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Topic IV. C. HUMAN RIGHTS
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**RIGHTS OF EMBRYO AND FOETUS
IN PUBLIC AND PRIVATE LAW**

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Recent developments in biology and human embryology have posed new questions about the character of human life and the moral and legal status of the extracorporeal embryo. Most of these issues are directly connected with the new modes of assisted procreation, given that they are of particular importance for the reproductive choices, decisions and desires of the individual. Other topics are related with embryo research, a field with vast promising potential. Following the questionnaire submitted by General Rapporteur Professor Dr. Özsunay, this report presents the answers of the Greek legal order to some of the challenges which refer to embryo protection.

A. TERMINOLOGY

1. In the Greek civil law terminology the latin term “*nasciturus*” (*a child in utero*) is equivalent to the term “*kyophoroumenos*”. The term *nasciturus* concerns an embryo, conceived naturally or by means of assisted procreation, that is now *in utero* of his mother and developing therein.

The term embryo is used in the Greek law about abortion. The distinction between “embryo” and “foetus” does not exist in the Greek language: The human being from the moment of conception to birth is called “embryo”.

The legal term “*nasciturus*” is narrower than the medical term “embryo”: An embryo is also an extracorporeally fertilised ovum, that has not yet been implanted in utero or that is in the stage of the 8-cell differentiation and has been cryopreserved.

The term “embryo” is further used by the doctrine in connection with the recent developments in biology and medicine (i.e. extracorporeal embryo, embryo

research etc.)¹. As a draft law on human assisted procreation was under discussion, some suggestions have been submitted as to the terminology to be adopted, like the terms “pro-nasciturus” (referring to the extracorporeal embryo till the fourteenth day) and “surro-nasciturus” (referring to the embryo created *in vitro* from the gametes of a couple and then implanted in the uterus of a “surrogate mother”)²; another suggestion favours the term “fertilised egg” for the extracorporeal embryo³. The latter term is also in use in the German “Embryo Protection” Law of 1990⁴ and in the Austrian Reproductive Medicine Law no. 275 of 1992⁵. This term was finally adopted in the law 3089/2002, which regulates issues related to assisted conception and modifies the articles of the Civil Code relevant to the filiation and heredity rules.

B. EMBRYO AS A “PERSON” WITH REGARD TO THE BEGINNING OF “PERSONALITY” AND “CAPACITY TO RIGHTS”

1. Greek Civil Code distinguishes between *the capacity of holding rights and duties* (which is a “passive” capacity) and the *capacity of concluding juridical acts* (which is an “active” capacity). The former is the capacity of a person to enjoy rights and to have duties. Everyone has this capacity from birth to death (articles 34 and 35 Civil Code). For this reason it is equivalent to the identity of the person, the personality.

Legal capacity (Rechtsfähigkeit) is recognized only to the born child from the time that he is detached from his mother’s body, alive or viable (article 35 Greek Civil Code).

2. Greek Civil Law acknowledges a wide protection to the child *in utero*: Article 36 of the Greek Civil Code sets out : “*Nasciturus (i.e. a child en ventre sa mere)* shall be deemed born, insofar as his/her rights are concerned, if it was born alive”.

¹ I. Kriari–Catranis (1994): *Biomedical developments and constitutional law*, Thessaloniki, Sakkoulas, pp. 100 et seq.; The same (1997): Embryo research and human rights – An overview of the developments in Europe in: *European Journal of Health Law*, pp- 43 – 67.

² I. Androulidakis Dimitriadis (1996): *Nature and status of the embryo – Legal aspects-Continental Law Juridictions in*: Council of Europe, Third Symposium on Bioethics: Medically Assisted Procreation and the Protection of the Human Embryo, CDBI/SPK (96) 9.

³ E. Kounougeri – Manoledaki (1999): Sperm, ovun and fertilized egg outside the human body- Their legal status in civil law (in Greek), *Armenopoulos*, pp. 465-479.

⁴ International Digest of Health Legislation 1991, pp. 60 – 64. Article 8 of the German Embryo Protection Law states : “For the purpose of this law, the term embryo means the human egg cell, fertilised and capable of development, from the time of fusion of the nuclei, as well as each totipotent cell removed from an embryo that is capable, in the presence of other necessary conditions, of dividing and developing into an individual”.

⁵ International Digest of Health Legislation 1993, pp. 247-248. Article 1 para. 13 of the Law on Assisted Procreation of 1992 ascertains that “viable cells is defined to mean fertilised oocytes and cells that have developed from such oocytes”.

So “nasciturus” has the capacity to be holder of rights, on condition that it is born alive (article 36 CC). “Nasciturus” has hereditary rights: He/she can be an heir by intestate succession or by testament. This right exists even for somebody who he has not yet been conceived (article 1924 CC)⁶.

Further, if the husband of a pregnant woman dies, the child that will be born will have a claim for damages against the person who killed his father, as entitled to alimony from him, although the child had not been born at the time of his father’s death⁷.

3. The capacity of concluding juridical acts is the capacity of a person to undertake legal transactions *in propria persona*, that is to play an active part in economic and legal life, binding himself by his own acts. The capacity of concluding juridical acts is held basically only by mature persons who can, in principle, weigh the consequences of their acts. Anyone who has completed his eighteenth year is an adult and has the capacity for any juridical act (article 127 CC). Minors (under the age of 18) either lack capacity completely, that is they are incapacitated from any juridical act (those under the age of ten) or are of limited legal capacity (those between the ages of ten and eighteen)⁸.

Apart from the question of age, mental and psychological and in some cases physical health are crucial. Thus, those who have been placed under judicial interdiction (instances of persons who suffer from permanent mental illness which precludes the use of the reason or from a serious physical disability and are thus unable to care for themselves and their property – Articles 1686 et seq.) totally lack capacity to conclude juridical acts. Moreover, of limited legal capacity (i.e., they cannot on their own undertake certain important acts specified by law) are those who have been provided with a judicial advisor (instances of mental illnesses which do not preclude completely the use of the reason as well as partial physical disability, addiction etc. – Articles 1705 et seq. CC)⁹.

4. If the foetus is born alive with Down’s syndrome (ie.a chromosomal disorder resulting in mental retardation of differing degrees) then it is entitled to special care, if there are proper educational facilities addressing that condition in his/her place of residence (article 5 para. 5 of the Constitution guaranteeing the right to health and article 21 para. 3 stipulating that the state shall adopt special measures for the protection of youth, disability and for the relief of the needy).

⁶ See Council of Europe, Third Symposium on Bioethics, CDBI/SPK (96) 9: I. Androulidakis Dimitriadis (1996): Nature and status of the embryo - Legal Aspects – Continental Law Juridictions, p. 5

⁷ E. Kounougeri – Manoledaki (2000): Biomedical progress and the beginning of human life as a civil law problem, in: *Revue Hellenique de Droit International*, pp. 554 – 563 (554).

⁸ M. Stathopoulos (1995): *Contract Law in Hellas*, Kluwer/Sakkoulas, p. 87 – 88.

⁹ The Same, op. cit. p. 88.

If mental retardation precludes the use of reason, then the child is later placed under judicial interdiction (articles 1686 et seq. CC) or is provided with a judicial advisor, if the mental illness does not preclude completely the use of reason (articles 1705 et seq. CC).

C. HUMAN RIGHTS PROTECTION CONCERNING THE EMBRYO

Regulations related to the human rights protection of the embryo are to be found in the Greek Constitution and in the European Convention on Biomedicine.

The Constitution was promulgated in 1975 and revised in 1986 and 2001. Greece has signed the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine at Oviedo on 4 April 1997 and ratified it by Law 2619/1998.

As article 28 para. 1 of the Constitution lays down the principle of the openness of the Greek legal order to international law, the provisions of the Convention form an integral part of domestic Greek law since the 1st. December 1999 and prevail over any contrary provision of the law.

Greece has also signed and ratified the Additional Protocol to the Convention, relating on the prohibition of Cloning Human Beings¹⁰.

1. The right to genetic identity

“*Nasciturus*” as well as the extracorporeal embryo enjoy the right to genetic identity, incorporated into the Constitution during the recent Constitutional Revision (Government Gazette A` No.84/2001-4-17).

Article 5 para.5 reads: “All persons shall enjoy full protection of their health and genetic identity. All persons shall be protected with regard to biomedical interventions as provided by law”.

The genetic identity is to be understood as the genetic constitution of the individual, the inherited genetic pattern.

The constitutional protection of genetic identity has the following consequences:

- a. The protection of genetic identity in conjunction with the principle of equality forbids any form of discrimination, based on the genetic characteristics of the individual. The principle of non- discrimination is expressly foreseen in article 11 of the Oviedo Convention.

¹⁰ Critical remarks as to the way of ratification, which was not performed by Law but by a Common Ministerial Decision by the Ministers of Foreign Affairs and Health and Care on the 21.10.1998 see in: Sp. Vlachopoulos (2000): Cloning in the Greek Legal Order, Athens, Sakkoulas, pp. 32 et seq. and T. Vidalis (1999): Life without face – The Constitution and the Use of Human Genetic Material, Athens, Sakkoulas, pp. 130, Fn. 83.

b. The protection of genetic identity safeguards genetic unicity and genetic integrity.

Genetic unicity refers to the possibilities to be opened by cloning, whereby an individual may be endowed with a given genetic pattern and his/her characteristics may be predetermined in a way stripping him/her beforehand of the freedom they would otherwise enjoy. “Producing a host of theoretically identical beings constitutes an attack on the identity, the nonrepeatable nature and the genetic integrity of the individuals thus born, given that their genetic integrity has also been manipulated or at the very least selected”¹¹.

Therefore prohibiting cloning aims at preserving the random character of naturally occurring genetic recombination¹². Explicit prohibition of cloning is foreseen in the above mentioned Law 3089 /2002 (article 1455 Civil Code): Human reproduction with the methods of cloning is prohibited.

The cloning of a mammal may be realized by:

a. *embryo splitting* (whereby embryos generated *in vitro* may be split, after the initial cell divisions, into individual totipotent cells. Each of these cells may consequently develop to independent embryos) and by

b. *cell nuclei transfer* (where the recipient cells should incorporate the genetic information of the foreign cell nucleus. In the notorious *Dolly* experiment it has been possible to transfer the nucleus of a somatic cell into an ovum, from which the nucleus has been removed. The animal which developed was genetically identical with the donor of the somatic cell).

Cloning by embryo splitting does not raise the same ethical and legal questions as cloning by nuclei transfer. In both cases, however, an individual is endowed with a given genetic pattern and his/her characteristics are predetermined in a way stripping him/her beforehand of the freedom he/she would otherwise enjoy.

Genetic integrity refers to the need to protect the human genome against any intervention aiming to pre-determine and/or to modify it for reasons other than preventive, diagnostic or therapeutic ones and thereby limit the individual autonomy.

Genetic interventions include genetic experimentation and therapy.

At the *somatic cell therapy*, a type of therapy involving genetic manipulation, produced genetic changes are not inheritable. Interventions at the somatic cells are allowed, if they are dictated by preventive, diagnostic or therapeutic purposes.

At the *germ line therapy* genetic changes in the reproductive cells or in the embryo could be passed on to future generations. Genetic interventions could be a threat to human autonomy, if they were to be practiced for the purpose of “genetic

¹¹ So the formulation by Carlos M. Romeo Casabona (1998): Legal limitations on research and its results? The cloning paradigm in: Fujiki/Macer (Eds.): Bioethics in Asia, pp. 41 – 50 (46); also I. Kriari – Catranis (2000): Die verfassungsmässige Problematik des Klonens in Griechenland, in: *Revue Hellenique de Droit International*, pp. 591 – 612, *passim*

¹² See Emm. Roucouas (2001): The Setting of International Standards in Genomics in: Studies in Honour of A. Cassese : “*Man’s Inhumanity to Man*”, p. 14

enhancement”, i.e. in order to endow the individual with desired characteristics at the pre-conceptual or early post-conceptual stage. Interventions to the germ cells (sperm and ova), to the gonads (ovaries and testicles) and to the embryo at the first stages of its developments could modify the germ line not only for medically indicated aims but also for socially unaccepted (i.e. eugenic) purposes. Given that these interventions are at an experimental stage they should not be allowed even for health care purposes. The prohibition to modify the hereditary characteristics of the individual is also foreseen in article 13 of the Oviedo Convention¹³.

The Greek constitutional provision about the protection of genetic identity is the third one in Europe: The Swiss Federal Constitution in article 119 para. B sect. 2 does not refer to the term “genetic identity” but forbids genetic interventions to the germline and to embryos¹⁴; the Portuguese article 26 para. c, incorporated to the Constitution in 1997, guarantees the protection of genetic identity in regard with biomedical interventions and experimentation¹⁵.

2. The right to life

The right to life of the embryo has been initially discussed in connection with the issue of abortion. Although some authors share the view that the unborn child enjoys constitutional protection under article 5 para. 2 of the Constitution at least after the fourteenth day of conception (ie. after nidation)¹⁶, the respective law has opted for the pro-choice model, enabling women to decide freely thereupon during the first twelve weeks of pregnancy¹⁷.

Legal protection for the extracorporeal embryo (ie. for the fertilised egg between conception and nidation) is lacking. This is due to the fact that it was only recently, through the techniques of *in vitro* fertilisation, that human eggs could be fertilised outside the human body or could be disconnected from their genetic mother before nidation.

The extracorporeal embryo has, under favourable conditions such as implantation, nidation and gestation, the potential to develop to a human being; Its legal status, however, is not determined in any Greek legal text, due to the fact that there is no unanimity as to the moral status of the embryo, which is, worldwide, surrounded by

¹³ See also Group of Advisers on ethical implications of biotechnology of the European Commission: *Report on ethical aspects of gene therapy (Rapporteur Luis Archer)*, 13.12. 1994; UNESCO: Universal Declaration on the Human Genome and Human Rights, 1997, article 1.

¹⁴ R.J.Schweitzer, Kommentar zur Eidgenössischen Bundesverfassung, Art. 29 novies

¹⁵ Helena Pereira de Melo (1998) : O biodireito in : Serrao/Nunes (Eds.): *Etica em Cuidados de Saude*, pp. 171 et seq. (180)

¹⁶ See Raikos, Ath. (1986): *Lectures on Constitutional Law*, t. B`, Book c`, p. 16 et seq. (in Greek); El. Bessila–Makridis (1993): *The constitutional problematic of abortion*, Athens, (in Greek), *passim`* of different opinion G. Katrougalos (1993): *The right to life and death*, Athens, Sakkoulas, pp. 59 et seq.

¹⁷ See *infra* section E.

uncertainty¹⁸. As summarised by the Ethics Committee of the American Fertility Society¹⁹ “the preembryo deserves respect greater than that accorded to human tissue but not the respect accorded to actual persons. The preembryo is due greater respect than other human tissues because of its potential to become a person and because of its symbolic meaning for many people. Yet, it should not be treated as a person, because it has not yet developed the features of personhood, is not yet established as developmentally individual, and may never realize its biologic potential... Therefore, we find a widespread consensus that the preembryo is not a person but is to be treated with special respect because it is a genetically unique, living human entity that might become a person”.

Greek scholars do not share the same view as to the status of the extracorporeal embryo: For some authors the fertilised ovum is merely a thing, given that individual human life has not yet begun to develop²⁰; others support the view that the embryo is to be placed in an *interim* category between persons and things²¹; others are of the opinion that the “pro – nasciturus” is a human being with a differentiated status, distinguishing them from that of the “nasciturus”²². In our opinion the extracorporeal embryo should be protected, because of its quality as the primary stage in human development. It should be respected for its intrinsic value, since it represents the beginning of human life. However no total protection can be accorded to the extracorporeal embryo: Given that no absolute “right to life” is recognised for the embryo *in utero*, similar relative protection should be recognised to the extracorporeal embryo: They should be given the chance to develop to human beings, the respective decision residing with the man and the woman who have provided the gametes.

¹⁸ See I. Kriari-Catranis: Embryo research and human rights..., pp.44-48; also in Evans D. (Ed.) (1996): *Conceiving the embryo*, the contributions of M. Mori : Is the human embryo a person? No, pp. 151 – 164; A. Przuluska – Fiszer: Human embryology and the criterion of moral standing, pp. 165 –172; K. W. Ruyter: Embryos as moral subjects and limits of responsibility, pp. 173 – 192; S. Holm: The moral status of the pre-personal human being: the argument from potential reconsidered, pp. 193-220; W.Lang: The legal status of the human foetus. A comparative analysis, pp.249 –268; see also the contributions at the Council of Europe: *Third Symposium on Bioethics*, Strasbourg, 15-18 December 1996: R.Colombo: The nature and status of the human embryo; Broekhuijsen – Molenaar, A.M.L.: The legal status of the embryo in vitro; Lang, W.: The conditions for consensus on embryos in pluralist societies; Knoppers, B.M (and Pascal-Rossi, S.): The nature and status of the embryo: Commun Law; Boubakeur, D.: L’embryon dans l’ Islam; Green, R.M.: The report of the National Institutes of Health’s Human Embryo Research Panel: an Overview of Key Issues; Kurilo, L.F. : Nature and status of the embryo: scientific aspects.

¹⁹ Ethics Committee of the American Fertility Society (1990): *Ethical Considerations of the New Reproductive Technologies*, Birmingham, Alabama, p. 34s – 35s.

²⁰ See E. Kounougeri – Manoledaki, op. cit. p. 559` T. Vidalis, op. cit. p. 73.

²¹ Theophano Papazissi (2000): De “Habeas Corpus” a “Habeas Mentem” – Protection de l’embryon apres les nouvelles methodes de la biotechnologie in *Revue Hellenique de Droit International*, pp. 565 – 590 (574).

²² Ismini Androulidakis – Dimitriadis, op. cit. p. 8

3. The protection of medical and genetic data

During the recent Constitutional Revision²³ a new article 9A stipulates that: “Everybody enjoys full protection of their personal data“. This article, read in conjunction with article 5 para. 5 on the protection of genetic identity, safeguards the protection of genetic data as well. Article 10 of the Oviedo Convention lays down the right to respect for private life in relation to information about his or her health

Further Law 2472/1997 on the “Protection of individuals with regard to the processing of personal data” qualifies health data as “sensitive” and stipulates special guarantees for their collection, storage etc., after obtaining permission of the respective Authority, responsible for the protection of personal data (article 7).

In our opinion this protection refers also to the medical and genetic data of the embryo and foetus, given that their unlawful storage, collection etc. deprives not only the individual-to-be-born from adequate protection in later stage in life but also -in the case of genetic data- their blood relatives²⁴.

D. FOETUS AND MOTHER: RIGHTS IN CONFLICT

1. In Greece there are no *ad hoc* regulations of the possible use of the products of an elective or spontaneous abortion (i.e. for transplantation or research purposes). As the Foetus is considered part of the woman’s body, her consent to the use of fetal tissue for transplant or research purposes is necessary.
2. “Nasciturus” after his birth could claim damages against third parties (including doctors), for any bodily injuries which occurred during pregnancy. After his birth “nasciturus” can claim restitution for moral damages which occurred during pregnancy; he can also claim damages for offences of his personhood during pregnancy (article 914 et seq., and 932 in conjunction with article 36, 57, 59 CC).²⁵

In that case the parents, as legal representatives of the child, could represent the interests of foetus against third persons (e.g.hospitals, physicians etc..) following articles 1510 et seq.of the Civil Code.

3. The parents of a child born with a serious handicap may raise an action against a genetic counsellor or a doctor who has failed either to advise them of the risk of genetic illness in that child or to carry out and interpret correctly appropriate

²³ Government Gazette 84 A´, 17 April 2001

²⁴ See I. Kriari – Catranis (1999): *Genetics and Human Rights*, Athens, Sakkoulas, pp. 100 et seq.

²⁵ Androulidakis Dimitriadis, op. cit. p. 5; Georgiadis Ap./ Stathopoulos, M. (1997): Civil Code Interpretation, pp. 66 – 67.

diagnostic procedures which would have disclosed abnormalities in the embryo²⁶. Damages may be sought in respect of the costs, which are entailed in bringing up the child as well as in respect of the distress occasioned by the mother, who might, if properly advised, have opted for abortion. These parental claims may be based on the contractual and delictual liability of the doctors (articles 914 in conjunction with 932 and articles 330, 335 et seq.)²⁷, ²⁸.

E. TERMINATION OF PREGNANCY AND PROTECTION OF EMBRYO AND FOETUS

Article 304 of the Penal Code as amended by Articles 2 –5 of Act 1609/1986 sets out following principles related to abortion:

1. All abortions are legal during the first twelve weeks of pregnancy; The abortion has to be practised by a physician and an anaesthesiologist in a medical establishment; The pregnant woman is to receive adequate information as to her rights, the possibilities of adoption and the risks of the intervention.
2. Until the 24th week of foetus` life abortion is allowed, if the foetus is seriously ill and he/she may be born impaired; In that case the opinion of a second physician is required.
3. The termination of pregnancy is legal any time before birth, if the life or health of the mother may be endangered;
4. Abortion is legal until the 19th week of pregnancy, if the latter was the result of rape, incest, seduction of a minor or exploitation of a woman unable to resist. The physician and the consenting woman are liable to punishment, if the a.m. conditions are not met (article 304, para. 2a Penal Code).
The Greek system is a pro-choice one, allowing a great margin of appreciation to the woman herself. Although the debate about abortion was tense, the issue was not brought to courts.

F. PROTECTION OF EMBRYO “IN VITRO”

1. Assisted procreation

²⁶ For the “wrongful birth” conception in the anglosaxonic world see Mason and McCall Smith (1999): Law and Medical Ethics, Butterworths, p. 158.

²⁷ For the concurrence of contractual and delictual liability see Stathopoulos, op. cit. p. 41; about the Greek theoretical discussion and the jurisprudence of the Greek courts concerning medical liability see M. Canellopoulou - Botis (1999): Informed Consent Medical Liability in Greek and Common Law (in Greek), pp. 6 et seq.

²⁸ Similar views, adopted by the German Federal Constitutional Court see in: NJW (1998), p. 519 et seq. *BVerfG (Erster Senat), Beschl. v. 12.11.1997: Unterhaltspflicht bei fehlgeschlagener Sterilisation oder fehlerhafter Beratung.*

Although homologous and heterologous insemination and *in vitro* fertilization have been performed in Greece for a long time, there was no specific legal provisions related thereto as of recently.

1.1. The establishment and operation of units of assisted procreation is foreseen in section 59 of Law 2071/1992 on the “ Modernisation” and Organisation of the Health System. A Presidential Decree, issued upon proposal by the Ministers of Finances, Justice, Health Care and Social Services and based upon opinion of the Central Council of Health will determine the terms and conditions for the establishment and operation of these units as well as all details referring to the ethical, professional, legal and economic issues, related thereto (para. 1). These units are to operate in specially equipped and structured public or private hospitals or private clinics (para. 2).

1.2. The a.m. Presidential Decree has not been issued yet; Ministerial Decision 1335/13.3.1996 on the operation of Human Fertilization Units and Sperm Banks, issued by the Ministry of Health and Care, sets out the principles governing the use of sperm in the process of human fertilisation:

a. Only frozen sperm by donors may be used for infertility treatment, after been subject to all necessary tests foreseen by the World Health Organization and other internationally recognized bodies;

b. A sperm certificate will be deposited at the sperm bank and a copy thereof will be kept at a special registry at the human fertilization unit (article 2);

c. Personal data related to the sperm donors (such as name, address, nationality, health data) will be kept at the registry of the sperm bank;

d. Authorized officers of the Ministry of Health and Care as well as Justices may have access thereto (para. 3).

1.3. There are no specific regulations concerning liability, in the case of damage caused to embryo during cryopreservation. One author supports the view that the provisions of Civil Law on the deposit of goods might be applied by analogy. The depository/unit holding the cryopreserved embryo would then be responsible for any minor or serious fault, if there were an agreement for remuneration: otherwise the depository would have an obligation to care as for his own²⁹. In our opinion damages on the extracorporeal embryo, during the time of its cryopreservation, should be claimed by applying the Civil Code provisions related to damages on the *nasciturus* (art. 36, 57, 59 914, 932)³⁰.

2.1. The new law 3089/2002 on human assisted procreation

General field of application: The law applies to the various assisted human procreation methods, such as artificial insemination with the husband’s semen, with that

²⁹ P. Dalla –Vorgia (1996): Assisted Reproduction in Greece in D. Evans (Ed.) *Creating the Child, The Ethics, Law and Practice of Assisted Procreation*, pp. 279 – 286 (284).

³⁰ See *supra* sect. D, no. 2

of the partner (when the couple is not married) or with a donor's semen; further it applies to *in vitro* fertilisation with embryo transfer; the Law also allows the reception of an egg by an infertile woman who will complete gestation, and also the reception of an embryo, created by donated gametes. *Post mortem* insemination and *post mortem* embryo transfer are allowed (art. 1457 CC), as well as gestational surrogacy (i.e. the implantation of an embryo into the uterus of a woman, who has not provided the ova; this woman will gestate an embryo genetically "unrelated" to her and give it his/her genetic parents) (art. 1458).

The law strives to fulfil three purposes: a fundamental purpose, consisting in the combat of human infertility, a complementary purpose, which aims at the prevention of disease and a third purpose, which strives at facilitating research.

a. The fundamental purpose, which consists in combating human infertility. The law lays down the principle that the various methods should not be used as an alternative mode of procreation but they may be applied for the benefit of heterosexual couples, when other methods of treatment of infertility have failed or offer no prospect of success (article 1455, paragraph 1 CC).

The law refers to married women as well as to unmarried women, who are living (cohabitating) with a man (article 1456, paragraph 1). It should be noted, that the law implicitly allows single *infertile* women³¹, to make use of assisted procreation techniques, given that it foresees that the unmarried woman should give her consent to assisted procreation by means of a notarial document³² (article 1456, paragraph 1).

As far as the *age* of the treated person is concerned, the law foresees that medical assistance is permissible up to the reproductive age of the assisted person (article 1455 paragraph 2 CC).

b. The complementary purpose: Prevention of a serious genetic or hereditary illness. The new techniques may be also used when a serious risk exists of transmitting to the child a grave hereditary disease or when there is a serious risk that the child would suffer from some other disease which would result in his early death or severe handicap. This means that the law authorizes the selection of healthy gametes or of pre-implantation embryos, so that only healthy embryos be implanted.

These techniques should not be used for obtaining particular characteristics in the future child or for the purpose of selecting the sex except where a serious hereditary disease linked with the sex is to be avoided (i.e. diseases related to the X chromosome such as haemophilia and Duchenne's muscular dystrophy)(article 1455, paragraphs 1 and 4 CC).

³¹ See a similar regulation in the Spanish law on assisted procreation No. 35 of 1988: "Any woman may be the recipient or user of the techniques that are regulated by the present law...", article 6. Critical remarks by C.M. Romeo – Casabona/ J. U. Hernández- Plasencia/ E. Sola - Rechesee in: International Encyclopaedia of Laws, Kluwer, 1994, Spain, pp. 174 – 176.

³² Article 1456, paragraph 2: In the case of unmarried woman, her consent or the consent of her partner, if such exists, are furnished by a notary document.

c. The third purpose of the law is to provide the general frame for embryo research.

Research with embryos is considered essential to further progress in *IVF* and other forms of infertility treatment. It could also provide useful knowledge about birth defects, contraception, cancer and a wide range of other important topics such as chromosomal abnormalities, normal and abnormal cell growth and differentiation or genetic disease.

Embryo research could be distinguished in two main areas:

a. Experimentation carried out on extracorporeal embryos before implantation (diagnostic and therapeutic research) and

b. Experimentation carried out on extracorporeal embryos with no chances and/or intention of implantation (scientific research referring to diagnostic or therapeutic issues). Since the latter does not benefit the embryo, basic legal and ethical constraints apply.

Research could also be conducted on embryos created especially for research or on surplus embryos: The *creation of embryos for research purposes* is considered as denying their human nature and subjects them to arbitrary goals, thereby infringing the principle of human dignity, enshrined in article 2 para. 1 of the Constitution. Article 18 para. 2 of the European Convention on Biomedicine forbids the creation of embryos for research purposes.

Only the *fertilized but unimplanted eggs*, which have been available during the course of infertility treatment, may be used for research purposes, following the conditions contained in the Council of Europe report on Human Artificial Procreation (Principle 17, para. 2b).

Article 1459 CC states that the surplus embryos, created during an infertility treatment and not transplanted for various reasons may be donated to another infertile couple, on condition that the consent of the individuals providing the gametes has been obtained before the beginning of *in vitro* fertilisation treatment. The gamete providers have decision making authority over the embryos that are created by their sperm and ova and they may decide to donate them³³. The main reason behind the possibility of donation is to save surplus embryos from destruction when they are no longer needed by the first couple³⁴. The gratuitous donation of the embryo rests on the idea that the human body is *res extra commercium*.

³³ The general problems related to embryo donation see in the highly publicized American case *Davis v. Davis*, Supreme Court of Tennessee/1.6.1992, 842 South Western Reporter, 2d series, p. 588 et seq.

³⁴ See Council of Europe Report on Human Artificial Procreation, op. cit. principle 11.- Embryo donation is explicitly regulated in the French Bioethics Laws of 1994 (articles 152 -3,152-4, 152-5 of the Code of Health. The donation is ordered by court decision, after the written consent of the gamete providers has been obtained.

Further the gamete providers may decide to give them to research teams for research or therapeutic purposes or to let them be destroyed³⁵. In case there is no common declaration of the persons concerned, cryo – preservation can last up to five years. After this period of storing, cryo - preserved embryos can either be used for research and therapeutic purposes or be destroyed.

Non cryo-preserved fertilized ova should not be stored for a period exceeding 14 days, the time of cryo-preservation not being taken into consideration. (article 1459, paragraph 3).

The law does not provide any further specification on embryo research. Yet *generation of chimeras and hybrids* is considered as infringing on human dignity: During the first cell divisions after fertilization, it is possible to combine the totipotential cells from two or more genetically different embryos (chimera). By the formation of a *hybrid organism* the gametes of different species combine on fertilization.

These types of experiments conflict particularly crassly with the right of the individual to dignity, genetic identity and self-determination. The manipulative and contemptuous treatment of human life is carried too far in such experiments. The very existence of the human being is manipulated from the very beginning and, therefore, the inherent freedom of choice of every person is limited³⁶.

2.1.1. Specific requirements about assisted procreation

Gamete donation should be permitted, on condition that the mutual anonymity of the donors and recipients be respected. Medical information related to the donor is kept confidential. The child may have access to this information on medical grounds, related to his/her health (article 1460 CC).

There should be no profit to the donors of gametes, only the refunding of expenses (article 21 of the European Convention on Biomedicine).

2.1.1.2. In the case of heterologous insemination by donor an amendment of the Greek Civil Code, already in 1983 (article 1471 para. 2) forbids a husband from *disputing fatherhood*, if he had previously given his consent to artificial insemination³⁷. Law 3089 of 2002 modifies partially this regulation by adding provisions related to the cohabitating couple. The percentage of people cohabitating in Greece is the lowest of all member –

³⁵ About the potential of embryo research see I. Kriari – Catranis (1997): Embryo Research and Human Rights – An Overview of Developments in Europe, in: *European Journal of Health Law*, 1997, σ. 43 – 67

³⁶ See Ernst Benda (1985): Die Erprobung der Menschenwürde am Beispiel der Humangenetik in: Flöhl (Ed.): *Genforschung-Fluch oder Segen?* pp. 205 – 240 (231).

³⁷ See Ism. Androulidakis – Dimitriadis (1986): Legal questions about the IVF techniques in: *Legal Tribune (NoB)* 34, pp. 10 – 17 (in Greek); Greek Civil Lawyers Association: First Congress, Nappaktos 27-28 Mai 1994, Section III “Medically assisted procreation and civil law”, Reports: Deliyiannis, J., pp. 199-219; Androulidakis-Dimitriadis, pp. 221- 231; Interventions: Kounougeri – Manoledaki, pp. 235 – 241, Papadopoulou, pp. 243 – 246, Papazissi, pp. 247 – 253; Nikolopoulos, 255 – 257; Kotzabassi, 259-262; Stambelou, 263-265; Christodoulou, 268 – 282; Christakou – Fotiadi, 283 – 284. Conclusions: Daskarolis, p. 285 (in Greek); See also Papadopoulou, Art. 1463-1464 Gr. Civ. Code, in the Commentary of Greek Civil Code ed. by Georgiades- Stathopoulos, vol. VII, pp. 499-536 (in Greek).

states of the EU: Although the average percentage in the EU is 7%, in Greece the figure is only 1%. In the under 30 age group, the average percentage in the EU is 28% and in Greece it is only 7%³⁸.

The main principles of the new law are:

a. Every medical act intending to assist human reproduction should be undertaken with the written consent of the couple wishing to have children (article 1456 paragraph 1). If the *husband* has consented to the medically assisted reproduction of his spouse paternity cannot be contested (article 1471 CC).

c. In the case of *cohabitation*, the consents of the cohabitating couple should be given by a notarial act (article 1456, paragraph 1 section b). The notarial consent of the man has the same legal effects as the voluntary acknowledgement of a child born out of wedlock (article 1475 paragraph b). The woman's consent shall also apply as consent to voluntary acknowledgement.

d. At disputes concerning the contestation of maternity³⁹ or paternity the court may order the production of all relevant evidence. If a party to the action, although he/she has no particular reasons concerning his/her health, refuses to undergo the appropriate medical test, the Court presumes that the allegations of the opponents have been proved (article 615 paragraph 1 CC in conjunction with article 614 paragraph 1 CC).

2.1.1.3. The problem of gestational surrogacy had been discussed in the Greek legal doctrine, but there was no legal provision⁴⁰.

Given that as of now there was no legal prohibition of surrogacy, some doctors had begun to practise it. In a recent Court Decision genetic parents have adopted their genetic children, that were gestated and born by a surrogate, although the agreement about surrogacy is considered in the said Decision as against *boni mores*⁴¹.

The law 3089 of 2002 allows gestational surrogacy by a court authorization, issued before the embryo transfer, if following conditions are met:

a. There is a written and without any financial benefit agreement between the involved parties, meaning the persons wishing to have the child and the surrogate mother. In case the latter is married, the written consent of her husband is also required.

³⁸ See Pen. Agallopoulou (2003): Cohabitation and One –parent Families According to Greek Law, in: International Family Law, March 2003, pp. 24 – 28 (24, ft. 4).

³⁹ In the case of gestational surrogacy see *infra* point 1. 2. 3.

⁴⁰ See Ism. Kriari – Catranis, Biomedical Developments and Constitutional order..., op. cit. p. 114 et seq.; E. Kounougeri- Manoledakis (1994): The determination of maternity in the case of gestational surrogacy, *Armenopoulos*, p. 1233 et seq. (in Greek).

⁴¹ Dec. No. 31/5803/176/1999 of the Iraklion District Court; arguments for the legalisation of the procedure through gestational surrogate by framing the conditions thereto see in: Pen. Agallopoulou: Gestational Motherhood (2000) in: *Critical review of Legal Theory and Practice*, pp. 227 – 238, (in Greek); the same: Custody in the cases of assisted procreation (in Greek) in: *Charistia to J. Deliyanni*, Thessaloniki 1991, pp. 227 –238 (232-235).

b. The woman who will mother the child should provide a medical attestation about her inability to gestate the child. A medical attestation should provide information about the good health condition of the surrogate (article 1458 CC).

So an embryo may be created by the ovum of one woman and then it might be gestated by another; the latter will hand it over, after the delivery, to a third woman, the “social mother” of the child, i.e. the one who has got the court authorization for its creation..

c. Both the woman wishing the child and the surrogate mother should have their domicile in Greece (article 8 of Law 3089 of 2002).

d. In case the child is born by a surrogate, under the conditions of article 1458 CC, it is presumed that mother is the woman who has obtained the court permission. This presumption may be reversed by a legal action contesting the maternity, within six months after the birth of the child. The maternity may be contested by the legal action either by the presumed mother or by the surrogate, provided that evidence is procured that the child is created by ova from the latter. (article 1464 CC).

So the ancient roman axiom *mater semper certa est* does no longer represent a well-established truth.: In the above mentioned case of surrogacy, mother is not the woman who has delivered the child but the one who has received the court permission.

2.1.1.4. *Post mortem* fertilisation⁴². Assisted reproduction after the death of the male spouse or partner is allowed by *court authorization*, if both the following requirements are met:

a. The spouse or the partner suffered from a disease that either could affect fertility or could endanger his life and

b. The spouse or the partner had consented *via* a notary document for *post mortem* fertilization.

c. Assisted reproduction is carried out not before six months and not after two years from the death of the spouse or partner.

d. The regulations about inheritance are laid down in article 1711 CC, specifying that a person that was at least conceived at the time of devolution of the estate, may become a heir. This applies also to persons that are born by means of *post mortem fertilization*.

2.1.1.5. Social perception of the Law

Given that the necessity for a law regulating new reproductive techniques has been realized for quite a long time, its drafting has met with approval. However, some of its options have caused concern, as, for instance, the possibility of the single woman to have access to the methods, *post mortem* fertilization and gestational surrogacy.

⁴² Favourable opinion as to *post mortem* fertilization see in: T.Vidalis (1999): *Life without face - The Constitution and the Use of Human Genetic Material*, Athens, Sakkoulas, p.94 et seq. (in Greek).

In the first two cases it was argued that this choice must lie in the couple (married or not), in order to foster the well – being of the child: The existence of two parents does not guarantee that the family environment is an ideal one, but a child should not be deprived of the presence of the father (including all aspects of paternal authority, such as support, food, education etc.)⁴³ and of the connections with the paternal line by means of a state regulation, given that the constitutional protection of the family and the child should encourage the creation of two – parents family units (article 21 of the Constitution).

Surrogacy, as a form of instrumentalization of the woman, raises also constitutional concerns, given that a person *is used* as a means, and not as an end, contrary to the constitutional provision safeguarding human dignity. (article 2 paragraph 1). Further surrogacy has great potential to foster the physical, emotional and financial exploitation of women; the implications on the child’s mental health have not been gauged and there is concern that the procedure may present risks to all the participants⁴⁴ (as in the case that the child is born with handicaps –whereby the genetic parents may not wish to accept it, or in the case that the surrogate behaves in a way, that might endanger the baby’s life or health). Even if the law allows it, if practised on humanitarian grounds, financial transactions cannot be excluded.

These arguments were presented by the legal doctrine, some of them were adopted by deputies and they were debated upon in the Greek Parliament. Despite these objections the law was voted by all political parties represented in the Parliament⁴⁵, on the following grounds:

1. That the one – parent families are already a social reality and
2. That the wish of the genetic parents to have a child, by means of a surrogate, should not be considered as infringing the constitutional rights of another person.

⁴³ Similar comments in Casabona et al., in Spain, op. cit. p. 176

⁴⁴ See *in extenso* the arguments *pro* and *contra* gestational surrogacy in : The Ethics Committee of the American Fertility Society: *Ethical Considerations of the New Reproductive Technologies*, 1994, pp. 68s – 73 s.

⁴⁵ See our article: The Constitution and the Draft Law on Human Assisted Procreation“, in: *Annals in Private Law*, 8 , 2002, pp. 679 – 688 (in Greek). In the same review see: Th. Papachristou: *Lex dei, lex populi?*, p. 673 – 676 και E. Kounougeri - Manoledaki: Draft Law on human assisted reproduction and the arguments against it, pp. 676 – 679. In issue 7 of the same Review see M. Karassis: Draft Law on Human Assisted Procreation“, pp. 577 – 585 και K. Pantelidou: Remarks on Draft Law on Human Assisted Procreation, pp. 586 – 590.- See also the report of the Bioethics Committee of the Greek Orthodox Church in the newspaper TO BHMA (The Tribune), 30 and 31 October 2002 and the Report of the opposition by A. Lykourazos, Minutes of the Parliament, 5, 6 and 7 November 2002.

2. PREIMPLANTATION AND PRENATAL DIAGNOSIS

2.1. Preimplantation diagnosis carried out on embryos *in vitro* makes it increasingly possible to identify illnesses or inherited ailments; rather than risk terminating an established pregnancy, embryo screening permits only those embryos without the disease to be placed in the uterus.

Ethical objections have been raised against genetic diagnosis on the grounds that these techniques could be abused for eugenic purposes: natural selection could be replaced with scientific selection for which there is no convincing foundation either in scientific or ethical terms⁴⁶.

Further considerations refer to the couple's at risk liberty to employ genetic screening techniques in order to make its decisions about reproduction. Seen from that point of view, state restrictions on the use of preimplantation diagnostic techniques directly interfere with procreative liberty, by limiting a couple's access to information essential to make procreative choices. This opinion underlines the fact, that since fetuses with defects may be aborted, it appears irrational to prohibit discard of embryos proved to be affected⁴⁷.

In Greece there is no specific legislation thereon; Preimplantation diagnosis by means of embryo splitting may be conducted in some laboratories: The main cause is thalassemia (one Greek out of fifteen is bearer of the disease). Statistical data as to the number of examined cases and the resulted pregnancies are not available.

2.2. Prenatal Diagnosis is carried out in Greece mainly for two reasons:

- a. On pregnant women over thirtyfive, in order to detect chromosomal abnormalities and
 - b. When there is a family history on genetic diseases.
- Prenatal diagnosis is recommended, but it is not mandatory.

⁴⁶ See Capron, A.M. (1990): Which Ills to bear? Reevaluating the Threat of Modern Genetics in: *Emory Law Journal* 39: pp. 665 – 696 at 684 et seq.; Kriari – Catranis, I.: Embryo research and human Rights, op. cit. p. 40 et seq.; See also in: Council of Europe: Third Symposium on Bioethics, 15-18 December 1996: Bombiani, A.: Ethical Aspects of preimplantation diagnosis and Pembrey, M.E.: Ethical issues in preimplantation genetic diagnosis; P. Dalla- Vorgia (1996): The Human Embryo and Research in: Evans (Ed.): *Conceiving the Embryo- Ethics, Law and Practice in Human Embryology*, pp. 297 – 301.-

⁴⁷ Robertson, J. A. (1992): Ethical and legal issues in preimplantation genetic screening, *Fertility and Sterility* 57: 1 – 11, p. 9

G. CONCLUDING REMARKS

In our opinion the legal intervention should be accompanied by more detailed legal provisions mainly in three fields:

1. Establishment and operation terms of the assisted procreation units and sperm banks should be laid down by law⁴⁸.
2. Penal and administrative sanctions should be foreseen, in order to guarantee the protection of the rights and interests of all participants in an assisted procreation process (I.e. the couples, the donors, the doctors, the medical units).
3. The protection of the embryo *in vitro* should be carefully implemented in law: Under what conditions should the embryos become available to research; How research protocols should be evaluated and by what authority etc.
4. The rule of law doctrine requires that the possible application of preimplantation diagnosis must be the subject of clear, precise, legally binding definition, in order to give persons fair notice of what is prohibited. It should be desirable to frame a list of those illnesses, which would justify preimplantation diagnosis with potential discard of the affected embryo. This would serve the interests of the concerned families, while at the same time discourage the arbitrary use of these techniques or its abuse as a means to promote eugenic goals.
5. Public dialogue on the a.m. issues should be initiated and intensified, in order to detect the fears and hopes of the citizens towards the new biomedical developments. Technology assessment studies and consensus conferences could offer valuable help at the mapping of these socially and morally uncharted waters, where the society is forced to sail forth.

⁴⁸ See Council of Europe, Third Symposium on Bioethics, Montagut, Jacques: Health safety: from the range of needs to the necessity of certified centres and a common policy on public health