



European Master's Degree in Human Rights and Democratisation

2013-2014

# Reproductive Tourism in Europe:

## Legal and Ethical Issues

The cases of Sweden and Greece

Author: Pikramenou Nikoletta

Supervisor: Reichel Jane

## **Aknowledgements**

I would like to offer my special thanks to my supervisor, Jane Reichel for her valuable suggestions and her willingness to give her time generously during the development of this thesis.

I would also like to thank Takis Vidalis for his valuable contribution to this research as well as Andreas Takis for his useful recommendations regarding Chapter 2-Ethical issues.

Finally, I would like to thank my mother for her support and my father who knew from the very beginning my love for bioethics and human rights.

## **Abstract**

Reproductive tourism refers to the travelling of citizens from their country of residence to another country in order to receive fertility treatment through assisted reproductive technology (ART)<sup>1</sup>. In Europe, the reasons why people seek reproductive treatments outside their national boundaries are diverse but mainly because regulations differ a lot among countries. The legislations concerning ART are usually based upon different ethical perceptions and convictions. Sweden is considered as a country with restricted legislation on ART and many Swedish citizens seek ART services abroad. On the other hand, Greece is not considered as a country with a restricted legal framework and it constitutes a destination for “reproductive tourists”. Although “reproductive tourism” could be considered as a safe solution for infertile individuals, the phenomenon is often presented as problematic because it is often associated with legal implications as well as health dangers for the parties involved. In the end of this thesis, possible solutions to these problematic effects will be addressed in the light of the fact that “reproductive tourism” is an expanding phenomenon.

---

<sup>1</sup> Ferrarretti et al, 2010.

Abbreviations .....	
Glossary .....	
Chapter 1 .....	1
1. Introduction .....	1
1.1. Background.....	1
1.1.1. Description of the problem .....	2
1.1.2. Purposes and objectives of this research.....	3
1.2. Methodology.....	4
1.2.1. Type of analysis and main sources .....	4
1.3. Limitations.....	5
1.4. The international legal framework.....	6
1.4.1. New health technologies in the European Union .....	6
1.4.2. Biomedicine and Human Rights: The Oviedo Convention .....	8
1.4.3. Reproductive technologies under the ECHR .....	9
1.4.4. Reproductive technologies under the CRC .....	10
1.5. Latest studies on reproductive tourism in the EU.....	11
1.6. Outline of chapters.....	12
Chapter 2 .....	14
2. Ethical issues .....	14
2.1. Christian theories and reproductive technologies.....	15
2.1.1. Catholicism .....	15
2.1.2. Eastern Orthodoxy .....	16
2.1.3. Protestantism.....	17
2.2. Philosophical Ethical Theories applied in reproductive technologies.....	18
2.2.1. Utilitarianism .....	18
2.2.2. Kantianism.....	19
2.2.3. Liberal individualism.....	21
2.2.4. Communitarianism .....	22
2.3. Ethical problems surrounding surrogacy .....	23
2.3.1. Feminist perspectives on surrogacy.....	23
2.4. Ethical problems surrounding sperm donation .....	25

2.4.1.	Ethical arguments regarding non-anonymous sperm donation .....	25
2.4.2.	Ethical arguments regarding anonymous sperm donation.....	26
2.5.	Ethical problems surrounding reproductive tourism .....	27
2.6.	Concluding remarks.....	29
Chapter 3	.....	32
3.	Legal issues.....	32
3.1.	The case of Sweden.....	32
3.1.1.	Sperm donation.....	33
3.1.1.1.	The national legal framework .....	33
3.1.1.2.	Swedish law under the scope of the Convention on the Rights of the Child.....	35
3.1.1.3.	Swedish law under the scope of the European Convention on Human Rights .	37
3.1.2.	Surrogacy.....	39
3.1.2.1.	The absence of an explicit national legal framework.....	40
3.1.2.2.	Who is the legal mother in the case of surrogacy in Sweden? .....	41
3.1.2.3.	Does the right to know ones origins under the CRC and the ECHR extend to surrogate-born children? .....	43
3.1.2.4.	Reasons why Swedish citizens seek ART abroad.....	45
3.2.	Other European countries where citizens seek ART abroad.....	46
3.2.1.	The case of the United Kingdom .....	46
3.2.2.	The case of France.....	48
3.3.	Legal problems deriving from “reproductive tourism” .....	49
3.3.1.	A common issue that “reproductive tourists” may face: the problem of stateless children.....	49
3.3.2.	The conflict between national legislations and the EU legal order .....	51
3.4.	Concluding remarks.....	52
Chapter 4	.....	55
4.	Legal issues.....	55
4.1.	The case of Greece .....	55
4.1.1.	Sperm donation.....	56
4.1.1.1.	The national legal framework .....	56
4.1.1.2.	Issues relating to the CRC relevant to the Greek legal framework.....	57
4.1.1.3.	Greek Law and the right to privacy .....	58

4.1.1.4. The “double track” policy.....	60
4.1.1.5. Sperm donation and the Greek financial crisis .....	60
4.1.2. Surrogacy.....	62
4.1.2.1. The national legal framework .....	63
4.1.2.2. Legal motherhood in the case of surrogacy and the “freedom of services” .....	65
4.1.2.3. Is surrogacy in Greece truly altruistic? .....	68
4.2. Other countries of destination for “reproductive tourists” .....	69
4.2.1. The case of Spain.....	69
4.2.2. The case of Czech Republic .....	70
4.3. The decline of transnational adoption due to “reproductive tourism” .....	71
4.4. Concluding remarks.....	72
Chapter 5 .....	74
5. Closing thoughts.....	74
5.1. The right to procreate: to what extent does it include a claim for access to ART? .....	74
5.2. The proposal of common ethical guidelines .....	76
5.3. The issue of legal diversity .....	77
5.4. The proposal of legal harmonisation limited to safety and quality standards .....	78
5.5. Conclusion .....	79
Bibliography .....	81
Books .....	81
Case law.....	83
International materials.....	84
Journals .....	86
News articles .....	93
Presentations .....	95
Websites.....	95
Correspondence .....	98

## Abbreviations

<b>ART</b>	Assisted Reproductive Technology or Treatment
<b>CRC</b>	Convention on the Rights of the Child
<b>CM</b>	Commissioning mother
<b>DIY</b>	“do it yourself” surrogacy arrangements
<b>EU</b>	European Union
<b>EUTCD</b>	European Union Tissues and Cells Directives
<b>EC</b>	European Communities
<b>ECHR</b>	European Convention on Human Rights
<b>ECtHR</b>	European Court of Human Rights
<b>CJEU</b>	Court of Justice of the European Union
<b>IVF</b>	In Vitro Fertilisation
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>UK</b>	United Kingdom
<b>UNCRC</b>	The United Nations Committee on the Rights of the Child
<b>USA</b>	United States of America

## Glossary

<b>ART- Assisted Reproductive Technology</b>	All treatments or procedures that include the in vitro handling of human oocytes and sperm or embryos for the purpose of establishing a pregnancy.
<b>Commissioning parents</b>	The intended parents who commission a surrogate to bear a child by entering into a surrogacy agreement.
<b>Donor, sperm</b>	A person who donates his or her genetic materials for the purposes of ART treatment without intending to become the intended child's parent.
<b>Heterologous Artificial Insemination</b>	A procedure in which a tube is inserted through the natural opening of the uterus into the womb to deposit a sperm



sample from a donor other than the woman's mate directly into the uterus.

### **In Vitro Fertilisation**

Is a process by which an egg is fertilised by sperm outside the body.

### **Sperm donation**

The provision by a man of his sperm for the purpose of inseminating or impregnating a woman who is not necessarily his sexual partner.

### **Surrogacy**

A practice whereby a woman will become pregnant with the intention of giving the child to someone else upon birth.

### **Surrogate mother**

The woman who carries and gives birth to the child.

## Chapter 1

### 1. Introduction

#### 1.1. Background

During the last years, cheap flights, open borders and medical improvements have made it easier for infertile couples to seek assisted reproductive treatments (ART) in countries where such procedures are easily accessible. That situation can be described by using the term “reproductive tourism” or “fertility tourism”.

The most recent and widely accepted definition of “reproductive tourism” is given by Guido Pennings: “Reproductive tourism is the travelling by candidate service recipients from one institution, jurisdiction, or country where treatment is not available to another institution, jurisdiction, or country where they can obtain the kind of medically assisted reproduction they desire”<sup>2</sup>.

However, the use of “reproductive tourism”<sup>3</sup> masks the fact that from the perspective of the users of reproductive technologies, there is a wide range of motives for travelling to another country for treatment: dodging national bans on certain techniques, avoiding waiting lists, seeking quality and lower prices, and avoiding limitations on the choice of donors or on access for unmarried couples, single mothers, and homosexual couples<sup>4</sup>.

In Europe, the reasons why people seek reproductive treatments outside their national boundaries are diverse but mainly because regulations differ a lot among countries.

Sometimes, a combination of motives may exist. For instance, the first stream of patients from Sweden to neighboring countries for donor sperm after the abolition of

---

<sup>2</sup> Pennings, 2002, p. 337.

<sup>3</sup> R. Matorras finds the term “reproductive tourism” both inaccurate and inappropriate. It is inaccurate because “tourism” basically means travelling by pleasure and it is inappropriate because it trivialises infertility problems. According to him, the term “reproductive exile” is more sensitive with infertility patients.

<sup>4</sup> Bergmann, 2011, p. 282.

donor anonymity was a consequence of scarcity (decrease of candidate donors) in combination with the refusal of recipients to accept identifiable donors<sup>5</sup>.

Europe leads the way in the number of reproductive procedures, followed by the United States<sup>6</sup>. In general, the hot spots of ART treatment in Europe are clinics in European Union (EU) countries that have liberal legal regulations such as Spain or clinics in countries outside the EU that do not have any legal regulations such as Russia and Ukraine.

A typical empirical example, is the one of Jeanne Moulin. She traveled from France to an IVF clinic in Barcelona in order to have implanted two cryopreserved embryos that had been left over from another IVF treatment<sup>7</sup>. Why did she choose Spain? In France, she had no access to reproductive treatment because of her status as “single” and this treatment was available only to heterosexual couples. In Spain, single mothers by choice, such as Moulin, and lesbians were entitled to treatment<sup>8</sup>.

### 1.1.1. Description of the problem

Reproductive tourism is usually presented as a problem. The diversity of regulation worldwide and the travelling of people across frontiers raise the question whether “any single jurisdiction can continue to enforce its own rules”<sup>9</sup>.

In the EU area, we have to deal with an open market of services which is characterised by an integral legal system in broad sectors. Also, the freedoms of movement and economic activity are prevailing and consequently this is sufficient for ignoring national law restrictions, on the matter of “reproductive tourism”. What we face here, is a problem of efficiency of the national law and particularly of its prohibiting rules.

---

<sup>5</sup> Pennings, 2004, p. 2690.

<sup>6</sup> Kahn, 2008.

<sup>7</sup> People who use IVF to conceive children often have leftover embryos and decide whether to store them, dispose them or donate them for research.

<sup>8</sup> Bergmann, 2011, p. 281.

<sup>9</sup> Pennings, 2002, p.340.

Usually, “reproductive tourists” are not aware of the problems that may face while seeking ART in other countries. First of all, there are concerns regarding the safety and quality standards that are followed by the clinics. If they are not well-informed of the success rates of the clinics they risk to face negligence and incompetence.

Besides, when they return to their home countries, they may face legal problems. Especially in the case of surrogacy it cannot be guaranteed that the couple’s native country will recognise the child as a citizen. Of course, concerning the question of nationality, it is for the sovereign state to decide. As a result, many children risk statelessness which leads them to deprivation of rights in a national and international level.

All things considered, it could be argued that an interesting effect of the existence of alternatives for the citizens may be that the law makers have to put effort into convincing people of what is acceptable or unacceptable. The existence of different views stimulates reflection and obliges the holders of each position to offer rational arguments to convince those who hold the other position<sup>10</sup>.

### **1.1.2. Purposes and objectives of this research**

The purpose of this research is to examine the problem of European legal diversity which leads to the phenomenon of “reproductive tourism” by using the examples of Sweden and Greece, two countries which represent different models of legal framework and culture.

To this aim, I will examine the national legal framework which is applied in both countries in the case of sperm donation and surrogacy. I will also briefly analyse the legal frameworks applied in four more European countries: France, United Kingdom, Spain and Czech Republic in order to establish the disparities of EU legislation in the matter of “reproductive tourism”.

---

<sup>10</sup> Idem.

Furthermore, the different ethical theories, convictions and arguments concerning reproductive technologies, sperm donation and surrogacy will be explored. The objective is to show the direct link between ethics and legislation in the field of ART.

Ultimately, the main goal of this thesis is not to identify a common ground concerning the practice of ART within the European States. Whereas, the main question is how equal access and higher quality of reproductive services can be guaranteed to the individual without diminishing legal diversity. To this end, the proposition of common ethical standards and a legal harmonisation limited to safety and quality standards will be analysed. More specifically, the proposition of common ethical guidelines will be limited only to clinical practice and will not “touch upon” ethical matters that are strictly linked to each society. Then, the common ethical standards that will be introduced will serve us also as a basis for the legal harmonisation limited to safety and quality standards.

## **1.2. Methodology**

### **1.2.1. Type of analysis and main sources**

Bio law is concerned with the legal regulation of the use of biotechnology. Legal norms and principles examined in medical law and bio law are closely connected with the corresponding ethical norms<sup>11</sup>. Therefore, this thesis provides a both ethical and legal analysis regarding reproductive technologies, sperm donation and surrogacy in a European context.

The ethical part includes different religious and philosophical theories regarding reproductive technologies and different ethical arguments which surround surrogacy and sperm donation. All these different perspectives will help us realise the main reasoning behind the diverse legal frameworks. In addition, it could be said that the

---

<sup>11</sup> University of Helsinki, 2006.

general approach of the problem of “reproductive tourism” will be conducted under the spectrum of liberal individualism.

Next, the legal part includes the analysis of sperm donation and surrogacy arrangements as applied in Sweden, Greece, France, United Kingdom (UK), Spain and Czech Republic. It has to be noted that it is not a comparative study. The different legal orders are used in order to underline the problem of legal disparities within the EU which lead to patient mobility and “reproductive tourism”.

The primary legal sources comprise statute law and regulations, case law and international instruments. Regarding Sweden and Czech Republic the sources are limited to secondary sources and material translated in English due to the language barrier. That explains why I decided to analyse only sperm donation and surrogacy. In particular, it was almost impossible to find documents translated in English regarding other methods of reproductive technologies which are considered as less common.

Non- primary sources of law relied upon, comprise guidelines, documents such as information sheets and studies, journal articles and doctrine. Non-legal sources include books, international journal articles, medical articles and presentations.

Finally, most of the references to Greek law, French law and Spanish law have been translated by the author unless if it is otherwise specified.

### **1.3. Limitations**

To begin with, only the cases of Sweden and Greece will be thoroughly analysed. I chose Sweden because it was easier to access important documents through the University of Uppsala and Greece because I have studied and worked in the past on Greek legislation. Then I chose UK, France, Spain and the Czech Republic because of their similarities to the legal frameworks of Sweden and Greece. As I mentioned before, due to language barriers it was easier to analyse sperm donation and surrogacy.

This thesis examines the legal diversity within Europe which is based in different ethical perceptions, in order to find solution to the problem of “reproductive tourism”. To this end, the scope is focused on domestic legal frameworks and the implementation of the States obligations under the *European Convention on Human Rights (ECHR)*, the *Convention on the Rights of the Child (CRC)* and *European Union law (EU law)*. As EU law is really broad, the analysis is mostly focused on basic issues. The intention is not to undertake a deep analysis of sperm donation and surrogacy but to use the available legal frameworks in order to propose options to solve the problem of “reproductive tourism”.

Furthermore, “reproductive tourism” is not a European phenomenon. It is a worldwide phenomenon considered a part of the more general “medical tourism” in turn a part of the wider phenomenon of globalisation<sup>12</sup>. However, this thesis is focused on the situation within Europe.

In conclusion, although “reproductive tourism” can be viewed as a safety valve, the phenomenon is often associated with a high risk of health dangers, frustration and disparities<sup>13</sup>. These issues deserve attention and solutions need to be considered in the light of the fact that we are dealing with a growing phenomenon. Of course, the solutions proposed in the end of this thesis are “possible” solutions and not binding.

## **1.4. The international legal framework**

### **1.4.1. New health technologies in the European Union**

The *European Union Tissues and Cells Directives (EUTCD) 2004/ 23/ EC* introduced common safety and quality standards for human tissues and cells across the European Union. The purpose of the directives was to facilitate a safer and easier exchange tissues

---

<sup>12</sup> Ferrarreti et al, 2009, p. 261.

<sup>13</sup> Idem.

and cells (including human eggs and sperm) between member states and to improve safety standards for European citizens.<sup>14</sup>

The *EUTCD* includes three Directives, the parent Directive 2004/23/EC<sup>15</sup> which provides the framework legislation and two technical directives 2006/17/EC<sup>16</sup> and 2006/86/EC<sup>17</sup>, which provide the detailed requirements of the EUTCD.

Assisted conception is encompassed by *the European Directive on the Quality and Safety of Tissues and Cells (2004/23/EC)*. This applies to all ART units in all European Union and European Economic Area member states. Concerning ART, the directive is not concerned with pointing at different ways of increasing “performance” such as success rates. Instead, the directive aims at increasing quality through mandatory implementation of a quality management system.<sup>18</sup> This involves the presence of adequately trained and certified staff, full documentation and formulation of standard operating procedures, quality control and quality assurance at all units performing assisted reproduction<sup>19</sup>.

Above all, the *Directive 2004/23/EC* can be considered as a step in the right direction to improve patient safety especially in the case of “reproductive tourism” where safety and quality conditions are at stake. It could also be considered as a first step towards legal harmonisation limited to safety and quality standards. However, it remains unclear whether the implementation of this EU Directive, which requires extra time and money, has resulted in higher quality with respect to the quality dimensions of effectiveness, equity and patient centeredness.

---

<sup>14</sup> Human Fertilisation and Embryology Authority, 2009.

<sup>15</sup> Commission Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells.

<sup>16</sup> Commission Directive 2006/17/EC of 8 February 2006 implementing Directive 2004/23/EC of the European Parliament and of the Council as regards certain technical requirements for the donation, procurement and testing of human tissues and cells.

<sup>17</sup> Commission Directive 2006/86/EC of 24 October 2006 implementing Directive 2004/23/EC of the European Parliament and of the Council as regards traceability requirements, notification of serious adverse reactions and events and certain technical requirements for the coding, processing, preservation, storage and distribution of human tissues and cells.

<sup>18</sup> ESHRE position paper, 2007.

<sup>19</sup> Idem.



#### 1.4.2. Biomedicine and Human Rights: The Oviedo Convention

The European Convention on Human Rights and Biomedicine is the best current example of how to promote the protection of human rights in the biomedical field at a transnational level<sup>20</sup>. The importance of this instrument lies in the fact that it is the first comprehensive multilateral treaty addressing biomedical human rights issues<sup>21</sup>.

Furthermore, the Convention is the first legally-binding international text designed to preserve human dignity, rights and freedoms, through a series of principles and prohibitions against the misuse of biological and medical advances<sup>22</sup>. The Convention's starting point is that the interests of human beings must come before the interests of science or society<sup>23</sup>.

Particularly, the Oviedo Convention does not intend to provide an ideal solution to the bioethical challenges but it aims to set up some basic principles which could prevent practices that would infringe on human rights and human dignity. The importance of setting common standards in this field should not be understated, since they are conceived to constitute a first step towards promoting more concrete regulations at a national level<sup>24</sup>.

Besides, it should not be neglected that national governments are the primary agents for the promotion and realisation of human rights and not international organisations. If so viewed, and appreciating the need to accommodate diverse social, cultural and legal backgrounds, this instrument is a great achievement in itself<sup>25</sup>.

---

<sup>20</sup> Andorno, 2005, p. 133.

<sup>21</sup> Idem.

<sup>22</sup> Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Summary of the treaty.

<sup>23</sup> Idem.

<sup>24</sup> Andorno, 2005, p. 143.

<sup>25</sup> Idem.

It has to be noted that among the countries that will be included in this thesis, only Greece, the Czech Republic and Spain<sup>26</sup> have ratified the Oviedo Convention. Nevertheless, it includes principles and rights which should be taken into account especially in the case of a possible legal harmonisation regarding “reproductive tourism”.

### 1.4.3. Reproductive technologies under the ECHR

The European Convention on Human Rights (ECHR) has been particularly influential in framing human rights discourse across Europe. Over the years, a considerable number of actions brought before the European Court of Human Rights (ECtHR) have concerned health and reproduction<sup>27</sup>. Different interpretations of *Article 8* on the right to privacy have been used in claims concerning reproductive rights<sup>28</sup>. It is remarkable that, the principle of respect for human dignity which can be considered as another keyword regarding new technologies and human rights produced fewer cases than expected<sup>29</sup>. In particular, there is just one reference in the dissenting opinion by judge Marcus- Helmons in the case of *Cyprus v. Turkey*<sup>30</sup> who noted that “the rapid evolution of biomedical techniques meant that new threats to human dignity may arise”<sup>31</sup>.

Nonetheless, the approach taken by the Court to certain controversial issues where there are wide differences in ethical perspectives across states illustrates the difficulty in utilising a human rights approach in developing health law and health policy across the EU<sup>32</sup>. Particularly, the ECtHR developed the concept of “margin of appreciation” to

---

<sup>26</sup> Eurogentest, “ Overview of Countries who have ratified the European Convention on Human Rights and Biomedicine”.

<sup>27</sup> McHale, 2010, p. 286.

<sup>28</sup> Idem.

<sup>29</sup> Murphy and O’Cuinn, 2010, p. 612.

<sup>30</sup> Case of Cyprus v. Turkey, Application no. 25781/94, 2001.

<sup>31</sup> Murphy and O’Cuinn, p. 612.

<sup>32</sup> McHale, 2010, p. 287.

take into account that the principles of the Convention are broadly-drawn and to anticipate different interpretations in different societies<sup>33</sup>.

In *S.H. and Others v. Austria*<sup>34</sup>, the applicants complained that the prohibition of sperm and ova donation for In Vitro Fertilisation (IVF) violated their right to respect for family life under *Article 8*. The Court held that the legal restrictions fell within the margin of appreciation of Austria. In addition, the Court observed that there is an emerging consensus in Europe that sperm and egg donation for IVF should be allowed. Nevertheless, in the dissenting opinion, several judges argued that “in a case as sensitive as this one, the Court should not use the margin of appreciation as a pragmatic substitute for a thought-out approach to the problem of proper scope of review”<sup>35</sup>. Indeed, the decision of the Court sends the message that any law in an area of contested morality, like gamete donation, can fall within the margin of appreciation even if it is irrational.

This decision has several consequences: legal diversity will persist, there is no recognition of the basic right to procreation for couples who need donor gametes in Europe and “reproductive tourism” will probably continue to be the only option for many patients<sup>36</sup>.

#### 1.4.4. Reproductive technologies under the CRC

In 1989, the United Nations General Assembly adopted the Convention on the Rights of the Child (CRC). This treaty quickly became the most widely ratified human rights treaty in the history of international human rights law<sup>37</sup>. The question of whether ART practices are in line with the right of the child certainly needs to be addressed.

---

<sup>33</sup> Van Hoof and Pennings, 2012, p. 194.

<sup>34</sup> Case of *S.H. and Others v. Austria*, application no. 57813/00, 2011.

<sup>35</sup> *Idem*.

<sup>36</sup> Van Hoof and Pennings, 2012, p. 667.

<sup>37</sup> Tobin, 2011, p. 1.

It is clear that, with the development of ART, the concept of “family” has dramatically changed. While the CRC pays great attention to the importance of the familial environment to the child, it does not limit the definition of the family to the traditional Western structure of a mother and a father<sup>38</sup>. Rather, it allows for pluralism in family relations, requiring States to “respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child”<sup>39</sup>.

Nevertheless, the matters that raise the greatest concerns regarding “reproductive technologies” and the CRC are anonymous gamete donation and ART treatments which go beyond the natural procreation such as posthumous conception<sup>40</sup>. Concerning anonymous gamete donation, it has been argued that it violated the child’s right to know his origins and to preserve his identity<sup>41</sup>. However, this opinion cannot be considered as consolidated because this issue is fraught with legal, ethical, religious, cultural and health- related considerations relevant both to the child and to the other stakeholders<sup>42</sup>.

Finally, the CRC offers a child-centered perspective to the application of ART and of course to “reproductive tourism”. Understanding children’s views may help remove some of the misconceptions that surround non-traditional parents. Furthermore, considering the child’s view helps to illuminate the need to develop responsible public policies and create an environment where the health need of society’s members are properly met<sup>43</sup>.

## **1.5. Latest studies on reproductive tourism in the EU Comparative study of the European Parliament**

---

<sup>38</sup> Sabatello, 2013, p. 82.

<sup>39</sup> Art. 5 of the CRC.

<sup>40</sup> Sabatello, 2013, p. 84.

<sup>41</sup> Art. 7 and 8 CRC.

<sup>42</sup> Sabatello, 2013, p. 85.

<sup>43</sup> Idem, p. 98.

As I mentioned before, two forms of reproductive technology will be examined during this thesis: sperm donation and surrogacy. However, it is worth referring to a recent study concerning surrogacy in the EU.

The 8<sup>th</sup> of July 2013, the Parliament's Committee on Legal Affairs presented a study on the different legal regimes for surrogacy motherhood in the European Union. The aim of the Committee was to shed light on the wide variety of legal frameworks in the EU, and the problems that may ensue. In addition, this was the first exhaustive legal research into surrogacy laws in Europe. The study concluded that:

- Legal regimes vary widely between Member States.
- Very little data is available on surrogacy practices across the EU, despite it becoming more popular over recent years.
- There are numerous policy concerns about surrogacy at both national and international levels. More research would be beneficial to policy-making, and particularly qualitative research on the experience of surrogacy.
- While EU action in the area may be considered, a global approach may be more effective to regulate the global aspect of current surrogacy practices.<sup>44</sup>

To sum up, the study of the European Parliament highlights the problem of legal diversity within the EU. As I already mentioned this is the main cause of “reproductive tourism”. It is obvious that there are many concerns and more research could contribute in order to reach a consensus.

## **1.6. Outline of chapters**

This thesis is consisted of five Chapters. Special medical terms that require to be clarified have been defined in the Glossary at the beginning of this thesis.

---

<sup>44</sup> The European Parliament's Intergroup on LGBT Rights, 2013.

Chapter 1 includes the introduction. Chapter 2 comprises different ethical perspectives that affect the law. First of all, the Christian perspectives which are dominant in the countries that will be analysed later in this thesis. Then, it contains different philosophical perspectives concerning medical healthcare and reproductive technologies that have affected law-making all over the years and in the end it concludes with different ethical arguments concerning sperm donation, surrogacy and “reproductive tourism”.

Chapter 3 explores the Swedish legal framework concerning sperm donation and surrogacy. It continues with the ECHR and the CRC and to which extent Swedish legislation has implemented its obligations. It follows a brief analysis of two more countries with similar legal frameworks: United Kingdom and France. It ends with the legal issues that derive from “reproductive tourism”.

Chapter 4 examines the Greek legal framework regarding sperm donation and surrogacy. Later, it is examined whether the Greek legal framework meets its obligations under the ECHR, the CRC and EU law. It ends with a brief analysis of Spain and the Czech Republic and how the growing phenomenon of “reproductive tourism” has led to the decline of transnational adoptions.

Chapter 5 is the conclusion. It begins with some concluding thoughts regarding the right to procreate, the set of common ethical guidelines and the issue of legal diversity. It concludes with the proposition of a legal harmonisation limited to safety and quality standards as a possible solution to the problem.

## Chapter 2

### 2. Ethical issues

Ethics and law are different systems of norm-making and norm-application, but they constantly interact with each other. Sometimes ethics and law coincide or overlap, and at other times they conflict with and contradict each other<sup>45</sup>. Exercise of a legal choice is not necessarily ethical and equally, an ethical choice of conduct may not be legally permitted, because the law bars an option it would be ethical to exercise<sup>46</sup>.

A typical example that shows the link between law and ethics is the *Universal Declaration of Human Rights*. The 1948 document was described as a “Declaration” because it declared the best of prevailing values, inspired by ethical traditions and given practical effect through law, which acknowledge themselves ethically bound to respect<sup>47</sup>.

The relation between human rights and ethics is described by *J.M. Mann*: “As with medicare and public health, rather than seeing human rights and ethics as conflicting domains, it seems more appropriate to consider a continuum, in which human rights is a language most useful for guiding societal level analysis and work, while ethics is a language most useful for guiding individual behaviour”<sup>48</sup>.

In *Chapter 2*, I will examine in the first sections the different religious and philosophical theories that surround reproductive technologies and then, the ethical issues concerning surrogacy and sperm donation. This chapter will help us realise that ethics affect directly the European legislation regarding reproductive health and ART.

---

<sup>45</sup> Cook et al, 2003, p. 88.

<sup>46</sup> Idem.

<sup>47</sup> Idem, p. 91.

<sup>48</sup> Mann, 1997, p. 10.

## 2.1. Christian theories and reproductive technologies

Religion usually persists in asking about goals, ultimate meanings and long-term consequences.<sup>49</sup> It has been remarked that the great religions of the world share many common values. They espouse the dignity of human beings, reject cruelty and oppression, deny the morality of lying, stealing, murdering and the like<sup>50</sup>. In a religious context, all human activities (including ART) are imperfect because they are considered to violate the design God built into the human race. In this section, I will refer only to some Christian ideals and their interpretations and applications in bioethics, because the dominant religions in the countries that I will analyse in the next chapters are the Christian ones.

### 2.1.1. Catholicism

The Roman Catholic Church opposes all kinds of ART because they separate the procreative goal of marital sex from the goal of uniting married couples. In particular, according to the *Catechism of the Catholic Church*:

*“Techniques involving only the married couple such as homologous insemination and fertilisation are perhaps less reprehensible, yet remain morally unacceptable. They dissociate the sexual act from the procreative act. The act which brings the child into existence is no longer an act by which two persons give themselves to one another, but one that “entrusts the life and identity of the embryo into the power of doctors and biologists and establishes the domination of technology over the origin and destiny of the human person. Such a relationship is in itself contrary to the dignity and equality that must be common to parents and children”<sup>51</sup>.*

---

<sup>49</sup> Steinberg, 2007, p. 32.

<sup>50</sup> Idem, p. 33.

<sup>51</sup> Vatican, 2008.



Regarding sperm donation, the main problem for Catholicism appears to be the collection of a sperm sample which can only be operated through masturbation. The Catholic Church teaches that “masturbation constitutes a grave moral disorder<sup>52</sup>”. It appears that, as masturbation is prohibited under Catholicism, sperm donation is also prohibited because they are linked to each other.

Surrogacy is also prohibited under *paragraph 2376 of the Catechism of the Catholic Church*:

*“Techniques that entail the dissociation of husband and wife, by the intrusion of a person other than the couple (donation of sperm or ovum, surrogate uterus), are gravely immoral. These techniques (heterologous artificial insemination and fertilisation) infringe the child's right to be born of a father and mother known to him and bound to each other by marriage. They betray the spouses' "right to become a father and a mother only through each other".*

### **2.1.2. Eastern Orthodoxy**

The Greek Orthodox Church does not recommend assisted reproduction as the solution to infertility, instead, it proposes a non-secularised perception on life that guarantees simplicity and mutual trust between spouses. It does not oppose resorting to medical help, but, at the same time suggests that men and women render their life to the hands of God<sup>53</sup>.

The Church does not support sperm donation and in general gamete donation. Basically, every form of heterologous assisted fertilisation degrades the concept of motherhood and fatherhood. The requirement of a third person's intervention in the sacred procedure of human reproduction makes it impossible for the Church to accept such a practice<sup>54</sup>.

---

<sup>52</sup> Cardinal Seper, 2008.

<sup>53</sup> Nikolaou M., 2008.

<sup>54</sup> Metropolitan Nikolaos of Mesaogaia and Lavreotiki, 2008, p. 29.

Furthermore, for the Greek Orthodox Church, the developing bond with the embryo during pregnancy is an essential part of motherhood and the continuing relationship between the surrogate and the embryo is unjust towards the genetic parents. The interruption of this relationship is also unjust towards the surrogate mother but mostly towards the child. For this reason and most all due to the fact that the family unity is disrupted the Church does not approve surrogacy<sup>55</sup>.

### 2.1.3. Protestantism

As in other Christian religions, Protestantism considers that infertility may cause immense suffering to a couple. However, in Protestantism there is no divine obligation to procreate. Consequently, infertility is a problem of the individual respectively the couple, and not a problem between God and the believer<sup>56</sup>.

For Protestants, all ethical considerations of all methods used in reproductive medicine depend on the status of the embryo. Modern Protestant theology supports that as long as an embryo has no nervous system, no organs and no pain receptors, it cannot be considered as a human being<sup>57</sup>.

According to the Protestant ethical standards, IVF by itself is not unethical<sup>58</sup>. Protestant moralists tend to argue that the complex of goods of marriage should characterise the overall course of the marital relationship rather than each individual act of sexual intercourse<sup>59</sup>. Sperm and egg donation are also considered to be ethical. On the contrary,

---

<sup>55</sup> Idem.

<sup>56</sup> Birkhauser, 2013, p. 957.

<sup>57</sup> Idem.

<sup>58</sup> Kuhse and Singer, 2009, p.51.

<sup>59</sup> Idem.

it is considered to be unethical to hire and pay surrogate mothers, exposing them to the risk of physical and mental harm<sup>60</sup>.

## 2.2. Philosophical Ethical Theories applied in reproductive technologies

### 2.2.1. Utilitarianism

Utilitarianism is founded on the work of *Jeremy Bentham* and *John Stuart Mill*<sup>61</sup>. It is based on a single principle of what is *good*: the principle of utility. The morally correct decision or course of action is often summed up as that which promotes “the greatest good for the greatest number”. The principle of good holds that we ought to produce the maximum amount of good<sup>62</sup>. The main constituents of any utilitarian theory may be called *consequentialism*, *welfarism* and *aggregationism*<sup>63</sup>.

*Consequentialism* is the view that morality is all about producing the right kinds of overall consequences. For example, if you think that the whole point of morality is (a) to spread happiness and relieve suffering, or (b) to create as much freedom as possible in the world, or (c) to promote the survival of our species, then you accept consequentialism<sup>64</sup>. Although those three views disagree about which kinds of consequences matter, they agree that consequences are all that matters<sup>65</sup>. The formulation of consequentialism which is inspired by *Immanuel Kant* and is relevant to biomedicine is: “Act so that you treat humanity, whether in your own person or in that of any other, always as an end and never as a means only”<sup>66</sup>.

---

<sup>60</sup> Birkhauser, 2013, p. 958.

<sup>61</sup> Papanikitas, “Ethical Theories”.

<sup>62</sup> Idem.

<sup>63</sup> Kuhse and Singer, 2009, p. 85.

<sup>64</sup> Haines, “Consequentialism”.

<sup>65</sup> Idem.

<sup>66</sup> Lohman, “Consequentialism Deontology”.

About *welfarism*, utilitarians think that consequences that are relevant to the morality of actions are consequences that increase or diminish the welfare of all those affected<sup>67</sup>. We may define “welfare” as the obtaining to a high or at least reasonable degree of a quality of life which on the whole a person wants, or prefers to have”<sup>68</sup>. The concept of “welfarism” has received much more attention in health economics than in biomedicine. Furthermore, *aggregationism* implies that we should ignore the distribution of the welfare that we are bringing about, and simply maximise its total sum in aggregate<sup>69</sup>. This is a concept that can also be better applied in health economics than in biomedicine.

It is remarkable how *John Stuart Mill* touched upon the topic of commercial surrogacy in the final chapter of *On Liberty*. He comments “Whatever it is permitted to do, it must be permitted to advise to do. The question is doubtful only when the instigator derives a personal benefit from the advice, when he makes it his occupation, for subsistence or pecuniary gain, to promote what society and the State consider to be an evil”<sup>70</sup>. In other words, the proposed bans on the market exchange of goods and services should be evaluated according to the expected consequences of such bans. Consequences -of commercial surrogacy, in our case - shall be evaluated according to an egalitarian welfarist standard<sup>71</sup>.

Finally, about “reproductive tourism”, for some moral theories, but particularly for utilitarianism, it might be better to allow access to a particular technology or freedom in one’s own jurisdiction (where some regulatory control can be maintained) than to encourage travel to less regulated jurisdictions<sup>72</sup>.

### 2.2.2. Kantianism

---

<sup>67</sup> Kuhse and Singer, 2009, p. 86.

<sup>68</sup> Idem.

<sup>69</sup> Ibidem, p. 87.

<sup>70</sup> Mill, 1978, pp. 97-98.

<sup>71</sup> Arneson, 1992, p. 133.

<sup>72</sup> Pattinson, 2006, p. 268.

Basic to Kant's moral philosophy is the notion that one should follow a general principle of *moral action*. Kant rejected the teleological position of utilitarianism<sup>73</sup>. Instead, he proposes a deontological moral theory.

Kant's ethics are an ethics of duty (also called deontological) because they emphasise not having the right desires or feelings, but acting correctly according to obligation. For Kant, the correct motive for treating a patient well is not because a physician feels like doing so, but because it is the right thing to do<sup>74</sup>. In other terms, ethics is not a matter of consequences but of a *duty*.

Kant in his book "*Grounding for the Metaphysics of Morals*" holds that:

*"Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end"*<sup>75</sup>.

Basically, *Immanuel Kant* does not say it is necessary wrong to treat another person as a means to an end, what is wrong is treating somebody *merely* as a means or as a means only<sup>76</sup>. Consequently, medical practitioners should treat patients as ends themselves. Of course, the patient should agree to such a practice ("autonomous will"). As a result, according to this interpretation of Kant's theory a woman can dispose her body in the case of surrogacy, as long as she is not treated "merely" as a mean and she gives her consent.

In short, Kant's medical ethics show the greatest respect for human dignity and autonomy. Kant also said that because humans are rational beings, we should never

---

<sup>73</sup> Shepherd, 2005, p. 16.

<sup>74</sup> Pence, pp. 10-25.

<sup>75</sup> Kant, 1993, p. 30.

<sup>76</sup> Pence, pp. 10-25.

treat people “*simply as a means but always at the same time as an end*”<sup>77</sup>. The emphasis here is on the fact that all people are equal and deserve equal respect<sup>78</sup>. Similarly, Kant’s theory provides also a basis for Human Rights as it provides the foundation for modern conceptions of equality and justice<sup>79</sup>. Perhaps Kant’s most important legacy to modern medical ethics is his emphasis on the “autonomous will” of the free, rational individual as the seat of moral value<sup>80</sup>. When combined with the emphasis on personal liberty in our democracies, Kant’s emphasis on autonomy sets the stage for modern medical ethics<sup>81</sup>.

### 2.2.3. Liberal individualism

“Individualism” is the view that individuals enjoy a kind of ontological or axiological priority to the collectives they constitute. “Liberalism” is the view that liberty is an inalienable right that ought to receive special protection in the constitution and laws of a just government, even to the point of permitting the right to do what is morally wrong<sup>82</sup>. As a result, “liberal individualism” denotes a distinctive combination of liberalism and individualism.

Because individuals are prior to society, the liberal individualist says, they are entitled by right to live and act by their own judgment<sup>83</sup>. The authors *Beauchamp* and *Childress*, by “liberal individualism”, refer to the notion that individuals in society have various rights that protect them from the intrusion (especially the State’s intrusion) with regard to a wide set of personal choices and acts<sup>84</sup>.

---

<sup>77</sup> Papanikitas, 2013.

<sup>78</sup> Idem.

<sup>79</sup> Kant’s Ethical Theory Strengths and Weaknesses.

<sup>80</sup> Pence, pp. 10-25.

<sup>81</sup> Idem.

<sup>82</sup> Khawaja, 1999, p. 73.

<sup>83</sup> Idem.

<sup>84</sup> Shepherd, 2005, p. 17.

“Liberal Individualism” is a combination of different ethical philosophies. The philosopher who was primarily concerned with the protection of individual human rights was *John Locke*. He believed that individuals can authorise the society to make rules for the public good. Later, *John Stuart Mill*, believed that a society should allow persons to develop according to their convictions as long as they do not interfere with the freedom of others. *Mill* was concerned with not interfering with autonomous expression and actively strengthening the autonomy of others<sup>85</sup>.

“Liberal individualism” focuses mainly on the individual and his rights. For liberal individualists the human world is made up of individual people each with his or her own desires, interests and conception of the good, each with the ability to choose freely his or her own way of life<sup>86</sup>. Subsequently, the State should not forbid to an individual to exercise his right to found a family. If the existing legislation in a country allows all people to obtain the medical service they desire, there is no need for reproductive tourism<sup>87</sup>.

#### 2.2.4. Communitarianism

Communitarianism refers to a theoretical perspective that seeks to lessen the focus on individual rights and increase the focus on communal responsibilities<sup>88</sup>. This is the main contrast between liberal individualism and communitarianism: liberal individualism precludes the sort of wisdom that stems from comprehending the person’s place within the larger community<sup>89</sup>.

---

<sup>85</sup> Beauchamp and Childress, 2001, p. 64.

<sup>86</sup> Parker, 1999.

<sup>87</sup> Pennings, 2002, p. 338.

<sup>88</sup> Regis University, “Communitarian Ethics”.

<sup>89</sup> Shepherd, 2005, p. 18.

For communitarians, the key to resolving ethical questions and conflicts lies in respect for local values that demonstrate careful deliberation and local community acceptance<sup>90</sup>. In other words, people are individual members of communities with shared values, ideals and goals. As a result, individual ideas of the good cannot be separated from the community as a whole. In addition, communitarians believe that self is fundamentally a social self in which self and society are harmoniously reconciled and where their relationship turns out to be mutually constitutive<sup>91</sup>. Therefore, questions about right and wrong of policies should always be raised for the betterment of the community as a whole<sup>92</sup>.

It is clear that, for communitarians the individual is directly linked to the society. For them, claiming rights would definitely not be a good idea. They would prefer a group consent. If we apply their theory to the main question of this thesis, communitarians would not agree with “reproductive tourism” as a practice because the individual decides for himself and in order to satisfy his desire, he “breaks” the rules that his society has imposed. In addition, “reproductive tourists” do not agree with the legal restrictions imposed to them and they satisfy their desire to found a family by moving to other States with less restricted legislations. When the individual does not agree with the legal restrictions imposed by his State does not only “break” the rules of his society but he also renounces his identity because according to communitarians the community attachments constitute the full identity of a real human being.

### **2.3. Ethical problems surrounding surrogacy**

#### **2.3.1. Feminist perspectives on surrogacy**

---

<sup>90</sup> Idem.

<sup>91</sup> Brown University (Presentation).

<sup>92</sup> Lohman (Presentation).



The issue of surrogacy has received a great attention during the latest years. Ethicists, psychologists, and legal experts have struggled with the meanings of this practice. In contemporary times, however, the phenomenon of surrogacy has assumed new dimensions as it travels across national borders in the context of globalisation<sup>93</sup>.

In particular, the word “surrogate” literally means “substitute” or “replacement”. A “surrogate mother” is the woman who, agrees to bear a child for another woman who may be incapable or in rare cases does not want to do so herself. It is impossible to identify a unified feminist perspective on surrogacy. Some see surrogacy as simply one more battle in the long war to increase women’s personal freedom to control their own reproduction<sup>94</sup>. Others view surrogacy as a form of slavery or prostitution and others believe that the surrogate women are used as commodities.

Firstly, I would like to refer to the analogy made between commercial surrogacy and prostitution. *Andrea Dworkin*, the well-known American feminist argues that a surrogacy arrangement is not one in which a woman can enter into by her own free will because in both prostitution and surrogate motherhood, the State has created the social, economic and political situation in which the sale of some sexual or reproductive capacity is necessary to a woman’s survival<sup>95</sup>. In addition, *Prokopijevic* notices the following: “ In both cases one’s physical service is being offered, in both instances a deep personal or emotional relationship is not required for the transaction to be completed, in both cases material compensation is offered for the physical services provided”<sup>96</sup>.

The second argument is that commercial surrogacy turns women into a commodity. The view that surrogate motherhood and the commodification of women goes hand in hand relies on the deontological argument that it is not consistent with human nature to disengage the genetic-biological aspect of motherhood from pregnancy<sup>97</sup>. It further

---

<sup>93</sup> Banerjee, 2010, p. 107.

<sup>94</sup> Brendel, 1995, p. 492.

<sup>95</sup> Sera, 1997, p. 319.

<sup>96</sup> Niekerk and Zyl, 1995, p. 347.

<sup>97</sup> Stoll, 2013, p. 66.

compromises the dignity of the mother, by treating her as a gestational oven<sup>98</sup>. Proponents of this view believe that we are always obliged to safeguard the dignity of human life<sup>99</sup>.

There is also the psychological bonding made between the mother and the child which is also a main argument regarding the commodification of the surrogate. *Anderson* argues that the social norms surrounding pregnancy are designed to encourage parental love for the child, that by giving up the child to the intended parents, her labour is alienated<sup>100</sup>. She even brings up the subject of sonograms as not only diagnostic tests, but to assist a pregnant woman in bonding with the foetus<sup>101</sup>.

Besides the concerns regarding woman's dignity, it is also argued that such commodification (baby-selling) is also an attack to the child's dignity. This view and the concerns expressed are not dissimilar to those expressed in the Swedish preparatory works<sup>102</sup>. Swedish journalist and author *Kajsa Ekis Ekman* describes the process of surrogacy as "the pregnancy market"<sup>103</sup>.

Finally, according to the feminist perspective, even if the surrogate is acting altruistically, surrogacy is still unethical because the surrogate is seen and used as an object for the desires of someone else, for something that concerns life's most fundamental aspect<sup>104</sup>.

## **2.4. Ethical problems surrounding sperm donation**

### **2.4.1. Ethical arguments regarding non-anonymous sperm donation**

---

<sup>98</sup> European Center for Law and Justice, 2012, p. 5.

<sup>99</sup> Stoll, 2013, p. 66.

<sup>100</sup> Anderson, 1999, p. 82.

<sup>101</sup> Idem, p. 81.

<sup>102</sup> Stoll, 2013, p. 61.

<sup>103</sup> Idem.

<sup>104</sup> Idem, p. 66.

During the latest years, a strong tendency in favor of non-anonymous sperm donation emerged in Europe. Proponents of non-anonymous sperm donation argued that human beings have a fundamental interest, and perhaps even a legal right, to know their biological origins<sup>105</sup>. Disclosure was a key part of open and honest communication with children, which helped to avoid secrets in the family that can damage family relationships and generate possible strain and anxieties<sup>106</sup>. Openness does not appear to injure the child, as some studies have shown that children told of their conception through sperm donation are well-adjusted<sup>107</sup>.

Proponents of disclosure also argue that planned disclosure will protect the child from accidentally finding out about his or her origins, which would be more damaging than an intentional, structured disclosure<sup>108</sup>. In addition, disclosure may benefit children by protecting their interests in knowing their genetic heritage and in securing accurate information about potential health problems<sup>109</sup>.

Sweden is the first country that enshrined in its legal framework the right to obtain identifying information about the donor when the offspring are sufficiently mature. According to a recent study conducted by the Linköping University, two decades after the Swedish legislation of identifiable gamete donors came into force, couples undergoing gamete donation are relatively open about their treatment and agree that donation offspring have the right to know about their genetic origin<sup>110</sup>.

#### **2.4.2. Ethical arguments regarding anonymous sperm donation**

---

<sup>105</sup> Gong et al, 2009, p. 649.

<sup>106</sup> Idem.

<sup>107</sup> Ethics Committee of the American Society for Reproductive Medicine, 2013, p. 46.

<sup>108</sup> Idem.

<sup>109</sup> Idem.

<sup>110</sup> Isaksson et al, 2011, p. 860.

Those who argue against disclosure express concerns that telling the child of his or her conception by donation will subject the child to social and psychological turmoil, which will be especially disruptive if the child wants to learn more about the donor but cannot<sup>111</sup>.

Besides, nondisclosure allows parents to maintain the issue of infertility as a private matter, which may be vital to them for a variety of reasons. For instance, they may be concerned that the child will reject the non-genetic parent, or they may wish to conceal the fact of donation from disapproving family members, especially those from cultures less accepting of sperm donation<sup>112</sup>. Nondisclosure also may be important to protect the privacy of donors. Rates of donation have declined significantly in jurisdictions such as the United Kingdom that require that identifying information be available on request<sup>113</sup>.

In conclusion, studies that have been conducted in Europe, indicate that a significant majority of recipient parents do not plan to inform offspring about the facts of their conception. Many parents who have used donor sperm do not intend to tell their children even though they have disclosed the fact to others<sup>114</sup>.

## **2.5. Ethical problems surrounding reproductive tourism**

Reproductive tourism is by some accounts a multibillion dollar industry. The seeking by clients in high income nations of surrogate mothers in low income nations, presents a set of largely unexamined ethical challenges<sup>115</sup>.

---

<sup>111</sup> Ethics Committee of the American Society for Reproductive Medicine, 2013, p. 46.

<sup>112</sup> Gong et al, 2009, p. 649.

<sup>113</sup> Ethics Committee of the American Society for Reproductive Medicine, 2013, p. 46.

<sup>114</sup> Golombok et al, 2002, pp. 830-840.

<sup>115</sup> Deonandan et al, 2012, p. 742.

First of all, the act of tourists seeking services abroad implies that services are insufficient in quality, type, timing or affordability in the home country<sup>116</sup>. Also, those who seek services abroad deny their resources to their home community, and instead offer them to clinics in destination countries<sup>117</sup>. When considered from the perspective of the “tourist”, the issue becomes one of subtle libertarianism: one is free to spend one’s money where one sees fit. However, from a policymaker’s perspective, it is conceivable that a sufficiently robust global medical tourism industry may be seen as a financial negative for the society providing more tourists than it does service providers<sup>118</sup>. Furthermore, inconsistencies in the quality of medical services may occur between jurisdictions. A tourist seeking a service in a foreign jurisdiction may not receive the same standard of care they would have expected in the home country<sup>119</sup>.

One of the main objections to reproductive tourism is that, in the case of surrogacy, it is seen as exploitative because cross border reproductive services take advantage of the vulnerabilities of poor women in less developed countries<sup>120</sup>. In addition, laws concerning the custody rights of a surrogate vary from country to country. Accordingly, as reproductive tourism grows in economic importance, the extent to which a nation’s custody and adoption laws become informed and influenced by the needs of the reproductive tourism industry need to be considered<sup>121</sup>.

On the other hand, *Guido Pennings* claims that the phenomenon of “reproductive tourism” can be seen as a solution to restrictive legislation<sup>122</sup>. Reproductive tourism can be seen as “a pragmatic solution to the problem of how to combine the democratic system which proceeds according to the majority rule, with a degree of individual freedom for the members of the minority”<sup>123</sup>. He also claims that “... respect for the moral autonomy of the minority demands an attitude of tolerance”<sup>124</sup>. This implies that

---

<sup>116</sup> Deonandan and Taber, 2014, p. 2519.

<sup>117</sup> Deonandan, 2013, p. 154.

<sup>118</sup> Idem.

<sup>119</sup> Idem, pp. 158-159.

<sup>120</sup> Stoll, 2013, p. 71.

<sup>121</sup> Deonandan, 2013, p. 166.

<sup>122</sup> Pennings, 2002, p. 338.

<sup>123</sup> Idem, p. 341.

<sup>124</sup> Idem.

a State should not take active measures to prevent its citizens from looking for medical care in states where policies might better coincide with their own moral views or standards<sup>125</sup>.

In other words, the supporters of cross-border reproductive services argue that reproductive tourism has a stabilising effect on the restrictive policies of the home country because people who feel oppressed by domestic limitations are able to bypass them<sup>126</sup>.

## 2.6. Concluding remarks

What is ethical and what is considered as unethical? This question is hard to answer. What is clear is that there is no consensus concerning reproductive technologies and consequently, reproductive tourism.

In the beginning of this chapter, I analysed how Christian religions face reproductive technologies. Catholics, Orthodox and Protestants have different opinions about sperm donation but they have the same opinion about surrogacy: they all consider it as unethical. In that case, the problems usually arise in countries where the State is not separated from the Church. A typical example is Italy, where the Vatican always affects the Italian legislation. Treatments such as artificial insemination and IVF have become increasingly popular across the Western world. But in Italy, they have been opposed by a conservative establishment influenced by the Catholic Church, which rejects non-traditional conception and opposes the discarding of embryos with defects, believing an embryo should be treated as a person from the moment of conception<sup>127</sup>. In my point of

---

<sup>125</sup> Idem.

<sup>126</sup> Stoll, 2013, p. 73.

<sup>127</sup> O'Leary, 2014.

view, the Church should be separated from the State and the legislator should act by taking into account the welfare of the State and mostly the welfare of the individual.

Regarding feminism and reproductive technologies, in the case of surrogacy, which is apparently the most debated one, many feminists believe that the surrogate is a victim of commodification. I believe that the parents can also be treated as a “commodity” because their desire to exercise the right to found a family is strong and they are able to do everything in order to make their wish come true. As a result, they can easily be “exploited” by the surrogate who just offers her services.

Furthermore, the objectives of prostitution and surrogacy are different. Prostitution involves selling a woman’s body for sexual satisfaction, whereas the purpose of surrogacy is to create a child<sup>128</sup>.

Another objection to the prostitution argument is that people are allowed to “sell their bodies” in a broad variety of other ways. In United States of America (USA), for instance, people can sell eggs, sperm, plasma or hair and they can accept jobs that are known to compromise their physical health<sup>129</sup>. There is no reason to think that surrogacy is more like prostitution, an illegal form of “body-selling”, than it is like egg-selling or any of the other legal forms of “body-selling”<sup>130</sup>.

A third objection could be that surrogacy is more like the case of being paid for the service. The contracting couple does not gain a right to do whatever they please with the woman’s body while she carries the child. What is important here, is the main purpose of the child, which is to found a family. In surrogacy, a woman is not “selling her body” but being compensated for her services<sup>131</sup>.

The last argument concerns “baby-selling” and how it attacks human dignity, the dignity of the child, the surrogate’s and the couple’s (Section 2.3.1.). First, according to *Damelio* and *Sorensen* what matters is the purpose of surrogacy. Second, in most cases

---

<sup>128</sup> Damelio and Sorensen, 2010, p. 270.

<sup>129</sup> Idem.

<sup>130</sup> Idem.

<sup>131</sup> Idem.

the contracting father has supplied the sperm to create the child. He is genetically the father, so it seems odd to say he is buying his own kid<sup>132</sup>.

When it comes to the problem of reproductive freedom and its limits, a combination of several elements of different philosophical theories could be applied. Particularly, in the case of infertility, the individual should have access to reproductive technologies because this access will bring him the greatest happiness (utilitarianism) and will allow him to exercise the right to found a family (liberal individualism). Concerning reproductive technologies, the surrogates or the gamete donors should not be exploited by being treated only as a “means” (Kantianism) but their rights and their human dignity should be respected. On the other hand, the State should always exercise a minimum control, especially when it comes to public health (communitarianism).

All things considered, we should take into account the value of “reproductive freedom” for the human being that can be considered as a prerequisite for the realisation of all the other freedoms: “reproductive freedom is vital to humanity. It is even more vital than all the other freedoms that we cherish: freedom of religion, freedom of thought and speech, and the freedom to live our lives as we see fit. Humanity has these freedoms, or should have them, because they add to human happiness and make for a better world. So does reproductive freedom”<sup>133</sup>.

---

<sup>132</sup> Idem.

<sup>133</sup> Sanger, 2004, p. 70.



## Chapter 3

### 3. Legal issues

The early twenty-first century picture of medical practice is one of rapidly advancing technology. The law, however, moves more slowly than either the medical or public mores<sup>134</sup>. At that point, the crucial question is that of determining the extent to which medical decisions should be objected to legal scrutiny.

There are two views concerning the question of legal control and medical healthcare: on the one hand, there are the ones who hold that the medical profession should be left to regulate itself and that it alone should decide what is acceptable conduct<sup>135</sup>. On the other hand, there are the ones who believe that reserving to the medical profession the right to decide on issues of life (and death) is an improper derogation from an area of legitimate public concern. According to the proponents of this opinion, the law, even if it is an imperfect and often inaccessible weapon, is at least one means of controlling the health care professions in the interests of the community as a whole<sup>136</sup>.

In this chapter -as well as in Chapter 4 concerning the Greek legislation- I will analyse the different legal frameworks applied by Sweden and Greece in the case of ART. We will see, as we go through these chapters, how these different approaches play a significant role in the development of “reproductive tourism”. In the end of this Chapter I will refer briefly to similar European legal frameworks (UK and France).

#### 3.1. The case of Sweden

---

<sup>134</sup> Mason and Laurie, 2011, p. 24.

<sup>135</sup> Idem, p. 25.

<sup>136</sup> Idem.

Sweden is a welfare state, which supports fertility treatment by offering a limited number of free cycles to fertility patients at public hospitals. In addition to the public healthcare system, private clinics also carry out fertility treatment. Nevertheless, it is only public clinics that can legally perform sperm banking and insemination with donor sperm<sup>137</sup>. Although Sweden is well regulated in this field, there is widespread use of reproductive technologies to overcome infertility.

About 20.000 to 25.000 couples annually seek reproductive technology abroad<sup>138</sup>. The assisted reproductive technology procedures that can be performed in a given country are influenced by the country's ethical, legal, and cultural characteristics. These differences will always exist and may at times exclude some patients from services, and these patients must seek services abroad<sup>139</sup>.

As regards to Sweden, at least 250 Swedish sperm recipients travel to Denmark annually<sup>140</sup> for insemination because sperm donation is the most debated of the reproductive technologies that are currently in use. In addition, concerning surrogacy, which is another form of reproductive technology, there are no Swedish specific legislative provisions that clarify family law status. As a result, Swedish citizens seek ART treatments in other countries.

In this chapter, I will examine the reasons why Swedish people become very often “reproductive tourists”.

### **3.1.1. Sperm donation**

#### **3.1.1.1. The national legal framework**

---

<sup>137</sup> Stine, 2010, p. 395.

<sup>138</sup> Lunt and Carrera, 2010.

<sup>139</sup> Idem.

<sup>140</sup> Ekerhovd et al, 2008, p. 305.

On 1 March 1985, when the *Act on Insemination (SFS 1984:1140)* came into effect, Sweden became the first country in the world to have legislation regulating sperm donation. The intention of this legislation was to ensure that parents disclosed the use of donor insemination to their child, and that donor children were able to find out who the donor was at the age of maturity<sup>141</sup>.

It should be mentioned that in the beginning, access to sperm donation was limited to heterosexual couples, but it changed in 2005, when lesbians living together received the legal right to be inseminated at public clinics in Sweden. Besides, until today single women still cannot be legally inseminated.

This general focus on the child through Swedish legislation continued with the enactment of the *In Vitro Fertilisation Act (SFS 1988:711)* and remains central today under the *Genetic Integrity Act (SFS 2006:351)*<sup>142</sup>. Nowadays, the *Genetic Integrity Act (SFS 2006:351)* governs all activities related to assisted human reproduction, including access to information following donor treatment procedures. The right to identifying information about the donor can be found in Chapters 6 and 7 of the *Genetic Integrity Act (SFS 2006:351)*:

*“A person conceived {as a result of a donor treatment procedure} has, if he or she has reached sufficient maturity, the right to access information about the donor which is recorded in the hospital’s special medical record.”*<sup>143</sup>

The unconditional legal right applies only to donor offspring conceived under the *Genetic Integrity Act (SFS 2006:351)*. Consequently, that donor offspring born through

---

<sup>141</sup> Stine Willum, 2010, p. 396.

<sup>142</sup> Stoll, 2008, p. 15.

<sup>143</sup> Idem, p. 44, (Author’s translation).

private arrangements<sup>144</sup> or following treatment procedures carried out *abroad* have no right to information about the donor under the *Genetic Integrity Act (SFS 2006:351)*<sup>145</sup>.

However, a donor offspring's right to information about the donor would not be efficient without an effective system for the preservation of records. The *Genetic Integrity Act (SFS 2006:351)* stipulates that information about the donor shall be recorded in a special medical record which shall be preserved for at least 70 years<sup>146</sup>.

Furthermore, the *Genetic Integrity Act (SFS 2006:351)* contains two prohibitions relevant to the interests of donor offspring and their right to identifying information about the donor. First, the prohibition against the importation of sperm<sup>147</sup>, in order to prevent foreign sperm banks from selling sperm by mail order to women in Sweden and second, the prohibition against using the gametes of dead donors because it is considered that it could have negative consequences for the child<sup>148</sup>.

It is clear that, the main feature of the Swedish legislation is its commitment to satisfy the interests of the child born from a donor treatment procedure. However, parent interests cannot be ignored. The possible interests of donors should not be ignored either. Perhaps, a possible balance should be established in order to avoid compromising the objectives of Swedish legislation.

### **3.1.1.2. Swedish law under the scope of the Convention on the Rights of the Child**

In 1989, the CRC was drafted as the first legally binding international instrument to incorporate the full range of human rights to protect children. By ratifying the CRC, States Parties commit themselves to protecting and ensuring children's rights and developing actions and policies to promote the interests of the child.

---

<sup>144</sup> This term is used in this context to refer to "DIY" inseminations which are not performed in hospitals that have been authorized to perform such procedures by the National Board of Health and Welfare. (Stoll, 2008, p. 45).

<sup>145</sup> *Idem*, p. 45.

<sup>146</sup> Stoll, 2008, p. 49.

<sup>147</sup> Chapter 6, Section 7 "Import of sperm" (SFS 2006:351).

<sup>148</sup> Chapter 7, Section 6 "Choice of donor" (SFS 2006:351).

None of the articles in the CRC promote explicitly a child's right to knowledge of his/her origins. However, the Committee on the Rights of the Child, who monitors the rights granted by the CRC, gives a broad interpretation to *article 7*:

1. *The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.*
2. *States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.*<sup>149</sup>

The Committee has interpreted *Article 7* as getting a child's right to knowledge of his or her origins. Still, national authorities have a degree of discretion, provided they do not give higher priority to parental rights than children's rights.

In the context of the right to know, the reference to parents could indicate a right to know one's biological parents since it is possible to interpret *Article 7* broadly so that the term "parents" includes not only social or legal parents, but also biological and gestational parents<sup>150</sup>.

It has to be mentioned that although the CRC is the international instrument which contains the clearest reference that can be linked to a donor offspring's right to information about the donor, it applies only to children and lacks an effective enforcement mechanism<sup>151</sup>. In particular, the CRC does not present effective mechanisms for the implementation of children's rights. According to *Eric Engle* the CRC is a "paper tiger": the rights it protects sound good, but are, in practice, often unenforced. This is partly because of a lack of enforcement mechanisms within the convention itself, but also because the CRC does not create individually enforceable

---

<sup>149</sup> CRC, supra note 19, art. 7.

<sup>150</sup> Clark, 2012, p. 626.

<sup>151</sup> Engle, 2011, p. 810.

rights<sup>152</sup>. The treaty is not self-executing: it expressly calls for State Parties to undertake implementing legislation to make its normative provisions positively binding<sup>153</sup>.

In 1990, when the Swedish Parliament gave its consent to ratify the CRC, it considered that the obligations set out in the Convention were already satisfied by existing Swedish law without the need to convert it into Swedish law. Consequently, although Sweden is bound under international law to implement the CRC, the Convention itself is not formally binding on Swedish courts since its provisions do not constitute Swedish law. Nevertheless, there is no question that it could be relied upon as a fundamental resource to promote children's interests.

### 3.1.1.3. Swedish law under the scope of the European Convention on Human Rights

The ECHR is the legal mechanism by which the countries of Europe are bound to universal human rights standards. The CRC and the ECHR could be considered as complementary to each other.

In contrast to the CRC, the ECHR guarantees rights to everyone and is directly binding on Swedish Courts. *Article 8* of the ECHR is the one that is relevant to the right to information about genetic origins:

#### *Right to respect for private and family life*

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

---

<sup>152</sup> Idem.

<sup>153</sup> Idem.

At that point, we could not neglect the interpretation given by the European Court of Human Rights to the *Article 8* ECHR regarding the right to information of donor's offspring.

In the case of *Gaskin v The United Kingdom*<sup>154</sup>, the ECtHR found a violation of *Article 8* ECHR. The applicant, after his mother's death was taken into the care of the City Council and foster parents until the age of eighteen. At the age of eighteen he brought negligence proceedings against the Council and asked for discovery of his case records. His request was refused on the grounds of public interest. The ECtHR held that the information requested by the applicant was the only coherent record of the applicant's early childhood. The refusal of the local authority to grant the applicant access, without any kind of independent scrutiny to determine the genuineness of the confidentiality claim amounted to an infringement of the right to a private life under *Article 8* which, according to the ECtHR, requires that everyone should be able to establish details of their identity. Subsequent judgments of the ECtHR such as *Jaggi v. Switzerland*<sup>155</sup>, *Odievre v. France*<sup>156</sup> and *Mikulic v. Croatia*<sup>157</sup> confirmed that the right to know one's genetic origins falls within the scope of *Article 8* of the ECHR.

Nevertheless, in the subsequent cases mentioned above, the ECtHR rejected the claim that the absolute birth secrecy granted in some European countries like France<sup>158</sup> violates *Article 8* ECHR. In other words, there is no absolute right to information about genetic origins under *Article 8* ECHR. This means that a donor offspring's right to identifying information under the Convention must be balanced, with the conflicting right of the genetic parent to remain anonymous.

---

<sup>154</sup> *Gaskin v The United Kingdom*, 10454/83, 1989.

<sup>155</sup> *Jaggi v Switzerland*, 58757/00, 2006.

<sup>156</sup> *Odievre v France*, 42326/98, 2003.

<sup>157</sup> *Mikulic v. Croatia*, 53176/99, 2002.

<sup>158</sup> In the *Odievre* decision, the Court considered that there were two competing interests in the case before it: on the one hand, the right to know one's origins and the child's vital interest in its personal development and, on the other, a woman's interest in remaining anonymous in order to protect her health by giving birth in appropriate medical conditions. The general interest was also at stake, as French legislation aimed to protect the mother's and child's health at the birth and avoid illegal abortions. In the light of the diversity of practice to be found among the legal systems and traditions, the Court held that the states had to be afforded a margin of appreciation to decide which measures were apt to ensure that the rights guaranteed by the Convention were secured.

It is obvious that, the scope of donor offspring's right to identifying information under the Genetic Integrity Act is broader than the scope of *Article 8* ECHR. Consequently, Sweden has met its international obligations under *Article 8* of the ECHR with respect to the right to identifying information for donor offspring. The only possibility for Sweden to be found to be in breach of *Article 8*, could be if it permitted information about donors to be unreasonably withheld from donor offspring without carefully balancing the legitimate interests in question.

### 3.1.2. Surrogacy

“*Traditional surrogacy*” involves the egg of a surrogate mother and usually, the sperm of the commissioning father. Here the surrogate is the genetic mother of the child that she promises to give up, while the role of social and legal mother is taken by another woman<sup>159</sup>. Another form of surrogacy is “*gestational surrogacy*”, which utilises the process of IVF where the egg and semen are obtained from the commissioning couple (or from anonymous donors), the resultant embryo subsequently being implanted into the surrogate mother<sup>160</sup>. Intended parents usually prefer gestational surrogacy due to the lack of genetic ties between the child and the surrogate woman. Consequently, the likelihood of the surrogate changing her mind and exercising custodial claims is reduced<sup>161</sup>.

Gestational surrogacy can be “*altruistic*” or “*commercial*”. *Altruistic surrogacy* means a practice whereby a woman agrees, for no financial gain, to become pregnant and bear a child for another person or persons to whom she intends to transfer the child's care at, or shortly after, the child's birth<sup>162</sup>. In contrary, *commercial surrogacy* happens when a

---

<sup>159</sup> Niekerk and Zyl, 1995, p. 345.

<sup>160</sup> *Idem*.

<sup>161</sup> Lin, 2013, p. 551.

<sup>162</sup> *Altruistic vs. Commercial Surrogacy*, 2012.



couple or a single person pays to a woman in exchange for her carrying and giving birth to a child on their behalf.

In this part, I will analyse the legal framework concerning surrogacy arrangements in Sweden as well as, the international approach in conjunction with Swedish regulations.

### 3.1.2.1. The absence of an explicit national legal framework

In Swedish legislation, surrogacy arrangements are not expressly prohibited by statute. However, according to the current Swedish legislation, there is an implied statutory prohibition against surrogacy. In particular, this restriction can be found *in Chapter 7, Section 3 of the Genetic Integrity Act*:

*“A fertilised egg may be introduced into a woman’s body only if the woman is married or cohabiting and the spouse or cohabitee gives written consent to this. If the egg is not the woman’s own, the egg shall have been fertilised using the husband’s or cohabitee’s sperm.”*<sup>163</sup>

As a result, ART is not possible unless if one of the prospective parents is genetically connected to the child. Since the woman giving birth must also be one of the prospective parents<sup>164</sup>, this provision, in effect, prohibits the use of ART to facilitate surrogacy arrangements<sup>165</sup>. Nevertheless, there is no express provision that this

---

<sup>163</sup> The Genetic Integrity Act (SFS 2006:351).

<sup>164</sup> ART is permitted only when “the woman is married or cohabitating”, in the :Genetic Integrity Act (SFS 2006:351) Ch. 7, s. 3.

<sup>165</sup> Stoll, 2013, p. 115.

provision can prohibit “do it yourself” surrogacy arrangements<sup>166</sup>. It appears to be applied only in the case of publicly-funded Swedish hospitals or an institution authorised by the National Board of Health and Welfare to perform this kind of procedures.

Finally, concerning the provision that I mentioned above, it prohibits the use of ART for the facilitation of surrogacy arrangements. For this purpose, any such facilitation could result in the imposition of criminal sanctions. It is clear from the wording of Chapter 7, section 3 that in this case, criminal sanctions would only apply to the doctor who transferred the fertilised egg to the woman’s body, or to the institution which employed the doctor.

It should be mentioned that, in 2013, the Swedish Ethics Council for Medical Sciences, recommended that the government should allow the practice which is currently forbidden<sup>167</sup>. Instead, there are still some restrictions in the Council’s proposal: the person who offers her womb should be a close relative, explicitly a sister or a sister-in-law, the expectant mother carries a pregnancy to help out another individual without speculating on the birth and the women who want to be a surrogate mother should be women who have the possibility to fully decide over their own bodies<sup>168</sup>. The Council also decided unanimously to recommend to the legislator to allow the donation of fertilised eggs<sup>169</sup>.

### **3.1.2.2. Who is the legal mother in the case of surrogacy in Sweden?**

Taking into account the absence of specific provisions about surrogacy, the rules that are set out in the first three chapters of the Children and Parents Code establish the

---

<sup>166</sup> People who have the financial means and wish to enter into a private surrogacy arrangements in order to create family.

<sup>167</sup> Orlandi, 2013.

<sup>168</sup> Idem.

<sup>169</sup> Idem.

parenthood following surrogacy arrangements. But still, the Children and Parents Code remains silent regarding maternity.

As a consequence, Swedish law applies the unwritten presumption of maternity: *mater semper certa est*<sup>170</sup>. It is clear that, the mother of the child is the woman who gives birth to the child and a commissioning mother has no legal parental status under Swedish law at the time of the child's birth.

The most crucial point which is directly linked to the problem of "reproductive tourism" is that it makes no difference if the child is born in Sweden or abroad. Regardless of whether or not the commissioning mother's parental status as legal mother is recognised in the jurisdiction of the child's birth, she will not be recognised as the legal mother in Sweden, since, according to Swedish law, maternity flows from gestation<sup>171</sup>.

In particular, according to the *Swedish Citizenship Act (SFS 2001:82)*, a child born overseas following a surrogacy arrangement is not automatically a Swedish citizen even where the commissioning parents are both the genetic parents of the child. The child acquires Swedish citizenship by birth if the mother is a Swedish citizen.

In 2009, the Swedish Ambassador, refused to issue a passport for a child born through commercial surrogacy in Ukraine on the basis that the child was not a Swedish citizen. The commissioning mother was not falling under the definition of "mother"<sup>172</sup>.

Besides, surrogacy and ART of single women is not allowed in Sweden. Regardless of whether or not a single commissioning mother is genetically connected to the surrogate-born child, she cannot be regarded as a legal parent under Swedish law because she has not given birth to the child<sup>173</sup>. The only way for a single female commissioning parent to become a legal parent is through adoption<sup>174</sup>.

---

<sup>170</sup> Mater semper certa est ("the mother is always certain") is a Roman-law principle which has the power of praesumptio iuris et de iure, meaning that no counter-evidence can be made against this principle.

<sup>171</sup> Stoll, 2013, p. 121.

<sup>172</sup> Stoll, 2013, p. 121.

<sup>173</sup> Idem, p. 132.

<sup>174</sup> Idem.

### 3.1.2.3. Does the right to know ones origins under the CRC and the ECHR extend to surrogate-born children?

In the first part of this chapter, I examined the right to know ones origins in connection with sperm donation and Swedish regulations. The same question arises in the case of surrogacy and in particular in cross-border surrogacy. As there is no explicit legal framework concerning surrogacy in Sweden, many Swedish citizens decide to cross the borders and proceed in surrogacy arrangements abroad. But what happens when they return to their country of origin?

First of all, it is important to clarify the meaning of the term “parent” as found and interpreted in the CRC. Nowadays, the term “biological” parent may have a complex meaning. A typical example could be the egg donation, where the biological parent could be either the genetic parent or the birth mother. As far as the child’s right to know his or her origins is concerned, the definition of “parents” includes genetic parents (for medical reasons alone this knowledge is of increasing importance to the child) and birth parents, that is the mother who gave birth and the father who claimed paternity through partnership with the mother at the time of birth (or whatever the social definition of father is within the culture: the point being that such social definitions are important to children in terms of their identity)<sup>175</sup>.

The source of the child’s right to information about his or her biological origins is derived from the child’s right to know his or her parents. This right can be found on *Articles 7(1)* (section 2.1.1.3) and *8(1)*<sup>176</sup> of the CRC. If we interpret these articles the same way as in the case of donor offspring, it makes sense that surrogate-born children should also have the right to information about the surrogate mother.

---

<sup>175</sup> Hodgkin and Newell, 2002, p. 105.

<sup>176</sup>Preserving identity: “States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference”.

More specifically, if surrogate-born children have a right to information about the surrogate mother under *Article 7*, recording and preserving identifying information about surrogate mothers in accordance with *Article 8*, it could be interpreted as necessary since the existence of such information is a prerequisite for surrogate-born children to be able to trace their biological origins<sup>177</sup>. Our main question now would be if the right to know under *Article 7* extends to identifying information.

In determining the meaning of the phrase “*as far as possible*” in the *Article 7 (1)* of the CRC, three different situations have been identified: a parent cannot be identified or a mother refuses to identify the father or a State decides that a parent should not be identified (margin of appreciation). Even so, there is a little room for an interpretation that permits the destruction of records about a child’s genetic parents or a gestational surrogate mother where this information is available<sup>178</sup>.

The source of the right to information about biological origins in the ECHR is *Article 8*, the right to respect for private and family life (Section 2.1.1.4). Engaging *Article 8* does not appear to be a problem for donor offspring. As a result, it should not be a problem for surrogate-born children. But, the right to information about origins is not absolute because of the competing interests that may exist and the margin of appreciation of the States.

Regarding Sweden, on March 2012, the Swedish Parliament accepted that cross-border surrogacy is a problem. Therefore, it proposed a broad and unbiased investigation on surrogacy to be undertaken comprising legal, ethical and economic perspectives and having regard to international circumstances. On February 2013, the Swedish National Council on Medical Ethics (SMER) claimed that it is urgent that children born following surrogacy abroad are given the same conditions as other children<sup>179</sup>.

All things considered, according to *Jane Stoll*, surrogate-born children have a right to information about the surrogate mother<sup>180</sup>. Perhaps, in a domestic level the existence of

---

<sup>177</sup> Stoll, 2013, Presentation.

<sup>178</sup> Idem.

<sup>179</sup> Stoll, 2013, Presentation.

<sup>180</sup> Idem.

a central register, a DNA register and birth records could facilitate the access to information. As well as the improvement of the searching process, the counseling for parents and authorities and the disclosure of more information to the public.

#### **3.1.2.4. Reasons why Swedish citizens seek ART abroad**

Cross-border reproductive care travel usually refers to patients who want to avoid legal restrictions but this is not the only motivation. This phenomenon is more complex and its extent is a consequence of the political, economic, religious and social factors influencing assisted reproduction practice and accessibility. As a result it is important to reveal all the main causes of travelling abroad for ART.

Sweden is a country which is considered as a major point of departure for patients of reproductive tourism. To begin with, the main reasons why patient migration is widespread in Sweden are legal: the prohibition of donor anonymity and of surrogacy arrangements for single women<sup>181</sup>.

Swedish legislation in the 1980s promoted one of the first documented “reproductive tourism waves”: Swedish couples started to seek anonymous donor insemination in Denmark to avoid the Swedish law<sup>182</sup>. In addition, single Swedish women seek surrogacy arrangements abroad because they are considered as not eligible for infertility treatments. They usually choose altruistic surrogacy which is allowed in countries such as Israel and Greece.

Another reason is that many big facilities in various countries like Sweden have a long waiting period. This is a result of a combination of factors, involving legal restrictions (for instance, shortage of male donors due to the removal of anonymity). In fact, Sweden has almost a two year waiting list for sperm donation<sup>183</sup>. In this scenario, the

---

<sup>181</sup> Sekhar, Presentation.

<sup>182</sup> Ferrareti et al, 2010, p. 262.

<sup>183</sup> Samit, Presentation.

intended parents would not want to wait. Hence, this factor is a major contributor to reproductive tourism.

Finally, ART costs may be higher in Sweden than in other countries but this reason does not seem to promote significantly patient migration in our case. According to the 2007 Surveillance, only six countries in the world offer a complete public coverage: Belgium, France, Greece, Slovenia, Sweden and Israel<sup>184</sup>.

## 3.2. Other European countries where citizens seek ART abroad

### 3.2.1. The case of the United Kingdom

The UK accepts surrogate motherhood since 1985. According to *Surrogacy Arrangements Act 1985*, surrogacy arrangements are not illegal if they are altruistic<sup>185</sup>. Furthermore, according to the *Human Fertilisation and Embryology Act of 2008*, the surrogate is the mother of the child<sup>186</sup>.

However, it allows couples that desire to have children by using a surrogate, to obtain legal parenthood through a parental order which modifies the birth certificate<sup>187</sup>. In addition, *Section 59* of the same Act allows a “reasonable payment”, to be paid to the surrogate for carrying and giving birth to the child.

Nevertheless, this is not always the case for payments for overseas surrogacy. The case *X and Y (foreign surrogacy) 2008*<sup>188</sup> was the first international surrogacy case to authorise a commercial surrogacy arrangement. A British couple paid a Ukrainian surrogate the total amount of 27.000euros in order to carry their children. The High Court authorised this transaction because the intended parents had behaved honestly, the surrogate had not been exploited and the children would be otherwise “marooned

---

<sup>184</sup> Ferrareti et al, 2010, p. 263.

<sup>185</sup> “Surrogacy Arrangements Act 1985”, Chapter 49.

<sup>186</sup> “Human Fertilisation and Embryology Act”, “Meaning of mother”, Section 33.

<sup>187</sup> “Human Fertilisation and Embryology Act 2008”, Section 54.

<sup>188</sup> X and Y (Foreign Surrogacy), Case No: FD08P01466, High Court of Justice of Family Division, 9 December 2008.

stateless and parentless” in Ukraine. Another remarkable case is *CW v NT 2011*<sup>189</sup> where the Court awarded the care of the child to the surrogate mother (through traditional surrogacy). The Court found that removing the child from her mother would cause harm to the child’s emotions. It follows that, UK law may be restricted but the British Courts follow a child-centered line in their decisions concerning sensitive issues, such as surrogacy.

In 2004, the *Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004/1511*, enabled donor-conceived children to access the identity of their sperm (egg or embryo) donor when they reach the age of 18<sup>190</sup>. Consequently, since 1<sup>st</sup> April 2005, any person who was born as a result of donation can request the donor’s identity. In 1991, Britain logged 503 sperm donors, according to the figures from the Human Fertilisation and Embryology Authority. In 2000, there were 325 and in 2006- the year after the law was changed- the number dropped to 307<sup>191</sup>.

Above all, which are the most commonly reasons that motivate UK couples to seek ART abroad? According to a recent study<sup>192</sup>, patient motivations for travelling abroad vary. A desire for affordable treatment with donor gametes was in a high number of cases (71%). The main reasons are: donor shortages (due to the ban of donor anonymity in 2005), the cost of UK treatments<sup>193</sup>, higher success rates abroad, treatment in a less stressful environment and dissatisfaction with UK treatment<sup>194</sup>. The most popular destinations are Spain and the Czech Republic<sup>195</sup>.

---

<sup>189</sup> *CW v NT & Anor*, Case No: NG10P01394, High Court of Justice of Family Division, 21 January 2011.

<sup>190</sup> The Human Fertilisation and Embryology Authority Regulations 2004, Regulation 2.

<sup>191</sup> Associated Press, 2008.

<sup>192</sup> Culley et al, 2011.

<sup>193</sup> A typical example is the case of surrogacy: Paying for a surrogate is illegal but again, the couple needs to cover the surrogate’s expenses such as travel expenses, clinic expenses and loss of earnings. In particular, the costs of expenses can range from £7,000 to £15,000 (8.602 euros-18.433 euros). There are also supplementary costs that incur if the couple uses the services of an IVF clinic (Surrogacy UK Information Support Community, 2014).

<sup>194</sup> Culley et al, 2011, p. 1.

<sup>195</sup> Idem.



### 3.2.2. The case of France

Surrogate motherhood is prohibited in France since 1991 under the decision of the “Cour de Cassation” (France’s Supreme Court)<sup>196</sup>. This prohibition was codified in article 16-7 of *French Civil Code* (“Code Civil”): a surrogacy contract is null and void, and violations are punished by civil and criminal sanctions<sup>197</sup>.

This prohibition was reaffirmed during the revision of Bioethics Laws in 2009-2010. The Committee in charge found that surrogacy is incompatible with French moral principles and human dignity<sup>198</sup>. The Committee referred also to the case of the UK and mentioned that the UK law favors surrogate mothers and creates insecurity for adopting couples by allowing surrogate mothers to keep the child after birth<sup>199</sup>. Since 2010, French courts follow this line and deny surrogacy arrangements abroad, adoption and recognition of French citizenship to several children born overseas from surrogates<sup>200</sup>. However, last year, the Justice Minister *Christiane Taubira* tried to issue a circular and proposed to the French Courts to accept citizenship for children born via surrogates in other countries<sup>201</sup>.

Sperm donation in France is regulated in *Bioethics Law of 1994* (Loi de bioéthique de 1994). In the article L666-1 of *Bioethics Law* is cited that the sperm donor remains anonymous and he has to be a volunteer, in other words there is no financial profit. Moreover, in the article L152-2 of the same law, it is cited that only heterosexual

---

<sup>196</sup> Cass. Ass. plén., 31/05/1991, 90-20105.

<sup>197</sup> Bertilotti, 2012.

<sup>198</sup> Idem.

<sup>199</sup> Idem.

<sup>200</sup> In the *Menesson case*, the Cour de Cassation ruled that it was contrary to public policy to give effect to foreign surrogacy agreements. The intending parents have already appealed to the ECHR (*Menesson and Others v. France* no.65192/11). The ECHR in its cases *Kroon v. Netherlands*, 27/10/1994 and *Wagner v. Luxembourg*, 28/06/2007 favors the protection of the family and the children and could be possible to condemn France in the future.

<sup>201</sup> Beaudoux, 2013.

couples are entitled to ART<sup>202</sup>. As a result, many French lesbians travel to Belgium, Spain or Denmark to be inseminated with donor sperm<sup>203</sup>.

In France, even if sperm donation is anonymous and the government covers donor's expenses, there are problems of sperm shortage. France registered 248 sperm donors in 2006, according to the country's Agency of Biomedicine, which is not enough to supply demand<sup>204</sup>.

It is clear that French law is restricted and that leads French citizens to seek ART abroad. According to a study conducted by the European Society of Human Reproduction and Embryology (la Société Européenne de Reproduction et d'Embryologie) and led by *Dr. Françoise Shenfield*, in 107 European couples that seek ART abroad, 9 of them are French<sup>205</sup>. The most common destinations are: Belgium, Hungary, Denmark, Slovenia, Spain and Switzerland<sup>206</sup>.

### 3.3. Legal problems deriving from “reproductive tourism”

#### 3.3.1. A common issue that “reproductive tourists” may face: the problem of stateless children

The acquisition of nationality at birth can be operated under two principles: *jus soli* (right of the soil) and *jus sanguinis* (right of blood)<sup>207</sup>. Nations who operate under the *jus soli* confer citizenship to those born within its territories. On the other hand, nations

---

<sup>202</sup> On 9 April 2004, the Tribunal de Grande Instance de Versailles (Great Tribunal of Versailles) refused to concede parental rights to a homosexual couple who was conceived through heterologous artificial insemination in Belgium (Dupont, 2014). It is remarkable that homosexual marriage is legal in France since May 2013, but adoption or ART for homosexual couples are not.

<sup>203</sup> Van Hoof and Pennings, 2012, p.189.

<sup>204</sup> Associated Press, 2008.

<sup>205</sup> Gardes, 2010.

<sup>206</sup> Nau, 2009.

<sup>207</sup> Lin, 2013, p. 555.

who operate under the *jus sanguinis* grant citizenship based upon the nationality of the child's parents or ancestors<sup>208</sup>.

In the case of surrogacy, if a couple hires a surrogate in a foreign nation that is operating under *jus soli*, their child would not be born stateless, although there is no guarantee that the couple's native country would recognise the child as a citizen<sup>209</sup>. Conversely, a couple whose child was born through surrogacy in a nation operating under *jus sanguinis* may find that their child is not recognised as a citizen of any nation, as a result the child will be stateless<sup>210</sup>.

A stateless individual is deprived of his rights in a national and international level. Singularly, nationality is the main link between the individual and international law. In addition, in a national level, stateless persons may be denied access to education, health care, legal employment and political participation<sup>211</sup>.

The individual's right to nationality is protected under international law. The *article 15* of the *Universal Declaration of Human Rights* cites "everyone has the right to a nationality"<sup>212</sup>. Furthermore, *the Convention of the Rights of the Child* in its *article 7* proclaims that children have "the right to acquire a nationality"<sup>213</sup>. There are also more specific conventions in order to eliminate the problem of statelessness such as the *Convention relating to the Status of Stateless Persons*<sup>214</sup> and the *Convention on the Reduction of Statelessness*<sup>215</sup>.

Usually the States do not seem to comply with the international regulations without realising the consequences. On the one hand, the state which creates statelessness may gain some temporary political advantages by securing its internal value system<sup>216</sup>. On

---

<sup>208</sup> Weil, 2001, p. 17.

<sup>209</sup> Lin, 2013, p. 556.

<sup>210</sup> Idem.

<sup>211</sup> Idem, p. 559.

<sup>212</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) art. 15, 1948.

<sup>213</sup> Convention on the Rights of the Child art. 7(1), 1989.

<sup>214</sup> The Convention relating to the Status of Stateless Persons, U.N., Text of the 1954 Convention Relating to the Status of Stateless Persons.

<sup>215</sup> The Convention on the Reduction of Statelessness, U.N., Text of the 1961 Convention on the Reduction of Statelessness.

<sup>216</sup> Walker, 1981, p. 107.

the other hand, denationalisation accompanied by exclusion from participation in the internal value processes may have serious consequences to the stability and growth of the state itself<sup>217</sup>. Likewise, the internal value processes of the state can be impacted by an influx of stateless persons with a different background and culture. The state may be unable to integrate these persons into its value system and to expel the undesirables due to the unwillingness of any other country to receive them<sup>218</sup>.

The impact of statelessness is even more intense in relation to the child. Stateless children are vulnerable to the multiple deprivations of rights caused by a lack of nationality. Their stateless status means they have no legal personality and have little or no voice to influence the society they live in<sup>219</sup>. Basic human rights such as the access to certain forms of health care and social security are also affected. Finally, the most obvious challenge facing stateless children is their deprivation of the right to education<sup>220</sup>.

### 3.3.2. The conflict between national legislations and the EU legal order

In 1996, Diane Blood, sought to use sperm which had been collected from her deceased husband, while he was ill with meningitis. Diane had discussed with her husband having a family but he had not given written consent for the taking of his sperm. In English law, the use of the sperm was prohibited under the *UK Human Fertilisation and Embryology Act 1990*. However, the English Court of Appeal granted Diane permission to receive the treatment she sought in Belgium relying on her right to receive medical treatment in another Member State according to the “directly effective”<sup>221</sup> articles 56 and 57 of the *Treaty on the Functioning of the European Union (TFEU)* about the freedom of services. The Blood case shows that provisions of EU law may be capable

---

<sup>217</sup> Idem, p. 108.

<sup>218</sup> Idem.

<sup>219</sup> Open Society Justice Initiative, “Children’s right to a nationality”.

<sup>220</sup> Idem.

<sup>221</sup> It has been ruled by the Court of Justice of the European Union in the *Case 33/74 Van Binsbergen*, 1974, that the articles 59 and 60 TFEU are “directly effective”. In other words, there is an automatic application of these articles in the national legal orders of the Member States.

of undermining national legal provisions even those enshrined in national constitutions, concerning the regulation of human reproduction<sup>222</sup>.

Similarly, EU law could extend to various medical services relating to human reproduction (i.e. artificial insemination, IVF). The service of surrogate motherhood could also fall within EU law. The only condition is that the service provided should fall within the scope of EU law. In particular, the articles 56 and 57 *TFEU* can be applied if the “service” is remunerated and there is an element of “inter-state” activity<sup>223</sup>.

The problem that arises in that case is that the application of EU law in such circumstances, where moral or ethical choices have been given legal force within states, constitutes a situation of conflict between national and European regulatory regimes<sup>224</sup>. However, the recent *directive 2011/24/EU*<sup>225</sup> on the application of patient’s rights in cross-border healthcare can be considered as a small step in the direction of legal harmonisation on the basics of cross-border healthcare, but it does not alleviate the tension of legal diversity on ethically controversial treatments such as surrogacy and sperm donation<sup>226</sup>.

### 3.4. Concluding remarks

After having analysed sperm donation and surrogacy in Sweden, it appears that the Swedish legal framework is restricted and this is the main reason why many Sweds seek ART abroad. However, in my point of view, Swedish legislation is not exactly restricted but deeply child-centered.

---

<sup>222</sup> Hervey, 1998, p. 210.

<sup>223</sup> *Idem.*

<sup>224</sup> *Idem.*

<sup>225</sup> Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients’ rights in cross-border healthcare.

<sup>226</sup> Van Hoof and Pennings, 2012, p. 194.

Sweden was the first country to ban donor anonymity. This reform was made due to ethical problems such as the implications that sperm donor anonymity can have to the psychology and the health of the child (Section 2.4.1.). Furthermore, there is an unclear regulation on surrogacy. It is not expressly forbidden but it is not permitted. I believe that this uncertainty exists because the case of surrogacy is more complicated than sperm donation. Many parties are involved but mainly, the surrogate carries a child during nine months and that makes surrogacy a much more complicated procedure comparing to sperm donation. Accordingly, if there is a future regulation the Swedish legislator probably will follow a child-centered line but at the same time he will have to balance the interests of the child, the surrogate and the commissioning parents.

It is clear that, children's rights are of major importance and they have to be respected. However, Swedish legislation has been over protective without managing to strike a balance between the rights of all the stakeholders. As a result, Swedish citizens often become "reproductive tourists". Furthermore, they face a lot of problems when they come back to their country of origin. Particularly, the commissioning parents may be unsecure about how to get their parental rights, probably they will have to take part in different uncertain proceedings and this will have an impact on their psychology but can also jeopardise the legal security. Of course, similar problems exist also in other European countries with similar legal frameworks such as the UK and France.

On the one hand, EU citizens are free to move inside the EU and benefit from EU services. On the other hand, when citizens make use of "reproductive tourism" for law evasion, they will not be prevented from going or punished when they return: states impose rules to regulate conduct on their territory, but the behaviour of citizens while they are abroad is not controlled<sup>227</sup>. At that point, two kinds of ethical arguments should be distinguished: utilitarian arguments (Section 2.2.1.), that refer to the effects on the welfare on the persons involved, and deontological arguments, which refer to moral

---

<sup>227</sup> Van Hoof and Guido Pennings, 2011, p. 547.

rules and rights and duties (Section 2.2.2.). Usually, these arguments overlap: interests of people are protected by rights<sup>228</sup>.

The diversity of legislation on applications of medically assisted reproduction demonstrates the lack of consensus on the harmfulness or wrongfulness of these treatments<sup>229</sup>. In the meantime, “reproductive tourists” keep on facing legal issues when they return to their country of origin such as the statelessness of their children. That triggers the call for a legal harmonisation at least concerning safety and safety and quality standards.

---

<sup>228</sup> *Idem*, p. 548.

<sup>229</sup> *Idem*, p. 552.

## Chapter 4

### 4. Legal issues

#### 4.1. The case of Greece

In the previous chapter, I analysed one of the countries of origin of “reproductive tourism”, Sweden. In this chapter, I will analyse a country of destination for “reproductive tourists”, Greece.

Until 2002, there was no Greek legal regulation for assisted reproduction, despite the fact that there were many IVF clinics<sup>230</sup>. On 19 December 2002 the Greek Parliament approved the *Law 3089/ 2002 “Medical assistance in human reproduction”* (N. 3089/ 2002 «*Ιατρική Υποβοήθηση στην ανθρώπινη αναπαραγωγή*») and on 18 January 2005 the *Law 3305/2005 “Enforcement of Medically Assisted Reproduction”* (N. 3305/2005 «*Εφαρμογή της Ιατρικώς Υποβοηθούμενης Αναπαραγωγής*»)<sup>231</sup>.

European registrations indicate that the proportion of infants born by assisted reproduction in 16 European countries comes to 3.9% of all live-born children<sup>232</sup>. These techniques have been widely developed in Greece, and since 2005, 49 reproductive clinics have been officially registered, a number which is greater than other European countries with the same population<sup>233</sup>.

It is estimated that 1.000 couples travel to Greece every year to seek ART treatments in regards to Greece’s high success rates and its low prices comparing to other countries. These couples usually combine their trip with a vacation either to Athens or the Greek islands. Consequently, Greece has often been characterised in scientific news as an “ideal destination for reproductive tourism”<sup>234</sup>.

---

<sup>230</sup> Leon et al, 2011, p. 820.

<sup>231</sup> Idem, p. 821.

<sup>232</sup> Andersen et al, 2009, pp. 1-21.

<sup>233</sup> Leon et al, 2011, p. 821.

<sup>234</sup> Gtp headlines, “Greece Considered Ideal “Reproductive Tourism” Destination”, 2013.



#### 4.1.1. Sperm donation

##### 4.1.1.1. The national legal framework

It could be said that even before the legal regulation for assisted reproduction, the sperm donation was allowed in Greece. In particular, sperm donation was tacitly allowed in the provisions of the previous *article 1471 par. 2 No 2 of the Civil Code (άρθρο 1471 παρ.2 αρ.2 ΑΚ)*<sup>235</sup>. In addition, it used to be common that when genetic material was used from a third donor, he had to be anonymous. The “principle of anonymity” found its source *in the article 8 of the Greek Law 1383/1983*<sup>236</sup> (N. 1383/1983) concerning the transplantation of organs, even if the scope of this provision exempted the case of sperm donation.

*Article 1455 of the Civil Code* sets the legal framework for medically assisted reproduction<sup>237</sup>:

*“Medically assisted human reproduction is permitted only in the case of inability to have children in a natural way or to avoid the transmission of a severe genetic disorder to the child.”*

*Article 1456 of the Civil Code* allows the access of unmarried or single women to medically assisted human reproduction (artificial fertilisation). As indicated in *article 1457 of the Civil Code*, medically assisted reproduction is also allowed after the death of the spouse or the partner.

Regarding the anonymity of the sperm donor, *article 1460 of the Civil Code* indicates that the identity of the donor of reproductive material is not to be disclosed to the persons who want to have a child. Medical information concerning the donor is kept

---

<sup>235</sup> Kounougeri-Manoledaki, 2005, p. 92.

<sup>236</sup> Later, the new Law 2737/1999 (N. 2737/1999) concerning the transplantation of organs, repealed the article 8.

<sup>237</sup> Through the enactment of Law 3089/2002 (N. 3089/2002) on Medically Assisted Human Reproduction.

confidential. Access to this information is permissible only for the child's medical benefit. Finally, the identity of the child and its parents is not disclosed to the donor<sup>238</sup>.

*Kounougeri-Manoledaki* explains that the *article 1460 of the Civil Code* concerning sperm donor anonymity is based on the “principle of socio-emotional connection”. According to this principle, in a century of a significant progress of biotechnology, the “social connection” between the person who desires a child and the child is more important than the “biological truth” i.e. the biological connection between the donor and the child<sup>239</sup>. Of course, other arguments were taken into account such as the privacy of donors, the psychology of the parents and the child (Section 2.4.2.) and the fact that the donor will not be able to claim parental rights<sup>240</sup>.

In conclusion, the Greek legal framework regarding assisted reproduction and sperm donation cannot be considered as a restricted one. The only restriction is that assisted reproduction is not allowed to homosexual couples, which could be justified by the fact that in general, Greek law does not recognise any rights to homosexual couples yet<sup>241</sup>.

#### 4.1.1.2. Issues relating to the CRC relevant to the Greek legal framework

The problem of donor anonymity is most commonly linked to *Articles 3* (the best interests of the child) and *7* (the right to know one's origins, Section 3.1.1.2.) of the *CRC*.

**Article 3** establishes that: “*in all actions concerning children, whether undertaken by public or private social welfare organisations, courts of law, administrative authorities*

---

<sup>238</sup> Leon et al, 2011, p. 821.

<sup>239</sup> Kounougeri-Manoledaki, 2005, p. 98.

<sup>240</sup> Idem, p. 97.

<sup>241</sup> On 7 November 2013, the ECtHR condemned Greece for banning same-sex civil unions in the case *Valianatos and others v. Greece (applications nos. 29381/09 and 32684/09)*. The Court held that the Greek position was unique in Europe. Elsewhere in Europe, whenever civil unions were introduced, they included cohabitation and family rights for same-sex couples. However, the execution of this judgment is still pending.

or legislative bodies, the **best interests** of the child shall be a primary consideration”<sup>242</sup>.

It could be argued that, since the *CRC* refers to the best interests of the child only as a primary consideration, and not *the* primary, it cannot be relied upon to give the best interests of children any degree of priority compared to the best interests of others (the parents and the sperm donor in our case)<sup>243</sup>. It is true that, there is an ambiguity about the precise meaning of the welfare of the child as it could be interpreted in different ways. *Dawn Primarolo*, for instance, has argued that it is in children’s best interests not to know anything about the circumstances of their origins since this could set them apart from other children<sup>244</sup>.

Nevertheless, *article 7 of the CRC* establishes the right of the child to know his/her origins. In addition, *article 2* provides for protection from discrimination. It could be argued that withholding information from a donor-conceived person about his/ her origins and providing such information could be discriminatory<sup>245</sup>. Consequently, Greek legislation which supports donor anonymity could be considered that breaches *articles 7 and 2 of the Convention*.

The *United Nations Committee on the Rights of the Child (UNCRC)*, has demonstrated concerns that the existence of donor anonymity may breach *Articles 3 and 7 of the Convention*. It has also formally endorsed the abolition of donor anonymity. However, the majority of countries which permit donor conception also support the principle of donor anonymity<sup>246</sup>.

#### 4.1.1.3. Greek Law and the right to privacy

The anonymity of the donor is about to protect donor rights and his privacy. *Article 8 of the ECHR* defines privacy as the right to respect private and family life (Section

---

<sup>242</sup> *CRC*, supra note 19, art. 3.

<sup>243</sup> Blyth and Farrand, 2004, p. 93.

<sup>244</sup> *Idem*, p. 94.

<sup>245</sup> *Idem*, p. 96.

<sup>246</sup> *Idem*, p. 99.

3.1.1.3.). In exercising the privacy right there shall be no interference by a public authority except cases when it is in accordance with the law and is necessary in a democratic society<sup>247</sup>.

Anonymity as the provision of the privacy right is based on the individual right of everyone to have full control over their bodies. The donor anonymity is based on the dignity of the human body and the right to have a quiet life<sup>248</sup>. If we interpret *Article 8* in this way, it protects the right of the donor to maintain the anonymity in connection with all the actions he performs with his body such as the sperm donation<sup>249</sup>. In addition, if we take into account that most of the donors are young students who become sperm donors for financial purposes, the disclosure of their identity can lead to a breach of their family life and privacy<sup>250</sup>.

The knowledge of genetic origins contains two parts: the first is the secrecy issues which touches the question whether the person is informed that he was conceived by means of sperm donation. The second part is the donor anonymity concerning the release of the identity of the donor to the offspring<sup>251</sup>. However, no country has a rule that obliges the parents to inform the child or that informs the child itself against the will of the parents<sup>252</sup>.

Finally, the problem of donor anonymity and the right to privacy depends on how we interpret the ECHR. The ECtHR in its case law (Section 3.1.1.3.) has not proposed a common policy concerning donor anonymity. Nevertheless, it confirms that the disclosure of donor information falls within the scope of *Article 8* but at the same time it does not consider the right to information about one's origins as an absolute right. As there is no consensus on how we should interpret the ECHR, we cannot claim that countries which do not ban donor anonymity, such as Greece, violate the *article 8* of the Convention.

---

<sup>247</sup> Zyberaj, 2013, p. 578.

<sup>248</sup> Idem, p. 579.

<sup>249</sup> Idem.

<sup>250</sup> Idem.

<sup>251</sup> Idem.

<sup>252</sup> Pennings, 2001, p. 14.

#### 4.1.1.4. The “double track” policy

Although there is no evidence that any one policy is the best solution, it is obvious that legislators tend to impose one position about donor anonymity. However, the most evident alternative policy is to let the parties decide for themselves<sup>253</sup>.

According to *Guido Pennings*, the policy is simple: a donor has the choice to enter the program as an anonymous or as an identifiable donor and recipients can choose between an identifiable or an anonymous donor<sup>254</sup>. This model is built on the concept that no position is better than the others and the parties involved should be able to decide under which conditions they want to participate.

The model could also be applied to other dimensions of the donation. First, donors could decide if they want to be contacted by the donor offspring. Besides, donors can claim the right to decide whether their gametes should be given to single or lesbian women. Finally, recipients could be asked to give non-identifying information about themselves to the donor<sup>255</sup>.

This model has already been established in some sperm banks in USA and in the University Hospital of Leiden in the Netherlands<sup>256</sup>. All things considered, in my opinion, the “double-track” policy seems like a good attempt to “solve” the problem of donor anonymity because it balances the rights of all the parties (the donors, recipients and the donor offspring).

#### 4.1.1.5. Sperm donation and the Greek financial crisis

---

<sup>253</sup> Pennings, 1997, p. 2839.

<sup>254</sup> Idem.

<sup>255</sup> Idem, p. 2840.

<sup>256</sup> Idem, p. 2839.

Due to the economic crisis, hundreds of Greeks and immigrants who live in Greece sell their sperm in order to earn money, especially during summer or before Christmas holidays<sup>257</sup>.

According to *Article 8 of the Law 3305/ 2005 “Enforcement of Medically Assisted Reproduction”* (N. 3305/2005, «Εφαρμογή της Ιατρικώς Υποβοηθούμενης Αναπαραγωγής»), a sperm donor can receive only a compensation regarding the medical expenses and the transport. However, some sperm banks are willing to pay as much as an additional of thirty to fifty euros for each donation<sup>258</sup>.

Unfortunately, due to austerity measures, there is no longer the National Independent Authority for Medically Assisted Reproduction<sup>259</sup> to control whether the necessary medical tests have taken place or not. The sperm banks are operating without permission, since there is no authority to publish it<sup>260</sup>. In addition, due to the lack of the National Authority for Medically Assisted Reproduction, the State does not even know the exact number of sperm banks that exist, nor whether they follow the necessary rules<sup>261</sup>.

*Article 26 of the Directive 2004/ 23/ EC* which also applies in assisted reproductive technologies (Section 1.4.1.), establishes that:

*“Member States should organise inspections and control measures, to be carried out by officials representing the competent authority, to ensure that the tissue establishments comply with the provisions of this Directive”*<sup>262</sup>.

The directives bind any Member State to which it is addressed with regard to the result to be achieved, while allowing the national authorities competency as to the form and

---

<sup>257</sup> Pavlou, 2011.

<sup>258</sup> Idem.

<sup>259</sup> The functions of the National Independent Authority for Medically Assisted Reproduction were regulated by the Law 3305/2005 , Chapter E.

<sup>260</sup> Newsbeast, «Ουρές στις τράπεζες σπέρματος», [Queues in Sperm Banks] 2011.

<sup>261</sup> Idem.

<sup>262</sup> Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells.

methods used<sup>263</sup>. Furthermore, each Member State is responsible for the implementation of EU law within its legal system. Under the Treaties<sup>264</sup>, the Commission of the European Communities is responsible for ensuring that EU law is applied. Consequently, when a Member State fails to comply with EU law, the Commission has powers of its own to try to bring the infringement to an end and, where necessary, may refer the case to the European Court of Justice<sup>265</sup>.

In the case of Greece, the National Independent Authority for Medically Assisted Reproduction which was responsible to control the function of sperm banks does not exist anymore due to austerity measures. Consequently, it could be said that Greece has failed to comply with the EU law. In that case, the Commission could take whatever action seems to be appropriate in response to either a complaint or indications of infringements which it detects itself<sup>266</sup>.

Personally, I believe that this would be an extremely complicated case because on the one hand, Greece was obliged to comply with the austerity measures and on the other hand, non-compliance with the Directive is a violation of EU law. In addition, Greece is a major destination for “reproductive tourists” and if the gametes are not sufficiently controlled and a problem occurs, it would have a grave impact in European public health (and worldwide).

#### 4.1.2. Surrogacy

In *Chapter 3 Section 3.1.2.*, I analysed different types of surrogacy such as “traditional”, “gestational” and then the categorisation of “gestational” surrogacy into “altruistic” and

---

<sup>263</sup> Moussis, “Access to European Union law, economics, policies”.

<sup>264</sup> *Article 258 of the Treaty on the Functioning of the EU and Article 106a of the Euratom Treaty.*

<sup>265</sup> European Commission, “Infringements of EU law”.

<sup>266</sup> *Idem.*

“commercial” surrogacy. For the purposes of this Section, I will also refer to “social surrogacy” and “gay surrogacy”.

“*Social surrogacy*” is the type of gestational surrogacy, where a woman decides to have another woman bear her child by choice (for cosmetic or career reasons), even though she is able to carry the child herself at no significant risk<sup>267</sup>. “*Gay surrogacy*” is the type of surrogacy where a gay male couple wishing to have a baby, rent the services of a surrogate mother who offers her womb and sometimes her ovum. One of the two fathers provides the sperm<sup>268</sup>.

#### 4.1.2.1. The national legal framework

Greek legislation uses two terms: carrying maternity and replaced maternity. The first term describes the situation in which a woman puts herself forward for the transfer to her uterus of an embryo produced *in vitro* with gametes of the couple (“the rent of uterus”). The second term describes the situation in which a woman puts forward both her oocytes and uterus. In that case, the woman is engaged to deliver the baby to the third party that it had been “commissioned from”. The second situation is prohibited by Greek law<sup>269</sup>.

Since 2002 only altruistic gestational surrogacy is legal in Greece<sup>270</sup> after a special permission of the court. Surrogacy is regulated in *Article 1458 of the Greek Civil Code*<sup>271</sup>:

---

<sup>267</sup> Hatzis, 2010, p. 2.

<sup>268</sup> Idem.

<sup>269</sup> Leon et al, 2011, p. 822.

<sup>270</sup> Hatzis believes that discrimination is a consequence of altruistic surrogacy. He believes that it is discriminative against couples with no altruistic relatives or friends available and unfair against surrogates because it doesn't allow them to decide for themselves about the cost of their decision.

<sup>271</sup> Introduced through article 8 of the Law 3089/ 2002 (N.3089/2002).



*“The transfer of a fertilised ova into the body of another woman -the ova should not be hers- and the pregnancy by her is allowed by a court authorisation granted before the transfer, given that there is a written and, without any financial benefit, agreement between the persons wishing to have a child and the surrogate mother and in case that the latter is married of her spouse, as well. The court authorization is issued after an application by the woman who wants to have a child, given that it is confirmed she is medically unable to conceive”.*

Later, the Law 3305/2005 “Enforcement of Medically Assisted Reproduction” (N. 3305/2005 «Εφαρμογή της Ιατρικώς Υποβοηθούμενης Αναπαραγωγής») regulated assisted reproduction and surrogacy in more detail. However, only the most important articles will be mentioned such as *article 13 paragraph 4 and article 26 paragraph 8.*

**Article 13 paragraph 4 (Surrogacy):** *The agreement for the surrogacy should be made without financial compensation. The following are not considered as financial compensation:*

*a. The payment for any expenses necessary for the artificial insemination procedure, the pregnancy, the delivery and the childbed.*

*b. The restitution for any damages incurred and lost wages by the surrogate because she left her work or she took an unpaid leave of absence during the periods (and because) of insemination, pregnancy, delivery and childbed<sup>272</sup>.*

**Article 26 paragraph 8 (Criminal Sanctions):** *Whoever participates in a surrogacy procedure where the requirements of art. 1458 of Greek Civil Law, art. 8 of Law 3089/2002 and art. 13 of this law, are not met, is liable to imprisonment for a term at least of two (2) years and a fine of at least €1.500. The same sanction applies to:*

*- whoever publicly, with the circulation of documents, images or representations, introduces, draws attention to or advertise (even covertly), the procurement of a child through a surrogate mother*

---

<sup>272</sup> As translated by Hatzis.

- or he/she provides professional services as a middleman for any kind of financial consideration

- or he/she offers, in the same way, his/her services or the services of another for the attainment of this goal<sup>273</sup>.

To sum up, “traditional”, “commercial” and “social surrogacy” are explicitly prohibited by the Law. However, according to *Vidalis*, there is no problem of constitutionality in the case of “social surrogacy”. This position is based on the fact that the right to found a family is subject to individual freedom. This freedom does not justify any restrictions on different choices of family foundation. However, possible restrictions (for reasons of social acceptability of the method) on the right to found a family cannot be considered as unconstitutional, as long as the possibility to establish a family through various ways such as adoption is ensured to the individual<sup>274</sup>.

Finally, “gay surrogacy” is implicitly prohibited in a country where same sex civil-unions are banned. Surrogacy is only permitted after a judicial decision issued by the district court where the commissioning parents and the surrogate reside.

#### 4.1.2.2. Legal motherhood in the case of surrogacy and the “freedom of services”

*Article 1464 of the Civil Code* (an exception to the rule *mater semper certa est*) establishes that in the case of gestational surrogacy, it is presumed that the mother of the child is the one who receives the court authorisation. In other words, the commissioning parents are the legal parents of the child, the same way the biological parents do.

It is remarkable that the legislator in order to prevent the phenomenon of “reproductive tourism” established in the *Article 8 of the Law 3089/ 2002*, that *Articles 1458 and 1464*

---

<sup>273</sup> As translated by Hatzis.

<sup>274</sup> Extract from e-mail exchange with T. Vidalis (in greek), 15/06/ 2014.

*of the Civil Code* can only be applied in the case that the commissioning mother and the surrogate reside in Greece. Does this regulation breach EU law concerning the freedom of services?

Firstly, we should examine if we are dealing with a service under EU law. As I already mentioned, there is no financial benefit during surrogacy arrangements in Greece. Nevertheless, according to *Article 13 paragraph 4 of the Law 3305/2005* is not unlawful to reimburse the surrogate the expenses of the pregnancy and any loss of earnings.

The specificity of health care has for a long time dominated the European debate on the application of free movement principles in this sector<sup>275</sup>. Services within the meaning of the TFEU are defined by *Article 57 TFEU* as any activities “where they are normally provided for remuneration”. Accordingly, the basic criterion that makes us assume that a health treatment is a “service” under EU law is its economic character.

If we take a look at the Court of Justice of the European Union (CJEU) case-law, the Court has given a broad interpretation in the meaning of “remuneration”. The economic nature of (private) health services was first acknowledged in the cases *Luisi and Carbone*<sup>276</sup>, and *Grogan*<sup>277</sup>. Nevertheless, the cases *Kohll and Decker*<sup>278</sup> established for the first time the link with statutory reimbursement and social security. In the *Kohll and Decker* decisions the CJEU held that just because something is connected to social security does not mean that it is beyond the grasp of the internal market.

As a consequence, the fact that the provision of health care is a service activity within the meaning of EU law implies that health care providers established in one Member State are granted a “fundamental freedom” to provide their services in another Member State<sup>279</sup>.

---

<sup>275</sup> Gekiere et al, 2010, p. 465.

<sup>276</sup> Joined Cases 286/82 and 26/83, *Luisi and Carbone v. Ministero del Tesoro*, 1984.

<sup>277</sup> Case C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd v. Grogan*, 1991.

<sup>278</sup> Joined Cases C-120/95 and C-158/96 *Kohll and Decker*, 1998.

<sup>279</sup> Gekiere et al, 2010, p. 468.

All things considered, surrogacy in Greece is altruistic but it could be considered as a “service” under EU law. First of all, even if the surrogate herself is not reimbursed, it could be said that there is an economic activity because the expenses of the pregnancy (such as the expenses of the hospital) are covered by the commissioning couple or mother. In addition, even if the social security covers these expenses, the CJEU has ruled that there is an economic activity.

It remains to examine whether this restriction is discriminatory. At that point it has to be noted that “discrimination” denotes less favorable treatment of the imported good and the migrant Community national by comparison to that given to the domestic good and to the host national<sup>280</sup>. In addition, *article 18* of the TFEU prohibits any discrimination on grounds of nationality.

An important case of the CJEU regarding that issue is the *Van Binsbergen*<sup>281</sup> case. The importance of this case is that the CJEU spelt out the meaning of the principle of direct discrimination with regards to service provisions<sup>282</sup>. With regards to direct discrimination the CJEU formulated that *Article 56*<sup>283</sup> of the TFEU entails the abolition of any discrimination against a person providing services on the grounds of his nationality or the fact that he is established in a Member State other than the one in which the service is provided<sup>284</sup>. The CJEU concluded that *article 56* TFEU prohibits direct discrimination both on grounds of nationality and of the place of establishment.

It is obvious that we are dealing with a direct discrimination as the restriction concerning the residence criterion is explicitly stated under the Greek law. The fact that the individual has to be established in Greece in order to benefit from “surrogacy services” constitutes a direct discrimination and breaches EU Law.

---

<sup>280</sup> Connor, 2010, p. 160.

<sup>281</sup> J.H.M Van Binsbergen v. Bestuur Van de Bedrijfsvereniging voor de Metaalnijverheid (Case 33/74), 1974.

<sup>282</sup> Latvijas Universitate and Steinbeis University Berlin, 2008, p. 18.

<sup>283</sup> Article 56 of the TFEU: “Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.

<sup>284</sup> Latvijas Universitate and Steinbeis University Berlin, 2008, p. 18.

#### 4.1.2.3. Is surrogacy in Greece truly altruistic?

The existence of an altruistic surrogacy model does not guarantee that surrogacy arrangements will be ethical. According to *Hatzis* despite the prohibition of commercial surrogacy, most surrogacies in Greece are commercial. This is evident in the published judicial decisions where it is obvious that in most cases the surrogate and the commissioning parents were total strangers before the agreement. However, the judges give their permission to the surrogates without investigating the existence of a close relationship<sup>285</sup>.

*Hatzis* found all the decisions published by the district court of Athens from 2003 until the summer of 2007. From 32 decisions in only five the surrogate was a close relative. In all the other cases the surrogate was “the best friend”, often from Eastern Europe and only in five cases a Greek woman<sup>286</sup>. According to the estimates, there are many more cases of surrogacy in Greece but many procedures take place illegally to avoid all the expenses of the court procedure<sup>287</sup>.

Moreover, *Article 26 of the Civil Code* (Section 4.1.2.1.) makes no distinction between the surrogate, the middleman and the commissioning parents. Until now, nobody has been prosecuted for breaking the law. *Hatzis* claims that for the Hellenic Police these cases are of low importance and probably any case of commercial surrogacy will ever be brought before the Criminal Court<sup>288</sup>.

It is also remarkable that there are many advertisements of commercial surrogacy services offered by fertility clinics on the internet despite the prohibition of the law. *Hatzis* refers that during his correspondence with a fertility clinic in Greece the issue of non-residency (Section 4.1.2.2.) never came up. The fertility clinic had even a catalogue with possible candidates<sup>289</sup>.

---

<sup>285</sup> Hatzis, 2010, p. 5.

<sup>286</sup> Hatzis, 2009, p. 216.

<sup>287</sup> *Idem*, p. 217.

<sup>288</sup> Hatzis, 2010, p. 5.

<sup>289</sup> *Idem*, p. 11.

Finally, it appears that the “source” of this problem is the prohibition of financial compensation by the law. Probably, it would be better if the legislator had excluded from the very beginning this regulation<sup>290</sup>, because the procedures would be more transparent and the “under the table” payments would have been avoided.

## 4.2. Other countries of destination for “reproductive tourists”

### 4.2.1. The case of Spain

The *Spanish Law 35/ 1988 (Ley 35/ 1988 Sobre Técnicas de Reproducción Asistida)* regulated the important aspects of assisted reproduction techniques. According to *Article 5 of the Law 35/ 1988 (Ley 35/ 1988)* “donation of human gametes or embryos is a formal, free and secret contract between the donor and the centre. Under no circumstances will a donation be made for lucrative or commercial ends. Donation shall be anonymous”.

Later, the new *Law 14/ 2006 on Human Assisted Reproduction Techniques (Ley 14/ 2006 sobre Técnicas de Reproducción Humana Asistida)* in its *Article 5* established the absolute anonymity of gamete donors, in such a way that their identity may never be revealed. The legal text also states that children born thanks to reproduction treatments with donated gametes are legally registered as the treated couple’s children<sup>291</sup>.

Even if surrogacy is not allowed in Spain<sup>292</sup>, current Spanish legislation allows reproduction treatments that are prohibited in other European countries such as gender selection (in cases of gender related hereditary disease), embryo selection and treatments for single women<sup>293</sup>. Consequently, this makes Spain a major destination for “reproductive tourism”.

---

<sup>290</sup> Vidalis, 2007, p. 219.

<sup>291</sup> Instituto Bernabeu, “Legislation in Spain and Europe”.

<sup>292</sup> Article 10 of the Law 14/ 2006 (Ley 14/2006).

<sup>293</sup> Instituto Bernabeu, “Legislation in Spain and Europe”.

As the Spanish economic crisis deepens, many people decide to sell their eggs and sperm in order to bring some extra cash. Selling gametes is forbidden but usually, assisted reproduction centres are allowed to pay a “compensation fee” to the donors for the inconvenience, transportation costs and time spent away from work<sup>294</sup>. Reproduction clinics reported a twenty to thirty percent increase in the number of donors since 2009<sup>295</sup>. At the same time, in the Spanish clinics, fifty per cent of clients are “reproductive tourists” who are attracted by lower prices and liberal Spanish legislation. Hence, with such a high demand, there are concerns that donors are not being monitored to ensure that they don’t engender more than six offspring which is the limit set by the Spanish law to avoid inbreeding<sup>296</sup>.

#### 4.2.2. The case of Czech Republic

The Czech Republic has been characterised as a “mecca” not only for “reproductive tourism” but for “medical tourism” in general. The main reason is that they would pay up to fifty percent less for the treatments while the quality and conditions are comparable to those in their countries<sup>297</sup>.

In the Czech Republic, donation of reproductive cells is governed by the *Act No. 296/2008 Coll. on Safeguarding the Quality and Safety of Human Cells and cells intended for use in man and on amendments to related acts (Act on Human Tissues and Cells)*<sup>298</sup> and *Decree No. 422/2008 Coll*<sup>299</sup> on detailed requirements for the safeguarding of the quality and safety of human tissues and cells intended for use in man. According to the

---

<sup>294</sup> Meritxell, 2012.

<sup>295</sup> Idem.

<sup>296</sup> Idem.

<sup>297</sup> Czech News Agency, 2014.

<sup>298</sup> In the original language: “Předpis č. 296/2008 Sb. Zákon o zajištění jakosti a bezpečnosti lidských tkání a buněk určených k použití u člověka a o změně souvisejících zákonů (zákon o lidských tkáních a buňkách”.

<sup>299</sup> In the original language: “Předpis č. 422/2008 Sb. Vyhláška o stanovení bližších požadavků pro zajištění jakosti a bezpečnosti lidských tkání a buněk určených k použití u člověka”.

current Czech legislation, sperm donation is legal and anonymous. A child born as a result of sperm donation has no right to seek identifying information about the sperm donor, even after the child has reached the age of eighteen<sup>300</sup>.

Finally, there is no legislation regulating surrogacy. It is often interpreted as “what is not forbidden is allowed” and in practice the couple willing to have a child finds a surrogate, mostly on the internet, and they go through the process of gestational surrogacy<sup>301</sup>.

#### **4.3. The decline of transnational adoption due to “reproductive tourism”**

At its peak in 2004, intercountry adoption was estimated to have affected approximately 45.000 infants and children worldwide each year<sup>302</sup>. Since then, a radical decline has been under way and is estimated to be at least 50% globally<sup>303</sup>. This decline is a result of complex dilemmas such as ethics and human rights considerations<sup>304</sup>. Besides, in tandem with the rise of medical solutions and access to overseas donors and surrogates, the numbers of international adoptions keep on declining<sup>305</sup>.

This decline can be justified. For many people, the most compelling reason to choose a specific pathway on parenthood is the influence they can have on their child’s genetic background. Of course, people who are unable to use their own eggs or sperm have less choice about how much genetic influence they can have<sup>306</sup> and usually they choose adoption.

Furthermore, the achievements of medicine have made it possible to treat infertility which is a medical condition afflicting a large proportion of humanity including more

---

<sup>300</sup> Europe IVF international, “IVF- donor sperm”.

<sup>301</sup> Tukhi, “Surrogacy- should law reflect the medical progress?”.

<sup>302</sup> Rotabi and Bromfield, 2012, p. 129.

<sup>303</sup> Idem.

<sup>304</sup> Idem.

<sup>305</sup> Fronck and Crawshaw, 2014, p. 4.

<sup>306</sup> Clark et al, 2009, p. 96.



than ten percent of couples worldwide<sup>307</sup>. In other words, adoption is considered as an alternative for infertile couples but it is not a solution to infertility. In addition, the decrease in opportunities to obtain healthy infants and children via intercountry adoption has also played a significant role in the shift to alternative family-building strategies, including transnational surrogacy<sup>308</sup>.

In conclusion, *Marre* and *Briggs* have pointed out that intercountry adoption and reproductive technologies have a direct effect on each other<sup>309</sup>. It is true that probably the decline of intercountry adoption will be continued, as intercountry adoption continues to become more difficult (due to long waiting lists, slow procedures) and commercial fertility activity continues to globalise and provide a radical solution to infertility.

#### 4.4. Concluding remarks

Usually “reproductive tourists” move to countries with more liberal legislations than the ones in their own countries. Conversely, the case of Greece proves us that this is not always the case.

In particular, I believe that Greek legislation is restricted. For instance, surrogacy may be allowed but under several restrictions i.e. the residence of the contracting parties should be in Greece and surrogacy arrangements should be altruistic. However as I already explained above, these clauses are not implemented and this is one of the main reasons why Greece is a famous destination for “reproductive tourists”.

The non-implementation of legislation is very common in Greece. Even well-structured regulations cannot be correctly implemented because the implementation system does not work. Of course, clinics take advantage of this situation and keep on attracting “reproductive tourists” who- most of the times- are not aware of these restrictions.

---

<sup>307</sup> Rotabi and Bromfield, 2012, p. 132.

<sup>308</sup> Idem.

<sup>309</sup> Marre and Briggs, 2009.

Apparently, Greece is not the only one. Also, in Czech Republic clinics take advantage of the fact that surrogacy is not regulated.

In that case, surrogacy can be characterised as unethical. The procedures that are followed are anti-deontological because they treat women as a “means” only (Section 2.2.2.). In addition, both the surrogates and the women turn into “commodities” through the “under the table” payments (Section 2.3.1.). It would be more convenient if commercial surrogacy was allowed in Greece because all these procedures would be more transparent.

Nevertheless, one positive aspect of Greek legislation concerning reproductive technologies is that it is very progressive. Greek society is considered as a conservative one. Orthodoxy which is the leading religion affects a lot Greek citizens in their way of thinking, even in our days (Section 2.1.2). The fact that the legislation concerning reproduction is that open minded, can be seen as an important step towards liberalism.

Finally, the impact of the financial crisis and austerity measures in health policies is grave. Both in Greece and Spain there are safety considerations concerning sperm donors. It is obvious that the *Directive 2004/23/EC* is not effective. The only possible solution would be the harmonisation of EU legislation concerning safety and quality standards which will be analysed in the next chapter.

## Chapter 5

### 5. Closing thoughts

In this Chapter, I will present my closing thoughts concerning “reproductive tourism” in Europe. More specifically, I will comment on the facts and reflections that have been presented during this thesis and I will propose a legal harmonisation limited to safety and quality standards as a “possible” solution. This solution will be based upon the proposal of common ethical standards that should be applied regarding ART and its clinical practice.

#### 5.1. The right to procreate: to what extent does it include a claim for access to ART?

To begin with, the right to procreate was first developed in the context of forced sterilisation, to oppose any non-consensual infringement of the capacity to procreate and second, in claims not to have a child by ensuring access to abortion and contraceptives<sup>310</sup>. Nowadays the right to procreate not only relates to the founding of a family, or a decision not to found one but also to claims that relate to financial assistance with assisted reproductive technologies<sup>311</sup>.

The ECHR is a “living instrument” and its main goal is to adapt to the progresses and demands of societies. Consequently it could be argued that *Article 8* has evolved to become the legal basis of the right to procreate and in general the basis for claims relating to reproduction. The Article provides that interference with private decision-making is allowed under specified criteria<sup>312</sup>. In the context of a right to procreate,

---

<sup>310</sup> Eijkholt, 2010, p. 129.

<sup>311</sup> Idem, p. 131.

<sup>312</sup> Article 8(2) of the ECHR: “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the

*Article 8* would determine that if a person decided to reproduce, she/he should be left alone to make an act on that decision<sup>313</sup>. This could imply a duty on the State not to interfere with decisions about how, where and when to reproduce. As to positive obligations, *Article 8* could require the State to assist citizens seeking to affirm a right to procreate, for instance, by supporting financially the individuals who seek ART<sup>314</sup>. It is important to note that ART consists of various services that can be provided in different ways. As a consequence, the obligation to assist others in the pursuit of parenthood by providing ART needs to be translated into a duty to assist using all possible means under any circumstances<sup>315</sup>.

It is true that here are many reasons for wanting children. Some motives can be more common than others and some may be perceived as morally better than others<sup>316</sup>. Above all, when it comes to having children, people should have the liberty to choose between different options. Nevertheless, it should not be neglected that negative rights are more stringent than positive rights and stronger arguments are needed to abridge or override them<sup>317</sup>. For instance, the interference of the State could be justified when there is an unavoidable consequence of medical treatment and it is in the patient's best interest not to proceed to the treatment.

Under those circumstances, if the right to procreation is interpreted as a positive one, then an infertile couple has a claim for access to reproductive technologies<sup>318</sup>. In addition, individuals who are unable to afford those treatments could expect society to guarantee their access. However, the adoption of a positive rights perspective, intensifies the demand for these technologies and encourages the entrepreneurs to provide a broad variety of these services that are not always quality controlled<sup>319</sup>.

---

interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

<sup>313</sup> Eijkholt, 2010, pp. 141-142.

<sup>314</sup> Idem, p. 142.

<sup>315</sup> Courtwright, 2007, p. 636.

<sup>316</sup> Bolvin and Pennings, 2005, p. 784.

<sup>317</sup> Courtwright, 2007, p. 636.

<sup>318</sup> Blank, 1997, p. 281.

<sup>319</sup> Idem.

Quality concerns that may arise explain the need for application of common ethical guidelines regarding clinical practice.

## 5.2. The proposal of common ethical guidelines

Ethics examine human conduct. Accepted practices of human conduct in a given country are termed normative behaviour<sup>320</sup>. Ethics differ from country to country and this is the main reason why legal diversity concerning reproductive technologies exists within Europe.

Different ethical perceptions on reproductive technologies should continue existing because they contribute to pluralism which is a major characteristic of a democratic society. Nevertheless, I take the view that common ethical standards should be applied in assisted reproductive technology but only with regards to clinical practice.

Assisted reproduction treatments should be conducted with respect to all involved. Primarily, the interests of the persons who may be born should be respected and secondly the welfare of all participants, including gamete donors and the surrogates. In addition, information and counseling should be provided to the participants. They are entitled to detailed information about all aspects of the procedures and receive professional counseling. However, the practice of consultation can be seen as a balancing exercise. It is important to provide enough, but not too much as the patient autonomy should also be respected<sup>321</sup>.

Ultimately, all the donors and surrogates should be medically examined and the clinics should insist on record keeping and data reporting but at the same time maintain the privacy of the participants. Patient informed consent to disclosure of private information

---

<sup>320</sup> Schenker, 2011, p. 2.

<sup>321</sup> Fournier et al, 2009, p. 135.

and an explicit written commitment to confidentiality by the clinics are some of the tools that can help resolve confidentiality challenges<sup>322</sup>.

### 5.3. The issue of legal diversity

The issue with legal diversity is that some countries prohibit some forms of medically assisted reproduction or deny access to some groups of people, while other countries permit the same actions<sup>323</sup>. Legal diversity is the main cause of “reproductive tourism”.

The reason why certain states impose restrictions on medically assisted reproduction is because they believe such acts to be ethically and morally wrong<sup>324</sup>. However, most treatments for which people cross borders in the case of “reproductive tourism” for law evasion are not necessarily morally wrong. The only treatment that is universally recognised as harmful or wrong at the moment is reproductive cloning<sup>325</sup>.

Recently, some states such as Turkey reacted to the phenomenon of “reproductive tourism” by installing extraterritorial legislation<sup>326</sup>. In that case, the central question would be whether a State has a moral right or duty to uphold its laws on moral matters abroad<sup>327</sup>. In my opinion, the application of extraterritorial legislation in extremely sensitive issues is not the solution.

Another suggested solution is legislative harmonisation. In general, harmonisation has a nice, positive connotation of people growing towards one another peacefully. However, the proponents of legislative harmonisation seem to consider it as a one-way movement<sup>328</sup>. In other words, the others should adopt the same laws we have and they

---

<sup>322</sup> Idem.

<sup>323</sup> Van Hoof and Pennings, 2012, p. 188.

<sup>324</sup> Idem, p. 192.

<sup>325</sup> Idem.

<sup>326</sup> Van Hoof and Pennings, 2011, p. 549.

<sup>327</sup> Idem.

<sup>328</sup> Pennings, 2004, p. 2692.

should forbid the same acts we forbid<sup>329</sup>. How can harmony be reached, if we start with this position?

Another issue is if a potential legislative harmonisation would move towards more restrictive or liberal legislation. At that point I will agree with *Pennings* who supports that “it is much easier to move from permission to prohibition when controversial issues are considered than vice versa”<sup>330</sup>.

From my point of you, legal harmonisation is not a solution. I am not convinced that legal diversity should be regarded as something negative. Diversity in legislation combined with reproductive tourism is beneficial for all<sup>331</sup>. Harmonisation of a restrictive legislation would close down the option of travelling and would increase the risk of a conflict within the society<sup>332</sup>.

#### **5.4. The proposal of legal harmonisation limited to safety and quality standards**

First of all, it should be noted that law and ethics are directly linked to each other. That explains why common ethical guidelines regarding clinical practice serve also as the basis for the legal harmonisation limited to safety and quality standards.

European patients have the freedom to move around the European Union and benefit from medical services. They also have the right to be protected against incompetence, negligence and recklessness on the part of the practitioners<sup>333</sup>. It could be said that the first step towards legal harmonisation limited to safety and quality standards was taken through the *European Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation,*

---

<sup>329</sup> Idem.

<sup>330</sup> Idem.

<sup>331</sup> Pennings, 2002, p. 340.

<sup>332</sup> Idem.

<sup>333</sup> Pennings, 2004, p. 2692.

*procurement, testing, processing, preservation, storage and distribution of human tissues and cells.*

A regulation limited on quality and safety standards should first guarantee quality standards regarding donor screening, cryopreservation, success rates and complication rates<sup>334</sup>. The legal framework should focus on licensing and controlling the clinics with the aim of ensuring homogeneous and adequate standards<sup>335</sup>. Patients should also be informed about the performance of the clinics<sup>336</sup>.

Nevertheless, *Pennings* supports that although safety and quality standards are important, regulation on safety should be carefully screened to prevent trespassing on ethics<sup>337</sup>. Of course, the issues that are at stake are of a highly moral and ethical character, consequently the designation of such regulation should be extremely careful in order to avoid the creation of documents which could serve as indicators of certain ethical positions on the matter.

## 5.5. Conclusion

In this thesis, I examined the legal and ethical disparities in the field of reproductive technologies which constitute the main cause for the phenomenon of “reproductive tourism”. Particularly, I used the cases of Sweden and Greece in order to show that legislation concerning sperm donation and surrogacy differs a lot within Europe. European legislation is based upon different ethical theories, arguments and convictions that each country adopts towards assisted reproductive technologies.

I am not for or against anonymous or non-anonymous sperm donation. I am not for or against surrogacy either. Instead, I am of the view that there is a right to procreate and it

---

<sup>334</sup> *Idem.*

<sup>335</sup> *Idem.*

<sup>336</sup> See Section 5.2. “The proposal of common ethical guidelines”.

<sup>337</sup> *Idem.*



includes the access to ART. This right should be respected and people should be able to travel within the EU in order to exercise it. One of the aims of the European Union was to abolish internal borders and give to the European citizens the opportunity to move around the EU and benefit from different services. The EU law and the jurisprudence of the CJEU confirm this position. . As a result, an unjustified restriction to their freedom of movement within the EU and the access to assisted reproductive technologies may constitute an infringement of their right to procreate.

Some would argue that “reproductive tourism” is discriminatory because only people who own the financial means can cross the borders and exercise their right to procreate. In my opinion, “reproductive tourism” is not discriminatory. We are living in an era which is characterised by the free market. The system of the free market is based on inequalities. Nevertheless, a welfare State should always fund the individuals who are in need of medical services such as ART and do not own the adequate resources.

To sum up, “reproductive tourism” should not be regarded as a negative phenomenon but as a solution to the problem of respect of individual freedom. At that point, following a liberal individual perspective, I would like to focus more on the individual and his rights than to the collectives they constitute. Consequently, it is better for an individual who does not agree with the acceptability of a certain practice in his country to search for an alternative in communities with different ethical standards than to be subjected to radical prohibitions.

## Bibliography

### Books

**Clark Rebecca, Richard-Davis Gloria, Hayes Jill, Pucheu Theall Katherine,** “Planning Parenthood: Strategies for Success in Fertility Assistance, Adoption and Surrogacy”, Johns Hopkins University Press, 2009.

**Cook J. Rebecca, Dickens M. Bernard and Fathalla F. Mahmoud,** “*Reproductive health and human rights*”, Oxford University Press Inc., 2003.

**Davies G.,** ‘*The process and side-effects of harmonisation of European welfare states*’, Jean Monnet Working Paper, 2006.

**Gekiere Wouter, Baeten Rita and Palm Willy,** “*Health Systems Governance in Europe: The Role of European Union Law and Policy*”, Cambridge University Press, 2010.

**Hodgkin Rachel and Newell Peter,** “*Implementation Handbook for the Convention on the Rights of the Child*”, prepared for UNICEF, United Nations Children’s Fund, 2007.

**Kant Immanuel translated by James W. Ellington,** “*Grounding for the Metaphysics of Morals 3<sup>rd</sup> edition*”, Hackett [1785], 1993.

**Kounougeri- Manoledaki Efi,** «Τεχνητή Γονιμοποίηση και Οικογενειακό Δίκαιο» [“Artificial Insemination and Family Law”], Editions Sakkoula, 2005.

**Kuhse Helga and Singer Peter,** “*A Companion to Bioethics*”, Blackwell Companions to Philosophy, 2009.

**Latvijas Universitate and Steinbeis University,** “*EC Internal Market Law*”, 2008 available at [http://home.lu.lv/~tschmit1/Downloads/Poddubny-and-others\\_Relevant\\_ECJ-Cases.pdf](http://home.lu.lv/~tschmit1/Downloads/Poddubny-and-others_Relevant_ECJ-Cases.pdf) (last accessed on 30 June 2014).

**Machale Jean,** “*Health Systems Governance in Europe*”, Cambridge University Press, 2010.

**Mann J.M.**, “*Medicine and Public Health, Ethics and Human Rights*”, Hastings Center Report, 1997.

**Mason J.K., Laurie G.T.**, “*Law and Medical Ethics*”, Oxford University Press, 2011.

**Mill John Stuart**, “*On Liberty*”, ed. Elizabeth Rapaport, Indianapolis and Cambridge: Hackett, 1978.

**Papanikitas Andrew**, “*Crash Course: Medical Ethics and Sociology*”, Elsevier, online book on <https://www.inkling.com/read/crash-course-medical-ethics-and-sociology-papanikitas-horton-szar-2nd/chapter-1/ethical-theories> , 2013. (last accessed on 1 June 2014).

**Parker Michael**, “*Ethics and Community in the Health Care*”, Routledge, 1999.

**Pattinson D. Shaun**, “*Medical Law and Ethics*”, Sweet& Maxwell, 2006.

**Pence E. Gregory**, “*Classic Case in Medical Ethics*”, Part two: Ethical Theories and Medical Ethics: A historical overview, Essay p.10-25.

**Rose Joanna**, “*A Critical Analysis of Sperm Donation Practices: The Personal and Social Effects of Disrupting the Unity of Biological and Social Relatedness for the Offspring*”, Queensland University of Technology, 2009, PhD thesis.

**Salvadori Massimo**, “*Locke and Liberty*”, London: Pall Mall Press, 1959.

**Sanger Alexander**, “*Beyond Choice: Reproductive Freedom in the 21<sup>st</sup> Century*”, New York: Public Affairs, 2004.

**Schenker G. Joseph**, “*Ethical Dilemmas in Assisted Reproductive Technologies*”, Walter de Gruyter GmbH & Co. KG, Berlin/Boston, 2011.

**Shepherd Dolgin**, “*Bioethics and the Law*”, Aspen Publishers, 2005.

**Steinberg David**, “*Biomedical Ethics: A multidisciplinary approach to moral issues in medicine and biology*”, University Press of New England, 2007.

**Stoll Jane**, “*Swedish donor offspring and their legal right to information*”, Uppsala University, 2008.

**Stoll Jane**, “*Surrogacy Arrangements and Legal Parenthood*”, Uppsala University, 2013.

**Tobin John**, “*The Convention of the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction*”, Melbourne Law School, Research Paper no. 541, 2011.

**Vidalis Takis**, «*Βιοδίκαιο: Το πρόσωπο*», [*“Biolaw: The Person”*], Sakkoulas Publications, 2007.

#### Case law

##### ➤ **The European Court of Human Rights:**

**Cyprus v. Turkey**, Application no. 25781/94, 10 May 2001.

**Gaskin v The United Kingdom**, Application no 10454/83, 7 July 1989.

**Odievre v France**, Application no 42326/98, 13 February 2003.

**Jaggi v Switzerland**, Application no 58757/00, 13 July 2006.

**Mikulic v. Croatia**, Application no 53176/99, 7 February 2002.

**S.H. and Others v. Austria**, Application no. 57813/00, 2011.

**Valianatos and others v. Greece**, Applications nos. 29381/09 and 32684/09, 2013.

##### ➤ **The European Court of Justice**

Joined Cases 286/82 and 26/83, **Luisi and Carbone v. Ministero del Tesoro**, 1984.

Case C-159/90, **The Society for the Protection of Unborn Children Ireland Ltd v. Grogan**, 1991.

➤ **UK case law**

**X and Y (Foreign Surrogacy)**, Case No: FD08P01466, High Court of Justice of Family Division, 9 December 2008 available at <http://www.nataliegambleassociates.co.uk/assets/assets/Re%20X%20and%20Y%202008.pdf> (last accessed on 2 June 2014).

**CW v NT & Anor (2011) EWHC 33 (Fam)**, Case No: NG10P01394, High Court of Justice Family Division at <http://www.bailii.org/ew/cases/EWHC/Fam/2011/33.html> (last accessed on 4 June 2014).

➤ **French case law**

**Cour de cassation, Assemblée plénière, 31 mai 1991, 90-20105** at <http://www.juricaf.org/arret/FRANCE-COURDECASSATION-19910531-9020105> (last accessed on 4 June 2014).

**International materials**

➤ **The European Union:**

**Directive 2004/27/EC of the European Parliament and of the Council of 31 March 2004**, at [http://www.biosafety.be/PDF/2004\\_27.pdf](http://www.biosafety.be/PDF/2004_27.pdf) (last accessed on 7 April 2004).

**Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare** at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:088:0045:0065:en:PDF> (last accessed on 7 June 2014).

ESHRE, “ESHRE position paper on the EU Tissues and Cells Directive EC/ 2004/23”, 2007 at <http://www.eshre.eu/~media/emagic%20files/Guidelines/Position%20Papers/Tissues%20and%20cells%20directive.pdf> (last accessed on 28 May 2004).

Human Fertilisation & Embryology Authority, “European Union Tissues and Cells Directives”, at <http://www.hfea.gov.uk/2072.html> (last accessed on 7 April 2004).

The European Parliament’s Intergroup on LGBT Rights, “New comparative study on surrogacy in the EU”, at <http://www.lgbt-ep.eu/parliamentary-work/new-comparative-study-on-surrogacy-in-the-eu/> (last accessed on 7 April 2004).

The Treaty of Rome, 25 March 1957 at [http://ec.europa.eu/archives/emu\\_history/documents/treaties/rometreaty2.pdf](http://ec.europa.eu/archives/emu_history/documents/treaties/rometreaty2.pdf) (last accessed on 5 June 2014).

The Treaty on the Functioning of the European Union, April 2008 at [http://www.eudemocrats.org/fileadmin/user\\_upload/Documents/D-Reader\\_friendly\\_latest%20version.pdf](http://www.eudemocrats.org/fileadmin/user_upload/Documents/D-Reader_friendly_latest%20version.pdf) (last accessed on 13 July 2014).

➤ **The Council of Europe:**

Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, at <http://conventions.coe.int/Treaty/en/Summaries/Html/164.htm> (last accessed on 7 April 2014).

➤ **The United Nations:**

Convention relating to the Status of Stateless Persons at <http://www.unhcr.org/3bbb25729.html> (last accessed on 5 June 2014).

Convention on the Reduction of Statelessness at <http://www.unhcr.org/3bbb286d8.html> (last accessed on 5 June 2014).

**United Nations Convention on the Rights of the Child**, UN Doc. A/44/736 (1989), at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (last accessed on 5 June 2014)

**Universal Declaration of Human Rights**, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) art. 15 (Dec. 10, 1948), at <http://www.un.org/en/documents/udhr/index.shtml> (last accessed on 5 June 2014).

### **Journals**

**Anderson E.**, “*Is women’s labour a commodity?*”, p. 71-92 in *Philosophy and Public Affairs*, Vol. 19, 1990.

**Andersen, N.A., Goossens, V., Bhattacharya, S., Ferraretti, A.P., Kupka, M.S., de Mouzon, J., Nygren, K.G.**, “*European IVF- monitoring (EIM) Consortium for the European Society of Human Reproduction and Embryology (ESHRE), Assisted reproductive technology and intrauterine inseminations in Europe, 2005: results generated from European registers by ESHRE*”, pp.1 -21 ,in *Human Reproduction*, Vol. 1, 2009.

**Andorno Roberto**, “*The Oviedo Convention: A European Legal Framework at the Intersection of Human Rights and Health Law*”, p. 133-143 in *JIBL*, Vol. 02, 2005.

**Arneson J. Richard**, “*Commodification and Commercial Surrogacy*”, pp. 132-164 in *Philosophy & Public Affairs*, Vol.21, 1992.

**Banerjee Amrita**, “*Reorienting the Ethics of Transnational Surrogacy as a Feminist Pragmatist*”, pp. 107-121 in *The Pluralist*, Vol.5, Number 3, Fall 2010.

**Beauchamp T. and Childress J.**, “*Principles of Biomedical Ethics*”, p.64, in Oxford University Press.

**Bergmann Sven**, *“Fertility tourism: Circumventive Routes that Enable Access to Reproductive Technologies and Substances”*, pp. 280-287 in *The University Chicago Press*, Vol. 36, No. 2, Winter 2011.

**Birkhauser Martin**, *“Ethical issues in human reproduction: Protestant perspectives in the light of European Protestant and Reformed Churches”*, pp. 955-959, in *Gynecological Endocrinology*, Vol. 29, 2013.

**Blank H. Robert**, *“Assisted Reproduction and Reproductive Rights: The Case of in Vitro Fertilization”*, pp. 279- 288, in *Politics and the Life Sciences*, Vol. 16, No. 2, 1997.

**Blyth Eric and Farrand Abigail**, *“Anonymity in donor-assisted conception and the UN Convention on the Rights of the Child”*, pp. 89-104, in *The International Journal of Children’s Rights*, Vol. 12, 2004.

**Blyth Eric and Farrand Abigail**, *“Reproductive tourism- a price worth paying for reproductive autonomy?”*, pp. 91-114, in *Critical Social Policy*, Vol.25, Issue 1, 2005.

**Boivin J and Pennings G**, *“Parenthood should be regarded as a right”*, pp. 784-785, in *Arch. Dis. Child.*, Vol. 90, 2005.

**Clark Brigitte**, *“A balancing act? The rights of donor-conceived children to know their biological origins”*, pp. 621-658, in *Georgia Journal of International and Comparative Law*, Vol.40, 2012.

**Connor Tim**, *“Goods, Persons, Services and Capital in the European Union”*, pp. 159-209, Vol. 11, No. 2 , 2010.

**Coutwright M. Andrew**, *“Is Restricting Access to Assisted Reproductive Technology an Infringement of Reproductive Rights?”*, pp. 635-640, Vol.9, Number 9, 2007.

**Culley L., Hudson N., Rapport F., Blyth E., Norton W., Pacey A.A.**, *“Crossing borders for fertility treatment: motivations, destinations and outcomes of UK fertility travellers”*, pp. 1-9, in *Human Reproduction*, Vol.0, 2011.



**Damelio J. and Sorensen K.**, “*Enhancing autonomy in a paid surrogacy*”, in *Bioethics*, Vol. 24, 2010.

**Deonandan Raywat, Green Samantha, Beinum van Amanda**, “*Ethical concerns for maternal surrogacy and reproductive tourism*”, pp. 742-745, in *J Med Ethics*, Vol. 38, 2012.

**Deonandan Raywat**, “*An Introduction to the Ethical Dimensions of Reproductive Medical Tourism*”, pp. 151-177 in *Transdisciplinary Studies in Population Health Services*, Vol. 4, 2013.

**Deonandan Raywat and Taber Sarah**, “*Characteristics of a Transcultural Ethical Framework for Cross-border Reproductive Tourism: Insights from Existing Studies*”, pp.2517-2525, in *British Journal of Medicine & Medical Research*, Vol.4, 2014.

**Eijkholt Marleen**, “*The Right to Found a Family as a Stillborn Right to Procreate?*”, pp. 127-151, in *Medical Law Review*, Vol. 18, Spring 2010.

**Ekerhovd E, Faurskov A, Werner C**, “*Swedish sperm donors are driven by altruism, but shortage of sperm donors leads to reproductive travelling*”, pp. 305-313, in *Ups. J. Medical Science*, Vol. 113, 2008.

**Engle Eric**, “*The Convention on the Rights of the Child*”, pp. 793-819, in *Quinnipiac Law Review*, Vol. 29, 2011.

**Ethics Committee of the American Society for Reproductive Medicine**, “*Informing offspring of their conception by gamete or embryo donation: a committee opinion*” pp. 45-49 in *ASRM Pages*, Vol. 100, No.1, 2013.

**Ferraretti Anna Pia, Pennings Guido, Gianaroli Luca, Natali Francesca, Magli M Cristina**, “*Cross-border reproductive care: a phenomenon expressing the controversial aspects of reproductive technologies*”, pp. 261-266, in *Reproductive Biomedicine Online*, Vol. 20, 2010.

**Fournier Veronique, Rari Eirini, Forde Reidun, Neitzke Gerald, Pegoraro Renzo and Ainsley J Newson**, “*Clinical ethics consultation in Europe: a comparative and ethical review of the role of patients*”, pp. 131-138, in *Clinical Ethics*, Vol.4, 2009.

**Fronek Patricia and Crawshaw Marilyn**, “*The “New Family” as an Emerging Norm: A Commentary on the Position of Social Work in Assisted Reproduction*”, pp. 1-10, in the *British Journal of Social Work*, 2014.

**Golombok S, Brewaeys A, Giavazzi MT, Guerra D, MacCallum F, Rust J.**” *The European study of assisted reproduction families: the transition to adolescence*”, pp. 830-40 in *Human Reproduction*, Vol. 17, 2002.

**Gong Dan, Liu Yu-Lin, Zheng Zhong, Tian Yi-Fein, Li Zheng**, “ *An overview on ethical issues about sperm donation*”, pp. 645-652 in *Asian Journal of Andrology*, Vol 11, 2009.

**Hatzis Aristides**, “*From soft to hard paternalism and back: the regulation of surrogate motherhood in Greece*”, pp. 205-220 in *Portuguese Economic Journal*, Vol. 49, No. 3, 2009.

**Hatzis Aristides**, “*The Regulation of Surrogate Motherhood in Greece*”, p. 1-13, paper published in Social Science Research Network available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1689774](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1689774) , 2010 (last accessed on 16 June 2014).

**Hervey K. Tamara**, “*Buy Baby: The European Union and Regulation of Human Reproduction*”, pp. 207-233, in *Oxford Journal of Legal Studies*, Vol.18, No.2, 1998.

**Inhorn C. Marcia and Patrizio Pasquale**, “ *Rethinking reproductive “tourism” as reproductive “exile”*”, p.904-906, in *Fertility and Sterility*, Vol. 92, Issue 3, September 2009.

**Isaksson S, Skoog Svanberg A, Gunilla Sydsjö, Thurin-Kjellberg A, Karlstrom P-O, Solensten N-G and Lampic C**, “*Two decades after legislation on identifiable*

*donors in Sweden: are recipient couples ready to be open about using gamete donation?*”, pp. 853-860, in *Human Reproduction*, Vol. 26, 2011.

**Kahn Michael**, “*Fertility tourism a worry: experts*”, in *Times Colonist*, 2008, C.1.

**Khawaja Irfan**, “*Whose Liberalism? Which Individualism?*”, in *Reason Papers* No 25, 1999, Cambridge and New York: Cambridge University Press.

**Laurance Jeremy**, “*So who’s the daddy? Ethics dilemma over sperm donor boom*”, in *Independent*, 2012 (<http://www.independent.co.uk/life-style/health-and-families/health-news/so-whos-the-daddy-ethics-dilemma-over-sperm-donor-boom-7606835.html> last accessed on 7 June 2014).

**Lin Tina**, “*Born Lost: Stateless Children in International Surrogacy Arrangements*” pp. 545-587, in *Cardozo J. Of Int’L & Comp. Law*, Vol. 21, 2013.

**Lunt N., Carrera P.**, “*Medical Tourism: Assessing the Evidence of Treatment Abroad*”, pp. 27-32 in *Maturitas*, vol.66, 2010.

**Marre, D. & Briggs L.**, “*International adoption: Global inequalities and the circulation of children*”, pp. 1–15, New York: New York University Press, 2009.

**Matorras Roberto**, “*Reproductive exile versus reproductive tourism*”, p. 3751, in *Oxford Journals*, 2005.

**Metropolitan Nikolaos of Mesogaia and Lavreotiki**, “*The Greek Orthodox position on the ethics of assisted reproduction*”, pp. 25-33, in *Reproductive BioMedicine Online*, Vol. 17, 2008.

**Morvan P. and Stock B.**, “*Medical learning curves and the Kantian ideal*”, pp.513-518 in *Clinical Ethics*.

**Murphy Therese and O’Cuinn Gearoid**, “*Works in Progress: New Technologies and the European Court of Human Rights*”, pp. 601-638, Vol 10, No.4, in *Human Rights Law Review*, 2010.

**Nau Jean-Yves**, “*Quand il faut voyager pour pouvoir procréer*”, in Rev Med Suisse, 2009 available at <http://rms.medhyg.ch/numero-211-page-1536.htm> (last accessed on 4 June 2014).

**Niekerk van Anton and Liezl van Zyl**, “*The ethics of surrogacy: women’s reproductive labour*”, pp. 345- 349 in Journal of medical ethics, 1995.

**Nikolaos M.**, “*The Greek Othodox position on the ethics of assisted reproduction*”, in Reproductive Biomedicine Online, Abstract, 2008. (<http://www.ncbi.nlm.nih.gov/pubmed/18983734> )

**Pennings Guido**, “*The double track*” policy for donor anonymity”, in Human Reproduction, pp. 2389-2844, Vol.12 No. 12, 1997.

**Pennings Guido**, “*The right to privacy and access to information about one’s genetic origins*”, pp. 1- 15 in Med Law, Vol. 20, 2001.

**Pennings Guido**, “*Reproductive tourism as moral pluralism in notion*”, pp. 337-341 in Med Ethics, Vol.28, 2002.

**Pennings Guido**, “*Legal harmonization and reproductive tourism in Europe*”, pp. 2689-2694 in Oxford Journals, Vol.19, Issue 12, 2004.

**Rotabi Karen Smith and Bromfield Footen Nicole**, “*The Decline in Intercountry Adoptions and New Practices of Global Surrogacy: Global Exlpoitation and Human Rights Concerns*”, pp. 129-141, in Affilia: Journal of Women and Social Work, Vol. 27, 2012.

**Sabatello Maya**, “*Are the kids all right? A child-centered approach to assisted reproductive technologies*”, pp. 74-98, in Netherlands Quarterly of Human Rights, Vol. 31, 2013.

**Sera M. Jean**, “*Surrogacy and prostitution: A comparative analysis*”, pp. 315-342 in Journal of Gender& The law, Vol. 5, 1997.

**Stine Willum Adrian**, *“Sperm Stories: Policies and practices of sperm banking in Denmark and Sweden”*, pp. 393-407 in *European Journal of Women’s Studies*, Vol.17, 2010.

**Tukhi Adela**, *“Surrogacy- should law reflect the medical progress?”*, paper on academia.edu available at [https://www.academia.edu/5283337/Surrogacy\\_-\\_should\\_law\\_reflect\\_the\\_medical\\_progress](https://www.academia.edu/5283337/Surrogacy_-_should_law_reflect_the_medical_progress) (last accessed on 20 June 2014).

**Van Hoof Wannes and Pennings Guido**, *“Extraterritoriality for cross-border reproductive care: should states act against citizens travelling abroad for illegal infertility treatment?”*, pp. 546-554 in *Reproductive Biomedicine Online*, Vol. 23, 2011.

**Van Hoof Wannes and Pennings Guido**, *“ Extraterritorial laws for cross-border reproductive care: the issue of legal diversity”*, pp. 187-200 in *European Journal of Health Law*, Vol.19, 2012.

**Van Hoof Wannes and Pennings Guido**, *“The consequences of S.H. and Others v. Austria for legislation on gamete donation in Europe: an ethical analysis of the European Court of Human Rights judgments”*, pp. 665-669, in *Reproductive Biomedicine Online*, 2012.

**Van Hoof Wannes and Pennings Guido**, *“Extraterritorial Laws for Cross-Border Reproductive Care: The issue of legal diversity”*, pp. 187-200 in *European Journal of Health Law*, Vol. 19, 2012.

**Vidalis Takis**, *“Regulating Assisted Reproduction in the EU: Time for a New Directive?”*, pp. 12-15 in *Journal of International Biotechnology Law*, vol.4, 2006.

**Walker Jean Dorothy**, *“Violation or Conduit for Violation of Human Rights?”*, pp. 106-123, in *Human Rights Quarterly*, Vol.3, No.1, 1981.

**Weil Patrick**, *“Access to Citizenship: A Comparison of Twenty-Five Nationality Laws”*, pp.17-35, in *Citizenship Today Global perspectives and practices in T.*

Alexander Aleinikoff and Douglas Klusmeyer (ed.), Carnegie Endowment for International Peace, 2001.

**Willemen Dorien, D’Hooge Thomas, Knoops Inge, De Neubourg Diane, Spiessens Carl**, “*Does the European Union Tissues and Cells Directive Improve Quality in the in Vitro Fertilization Laboratory? A Case Study in a Tertiary Referral Center*”, pp. 191-198, in *Semin Reprod Med*, vol.30, 2012.

**Zyberaj Jonada**, “*The Complications of Donor Assisted Reproduction Anonymity*”, pp. 578-582, in *Academic Journal of Interdisciplinary Studies*, Vol. 9 No. 9, 2013.

#### News articles

“*Altruistic vs. Commercial Surrogacy*” 2012, at <http://thedeputyforalimitedtime.blogspot.gr/2012/08/altruistic-vs-commercial-surrogacy.html> (last accessed on 29 May 2014).

**Associated Press**, “*Britain faces sperm shortage, calls for donors*”, 2008 at [http://www.nbcnews.com/id/27683226/ns/health-health\\_care/t/britain-faces-sperm-shortage-calls-donors/#.U4-kE\\_1\\_s1U](http://www.nbcnews.com/id/27683226/ns/health-health_care/t/britain-faces-sperm-shortage-calls-donors/#.U4-kE_1_s1U)

**Beaudoux Clara**, “*GPA: que dit la loi? Que dit la circulaire Taubira?*”, 2013 at <http://www.franceinfo.fr/societe/actu/article/gpa-que-dit-la-loi-que-dit-la-circulaire-taubira-225743> (last accessed on 4 June 2014).

**Bertilotti Laura**, “*The prohibition of surrogate motherhood in France*”, 2012 at <http://nyujilp.org/the-prohibition-of-surrogate-motherhood-in-france-2/> (last accessed on 4 June 2014).

**Bionews**, “*Reproductive tourism should be seen as a “safety valve”*”, at [http://www.bionews.org.uk/page\\_12401.asp](http://www.bionews.org.uk/page_12401.asp) (last accessed on 3 April 2014).

**Czech News Agency**, “*Czech Republic a mecca for medical tourism*”, 2014 at <http://www.praguepost.com/eu-news/36534-czech-republic-a-mecca-for-medical-tourism> (last accessed on 20 June 2014).

**Dupont Gaelle** pour Le Monde, “*Premier refus d'adoption à un couple de femmes ayant conçu un enfant par PMA*”, 2014 at [http://www.lemonde.fr/societe/article/2014/05/02/la-justice-refuse-l-adoption-a-l-epouse-de-la-mere-d-un-enfant-concu-par-pma\\_4410560\\_3224.html](http://www.lemonde.fr/societe/article/2014/05/02/la-justice-refuse-l-adoption-a-l-epouse-de-la-mere-d-un-enfant-concu-par-pma_4410560_3224.html) (last accessed on 9 June 2014).

**Gardes Emilie**, “*Le « tourisme procréatif » à la française*”, 2010, at <http://www.terrafemina.com/vie-privee/famille/articles/583-le-l-tourisme-procreatif-r-a-la-francaise.html> (last accessed on 4 June 2014).

**O’Leary Naomi**, “*Italian court overturns divisive ban donor eggs, sperm*”, 2014 at <http://uk.reuters.com/article/2014/04/09/us-italy-fertility-idUKBREA381BG20140409> (last accessed on 9 June 2014).

**Pavlou Lia**, “*Greeks become sperm donors due to Economic Crisis*”, 2011 at <http://greece.greekreporter.com/2011/08/02/greeks-become-sperm-donors-due-to-economic-crisis/> (last accessed on 15 June 2014).

**West-Welfare Society Territory, Orlandi Letizia** “*No-profit surrogate motherhood in Sweden*”, at <http://www.west-info.eu/no-profit-surrogate-motherhood-in-sweden/> (last accessed on 29 May 2014).

«**Ουρές στις τράπεζες σπέρματος**», [Queues in Sperm Banks] 2011 at <http://www.newsbeast.gr/greece/arthro/208823/oures-stis-trapezes-spermatos/> (last accessed on 15 June 2014).

## Presentations

**Brown University**, “*Communitarian Ethics*”, Presentation of the Northeast ethics education partnership (NEEP) and ethical awareness in international collaborations at [http://www.brown.edu/Departments/Environmental\\_Studies/QuigleyPowerPoint/Communitarian\\_ppt.pdf](http://www.brown.edu/Departments/Environmental_Studies/QuigleyPowerPoint/Communitarian_ppt.pdf) (last accessed on 22 May 2014).

**Lohman Charles**, “*Ethical issues in Health Care: Communitarianism, Liberalism*” at <http://www.slideshare.net/dotcomYOGA/phi-204-ethical-issues-in-health-care-communitarianism-liberalism> (last accessed on 22 May 2014).

**Samit Sekhar**, “*What are the various motives for patients to travel?*”, Kiran Infertility Center at <http://kiranivfgenetic.com/wp-content/uploads/2013/11/motives-for-patients-to-travel.pdf> (last accessed on 20 May 2014).

**Stoll Jane**, “*Reproductive Technology and surrogacy- A global perspective*”, PhD session II: International dimensions of surrogacy in cooperation with COST Action IS1001, Faculty of Law, Uppsala University, Sweden, August 25-27 2013.

## Websites

**Brown University**, *Liberal Individualism, Ethical Philosophies of John Locke, JS Mill, Immanuel Kant and Civil Rights*, [http://www.brown.edu/Departments/Environmental\\_Studies/QuigleyPowerPoint/LiberalIndividualism\\_Oct11.pdf](http://www.brown.edu/Departments/Environmental_Studies/QuigleyPowerPoint/LiberalIndividualism_Oct11.pdf) (last accessed on 22 May 2014).

**Cardinal Seper**, “*Persona Humana: Declaration on certain questions concerning sexual ethics*”, 2008 at [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19751229\\_persona-humana\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19751229_persona-humana_en.html) (last accessed on 8 June 2014).

**Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human**



**Rights and Biomedicine**, Summary of the treaty at <http://conventions.coe.int/Treaty/en/Summaries/Html/164.htm> (last accessed on 30 June 2014).

**Eurogentest**, “*Overview of Countries who have ratified the European Convention on Human Rights and Biomedicine*” at [http://www.eurogentest.org/fileadmin/templates/eugt/pdf/Overview\\_of\\_ratifying\\_countries\\_-\\_EuroGentest\\_website.pdf](http://www.eurogentest.org/fileadmin/templates/eugt/pdf/Overview_of_ratifying_countries_-_EuroGentest_website.pdf) (last accessed on 30 June 2014).

**European Commission**, “*Infringements of EU law*”, at [http://ec.europa.eu/eu\\_law/infringements/infringements\\_en.htm](http://ec.europa.eu/eu_law/infringements/infringements_en.htm) (last accessed on 16 June 2014).

**Europe IVF international**, “*IVF- donor sperm*”, at <http://www.fertility-ivf.eu/en/ivf-ds-donor-sperm.html> (last accessed on 20 June 2016).

**Family by Design**, “*Sperm Donor Legalities: Using (or becoming) a Known Donor vs an Anonymous Donor*” at <http://www.familybydesign.com/content/learn/legal/known-sperm-donor/> (last accessed on 8 May 2014).

**Global Doctor Options**, “*Surrogacy*” at <http://www.globaldoctoptions.com/surrogacy-cost/523?page=1> (last accessed on 3 June 2014).

**Greece Considered Ideal “Reproductive Tourism” Destination**, 2013 at <http://news.gtp.gr/2013/06/05/greece-considered-ideal-reproductive-tourism-destination/> (last accessed on 11 June 2014).

**Haines Williams**, “*Consequentialism*”, Internet Encyclopedia of Philosophy, <http://www.iep.utm.edu/conseque/> (last accessed on 21 May 2014).

**Human Fertilisation and Embryology Authority**, “*European Union Tissues and Cells Directives*”, 2009 at <http://www.hfea.gov.uk/2072.html> (last accessed on 30 June 2014).

**Instituto Bernabeu**, “*Legislation in Spain and Europe*” at <http://www.institutobernabeu.com/en/4-14/international-patient/legislation-in-spain-and-europe/> (last accessed on 19 June 2014).

**Jackson Bianca and Chambers Coram**, “*Surrogacy: A Guide to the Current Law (Part 2)*”, <http://www.familylawweek.co.uk/site.aspx?i=ed127234> (last accessed on 2 June 2014).

**Kant’s Ethical Theory Strengths and Weaknesses** at [http://www.rsrevision.com/Alevel/ethics/kant/strengths\\_weaknesses\\_kant.pdf](http://www.rsrevision.com/Alevel/ethics/kant/strengths_weaknesses_kant.pdf) (last accessed on 9 June 2014).

**Lohman Charles**, “*Consequentialism and Deontology (Biomedical Ethics)*”, <http://www.slideshare.net/dotcomYOGA/phi-204-ethical-issues-in-health-care-consequentialism-deontology> (last accessed on 21 May 2014).

**Mertixell Mir**, “*Huevos de austeridad*”, 2012 at <http://www.globalpost.com/dispatch/news/regions/europe/spain/120625/spain-egg-sperm-economy> (last accessed on 19 June 2014).

**Moussis Nicholas**, “*Access to European Union law, economics, policies*”, 3.3. The legal system of the European Union at [http://www.europedia.moussis.eu/books/Book\\_2/2/3/3/index.tkl](http://www.europedia.moussis.eu/books/Book_2/2/3/3/index.tkl) (last accessed on 16 June 2014).

**Open Society Justice Initiative**, “*Children’s right to a nationality*”, at <http://www2.ohchr.org/english/issues/women/docs/OtherEntities/OSJIChildrenNationalityFactsheet.pdf> (last accessed on 5 June 2014).

**Regis University**, “*Ethics at a glance: Communitarian Ethics*”, <http://rhchp.regis.edu/hce/ethicsataglance/communitarianethics/CommunitarianEthics.pdf> (last accessed on 22 May 2014).

*Surrogacy Arrangements Act 1985, 1985 Chapter 49* at <http://www.legislation.gov.uk/ukpga/1985/49> (last accessed on 2 June 2014).

**Surrogacy UK Information Support Community**, “*Common Questions Answered*” at [http://www.surrogacyuk.org/intended\\_parents/your-questions-answered](http://www.surrogacyuk.org/intended_parents/your-questions-answered) (last accessed on 3 June 2014).

**The European Centre for Law and Justice**, “*Surrogate Motherhood: A violation of Human Rights*”, Report presented at the Council of Europe by, 2012 <http://www.ieb-eib.org/en/pdf/surrogacy-motherhood-icjl.pdf> (last accessed on 22 May 2014).

**The European Parliament’s Intergroup on LGBT Rights**, “*New comparative study on surrogacy in the EU*”, 2013 at <http://www.lgbt-ep.eu/parliamentary-work/new-comparative-study-on-surrogacy-in-the-eu/> (last accessed on 30 June 2014).

**The Swedish National Council on Medical Ethics**, “*The Genetic Integrity Act (2006:351)*”, at <http://www.smer.se/news/the-genetic-integrity-act-2006351/> (last accessed on 3 April 2014).

**University of Helsinki**, “*Medical and bio law*”, 2006 at [http://www.helsinki.fi/law/disciplines/medical-%20bio\\_law/index.html](http://www.helsinki.fi/law/disciplines/medical-%20bio_law/index.html) (last accessed on 10 July 2014).

**Women Republic**, “The cost of surrogacy in the UK” at [http://www.womenrepublic.co.uk/family\\_pregnancy/surrogacy\\_cost.htm](http://www.womenrepublic.co.uk/family_pregnancy/surrogacy_cost.htm) (last accessed on 3 June 2014).

**Vatican**, “*Catechism of the Catholic Church. Section 2377*”, Retrieved 25 November 2008 at [http://www.vatican.va/archive/ENG0015/\\_P86.HTM](http://www.vatican.va/archive/ENG0015/_P86.HTM) (last accessed on 8 June 2014).

## **Correspondence**

Email (in greek) from Takis Vidalis, Member of the National Committee of Bioethics in Greece, Professor in the University of Crete, 15/ 06/ 2014.

Email (in greek) from Andreas Takis, Professor in the Law Faculty of Aristotle University of Thessaloniki, Greece, 22/ 05/ 2014.

Email (in greek) from Michail Pikramenos, Professor in the Law Faculty of Aristotle University of Thessaloniki, Greece, 9/06/ 20014.