via this method outside of Greece will be able to establish a legal bond with their children in Greece, while those who might have children within Greece will not!

Although the Greek law is notably innovative, allowing even controversial and prohibited in other European) from reproductive technologies.[76] This decision is based on the delineation of the free development of personality through reproduction from the 'rights of others'.[77] Another argument is the fear of the potential impact on the emotional development of the children born to same-sex couples, something which may be against the welfare of the child to be born.[78] Finally, if one accepts that MAR are used by couples unable to conceive naturally, they cannot be used in cases where natural reproduction is de facto impossible.

However, these arguments are unfounded. Firstly, it is absurd to consider that the welfare of the child – which is the basis of this prohibition – dictates not bringing the child into existence.[79] Moreover, homosexual individuals in our country have, as a rule, been born and raised by heterosexual parents. If one accepts that the sexual orientation of parents affects that of their children, no child from a heterosexual family would ever become homosexual,[80] which is, of course, not true.[81] Research has also clearly demonstrated that the sexual orientation of parents does not affect the sexual orientation, sexual behaviour, and overall sexual identity of their children.[82] Even fears of potential inadequate psychosocial development of these children have been debunked by research,[83] with the American Academy of Child and Adolescent Psychiatry emphatically stating in 2013 that "current research shows that children with gay and lesbian parents do not differ from children with heterosexual parents in their emotional development or in their relationships with peers and adults. It is important for parents to understand that it is the the quality of the parent/child

76 Rethymiotaki, 2014, p. 171.
77 Papachristou, 2013, p. 278.
78 Papachristou, 2013, p. 279.
79 Papachristou, 2013, p. 279.
80 In passing, this argument is not only fallacious but also not just weak, but homophobic, as it implies that potential homosexuality is something bad and harmful to a person.
81 Papazissi, 2007, p. 765.
82 Green, 1978, pp. 692-697, Miller, 1979, pp. 544-552, Bailey et al., 1995, pp. 124-129, and Farr et al., 2010, pp. 164-178.
83 Golombok, Spencer & Rutter, 1983, pp. 551-572, Patterson 2009, pp. 727-736, Sasnett 2015, 2015, pp. 196-222 and Telingator & Patterson, 2008, pp. 1364-1368.

relationship and not the parent's sexual orientation that has an effect on a child's development. Research has shown that in contrast to common beliefs, children of lesbian, gay, or transgender parents: Are not more likely to be gay than children with heterosexual parent/ Are not more likely to be sexually abused./Do not show differences in whether they think of themselves as male or female (gender identity)./ Do not show differences in their male and female behaviours (gender role behaviour)".[84]

Finally, the argument regarding the impracticality of applying MAR when reproduction is practically impossible is utterly flawed, as to be consistent with this argument, the application of MAR should be prohibited to single women as well – something that nobody contemplates doing. Therefore, it is self-evident that the prohibition of same-sex couples' access to MAR constitutes discriminatory and adverse treatment based on their sexual orientation, violating the principle of the free development of their personality.

In any case, the wording of the law does not allow same-sex couples to resort to MAR methods, whether they are women or men.[85] However, practically, same-sex couples circumvent the legal prohibition in the following ways: in lesbian couples, one partner applies for MAR as a supposedly 'single woman' according to the letter of the law,[86] and in gay couples, one partner appears with a surrogate as a supposed couple in civil union and acquires a child with her, or attempts to do so as a 'single man' with a surrogate, as will be discussed in the next part of this paper. In these cases, the problem lies in the fact that only one partner has a legal bond with the child in lesbian couples, and that in gay couples a surrogate has a legal bond with a child she may never have even seen, while the other partner – who raises the child – has no legal relationship with them, with all the implications that such a situation may entail.

Theoretically, each partner could form a legal bond with the child by adopting them. However, it is unknown whether the social services, which will be called upon to judge whether the specific adoption is in the best interest of the adopted child,[87] will reach such a decision. Moreover, even if a court approves the adoption of the child by the partner of the mother or of the father, any legal bond between the minor and

84 https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFFGuide/Children%20with%20Lesbian,%20Gay-Bisexual-and-Transgender-Parents-92.aspx

85 Papazissi, 2007, p. 766 και Fountedaki, 2007, p. 178.

86 Kantsa & Chalkidou, 2014, pp. 180-205 and Rethymiotaki, 2014, pp. 173-174.

87 1557 GCC: 'Before the adoption takes place, a social service or another recognized organization specializing in adoptions conducts a social investigation. A relevant report is then submitted to the court within the specified deadline, based on the criteria defined in the law. This report assesses whether, according to the gathered information, the particular adoption is in the best interest of the adoptee.'

the biological mother must be severed,[88] making it impossible for both parents of the child (either through adoption or through assisted reproduction) to exist simultaneously.[89] It is obvious that legislative changes are thus imperative, not for rewarding the circumnavigation of laws, but for safekeeping the welfare of the child to be born.

However, it is only a matter of time before a Greek same-sex couple resort to the ECtHR in order to seek the conviction of Greece for this discrimination. The ECtHR has already relevant case law seeking the protection of same-sex couples and the prohibition of discrimination against them, based on their sexual orientation. More specifically, the case *X v. Austria* was issued in 2013, with the Grand Chamber of the ECtHR ruling that the prohibition for a woman to adopt the biological child of her partner constitutes a discriminatory treatment against them compared to a heterosexual couple and that it violates Article 14 of the ECHR on the prohibition of discrimination and Article 8 of the ECHR on the right to respect for private and family life.[90]

5.5.3. Surrogacy (and Other MAR) for Single Men

One could argue that allowing surrogacy only to single women and (straight) couples is due to the fact that these categories are able to conceive a child naturally. The ECtHR's established case law, however, has now included the right to assisted reproduction within the individual rights enshrined in the European Convention on Human Rights, specifically in the right to private and family life (Article 8[91]), as well as in Article 7 of the Charter of Fundamental Rights of the European Union.[92] This stance of the ECtHR, also adopted by the Supreme Courts of individual European countries,

88 1561 GCC: 'Through adoption, every bond of the minor with their natural family is severed, with the exception of the provisions regarding marriage impediments of Articles 1356 and 1357. The minor is fully integrated into the family of their adoptive parent. In relation to the adoptive parent and their relatives, the minor has all the rights and obligations of a child born in wedlock. The same applies to the descendants of the adoptive child. In the case of simultaneous or successive adoptions of more than one child, a relationship is created among them similar to that between siblings.'

89 The article 1562 GCC (In the case where one spouse adopts the child of the other, the ties of the adopted child with their natural parent and relatives are not severed. In all other respects, adoption produces all the effects of adoption that occurs by both spouses), cannot be applied to same-sex couples, as article 1561 GCC explicitly refers to a 'spouse' and not a 'partner.'

90 Kostopoulou, 2013, pp. 720-729.

91 Full analysis of the article can be found in van Dijk & van Hoof, 1998, pp. 504-514 and Schabas, 2015, pp. 358-411.

92 Respect for private and family life - Everyone has the right to respect for his or her private and family life, home and communications.

such as Germany[93] and Italy,[94] essentially reverses the question to be answered: the question is not when assisted reproduction should be allowed, but when and why somebody may be prohibited from resorting to assisted reproduction if they want to procreate. In other words, any restrictions must be justified and, as the ECtHR states, absolutely necessary in a democratic society.

There is no doubt that reproduction, which can be achieved naturally (through a sexual encounter resulting in pregnancy) or by artificial means (by resorting to methods of assisted reproduction), is an aspect of private and family life. The mere fact that single men are obliged to resort to surrogacy to procreate is not such a justified and absolutely necessary restriction, as invoking biological and moral reasons that could impose the exclusion of single men from surrogacy would primarily lead to the prohibition of the very forms of single parenting for me (e.g. adoption and sole custody after a divorce or widowhood), and not just the prohibition of access to surrogacy – denying surrogacy to single men is inconsistent with the fact that single parent families are legally established and single women are allowed to have a child via a surrogate, using not only donor's sperm but also donor's eggs (so that the child has no biological link to them).[95]

After all, individuals should be allowed to make decisions with respect to their life plans, according to their own values, beliefs and wishes, as long as others are not harmed by the exercise of this right.[96] Peoples' reproductive decisions are personal and encapsulate the meaning of being human – disregarding them deprives both men and women from their right to control their most intimate spheres of their life.[97]

This issue has engaged Greek jurisprudence with the ground-breaking decisions of the Athens Single-Member Court of First Instance (decision No. 2827/2008)[98] and the Thessaloniki Single-Member Court of First Instance (decision No. 13707/2009),[99] which used the same reasoning and analogically applied the provisions of Law No. 3089/2002, granting permission to a single man to have a child through egg donation and surrogacy. Specifically, the Court ruled that Article 1458 of the GCC violates the right to free development of personality under Article 5.1 of the Constitution, given the ethical preference it gives to the single-parent family created by a single woman. Furthermore, it constitutes 'an overt discriminatory treatment' against men, as their

93 BGH 10.12.2014- Az. XII ZB 463/13, OpenJur 2014, 27194.
94 Corte Suprema di Cassazione 162/9.4.2014, Gazzetta Ufficiale 1ª Serie Speciale, n.26/ 18.6.2014.
95 Kounougeri-Manoledaki 2003, pp.145-154.
96 O' Donovan, 2018, p. 490–491.
97 Robertson, 2004, pp. 7-40.
98 NOMOS Database.
99 NOMOS Database.

exclusion from recourse to surrogacy deprives them of the opportunity to form a family and infringes[100] Articles 4.2 and 4.3 of the Constitution.[101]

However, these exceptional decisions were not repeated, as the jurisprudence took a conservative turn on this issue: the Public Prosecutor of the Courts of First Instance in Athens appealed against decision No. 2827/2008 taken by the Athens Single-Member Court of First Instance, which was accepted by decision No. 3357/2010 of the Athens Court of Appeals.[102] The latter decision annulled decision No. 2827/2008 of the Athens Single-Member Court of First Instance and rejected the application.[103] Moreover, a recent decision of the Thessaloniki Multi-Member Court of First Instance (decision No. 8641/2017)[104] accepted that MAR are not allowed to single men, only for couples and single women.

These decisions concluded that the issue of unconstitutionality does not arise, as the legislative differentiation between the two genders is created by their different nature.[105] According to the judicial opinion, only a woman can conceive and give birth, and therefore, only she may have a relevant medical inability, allowing her to resort to surrogacy. In contrast, a man, whether fertile or not, needs a surrogate to have a child, thus compensating for a medical inability that is not his own. However, this argument is fundamentally flawed: *when a fertile woman without a medical inability has a child with donated sperm, she also compensates for a medical inability that is not hers*. Whether a woman simultaneously needs to have a medical inability related to her gender does not mean that a man cannot have a medical inability related to his gender, such as oligoasthenozoospermia. This is when it becomes even clearer that the need for a man to use donated sperm must be evaluated by the law in exactly the same way as for women.[106] Just as a woman needs sperm donation, a man needs egg

100 Papachristou, 2009, p. 818.

101 More precisely, it states that '...the provision of the right to MAR to single women while simultaneously denying it to single men constitutes a blatant discriminatory treatment of those interested in the solution of MAR, which is not justified according to Article 4, paragraphs 3 and 4, of the Civil Code. The gap that arises concerning the right to artificial reproduction for single men is addressed by an overall analogy of the article 1455, emphasizing, particularly in relation to paragraph 1, point a, that, just as for the assistance of the single woman beyond the limits of her gender (using sperm donation), the same applies to the assistance of the single man beyond the limits of his gender (using egg donation and surrogacy). It is also required that there be a medical need for assistance for the aspiring single parent, preventing natural reproduction either in the context of a couple with a person of the opposite sex. This limitation is imposed in both cases, for the woman and the man, according to good morals (Article 1456 and 1458 of the Civil Code).'

102 NOMOS Database.

103 Note that this decision was preceded by the birth of this child from the unmarried father, which was ultimately prohibited.

104 NOMOS Database,

105 Papachristou, 2003, pp. 55 et seq., and Vidalis, 2003, pp. 839-840.

106 Kounougeri-Manoledaki, 2010.

donation and a uterus. In both cases (single men or women), monoparental families are created.

In fact, decision No. 8641/2017 of the Thessaloniki Multi-Member Court of First Instance takes another logical leap, demonstrating the Court's intention to avoid taking responsibility for granting permission. The Court argues that, aside from the fact that the legal order is not yet ready for such decisions,[107] the lack of a legal mother violates the personality of the child. This perceived violation justifies a legitimate restriction on the free development of the man's personality through the acquisition of an offspring.[108] Disregarding the fact that no personality violation arises in the case of a being that may not even exist yet as a fertilised egg, with the same logic, the fact that a child born to a single woman does not have a legal father should equally violate their personality. Therefore, the acquisition of an offspring using donor sperm should not be allowed for single women either. However, no one would contemplate prohibiting such a thing, nor was that the intention of the law.

For a more in-depth analysis of the welfare of the child, it should be noted that the main argument for prohibiting single persons form access to MAR is the idea that a child should grow up in a two-parent environment. While it is certainly beneficial for the responsibilities of raising a child to be shared between two parents, this does not mean that it is forbidden, impossible, or problematic for a child to be raised by a single parent. The number of families established by single women has been increasing – as a matter of fact, these families enjoy special protection under the law and studies indicate that children from these families continue to function satisfactorily as they enter adulthood.[109]

Specifically, in the case of single men, the reservations are based on the fact that single women and couples can 'naturally' procreate, while a single man is obliged to resort to surrogacy. Apart from the gender equality issue, there does not seem to be any sufficient and necessary condition to limit single men's access to assisted reproduction, as there is no well-founded study stating that single men cannot be

107 Certainly, one might reasonably wonder how the legal system will be ready for such cases when the justice system itself refuses to integrate them into society.

108 "...the provision of legal protection for the right to the free development of personality, based on Article 5 of the Constitution, undoubtedly has as its limit the right to the free development of the personality of other members of society. In this case, beyond the aforementioned, the reasonable question arises whether the recognition of the right to medically assisted reproduction using a surrogate uterus for a single man infringes on basic expressions of the personality of the child to be born through this process. This is because it would involve a child with a legally nonexistent mother, given that, based on our current legal order, no bond of kinship is created between the woman who carries the pregnancy and the child. Therefore, adopting the view that this specific case could be regulated by analogy with the law is considered, at least, risky for the personal identity and characteristics of the future child. Moreover, our legal system is not prepared to handle such cases, even at the administrative level...".

109 Vide indicatively Golombok 2020 and the bibliography therein.

good parents. The only acceptable distinction should be based not on gender but on a general prohibition of surrogacy; however, such a prohibition could not be applied in Greece where surrogacy is a legally regulated everyday practice. If surrogacy was against the welfare of the child, it should be completely banned and not restricted to certain categories of persons; anything else would constitute an obvious sophistry.

In conclusion, it is entirely unjust – especially considering that the law on MAR is based on social and emotional kinship – for a woman to be legally allowed to have a child through a surrogate using not only donor sperm but also donor eggs, while a man cannot do the same. Such perspectives are contrary to any declaration of gender equality, insulting both the female gender by suggesting that motherhood is a biological destiny and not a choice, and the male gender by implying that fatherhood is an auxiliary task and coercion, not a choice.[110] When it comes to the welfare of the child, one should not forget that surrogacy is a choice with significant financial and emotional costs. Therefore, the choice made by these single men is a conscious one, contrary to many pregnancies which just 'occur.'

6.
Conclusion

The absence of an explicit provision of gay and lesbian couples' and single men's unhampered access to MAR methods in Greece does not only lead to unacceptable discrimination against them, as this could be as much construed as an infringement to their autonomy.[111] After all, individuals should be able to make decisions with respect to their life plans, according to their own beliefs and wishes, as long as others are not harmed by the exercise of their right to decide for themselves.[112] According to Robertson and Jackson, decisions related to reproduction are personal ones and encompasses the sense of being human and disregarding them essentially removes from persons the right to control one of the most intimate spheres of their lives. If the law prohibits surrogacy for gay and lesbian couples and single men, this should have severe and explicitly stated reasons. However, in the current legal framework, such reasons are inexistent.

The ideal legal solution is amending the existing legal framework, so that the Greek law unconditionally recognises the right of gay and lesbian couples' and single men to reproduction, allowing them unhindered access to MAR methods – this will

110 Krajewska & Cahill-O'Callaghan, 2020, pp. 85-106.
111 Quigley, 2010, pp. 408-409.
112 O' Donovan, 2018, pp. 490–491.

also safeguard the best interests of any children born, the core of the legislation governing access to MAR.

Furthermore, if it has to be accepted and respected that straight couples and single women may not wish to become parents and neither pregnancy nor childbirth is imposed on them, it has to be equally accepted and respected that gay and lesbian couples and single men may wish to become parents and thus provide them with equal access to MAR and surrogacy.

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