Medically assisted reproduction in same-sex unions under Greek law

The legal treatment of same-sex unions is part of the wider reflection on the position of alternative family structures in modern law. In Greece, the legal history of same-sex unions is not related exclusively to the ruling of the ECtHR in the case of Vallianatos and Others v. Greece\(^1\), nor to the earlier cases of marriage on the island of Tilos\(^2\). In relation to marriage, the question has been posed to science and the case-law as to whether same-sex marriage may be regarded as valid under the applicable legislation, from an interpretive point of view, the prevalent reply to which appears to be (correctly in my view) in the negative\(^3\). On the other hand, it may be possible, albeit unrealistic under the circumstances, for the Greek legislator to extend the capacity to conclude marriage to same-sex couples as well, in which case the consequences of the legislator’s choice for family law and the legislation on medically assisted

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\(^2\) Note that two same-sex marriages took place in June 2008 at the Town Hall of the island of Tilos (two men and two women). By order of the Supreme Court Prosecutor G. Sanidas, the Public Prosecutor’s District Office at the Court of First Instance of Rhodes lodged an action for annulment and the marriages in question were declared null by the Court of First Instance [Rulings 114 and 115/2009, Efarmoges Astikou Dikaiou (ΕφΑΔ) (Hellenic Law Review)2009, 690], whereas the appeal of the persons involved was rejected (Dodecanese Court of Appeal 83/2011) and the mayor who had officiated the weddings was accused of breach of duty. The locus standi of the public prosecutor to bring an action for declaring a marriage invalid (see Article 608 of the Code of Civil Procedure, Article 1378of the Civil Code) has been questioned, see Papachristou, Observations on the Ruling of the Court of First Instance of Rhodes 114/2009, Chronika Idiotikou Dikaiou [Hellenic Law Review] 2009, 617 (620). Papazisi, Observations on the same ruling, Chronika Idiotikou Dikaiou [Hellenic Law Review] 2009, 621, 622. See Panagopoulos, Comment on the Ruling of the Court of First Instance of Rhodes 114/2009, Digesta[Hellenic Law Review] 2009, 176 et seq.

reproduction should be discussed. However, it would be more realistic to establish *same-sex registered partnership* instead of marriage, and this is how I will start my presentation.

In particular, by means of Law 3719/2008, the Greek legislator provided for the establishment of civil unions, other than marriage, in the form of “registered partnerships”. There has been justified criticism against the generally faint regulation of registered partnership, which, in my view, reflects a (deliberate or not) confusion in relation to its concept and purpose. It is clear from the explicit references in the Explanatory Memorandum that the legislator has the - obsolete in my opinion - belief that in order to protect the significant social institution of marriage its coexistence with other forms of *institutionalized* interpersonal relationships must be avoided. In other words, “alternatives” to marriage must either not be foreseen or, if so, they must not be correlated to marriage and its institutional dimension, so as not to have a competitive effect thereon. However, excluding any kind of institutional dimension from regulated family relationships is a rather unattainable goal⁴ - or even an incorrect one. In addition, in support of the previous argument, this regulation is not so different from that of marriage, as regards the *relationship of partners with their common children*. As a matter of fact, the presumption of paternity is also applicable to this case and, according to the most correct view on the matter, a couple under registered partnership is regarded as equal to a married couple under the legislation on medically assisted reproduction (for instance, there is no need for partners to sign a notarial consent, given that a simple private act would suffice, as is the case for married couples).

This equivalence in kinship, between registered partnership and marriage is inextricably linked to the well-known and much-discussed characteristic of registered partnership, namely that it is only available for *different*-sex couples. This is an element that demonstrates not only the weakness of the legislation but also its irrationality, as different-sex couples may either conclude marriage or enter a registered partnership, that is, they have an array of opportunities which could be argued to bring them at the verge of legal luxury, while same-sex couples are unable to legally establish their relationship in any way whatsoever, being equally deprived, as we will see later on, of the chance to have common children. A reverse provision

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would make more sense, as is the case for German⁵ or English⁶ Law (and the law of many other countries⁷), according to which registered partnership is exclusively intended for same-sex couples, to the extent that they are excluded from the ability to wed⁸. It is characteristically stated in the judgment of the ECtHR in Vallianatos and Others v. Greece⁹ that Greece and Lithuania are the only countries to have this paradox, i.e. a form of registered partnership designed solely for different-sex couples. Both the Scientific Service of the Hellenic Parliament¹⁰ and the National Human Rights Committee¹¹ had stressed that the discriminatory treatment of same-sex unions is not adequately justified by the provisions and the Explanatory Report of Law 3719/2008¹². The same fact was pointed out by most parties of the opposition during the passage of the Law¹³. This was followed by the ECtHR ruling on case Vallianatos v. Greece, which, taking account of the case-law of the Court in similar cases, was no legal surprise let alone a paradox. So far, Greece has failed to comply with the Court’s ruling, giving rise to (162) new applications lodged in respect of the same issue before the Court of Justice in Strasbourg. On the other hand, a draft law entitled “Amendment to Family Law Provisions”¹⁴ has been submitted¹⁵ since 2010 to the Ministry of Justice by the special legislative drafting committee chaired by Professor E. Kounougeri-Manoledaki from the Aristotle University of Thessaloniki, which

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⁵Gesetzüber die eingetrageneLebenspartnerschaft, commonly referred to as Lebenspartnerschaftsgesetz (LPartG), 2001.
⁷Such as Croatia, the Czech Republic, Germany, Slovenia and Switzerland (cf. Mallios, Legal establishment of same-sex cohabitation: Greek reality and European dimension (ECHR), http://www.constitutionalism.gr).
⁸This is no longer the case for English law. As of July 2013 (in effect from March 2014) same-sex marriage was also recognized in the United Kingdom, with the exception of N. Ireland. [Marriage (Same Sex Couples) Act 2013].
⁹Par. 25.
¹⁰Observations on Article 1 Law 3719/2008, hellenicparliament.gr/legislative work/search/report of the scientific council.
¹²It is further noted in the rulings that declared null the marriages of Tilos [Court of First Instance of Rhodes 114, 115/2009, Efarmoges Astikou Dikaioú(Hellenic Law Review)2009, 690], as an indirect acknowledgement of the fact that the legislation on registered partnership is insufficient: ‘bearing in mind that the Greek legislation is an organism which grows and evolves in order to reflect social reality and modern requirements… it would be safer to proceed to a legislative resolution of this issue [meaning same-sex civil unions] and, in particular, the issue of registered partnership’.
¹⁴For an extract of the Draft Law and its Explanatory Memorandum (in relation to the proposed amendments to registered partnership), see Kounougeri-Manoledaki, Family Law, ibid. II, Annex (p. 623 et seq.).
provides for (a) extending registered partnership to same-sex couples;\(^{16}\) (b) applying all legal provisions regulating the relationship of married couples to registered partnership, *mutatis mutandis*;\(^{17}\) (c) granting the right to adopt to couples in registered partnership, provided that the person adopted is an adult.\(^{18,19}\) However, the draft does not contain any specific provisions on medically assisted reproduction. A new legislative drafting committee has already been formed at the Ministry of Justice (December 2014), in order to revive the inquiry on extending registered partnership to same-sex couples.

Although in Greece what is obvious is often overlooked, I would like to think that at some point Greece will comply with the case-law of the ECtHR by extending registered partnership to same-sex couples. It would be very interesting to consider the *specific* implications of such compliance and the way it can be reflected in the field of medically assisted reproduction. This is because very often “reforms” remain general declarations.

At the beginning of this review, it would be useful to highlight the scope of implementation of the ruling on case *Valianatos*\(^{20}\): The applicants’ complaint was not related to a general and abstract obligation on the Greek State to provide for a form of legal recognition in domestic law for same-sex relationships, but to the fact that Law 3719/2008 provides for civil unions of different-sex couples only, thereby excluding same-sex couples from its scope. In other words, the Greek State was not sentenced for failing to comply with any positive obligation imposed by the Convention (i.e. to establish a same-sex civil union), but for introducing a distinction, by virtue of Law 3719/2008, which constitutes a discrimination. On the contrary, with reference to the same ruling, when a legal provision also applies to different-sex couples it does not constitute discrimination on the basis of sexual orientation against same-sex couples.

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\(^{16}\) Article 1 of the Draft Law contained no reference to gender or gender difference between partners.

\(^{17}\) Article 35 of the Draft Law provided for an additional paragraph two to Article 13 of Law 3719/2008, stipulating that: “The provisions of the Civil Code referring to the relations of spouses, as well as the provisions pertaining to public service, labor, social insurance, pension and tax legislation in relation to spouses shall apply, *mutatis mutandis*, to the members of a registered partnership, unless otherwise stipulated in the present Law or in any other law”.

\(^{18}\) Article 24 of the Draft Law provided for an amendment to Article 1579 of the Civil Code, as follows: “Adult adoption. Adult adoption shall be permitted only when the adopter is the spouse or registered partner of the adopted person’s parent, or if the said person has been foster parent to the adopted person for at least one year. In this last case, the same person may be adopted by two spouses or registered partners”.

\(^{19}\) For comments on the proposals made by the draft see Panagopoulos, *Gender difference in marriage and cohabitation*, Etairia Dikastikon Meleton [Society of Judicial Studies], Contemporary Trends in Family Law (2013), 62 *et seq*.

\(^{20}\)Par. 75.
Therefore, Greece would be able to comply with the ruling of the ECtHR by simply extending registered partnership to same-sex civil unions. However, this would keep in place - and extend to same-sex couples- one of the most significant problems of the applicable legislation with regard to registered partnerships, namely whether partners under registered partnership are assimilated to spouses in their relationship with each other. Here, I would like to remind you of my introduction on the relationship between registered partnership and marriage, as well as of the fact that the original draft of Law 3719/2008 provided for the extension of legal provisions on marriage to registered partnership, *mutatis mutandis*, however, the relevant provision was never included in the text of the Law. Though inconsistent with the statements of the Explanatory Memorandum as to the distinction between registered partnership and marriage, these provisions would be at least able to resolve certain problems of interpretation and enforcement, which Law 3719/2008 itself and the inexistent internal rationale of registered partnership are unable to address.

Therefore, it would be more appropriate for the Greek legislator to seize the opportunity of reforming the institution as a whole, so that the scope of the relations between partners may have the same legal consequences as marriage, or at least similar consequences, to a significant extent.

A perhaps more adequate alternative proposal would be to create two types of registered partnership: a “strong” partnership, which would be equivalent to marriage, from a regulatory aspect; and a rather “flexible” partnership, similar to the currently applicable registered partnership under Law 3719/2008. The existence of different forms of the same institution, which vary as to their legal consequences, is not an unknown phenomenon to family law, as demonstrated by the example of adoption. In our legal system, as in others, adoption is divided into “full” and “simple”, depending on the extent and intensity of the artificial kinship created. Similar or other terms may be used for making a similar distinction within the institution of formal or

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21 See, the wording of this provision in *Kounougeri-Manoledaki*, Family Law, ibid. II 593.
23 In Greek law, there is a distinction in legal consequences between the adoption of minors, which is “full” (see Articles 1561-1568 of the Civil Code) and the adoption of adults, which is “simple” (see Articles 1584-1587 of the Civil Code). Under French law, the distinction between “adoption simple/adoption plenière” is not exclusively related to the age of the adopted person, in the sense that “adoption simple” is possible for all adopted persons (see Article 360 of the French Civil Code). Regarding the terminology and specific content of this distinction, See *Fountedaki*, Adoption. Law 2447/1996, its amendments and enforcement (2010), 74.
registered partnership. Under this arrangement, it is expected that same-sex couples will opt for the first version of “strong” partnership, while different-sex couples will opt for the second version\textsuperscript{24}.

This legislative proposal concerns the relationship between partners, as to which an equivalence with married spouses must be established, at least in one form of registered partnership. Additional issues arise in relation to the partners’ children. As a matter of fact, there is nothing to prevent a member of the couple from having a child (by natural or assisted procreation\textsuperscript{25}) or from adopting one\textsuperscript{26} and then raising it along with his/her partner. However this will be a de facto and not a de jure family. The issue pertains to the ability of same-sex partners to have common children, either through adoption or by medically assisted procreation.

The following must be noted in relation to the particular field of medically assisted procreation: Under legislation in force on assisted procreation, having common children is not possible for same-sex couples and this is irrelevant to the fact that those couples are not permitted to enter a registered partnership. In addition, in the case of male couples, it would be impossible even for only one member of the couple to have children, as demonstrated by the case-law in respect of the ability of single men to have children, by applying, mutatis mutandis, the provisions on ovary donation and surrogacy\textsuperscript{27}. Furthermore, it is also impossible for female couples to

\textsuperscript{24} It is presumed that different-sex couples will have no reason to select the first form of registered partnership (the regulatory equivalent to marriage), given that they can conclude marriage. However, there are cases where different-sex couples simply reject the powerful symbolism of marriage (i.e. they actually want marriage under another name).

\textsuperscript{25} The ability of men without a female spouse or partner to have children by medically assisted reproduction is analyzed later on in this paper.

\textsuperscript{26} In case of an adoption of an adult, in accordance with the terms of Article 1579 of the Civil Code.

\textsuperscript{27} According to the view that has prevailed in the relevant case-law (Athens Court of Appeal 3357/2010 NOMOS [Hellenic Law Data Basel]) (which is more correct in my opinion, See Papadopoulou-Klamari, Kinship.Establishment - Registration - Protection, 2010, 223 et seq. Kotzampasi, Gender equality and private autonomy, 2011, 144, 156, 196.Vlachopoulos, The right to have children via surrogacy for single men, in Kanellopoulou-Mpoti/Panagopoulou-Koutnatzí [ed.], Medical liability and Bioethics. Modern approaches and future perspectives, 2014, 187 et seq.). However, there were previous rulings to the contrary by the courts of first instance and the State Legal Council, see Athens Single-Member Court of First Instance 2827/2008, Chronika Idiotikou Dikaiou [Hellenic Law Review] 2009 817 [which was quashed by the aforementioned ruling of the Court of Appeal]. Athens Single-Member Court of Appeal 13707/2009,Chronika Idiotikou Dikaiou [Hellenic Law Review] 2011 267. Opinion of the State Legal Council 261/2010, Efarmoges Astikou Dikaiou [Hellenic Law Review] 2010 1205, the provisions on surrogacy (Civil Code 1457, 1464) do not cover (neither from an interpretative aspect) men without a spouse or female partner, wishing to have a child. The opposite view is probably predominant in theory, see, for instance Koumoutzis, Artifical Reproduction (2006), 32.Koumoutzis, in the Civil Code by Georgiadis/Stathopoulos, Articles 1457-1458 par. 79. Koumoutzis, Artificial reproduction for single unmarried men, Chronika Idiotikou
have common children via medically assisted procreation. If one of the two women gives birth to a child using artificial reproduction methods, the establishment of kinship between the child and the other woman-partner of the mother is not provided by law, as is the case for the presumption of paternity in relation to the husband or male partner in registered partnership. In addition, automatic voluntary acknowledgment of the child by giving one’s consent to assisted reproduction [Articles 1456 and 1475(2) of the Civil Code] again applies only in relation to male partners (without a registered partnership) of the assisted women. In general terms, the presumption and acknowledgment of paternity under Greek law are concepts related exclusively to paternity. Nor would the adoption of a partner’s child by the other partner be a solution in such cases, as it does not lead to an establishment of kinship between the child and both partners.

This situation cannot be automatically resolved even if registered partnership is extended, under any form it may take in the future, to same-sex couples. It would actually seem reasonable to argue that, even then, this will not be a case of legal gap to be covered by the interpretative analogy; the legislator’s choice to limit the right to medically assisted reproduction only to spouses, different-sex couples and women without a spouse or partner was intentional and deliberate when adopting Law 3089/2002. This arises from the preparatory works and the Explanatory Report of Law 3089/2002. This choice was not linked to the institutionalization of non-marital cohabitation; said institutionalization did not exist in 2002, but different-sex couples in cohabitation were given the possibility to have common children through medically assisted procreation. Nor can it be argued that, in 2002, the legislator was unaware of the social reality of same-sex civil unions. Therefore, the legislator opted for structuring the provisions on medically assisted reproduction so that it may apply only to different-sex couples, married or not. The fact that after the adoption of Law 3719/2008 [different-sex] partners under registered partnership are assimilated to spouses, in the field of medically assisted reproduction,28 is due to the fact that the presumption of paternity applies to registered partnership as it does to marriage. Assimilating, under the same argument, same-sex partners with spouses in the field of

Medically assisted reproduction, when, in the future, the former are allowed to enter a registered partnership, would be a *petition principii*. In conclusion, extending registered partnership to same-sex couples would not automatically mean that such couples would be covered by the provisions on having common children via medically assisted procreation, as an additional legislative intervention would be required.

If this is the case (namely the inability of same-sex couples to have common children via MAP, which would continue to apply in principle even after they are given the ability to enter a registered partnership), does it constitute a violation of the principle of equality and Article 14 of the ECHR (in conjunction with Article 8)? The answer should probably be in the negative. According to the view which I find more correct, medically assisted procreation is, under Greek law, a *therapeutic medical practice*, aimed at overcoming the inability, for medical reasons, of natural procreation (namely the biological process of having children). From this standpoint, the case of different-sex couples is not the same as same-sex couples and the case of a woman who cannot become pregnant for medical reasons is not the same as that of a man, who is unable to become pregnant by definition. I do not wish to argue that the therapeutic approach of MAP is the only valid approach. However, I believe that it

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29 Based on the rationale of the general restrictions set out in Articles 1455 of the Civil Code, 1, 2 and 4 of Law 3305/2005, See, in that regard *Fountedaki*, Human reproduction and civil medical responsibility (2007), 162 et seq.

30 Namely, an action which is necessary and appropriate for maintaining or restoring the patient’s health or for avoiding its deterioration or for addressing by any other means a non-reversible health problem faced by the patient. In other words, therapeutic practice relates to medical indication (medizinische Indikation) and necessity (nécessité thérapeutique) See *Fountedaki*, Medical Civil Liability. General introduction - Dogmatic and judicial-political view - Fundamental concepts (2003), 224 et seq. In medically assisted reproduction, medical necessity lies in the inability to have children in a natural way or in avoiding the transmission of serious illnesses to the child, and it is explicitly provided by law as a condition for using the relevant methods (See Article 1455 of the Civil Code, See, indicatively *Kounougeri-Manoleadaki*, Family Law, *ibid.*, II 5 et seq. and for more details *Trokanas*, *ibid.*, 166 et seq. Regarding the classification of MAP methods as therapeutic practices see *Fountedaki*, Human reproduction, *ibid.*, 151 et seq.

has a clear legal basis under the applicable law, which, as a consequence, would have to change if MAP was to be regarded as something else, namely as the expression of the right of all persons to have children. In conclusion, the Greek legislator is neither required to nor prevented from extending, via various adjustments to the law of kinship, which would be impossible to deduce by interpretation, the permissibility and consequences of the application of medically assisted procreation to same-sex couples with or without a registered partnership (when they are allowed to enter one).

The question that follows is whether the answers to the issue at hand would be different or not if registered partnership, which in the future would cover same-sex couples, was to allow for the legal assimilation of partners with spouses or if, in the future, same-sex marriage was to be introduced in the Greek law, as well. As I mentioned earlier, the rationale of assimilating partners to spouses concerns the relationships between the couple and cannot apply, automatically, to the field of kinship. Even if same-sex marriage is legally established, the situation in respect of medically assisted reproduction will not automatically change. The critical aspect in relation to medically assisted procreation issues is not the specific form and institutionalization of the personal relationship between assisted individuals, but, on the one hand, the legislative determination of the permissibility to use these methods and, on the other hand, the establishment of kinship with the child to be born. Indeed, it must be stressed that a fundamental element of the rationale behind the legislative regulation of medically assisted procreation in Greece is that those two issues are inextricably linked, i.e. that the permissibility of medically assisted reproduction must be necessarily accompanied by the establishment of a legal parentage for the child to be born.

In conclusion, it is not enough to adopt legal provisions that will merely extend registered partnership or marriage to same-sex couples, in order to resolve the legal issues arising in relation to the use of assisted reproduction methods by such couples. For instance, it would not suffice to recognize registered partnership between two women. The question must be answered as to whether, when one of the women gives birth to a child, a “presumption of maternity” is activated in favor of her partner or whether another method must be foreseen in order to establish a legal link between the child and the mother’s female partner. It would not be enough to say that two men

can get married since, in order for them to be able to have a common child, amendments must be made both to regulations on surrogacy and to the presumption of paternity (given that the child cannot descend biologically from both men). Political will and commitment are necessary in order to address these issues, as they shouldn’t rely on legal interpretation and ad hoc judicial approaches.

A last remark: as regards childbearing by same-sex couples using medically assisted procreation methods, the interest of the child [Vide Article 1(2) of Law 3305/2005] is a far weaker argument compared to adoption, in relation to which, as is well known, said argument is often used against the establishment of registered partnership for same-sex couples: adoption has to do with a real child that should be given the most suitable family. Therefore, some argue that adoption by same-sex couples is not in the interest of the child, not because these persons are a priori bad parents for some reason but because, under the present circumstances, in neo-conservative Greece, the child’s social integration will be problematic. Regardless of the stance we adopt vis-à-vis this argument, things are different for medically assisted reproduction: in this case we are attempting to establish the permissibility of creating a new life, using the relevant methods, and subsequently regulating the legal status of the child, not only on the basis of the child’s biological origin but also on the basis of socio-affective kinship. Therefore, if a child is born, using any method whatsoever, it would be contrary to the interest of the child to fail to establish a legal connection with the persons who sought the child’s birth and wish to have the child. In addition, it would be inappropriate to argue that it is better for a child not to exist than to have, for instance, two fathers.

33 For a critical review of these provisions and their implementation by the case-law (See, indicatively Single-Member Court of First Instance of Katerini 408/2006. Single-Member Court of First Instance of Rhodope 400/2007. Single-Member Court of First Instance of Thessaloniki 14946/2010. Single-Member Court of First Instance of Thessaloniki 16574/2009 ISOKRATIS [Hellenic Law Data Base]), see Trokanas, ibid., 159 et seq. In contrast, a favorable opinion towards these provisions is expressed by Koutsouradis, Surrogacy issues, especially after the adoption of Law 3305/2005, NomikoVima [Hellenic Law Review], 2006, 337 et seq., 357.