Reproductive technology and the same-gender family: the role of family law

The regulation of biomedicine and its practices, including Medically Assisted Reproduction (MAR) has been an important challenge for law in general, and family law in particular. After national legislators questioned both symbolically and practically whether or not they should or could produce the regulatory framework for the use of reproductive technology, they included themselves in an innovative model of control, namely that of co-regulation. MAR is regulated by a miscellany of competent bodies, regulations and procedures related to law, bioethics, technology sciences and economics, which operates in a cyclical way. So how can the operation of this model be appraised thirty years after its introduction? What was its influence in the way family law is related to social reality? To what extent has it been adopted and integrated in Greece?

At the same time, especially after the year 2000 family law has been faced with the challenge of integrating in its institutions partnership and kinship of people of the same gender. The pressure is due to a wider change, the dissolution of gender difference and the legal and political assertions of the gay movement. Already most legislators of European countries have allowed homosexuals access to its institutions. The response on the part of legislators enhances the interactive nature of the legislator's relation to social reality. The question that arises is whether in the effort to fully include the same gender family the legislator has been moving towards the direction of expanding the scope of MAR, so that it transcend the biological inability to procreate due to the fact that the couple consists of people of the same gender. The relation of MAR with same-gender families is particularly interesting for the Greek family law, given the divided social attitudes towards couples of the same gender and the contradictions that emanate from the combination of legislative changes after the year 2000.
I. Challenges and innovation in the regulation of biomedical practice of MAR: a post hoc appraisal

I.1. The challenge of regulating MAR as a biomedical practice

The term MAR denotes a combination of methods/practices that have been developed to treat infertility. It is a biomedical technique since it combines the applications of medicine with those of biology, using the organs and products of one person's body as a means of treatment (direct or expected) of serious physical difficulties of other people. This use alludes to complex (and often conflicting) socio-economic choices. Since biomedicine blends scientific theories with therapeutic methods and socio-economic choices, it is defined as a combination of technological practices based on the use of the human body and its products. The human body, carrier of life (inextricably connected with human personality) becomes a source of indispensable, productive material which can be controlled, exchanged and capitalized on, in order to achieve goals with direct or indirect financial results. That is why the regulation of biomedicine requires enacted procedures of collective evaluation and calculation of therapeutic expectations against the risks e.g of commercialisation or/and instrumentalisation of the human body, for private and public purposes.

The “nature” of the above calculation of vested interests is obviously political, in the sense of the gist of decisions that need to be made, but also because of their procedure. On one hand reproductive technology concerns societies in their entirety, because it presupposes a crucial political choice of how the human body should be utilised. It also concerns numerous social groups with complimentary and conflicting interests e.g public and private agencies which provide healthcare services or patients who are in need of human body products and healthy people who are the bearers of these products. On the other hand, even today and despite their serious flaws, decision making institutions which are organised on the basis of democratic principles historically remain the best expression of balance of social powers. Under this light the law, also perceived as a system of communication which tends to regulate civil partnership both symbolically and practically, constitutes the appropriate system to regulate the use of reproductive technology and organise biomedical practices. The law provides both the language of a valid discourse that will ascribe at least a

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1 Rethymniotaki H., Regulation or self-regulation? The example of medically assisted reproduction, Ant. N. Sakkoulas publications, Athens- Komotini, 2003, p. 10 et seq.
minimum of commonly accepted moral values that the practical organization of social action demands.  

Especially MAR requires first and foremost the demarcation of the circle of people that may have access to its use. Secondly it raises the issue of the legal nature of human reproductive material use (i.e whether it is an element of a person or a thing) as well as its distribution (through sale or donation). The relevant discussion resonates the wider theoretical debate about the human body and its legal association with the person. The same discussion also applies to fertilised ova, concerning who has the power to distribute them and if the supernumerary ones should be donated, used for research or discarded. Thirdly, especially the practice of surrogacy highlights the gender-centered nature of the commercialization of the human body at the end of the 20th century, meaning the fact that the human body is utilised to a different extent and on different conditions according to whether it is male or female. Fourth, there is the question of kinship regarding the children born through the use of MAR techniques. The legislator stipulates the relation of motherhood and fatherhood and is called upon to exclude or not the biological progenitors and the woman that carried a child on behalf of another woman. This is done by the enactment of their anonymity or a presumption in favour of the socio-emotional mother, so that the children born can have only one father and one mother. In the end the question that arises is if the de facto involvement of more people in the birth of the above children will evolve or not into a de jure form of multiple parenthood.


7 Rethymiotaki (2003) op. cit. p. 146 et seq.

However, MAR appeared and developed in the past thirty-five years, a period during which the balance among the three regulating poles, the state, the market and civil society, was radically reconfigured⁹. Initially the law was “carried away” by the crisis and the transformation of the state, the top political institution of modernity. Within the framework of public discourse it was questioned whether or not state law should and could, in fact, effectively regulate and organise MAR practices. The same applied to all domains where the market technological application of scientific knowledge raised social and legal issues. Finally the market and the civil society claimed, and to a great extent managed, to participate in the regulation of MAR. What was overturned at first was the post-war model of social control over medical practice and scientific research, which was based on the allocation between medical profession/state on one hand, and medical ethics/medical law on the other, with a judge as a locum tenens of their regulatory scope of jurisdiction. Doctors themselves publicly declined the management of reproductive technology because it demands a risk assessment and a reconciliation of conflicting interests. Finally a complicated system for the regulation of MAR was established, where law, scientific ethics and rules of morality intersect and develop complementary and competitive relations.

I.2. The innovation of co-regulation and the role of law: an appraisal

The innovation of co-regulation regards the fact that MAR, as it so happens with all biomedical practices, is regulated by a network of rules/competent bodies and procedures which merges bioethics, law, scientific, technological and financial domains of social action. Nowadays bioethics and best practices in science and law have developed complementary or/end competitive relations to such an extent as to form an intricate system of social control over biomedicine, through which its regulation is finally achieved.¹⁰ Regulatory principles are transferred from the field of ethics to the field of law and vice versa. The institutional bodies of each of the above combine their function to jointly achieve control over biomedicine. In the end, since the dividing lines between law, ethics, morality, scientific rules and audit bodies have become dotted and their limits fluid, organization and social control of biomedicine

operate as a network where every hub is necessary for the organisation and the control of MAR.

So, after thirty years, how do we evaluate the role of state law within the framework of MAR co-regulation? Did it lose or win something after this new institutional arrangement? Admittedly, national legislators of European countries initially conceded some of their regulatory power but in the end they regulated MAR and in fact they did so while maintaining their national legal cultures, as they have been shaped through the political history of each country. European legislative regulations present considerable differences, which express profound and general attitudes towards the evaluation of legal goods that conflict so that the overall regulation can be achieved. Notable cases in point are the sale of reproductive material in England, the disclosure of donor identity in Sweden, the very limited research use of fertilised eggs in Germany and the prohibition of surrogacy in France. However, in the light of a political sociology of law the common point is that state law, as a regulatory system, “healed” through reconceptualization its shaken legalization and enhanced its practical function. However, the extent to which this happened depends on the particular circumstances that prevailed in every individual country during that period of time.

So in France for example, the innovative hub of this network was definitely bioethics because it connected the professional groups involved, the scientific community of different specialties, the public and private healthcare services providers, the legislator, the judge and the citizens. Bioethics was progressively established in the mid 80’s in three different forms that intersect before public opinion: as a philosophical reflection, as public discourse among ‘experts’ and as a system of organization and control of biomedicine. It was legalized in a dual way; on one hand as collective ethics, a prospective that examines social action in a general light, substituting or/and complementing politics and on the other hand as an alternative model of control interposed between regulation and self-regulation by Bioethics Committees that operate on different levels. Finally bioethics reinforced the

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legislator, expanding the realm of public discourse in order to achieve the social consensus necessary for the legislative regulation. At the same time, since it is produced by bodies of an inter-professional nature it legalized the self-regulatory dynamics of the competent bodies involved in the process through an interdisciplinary approach and the publicization of issues of interest. The above bodies may not have regulatory power, however they enjoy a broader symbolic prestige. They may give formal opinions only on specific issues that arise but they have progressively formulated a set of principles which served as a point of reference for all MAR stakeholders. Even if they do not have regulatory jurisdictions and mechanisms of supervision many a time they have indeed inspired legislators, judges and institutional bodies. In this way bioethics transcended the regulatory scope of conventional ethics since it transcended the realm of individual relations and it expanded to the relations of the institutional bodies involved in the process. The regulatory principles shaped are no longer destined for internal consumption by certain social groups but they can potentially regulate the conduct of all stakeholders involved in that specific social activity.

Furthermore, the evaluation clause of the statutes encompassed in the so called “bioethics laws” has proved to be an important innovation (signifying through their very name the interaction between law and bioethics), especially after the passing of time. The evaluation of the statutes for MAR has already been made twice by the National Bioethics Committee (which in the meantime became an Independent administrative Authority), the special Committee of the Council of State for the evaluation of the scientific and technological choices made by Parliament and the parliamentary committee specifically set up for this purpose. The procedure is completed with the hearings of experts before the Senate, at the stage of statute preliminary processing. This is a cyclical procedure of joint evaluation of regulatory systems whose outcomes are “inscribed” within each one of them. This kind of

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13 Rethimiotaki (2002) eadem
15 Law. 654/1994 on the donation and use of elements and products of the human body, M.A.R and prenatal diagnosis was re-evaluated and updated with the 800/2004 law on bioethics. It was updated anew with the law. 814/2011, which provides for its updating 7 years after its enactment.
interactive evaluation constitutes one of the distinctive characteristics of modern law, based on the theoretical paradigm of networks.\textsuperscript{16}

\section*{1.3. The Greek model of Medically Assisted Reproduction regulation}

In Greece, on the contrary, it seems that the need to invent new forms of organization and supervision in view of the regulation of biomedical practices in the light of the reconfiguration of relations between the market, technological sciences, the state and civil society has not been fully understood. Since the beginning of the year 2000 bioethics may indeed have been developing in the domains of philosophical and interdisciplinary reflections, however public discourse has remained limited. Indeed the National Bioethics Committee (NBC) was established (law 2667/1998) and was officially active since the year 2000. Its composition is interdisciplinary and its jurisdiction is consultative. It addresses its proposals and opinions to the competent public bodies - either when it is asked to do so, or by its own initiative. As it comes out of the annual reports the NBC for the most part chose issues by its own initiative, having reason to believe that the issues in question would sooner or later be relevant for Greece, too. Especially in the light of the legislative regulation of MAR the Committee was called upon to express its opinion. It has been publicizing its opinions and reports electronically on its website since 2005 and it communicates them to the Parliamentary Standing Committee for the Evaluation of Technology, so that MPs can be informed about bioethical issues. Since 2004 it has been calling experts to make specialised presentations in order to be informed on how issues are formulated and record conditions prevalent in Greek reality.\textsuperscript{17} However, the question lies in the extent to which the NBC and other Bioethics Committees (where operative) have trully elaborated on the organization of practices, up to the point of becoming an important constituent of the Greek regulatory model of bioethics, as it functions in the midst of the state and the market. For this reason the law officially remains the exclusively and absolutely dominant regulatory framework, however in practice it either abstains or


\textsuperscript{17} E.E.B., Annual report 2003-2004 and 2008-2009 in: www.bioethics.gr
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regresses. Even after the enactment of rules and designation of competent bodies the regulation has been functioning suboptimally.

Especially MAR, constitutes perhaps the most representative case of biomedical regulation model, which has finally been shaped in Greece. At first MAR was established in the private sector, without even rudimentary administrative supervision, in conditions of partial operation of supervisory mechanisms of the medical profession. To a great extent it was shaped in an arbitrary manner by private centres, which even today operate without always keeping due records and without official certification to confirm that they do abide by medical protocols; centres which endeavoured to transfer the therapeutic risk responsibility to couples faced with problems of infertility. The adverse issues which need to be managed and are related to the use of MAR techniques have not really been highlighted by the mass media during public discourse because the technique was related to the fulfillment of the social duty of women to become mothers, especially in the light of the serious problem of low birth rate in Greece. Furthermore the case law (numbering a few but indicative rulings) encouraged the establishment of kinship relations of the children born through MAR, acknowledging from the very beginning the priority of the socio-emotional bond over the biological one. However, in this way the life-changing potential of MAR was minimally emphasized. Apart from the domain of legal theory, discussions failed to focus on several aspects: the fact that reproductive technology enables the birth of children without the requirement of sexual contact between a couple of people of a different gender, the establishment of kinship relations which do not coincide with the biological truth and the commercialization of the female body.

The legislator regulated the medical practice with law 3089/2002 and law 3305/2005 and reserved the use of MAR exclusively for therapeutic treatment purposes, first and foremost, but also acknowledged the borderline expressions of the freedom to procreate, under strict circumstances. Secondly, the legislator acknowledged the power of a person to dispose their own reproductive cells and

19 Rethymniotaki (2003) op.cit. p. 76 et seq.
defined the legal requirements for such disposition. Thirdly, the motherhood and fatherhood of all people resorting to the use of reproductive technology explicitly expressing their volition to become parents was legislated without reserve. In what concerns the organization of the practice the legislator proceeded to the establishment of the National MAR Authority, aiming at organising, licensing, supervising and solving particular problems related to the technique. However, the Authority was then left inactive and as a result it discontinued its operation in June 2010 only to bounce back recently. This means that the Authority was not sufficiently supported by administration so as to conclude even its rudimentary work, which was to audit and grant license of operation to MAR centres and also organise the national registry of epidemiological data and outcomes related to MAR in Greece. For all that matters, the reluctance of the Greek state to organise the supervision of the practice has de facto changed the balance in the calculations made by the legislator in the course or regulating MAR in what concerns the risk of commercial exploitation of the female body, for example. This led to the strengthening of the trend of illegal trafficking of women, aiming at using them as surrogates through criminal organisations and the so-called reproductive tourism.

Finally the way of enforcement of the current legal framework by judges significantly influences the above balances. For example, a study of the rulings of voluntary jurisdiction concerning surrogacy agreements indicated that more than half of the surrogates are women from countries of Eastern Europe and the Balkans and in fact these women are, to a great extent, related to domestic help and have a dependent , working relationship with the commissioning parents. However, judges have proven quite frugal in terms of fully using the current interrogation system in order to

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thoroughly examine whether the altruism displayed by the future surrogate is real or not. On the contrary, when the judge was called upon to decide whether single men, too, had the right to use a surrogate, it seemed at first that they grasped the full dynamics of individual access (and not the access of couples) that the Greek legislator acknowledged for single women, for reasons of anatomy. Even if in the end the rulings were repealed the dynamics of the Greek regulation of MAR was highlighted more clearly.

II. The challenge of families with no gender difference: the interaction of law with social practice and the use of reproductive technology

II.1. The cultural fluidity of gender difference in sexual and partnership relations under the pressure of legal-political assertions of the homosexual movement

At the beginning of the 21st century it is no longer considered a foregone conclusion that people are divided, based on their anatomy, in men and women who instinctively form sexual relations through which they reproduce. This is a major cultural change fostered on a social level after the legal-political assertions made by the homosexual movement, of both its conservative and radical strand. This is a change inscribed in the broader social-economic environment of societies of late modernity. The human body on one hand becomes a symbol, incorporated in production procedures and is commercialized. On the other hand, it becomes the object of a fundamental battle fought so that the subjects, the bearers of the human body, can regain control over it. The body is perceived as a basic constituent to a person's self and its bearers constantly try to “transform” it. The human body and the relation of the subjects with it are in the forefront of assertion of rights also by the gay movement. The different (not mainstream) sexual orientation is invested as an element of either a minority identity or a different inter-subjectiveness (a way of relating through one's body) which need to be respected as such.

On an academic level the theoretical paradigms that prevail in social theory on gender and sexuality, on one hand the feminist-materialist and on the other hand the

constructivist, especially the version of representational performance, converge in the ascertainment that the way in which gender/sexual identities are produced, reproduced and transformed has changed, even though this change is explained and delineated under a different light\textsuperscript{27}. The crux to the issue under examination is whether or not and to what extent the importance of gender difference as a constituent to sexual, partnership and kinship relations has been ironed out, socially speaking. The two examples, even if they perceive the role of gender differently\textsuperscript{28} converge on the fact that on one hand gender continues to function as a category of social prioritization that material structures or/and discursive practices mould in order to legalize relations of power. Secondly they also converge in that the dominant model of heterosexual sexuality constitutes a vital pillar of the hegemonic structure. Third, they agree on the fact that a paradigm shift presupposes radical change in either productive relations or symbolically constructed gender and sexual classifications\textsuperscript{29}. However both conclude that under certain circumstances they can be questioned to a considerable extent, for different reasons. According to the materialistic example since the political economy of categorisations has changed, due to general circumstances formed as subjects of collective action claimed (and to an important extent achieved) to re-draw the lines of the “magic circle” of sexual stratification\textsuperscript{30} despite the strong reactions of other groups to that. According to the concepts of performance, gender difference was dissolved through repeated individual “variations” which multiplied to such an extent that they destabilised considerably the prevalent categories and they re-conceptualized them.


\textsuperscript{28} According to the feminist, materialist theory, gender constitutes a socio-historical material relationship of inequality, which is related to the way of production of a society. The political economy of gender is determined (i.e it is reproduced but also transformed) by the historical development of each society. According to the constructivist theory, biological and social gender constitute cultural constructs of inequality. Genderization is a constant process of representational performance through which subjects mould themselves, re-negotiating the power-related reasons that lead to their production. Indicatively Giannakopoulos (2006) , idem. and Astrinaki A., Anthropological Approaches to gender: A review, in: Kanta B./ Moutafi B./ Papataxiarchis Efth. (ed.), Studies on gender in anthropology and history, Athens, Alexandria Publications, 2011, p. 17-128.

\textsuperscript{29} The transpositions of the signifier does not suffice in order to radically modify the signified, Butler J., Merely cultural?, New Left Review, 1/227, 1998.

Therefore, one may not validly claim either that the material relations of exploitation have been reversed or that the dominant narratives on gender identities and sexual identifications have been de-constructed. After all, such a transcendence of structural limits would have been noticed readily with the naked eye! However, gender and sexual bipolarity has been shaken to a considerable extent because of the combined influence of changes made on the level of structures and agents of action. On one hand the body and its products have become processable products through innovative technologies and have acquired particularly lucrative uses in rapidly developing markets\(^{31}\). In a framework of aesthetic re-conceptualization they become points of reference and through allegories they are elevated to the state of symbols\(^{32}\). Through their consumption the subjects publicly manifest versions of themselves, asserting identities. The crucial question is whether this is a theatrical game in which subjects are involved because of a wider aesthetization of their daily lives\(^{33}\) Or whether this is a deeper psychological process of reconstruction through which the subject positions himself/herself against their own selves and challenges others to do the same\(^{34}\). The generalised commercialisation involving body, gender and sexuality\(^{35}\) (both straight and queer) and even kinship itself, advocate the first question. Points in favour of the second question regard the fact that assertions for the expression of any sexual desire are inescapably intertwined with categories of self-perception on one hand and a search of ways to connect with others physically on the other. Therefore it all boils down to a deeper, psychological process.

On the other hand the role of the movement of homosexual people, who became an object of politics, has been crucial. Especially socially privileged, white men\(^{36}\) asserted their rights using as a vehicle the right to equal treatment and tolerance of their different sexual orientation. They claimed the right to non-discrimination in the name of belonging to a different minority category and to an extent they succeeded- making the (unavoidable in every negotiation) necessary concessions. The

\(^{31}\) Indicatively services of body decoration (piercing/tattoo) and body building, aesthetic surgical and dermatological medical procedures and reproductive technology.


\(^{35}\) Hennesy R., Profit and Pleasure: Sexual Identities in Late Capitalism, Routledge, London/New York, 2000

\(^{36}\) Given the fact that gender and sexual relations are defined by the wider social framework where they develop and they interact with social class and race.
assertion was legalized through the reference to an “imaginary” community but, as it also happened with the feminist movement, this assertion was questioned from inside the movement. Part of the movement re-appropriated the derogatory term ‘queer’, denoting what is sexually weird, eccentric, peculiar, which marginalises “anything that goes against the normal, the legal, the mainstream”\(^\text{37}\). The trend of the “queer” movement believes that obsession with identity substantiates homosexuality and constitutes a strategy which may create a mirror reflection of an equally oppressive status of “homonormality”\(^\text{38}\) which will culminate in the legal-political assertion of the paramount institution of “heteronormality”, i.e marriage. It seems as if the conquest of the right to equal treatment had as a price the disarmament of homosexual erotic desire\(^\text{39}\). So has the pressure been released or is this a more profound disruption of the dominating arrangements for sexuality? On one hand, the internal “division” induced in the gay community, especially in view of the management of AIDS, advocates the first answer. The same applies to the feminist movement for female sexuality, on the occasion of versions of lesbian sexuality but also pornography. The very strong opposition expressed to the legislation of homosexual partnership and kinship relations that gay people make on the basis of homosexual erotic desire is a point in favour of the second answer. However, for all intents and purposes, the nature of assertions made by the homosexual movement is political and it was regarded as such by both judges and legislators.

**II.2. The response of the family law legislator in the following enactment of law: the interactive relation of law and social reality**

Asserting rights in terms of identity has been a political strategy which served (and perhaps no longer serves)\(^\text{40}\) the purpose of construction of a relatively unified subject of political action, because through it the social differences and different practices among homosexual people were erased. In fact homosexuality is a fluid


category of self-perception. However, since sexuality has a relationship dimension and addresses others, it also expresses the quest of connecting with these other people through the body.

In the perspective of a political Sociology of law, however, it is of interest that in the name of this identity or community, different social groups adopting a pattern of movement action questioned cultural mentalities, invented new forms of intimacy relations and finally claimed their acknowledgement by the law, giving new meaning to some of its categories, whose significance was indeed crucial. This action expresses the trend of inclusive citizen participation in the production and application of law in democratic societies. The recruitment of the law from below in order to acknowledge homosexual sexuality, partnership and family spans to the dual dimension of the law, the power-exerting and the symbolic one. On one hand organised groups of homosexuals use the typical political channels of communication in order to exert pressure on the state to legally acknowledge their relations ascribing to them rights in all domains of law, family, social insurance, taxation, employment etc. Opposing social groups attempted to interrupt their action using the very same channels. In this respect the assertions of homosexuals constitute examples of anti-hegemonic use of law, which precedes legislative change. They illustrate the awareness that legislative change constitutes a necessary but not absolute requirement to overturn hegemonic structures.

On the other hand one can observe all the features of law activation by social movements, an active process of production of regulatory meaning whereby the cultural power of the law is proven. First we had the publicization and then the magnification of the social injustice against the people involved. At this stage the legality of regulations and practices was put into question, since they violated

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individual rights. Secondly, in the code of the legal system, they were translated into issues that can be supported through legal principles and means. In the field of sociology of law the notion of “legal conscience” describes this sense of legality which emerges through what people say and do in reference to the law. Thirdly, the problem was generalised since it was incorporated in the sphere of universal problems, meaning the consolidation of democracy through which stakeholder groups also aspire to the creation of alliances. As a result the “sexual capacity of citizens” emerged, the need for the different, non-mainstream sexual orientation to be respected, so that homosexuals be recognised as an integral part of a democratic community. Fourthly, the issue was expanded since it projected the challenge that it represents for the entire legal system and culture, which is the definition and nature of family and the historically changing balance between individual autonomy and institutional protection. The aspiration now is to turn tolerance into acceptance and finally inclusion of all forms of sexuality, partnership and family in the institutions of the law.

The law has progressively responded to the petitions of the homosexual movement on both a judiciary and a legislative level. The ECJ acknowledged at first the right to non-discrimination due to sexual orientation on a legal basis, the freedom to self-determination. Then it acknowledged the relationship dimension to privacy, the person’s right to enter into relationships of intimacy and to establish partnership and family ties. Finally it defined family life as a relationship of intimacy, which manifests itself as a continuous coexistence (not necessarily co-habitation) of people expressing the feeling of mutual devotion, illustrating their willingness to commit

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irrespective of biological gender and sexual orientation\textsuperscript{52}. As a notable case in point, in 2013 the US Supreme Federal Court struck down the DOMA Act (In defense of Marriage Act) of 1996, which practically cancelled on a federal level the legislative acknowledgement of marriage between people of the same gender, wherever it had been enacted, overriding the allocation of jurisdictions between the States and the Federal government.

In addition, since the 90's European legislations have been progressively allowing homosexual couples to have access to institutions of family law\textsuperscript{53}. The same gender partnership relations can fall within the framework of some form of partnership agreement or marriage. Respectively, kinship relations can be established mainly by adoption and in a few cases through MAR. The acknowledgement of kinship relations, apart from gender difference, falls within the framework of the “big reconfiguration” of family law, initially with the acknowledgement of kinship outside marriage and then kinship beyond genetic filiation\textsuperscript{54}. This apt change proves a relation of progressive interaction between law and social reality. Thus the family law counteracts the legalization blow it suffered as a par excellence state law, since it constitutes the hard core of the field where the national legislator continues to have maximum discretionary power. The access of homosexuals to MAR (individually or in couples) constitutes yet another step in the construction of a pluralistic model of partnership relations co-articulation with the relations of kinship in the post-modern era.

\textbf{II.3. The enlargement of the MAR scope in order to transcend the biological failure to reproduce due to sameness of gender}

The intersection of the social dynamics of MAR with the dynamics of same-gender family completes the structural change of the family model in the last quarter of the 20\textsuperscript{th} century. The re-conceptualization of partnership is competed with that of kinship. Thanks to MAR, which uses anonymous reproductive material and the


\textsuperscript{53} The length and breadth of the change recorded in the Rainbow Europe Index, in: http://www.ilga-europe.org/home/publications/ reports_and_other_materials/ rainbow_europe

\textsuperscript{54} Rethymniotaki H., Family and law in Greece of the 21\textsuperscript{st} century: trends of individualization and conventionalization, Minutes of the 3\textsuperscript{rd} Ordinary Congress of the Hellenic Sociology Society, Elliniki Kinonia publications 1975-2010, re-classifications, challenges, Athens, 3-5 November 2011.
capacity of a woman to carry a child, the sexual contact between two people of a different gender has now stopped being a necessary requirement for procreation. So, biologically speaking, the obstacle of the inability of two people of the same gender to procreate through a sexual relationship is lifted. But is it also lifted from a social and cultural perspective, so as to be finally lifted both legally and politically? In order to connect the social and the legal concept of kinship the legislator, who has the constitutional jurisdiction to do so, needs to evaluate the extent and the depth of social change. Two questions are broached De lege ferenda. First whether the legislator will broadly enact joint parenthood, the one trilateral relationship within the framework of which two partners or spouses of the same gender undertake the responsibility of raising a child and share the right and the obligation of the child's legal guardianship. Secondly, if the biological failure to reproduce due to sameness of gender can be regarded as insurmountable difficulty, different in nature though it may be, but also justifying a similar legal treatment- thereby allowing the legislator to make an explicit provision and expand the scope of MAR on that basis.

In what concerns the former, family law creates, establishes and shapes kinship relations on the basis of biological fact or marriage/partnership agreement, legal transaction and court rulings. Kinship is a legal concept and it does not always coincide with biological descent. From an anthropological point of view kinship is not a hyperhistorical constant, dictated by nature, but a culturally constructed grid of relations which is legitimised through the rules of law, with rules of mandatory law even today, since private autonomy, enhanced though it may be, does not fall within the framework of kinship relations. However, the argument of a “single-gender or gender-free, or devoid of gender connotations” kinship is that it will deal a crucial

58 Papadopoulou- Klamari op.cit. p. 54.
60 Kotzabasi Ath., Gender equality and private autonomy in family relations- religious wedding ceremonies and multiculturality, Athens- Thessaloniki, Sakkoulas Ltd., 2011.
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A blow to the psychodevelopmental growth of the children involved. According to the western narrative on triangular kinship, this requires the implication of the Father-say in the mother-child relationship; the argument against is that western societies have a particularly stronger tendency to re-conceptualize already established relations of kinship and to invent new ones. In a very short period of time children born outside marriage were acknowledged, marriage was de-moralized, adoption was reinforced and children born through MAR techniques were socially included. Already child-psychiatric research and ethnographic research concluded that there exist other factors that trouble children and that same-gender families do not differ structurally from heterosexual ones. It was obviously on the basis of these arguments that national legislators that recognized marriage of homosexual couples also provided for their ability to proceed to joint adoption (by the terms that apply to heterosexual couples as well). Since the purpose of marriage and long term partnership is the establishment of a family life, it goes without saying that this life comprises having children in every natural or legally permitted way. Since the legislator has acknowledged the right of marriage for homosexual couples, the non-acknowledgement of their right to become parents would encroach on the very nucleus of their right to a family life. Such refusal would be an blatant discrimination against them on the basis of legally shaky arguments and not fully evidence-based psychiatric, paediatric, anthropological or sociological views.

So what is the difference between adoption and MAR? In adoption the child exists already, and therefore it is in the child's best interest to live with a family, however apart from that legal argumentation is identical for both practices. Adoption and MAR

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65 Pediatrics.publications.org/content/early/2013/peds.2013/03/18-0376
constitute two forms of socio-emotional kinship. If the legislator accepts the fact that there can be kinship in same gender relationships in the first case, then for the same reason the legislator has to acknowledge the same in the second case. In fact, in practice having children through MAR is easier than adoption due to the limited number of children available but also because of social prejudice against homosexual couples. Furthermore, depending on their gender, by resorting to MAR homosexual couples can combine (at least for one of the two parents or even for both) biological and socio-emotional kinship. Nevertheless, the sameness of parent gender can lead respectively to two fathers (if the child conceived through MAR is born inside a marriage is the presumption of fatherhood applicable in favour of the other spouse?) and perhaps two mothers (depending on what is stipulated for surrogacy). In addition, it leads to the inability to establish kinship with the opposite-sex parent since the donor (male or female) of the reproductive material remains anonymous and devoid of any legal bond with the child. Unless, in order to avoid kinship-free procreation one acknowledges that between the donor and the child there can be a sort of 'denuded' relation of kinship established, based on the presumption of biology. For all these reasons an explicit legislative provision is required in order to protect the kinship relations of children.

However, the second crucial question concerning the investigation of the reason for MAR applications or the extrapolation of inability to procreate for medical reasons to the failure to procreate due to sameness of gender remains unanswered. Here the wider issue of the power of the legislator to decide on the eligibility of candidates and the terms of using reproductive technology in order to become parents (individually or in couples) becomes relevant. On top of that, another issue which

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69 A couple of men can enter into contract with a surrogate mother (where this is permitted by legislation) and use a donor egg fertilized with the sperm of one of the two men. Respectively, a couple of women can use the sperm of an anonymous donor, which will fertilize the egg of one of the women and the fertilised egg will then be transferred to the other woman who will undergo the gestation.


remains pending is the commercialisation of the female body and its particularly lucrative and ever-extended uses in the rapidly growing market of MAR services.\textsuperscript{72}

In one sense, the possibility to allow the use of MAR by same-gender couples with no infertility problems would overly expand the scope of insurmountable difficulties, because in the particular case the failure to procreate is not attributable to an illness or physical impairment but emanates from the biologically imposed, gender-based character of sexuality that actually leads to procreation\textsuperscript{73}. However, one could argue that equality demands that when the right of access to reproductive technology is acknowledged to couples whose sexual relations can lead to reproduction, the same right should be acknowledged for those couples whose relations do not\textsuperscript{74}. It must also be highlighted that according to the case law of the ECHR, denial of the possibility of access to in vitro fertilization falls under the scope of article 8 on the protection of family life, because it expresses the decision of the members of a couple to become parents\textsuperscript{75}. The argument against is that in the first case the matter is indeed related to the medically diagnosed inability to reproduce while in the second it is all about choice. But what does the choice of a partner of the same gender express one would wonder; a rational choice whose consequences must be suffered as a penalty by homosexual couples or an insurmountable psychological reality which practically deprives them of the ability to reproduce?

The answer to the question is not easy; not so much because of the legal description of the inability of homosexual couples to procreate in general, but because of the fact that generally speaking MAR is under a state of constant strain regarding what is permitted, to whom, by whom and under what circumstances. Its legislation constitutes an open procedure where there is no room for definitive answers but a constant need for re-evaluation, not only of its technological potential but also of innovative social practices. That is why invariably all legislations designated MAR as a therapeutic practice. Nevertheless, due to the great differences among legal regulations (and not only practical applications) the definition scope of inability to

\textsuperscript{72} Kotzabasi A., Right to motherhood and in vitro fertilization: a political issue, Paratiritis-Epikentro publications, Thessaloniki, 2003.


\textsuperscript{74} Neirinck C., Accorder le mariage aux personnes de même sexe, oui. Reconnaître un droit à l’enfant, non. Pourquoi? Droit de la Famille, Les revues Jurisclasseurs, Janvier 2013, no 1, p. 11-12.

\textsuperscript{75} The Case of Dickson v. United Kingdom (4.12.07) which concerned granting permission to a life-sentenced male prisoner to have access to IVF services for the fertilization of his wife.
procreate and the legal forms of treatment vary to a considerable extent. In the end the difference lies in the margin of flexibility of every legal order, the extent to which it allows innovative technological advances and social practices, which enable their application, to transform the already existent legal system of kinship and its categories. Nevertheless fatherhood can in fact be legally presumed, in the only case in which it does not correspond with the biological truth between a shadow of a doubt Wherever surrogacy is not permitted the legal status of motherhood is redefined\textsuperscript{76}. Therefore any change that the regulation of the use of MAR by same-gender couples will bring about to the current legal categories of kinship will be attributed more to the social dynamics of reproductive technology development and less to the sameness of gender of the couples that will have access to it.

II.4. MAR and same-gender families: the divided social attitudes and the contradictions within the Greek family law

In the Greek society according to the survey carried out by the European Social Research council (2010-2012) the rate of homosexuality acceptance amounts to 51%\textsuperscript{77}. Even though it has increased spectacularly the above percentage remains among the lowest in Europe. Opinions are divided, even though there are considerable differences exhibited in accordance with the age and political convictions of the respondents\textsuperscript{78}. Because of economic, political and cultural changes, especially after the 90's, there has been a redefinition of gender and sexual identities as well as family practices, however no survey has made clear to what extent. The factors that explain intolerance towards different sexual orientations are numerous. Because of the Greek political history the assimilation of democracy and individual rights has been rather

\textsuperscript{76} Rethymiotaki (2008) op.cit.

\textsuperscript{77} ESS1_5_select_findings. Pdf. This is a survey which is repeated every two years and looks into the social trends and attitudes in the countries of EU in order to collect information, which will then be used for the production of policies. In answer to the question of whether “ gay men and lesbian women should be free to lead their lives as they see fit” the survey for the period of 2002-2004 recorded that 47% of respondents answered yes, 26% disagreed, while 20% were somewhere in between (neither agreeing, nor disagreeing)! During the last decade the percentage has remained stagnant in its lowest levels. It approaches the rate of eastern european countries and presents a difference compared to Mediterranean countries (Spain 81% - Portugal 63%).

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slow and the gay movement has developed after the year 2000\(^79\). As it so happens in all countries of the European south the institution of family has been deconstructed to a lesser extent, due to its economic role and its welfare function. The Mediterranean cultural perception of genders and sexual behaviour is “physiocratic”, it is based on the dichotomy of male/active and female/ passive sexual nature. Homosexual practices between men “could fit within” the confines of masculinity without subverting it and those between women existed in silence\(^80\). As soon as homosexuals make an opening and assert another male or female identity for themselves, they immediately shake the naturality of both masculinity and femininity of the rest of the people, which explains the reason why they are not readily tolerated.

In public discourse, while MAR and its regulation have gained social acceptance, homosexual partnership and its regulation still divide public opinion. The former is related to the natural duty of Greek women to become mothers\(^81\), the latter to the questioning of their male nature. In fact the Greek legislator of family law has been bold in the regulation of MAR and did not hesitate to acknowledge even the most controversial practices that lead to the transcendence of biological boundaries, such as the inability to carry a child or the death of one of the partners in a couple. However, provocatively ignoring homosexual partnership the legislator did not include it in the alternative form of co-habitation under law 3719/2008 and thereby encroached on the right to equality \(^82\), which led to the sentence by the ECJ on the grounds of discriminatory treatment due to non-mainstream sexual orientation\(^83\). Now the legislator is called upon to finally clarify the choices made in what concerns the civil partnership agreement and whether this will in fact be different from marriage,


\(^81\) Toutdasaki Ir., “Biology”, “Genetics” and “Socio-emotional” mother: conceptualizations of motherhood and familiness in parliamentary discourse on MAR, in: B. Kantsa, Motherhood in the limelight. Modern research into Greek ethnography, Athens., Alexandria publications, 2013, pp. 119-146.


and if yes to what an extent, since it will now apply to both heterosexual and homosexual couples. However the matter keeps being postponed. Now, concerning same-gender couple marriage, the wedding ceremonies of gay activists on the island of Tilos, which were finally declared null and void, have provided an opportunity for a wider discussion of the issue by Greek legal theorists\(^84\). However, drawing on the experience of other countries, the above is a step that typically follows the legislation and enactment of the cohabitation agreement. In fact, according to the European Social Research council cited above, the legislation has significantly increased social acceptance of homosexual couples in all the countries where it was adopted, thus proving the pedagogical role of law.

According to the above facts, the discussion for the establishment of kinship relations through adoption and, much more, through MAR seems at a first glance to be a table-top exercise. We should point out, however, that social attitudes may be divided on same-gender families but according to the afore-mentioned survey it is not true that same-gender families clash with prevalent opinions. It is only certain, though, that the lack of an institutional framework leads to problems in terms of international private law\(^85\). *De lege lata* only the legitimization of marriage will enable access to joint adoption or the adoption of the natural child of a spouse, since in accordance with the Greek law this process is provided for only for spouses\(^86\). In what concerns the formation of relations through MAR an explicit provision is needed in view of protecting the kinship relations involving children and the expansion of the scope of reproductive technology, so that the same-gender family can transcend the biological barrier related to the lack of gender difference\(^87\). Nevertheless, there exists

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\(^85\) The unpublished ruling of the Athens CoFI of 2129/2011 was against that, not acknowledging the precedent of a Belgian court ruling under which two same-gender spouses adopted an under age boy, on the grounds that: “the establishment of a same-gender family model constitutes a real condition which goes against the prevalent principles and mentalities that govern life and living in Greek society ... which has neither a legal framework to manage it nor is it progressive enough to tolerate it. Let it be noted that its difference of nature can prove to the detriment of the child involved, who will be subjected to derogatory remarks from his wider social surroundings”.


\(^87\) Foundedaki op.cit. and Rethymiotaki op. cit (2014b)
a certain fluidity emanating from the permissive nature of the Greek legal framework for the regulation of MAR. The legislator has already acknowledged the right of spouses/partners and single women to have access to MAR. Moreover, the legislator has also allowed women to carry children on behalf of other women, on certain conditions. So the question that arises is what will happen if the civil partnership agreement is acknowledged for homosexual couples as well. According to one view, legislators wanted to open access only for heterosexual couples. But if this be the case, won't the issue of discriminatory treatment arise again?

So, *de lege ferenda*, after the inclusion of relations of same-gender partnership in the Greek legal order the legislator needs to examine the above issues anew, consistently adopting some crucial choices which will not lead to contradictions. The other choice would be to either exclude both heterosexual and homosexual partners (in which case MAR will grow closer to adoption) or to allow both to have access. The same applies to the access of single men to MAR, which may have been settled in the case law for the time being, however there exists a theoretical dimension to it, too, not without reason. The legislator could have limited access only to couples, within the framework of a policy that promotes the concept that every child needs to have two parents, irrespective of the nature of the relation between them or its legislative validity. However, since the use of the technique was allowed for single women, who need male reproductive material to actually achieve results the question that readily arises is why should men, who need a woman for gestation, be excluded? The latter may be different biologically speaking, however the outcome concerning the kinship ties of children is the same since on both occasions the children born will lack a legal parent of either gender, given the anonymity of donation. Moreover, regarding surrogacy, of course it should be evaluated against the strong trend of commercialisation of the female body but since we do not consider it to be a practice against public order, one needs very strong arguments to exclude its use based on criteria of gender and sexual orientation. For all intents and purposes, procrastination and partial solutions (e.g the *de facto* de-activation of the MAR Authority, the non-

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88 *Foundedaki* op. cit.
90 *Rethymniotaki* (2014β) idem
compliance with the ECHR ruling) end up dealing a decisive blow to the prestige of law in the conscience of citizens.
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