

# **Human Assisted Procreation and Human Rights**

## **The Greek response to the felt necessities of the time**

*Ismi Kriari - Catranis*  
*Associate Professor*  
*Department of Public Administration*  
*Panteion University of*  
*Social and Political Sciences*

The new reproductive technologies enable otherwise infertile couples to reproduce noncoitally. Problems arising from the new reproductive techniques refer to the persons entitled to have access thereto, to the methods accepted (such as procreation by means of a surrogate mother), to the storage and donation of gametes and embryos, to donor anonymity etc. Although homologous and heterologous insemination and *in vitro* fertilisation have been performed in Greece for a long time, legal provisions thereon have been established only recently: Law 3089/2002<sup>1</sup> on assisted procreation builds the respective legal frame, regulating main aspects in this crucial field of interwoven human rights and social duties.

### **I. The constitutional frame**

1. *The right to make autonomous choices about one`s procreation* is inhering in article 5 para.1 of the Constitution, which safeguards the free development of the personality, under the condition that it respects the Constitution, the rights of third persons and the *boni mores*. Article 5 para. 1 should be read in conjunction with article 2 paragraph 1, guaranteeing human dignity and art. 21 paragraph 1, determining that the protection of family, motherhood and childhood are obligations of the state. Parenthood is an important part of the life most individuals envision for themselves<sup>2</sup> and decisions about parenthood alter dramatically an individual`s self-definition.

2. *The protection of genetic identity* is added to the Constitution, following its recent revision (as art.5 para.5), upon initiative of the Minister of Culture and Professor of

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<sup>1</sup> Official Gazette 327/ 23.12.2002

<sup>2</sup> See Ism. Kriari – Catranis (1994): *Biomedical Developments and Constitutional Law in Greece*, Sakkoulas, Thessaloniki, pp. 65 et seq. (in Greek).- The decisions as to whether to bear or beget a child may affect in the most fundamental way a person`s life. In the formulation of an American Court: «Not only does the birth of a new generation perpetuate our species, it allows every parent to contribute, both genetically and socially, to our collective understanding of what it means to be human. Every child also offers the opportunity of a unique lifetime relationship, potentially more satisfying and fulfilling than any other pursuit», see Arabian Justice, Concurring, in. Johnson v. Calvert, Supreme Court of California, In Bank, 20.5.1993, 851 Pacific Reporter, 2d Series, 776 et seq. (788).

Constitutional Law Evangelos Venizelos. The amendment was unanimously supported by all political parties represented in the Greek Parliament<sup>3</sup>. The new article reads as follows:

«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.

## II. International Law provisions

Greece 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 (Asturias) 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<sup>4</sup>.

Greece has also signed the Additional Protocol to the Convention on Human Rights and Biomedicine on the Prohibition of Cloning Human Beings, but has ratified it by a Ministerial decision and not by law, as of now<sup>5</sup>.

## III. The legal frame

1. Law 3089/ 2002 incorporates new articles in the Civil Code and modifies existing regulations about filiation, as a result of the new reproductive techniques.
  - 1.1. *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 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).

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<sup>3</sup> See Z' Revisional Parliament, Report of the Revision Committee, Report by E. Venizelos, pp. 7, 10, 24; Reports by representatives of the political parties of the opposition see . Varvitsiotis (New Democracy) pp. 85 (97); A. Skyllakos (Communist Party) pp. 129 (135); F. Kouvelis (Coalition of the Left and Progress) pp. 139(146). See also Imini Kriari – Catranis (2002):. Bioethical Issues and Human Rights in Greece in: *Law and the Human Genome Review*, No. 16 2002, pp. 37 – 57 (39).

<sup>4</sup> Art. 28 ara. 1 :” The generally acknowledged rules of international law, as well as international conventions as of the time they are sanctioned by law and become operative according to the conditions therein, shall be an integral part of domestic Greek law and shall prevail over any contrary provision of the law...”.

<sup>5</sup> See Sp. Vlachopoulos (2000): *Cloning in Greek Legal Order*, Sakkoulas, Athens in Greek).

The law strives to fulfill 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.

1.1.1. The fundamental purpose, which consists in combating human infertility. 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* women<sup>6</sup>, 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 document<sup>7</sup> (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).

Cloning, as a mode of reproduction, is *expressis verbis* prohibited (article 1455 paragraph 3 CC).. 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 totipotential 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. «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»<sup>8</sup>,

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<sup>6</sup> 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.

<sup>7</sup> 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.

<sup>8</sup> 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); .See also I. Kriari – Catranis (2002): Bioethical Issues and Human Rights in Greece in: *Law and the Human Genome Review*, No. 16 2002, pp. 37 – 57; Die verfassungsmässige Problematik des Klonens in Griechenland in: *Revue Hellénique de Droit International*, 2000, pp. 591 – 612; Sp. Vlachopoulos (2000): *Cloning in Greek Legal Order*, Sakkoulas, Athens (in Greek).

1.1.2. 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).

1.1.3. The third purpose of the law is to provide the general frame for embryo research. 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 them<sup>9</sup>. The main reason behind the possibility of donation is to save surplus embryos from destruction when they are no longer needed by the first couple<sup>10</sup>. The gratuitous donation of the embryo rests on the idea that the human body is *res extra commercium*.

Further the gamete providers may decide to give them to research teams for research or therapeutic purposes or to let them be destroyed<sup>11</sup>.

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).

## 1.2. Specific requirements

1.2.1. *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

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<sup>9</sup> 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.

<sup>10</sup> 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.

<sup>11</sup> 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

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).

1.2.2. 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 insemination<sup>12</sup>. 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 – 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%<sup>13</sup>.

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).

a. 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.

b. At disputes concerning the contestation of maternity<sup>14</sup> 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).

1.2.3. The problem of gestational surrogacy had been discussed in the Greek legal doctrine, but there was no legal provision<sup>15</sup>.

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<sup>12</sup> 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, Naypaktos 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).

<sup>13</sup> 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).

<sup>14</sup> In the case of gestational surrogacy see *infra* point 1.2.3.

<sup>15</sup> 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).

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*<sup>16</sup>.

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.
- 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.

1.2.4. *Post mortem* fertilisation<sup>17</sup>. 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

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<sup>16</sup> 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. Agalopoulou : 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).

<sup>17</sup> 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).

become a heir. This applies also to persons that are born by means of *post mortem fertilization*.

#### 2. Existing legal provisions about the administration of assisted procreation

The establishment and function of units of artificial fertilisation is foreseen in Section 59 of Law 2071/1992 on the « Modernisation and Organisation of the Health System». A law issued upon proposal by the Ministers of Finances, Justice, Health Care and Social Services, based upon the opinion of the Central Council of Health, will determine the terms and conditions for the establishment and function of Units of Human Artificial Fertilisation. These Units are to function only in specifically equipped and structured public or private hospitals, or specifically equipped and structured private clinics (para. 2).

The same law, now under elaboration, will determine all details referred to the ethical, professional, legal and economical regulation of the whole issue (para. 1).

A Ministerial Decision (1335 of 13.3.1996) on the operation of Human Fertilisation 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. Only frozen sperm by donors may be used for infertility treatment, after having been subject to all relevant tests, foreseen by the World Health Organization and other internationally recognized organizations. The establishment and operation of a national donor registry is also under elaboration in the above mentioned decree.

### IV. 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.

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.)<sup>18</sup> 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 participants<sup>19</sup>

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<sup>18</sup> Similar comments in Casabona et al., in Spain, op. cit. p. 176

<sup>19</sup> 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.

(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 Parliament<sup>20</sup>, on the following grounds:

1. That the one – parent families are already a social reality and
2. That the 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.

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20. 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. Lykourezos, Minutes of the Parliament, 5, 6 and 7 November 2002.