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The argument of equality in access to the medically assisted reproduction for the single man: legal and ethical perspective.

This intervention attempts to trace and to give answers to the special issue of whether the use of the methods of the medically assisted reproduction could be considered legally and ethically permissible for the (unmarried)1 single man. The basis of this position is the argument of equality, since the same is legislatively2 allowed for the single woman.

This issue came out from the judgment No 2827/2008 of the Athens Single Member Court of First Instance. In this judgment the court ruled that since the right to artificial reproduction is established in Article 5 paragraph 1 of the Constitution . . . . then the stance of Law 3086/2002 is problematic from the point of view of Article 4 of the Constitution, because the granting of the right of artificial reproduction to the single woman and at the same moment the single man’s deprivation of the right, . . . . is a fragrant discriminatory treatment of those interested in the solution of artificial reproduction which is not justified by articles 4 paragraph 3, 4 paragraph 2 of the Constitution3.

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1 Hereinafter, we will use only the term “single man” without the additional adjectival specification “unmarried”, because it is considered as an unnecessary redundancy. The crucial element of the topic under discussion is not the existence of a marriage but the fact that the man who desires to have a child through the methods of the medically assisted reproduction is single, i.e. he does not have a stable relationship with a person of the opposite sex. Besides, in the case of a married man who wants to have a child through the use of such methods, while his wife is still alive, I believe that the answer is, at least up until now, catholically negative and it would very hardly change; in any case this issue will not be addressed in this study. In relation now to the case of a man who is a widow and wants to have a child through post mortem fertilization, this is a separate issue and it is the object of analysis of another study.


3 The reference to Article 4 paragraph 3 of the Constitution is probably an inadvertent error of the judicial decision, since this particular constitutional provision does not have any relevance to this case. On the contrary, the reference to Article 4 paragraph 1 of the Constitution is necessary.
This judgment was followed by judgment No 13707/2009 of the Thessaloniki Single Member Court of First Instance\(^4\).

With these decisions the issue of the single man’s access to the medically assisted reproduction came at the forefront of the theoretical discussion. This issue is analyzed in the following pages under the prism of the argument of equality between men and women.

**The issue of equality**

*The argument*

Initially, in relation to the issue of equality, we have to examine whether the different treatment between the single woman and the single man is arbitrary and whether it is not founded in any objective reason, which could justify the differentiated treatment. If such an objective and substantial reason exists, then the issue of discriminative treatment cannot be raised.

The advocates of the position that these are essentially different cases focus on the fact of biological reality. As a consequence of his nature and biological construction, a man cannot perceive a child\(^5\). And if the replenishment of a medical necessity with the methods of medically assisted reproduction seems to be plausible for many, it cannot be accepted that this replenishment goes against the nature’s rules. The inexistence of uterus and of the absence of the possibility of gestation cannot be considered as a man’s medical necessity, because nature has not granted such a possibility to him. On the contrary, in the case of the woman, since the ability of gestation is part of her nature, this ability can be replenished via the methods of medically assisted reproduction, when there is medical necessity\(^6\).

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\(^4\) It is should be noted that the judgment No 28274/2008 of the Athens Single Member Court of First Instance was appealed by the Public Prosecutor of a First Instance Court and the judgment No 3357/2010 of the Athens Court of Appeal accepted the Public Prosecutor’s appeal, repealed the appealed decision, tried the case on merits, and dismissed the single man’s petition.

\(^5\) Th. K. Papachristou, Paratirisis sti 2827/2008 MPR Ath [Observations to the Judgment No 2827/2008 of the Athens Single Member Court of First Instance], CHRONIKA IDIOTIKOU DIKAIOU [CHRID] 818 (2009) (Greece) (however, the same author mentions that in the past he had supported an opposite opinion: Thanasis K. Papachristou, TECHNITI ANAPARAGOGI KE ASTIKO DIKAIO [ARTIFICIAL REPRODUCTION AND CIVIL LAW] 55 (2003) (Greece)).

The counterargument

The opposite side is projecting the argument that the cases are identical and that we cannot use physiology as excuse, because then neither a woman alone is able to conceive a child nor a man. Therefore, since it is accepted that the single woman can use the methods of medically assisted reproduction, for which the donor’s sperm (which is something that she does not have) is necessary, then the single man should also be allowed to use the same methods in order to replenish the missing elements of the female ovaries and uterus.

The thesis

This intervention adopts the position that the first opinion should be considered as more accurate with the following additions to its foundational syllogism: according to the prevailing opinion, the genetic material (sperm and ovum) is legally considered as “res”. On the contrary, the uterus is an organ of the woman’s body and, since it remains integrally connected with her body, it is part of her whole organism.

The first intermediate conclusion that we can draw from this finding is that the use of the genetical material of the opposite sex should be distinguished from the use of the uterus, because the latter is equated to the «use» of another person. This fact violates the fundamental constitutional principle of the value of the human being (Article 2 paragraph 1 of the Constitution), which prohibits the treatment of a human being (= physical being – bodily functions) as a “res” or as a means for the attainment of whatever purpose, even if the human being consents to this.

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8 E. Kounougeri-Manoledaki, He iatrika ipovoithoumeni anaparagogi. To dikaioma tou agamou ke monachikou andra na apoktisi paidi me ti voitheia parenthetis miteras [The medically assisted reproduction. The right of the single man to have a child with the assistance of a surrogate mother], http://www.medlaw-bioethics.gr/material/teuxos9.pdf, N. Koumoutzis, He anatropi tis dikastikis adias gia tin techniti anaparagogi [The reversal of the judicial permit for the artificial reproduction], CHRONIKA IDIOTIKOU DIKAIOU [CHRID] 552 (2013) (Greece).
9 Always under the necessary condition that in the face of the applicant there is a medical necessity which makes impossible the natural reproduction.
10 Chryssogonos, supra, at 109.
In the case of the single women, and only if medical necessity exists, they are allowed to use this particular scientific method in order to replenish an ability that they would otherwise have. However, it does not seem to exist a similar pursuasive reasoning, which could justify the allowance of the «use» by the single men of another woman and of the functions of her organism, because the men’s organism would never be in a position to perform similar functions, even if there was not any medical necessity.

Thus, the exclusion by the legislator of such a possibility is fully justified on the basis of the foundational reasoning of the relevant legislation on the medical assistance to the human reproduction and of the foundational reasoning of the more general constitutional principles\textsuperscript{12}. More specifically, the medically assisted reproduction is permitted only in cases of medical illenesses which do not allow the physical functioning of the human reproductive system and its ability to fulfil the constitutionally founded right to reproduction and to offspring acquisition. Since the methods of the medically assisted reproduction are permitted only for these reasons, they cannot become accepted for the transgression of the abilities that nature offers to man and woman. And since, as a consequence of their biological construction, man and woman differ in the fact that only the woman has the gestation ability, only to her is permitted to substitute her uterus with the assistance of another woman\textsuperscript{13}.

In conclusion, it is evident, I think, that these situations are not substantially identical and, therefore, their differentiated treatment is not only sound but also imperative.

\textbf{Is the scientifically plausible morally acceptable, too?}

Last but not least, we should raise more as an issue for thought rather than an argument, the moral stance of such a recognition and its acceptance from the society. Additionally, emphasis should be also placed on the psycological consequences that such a recognition will have on the child that will be born from the desire of a single

\textsuperscript{11} In its totality, the abovementioned position could be the basis for the serious contestation of the legality of the medical assisted reproduction with the method of surrogate uterus in general, even for the single women. Nevertheless, this argument is conversely used in Kounougeri-Manoledaki, \textit{supra}.


man and that will be gestated by a woman who is not intended to have any substantive relationship with this child after his or her birth\textsuperscript{14}.

Beginning with this last point, we should mention that the appearance of new scientific possibilities and the creation of alternative family schemes arose very recently and they «have gone» only a very short distance\textsuperscript{15}. Therefore, it seems that it is not possible to draw reliable and sufficient conclusions in relation to the consequences that they can have on the psychical health and balance of a child who grows only with his father, because that was his or her father’s choice\textsuperscript{16}.

Furthermore, the social acceptance of such phenomena has not been measured yet\textsuperscript{17}; Nevertheless, it can be derived that the legislator decided to intentionally leave them outside of the currently existing legal framework, because when these laws were voted, just few years ago, the legislator’s belief was that they lay beyond the good usages and the necessary social \textit{consensus}.

Of course, there are many times when the legislator has to be pioneer, radical, and progressive. However, the legislator is not allowed not to take into consideration the various social messages and the social factums. Let alone, it seems that the judge is not legitimized to create through the case law a situation a case which is differently regulated by the legislation.

On the other hand, it has to be evaluated, at a \textit{de lege ferenda} level, whether there is a sufficient and serious reason to justify the single man’s deprivation by the


\textsuperscript{17} See also Velli, supra, at 495, where references and statistics from other European countries are provided (see esp page 497).
law and the society of the possibility to have a child, when at the same time such an option is recognized for the single woman\textsuperscript{18}.

If we accept the position that at this moment there is not a single man’s right to have access to the methods of the medically assisted reproduction, since the purpose of this kind of reproduction is to heal a medical necessity, then at a next stage, we have to evaluate whether there is any sufficient and serious \textit{de lege ferenda-moral} reason that could justify the single man’s deprivation of the possibility to have a child, while such an opportunity is recognized for the single woman\textsuperscript{19}. Otherwise, such a right of the single man to have access to the technological facilities of the medically assisted reproduction could be established. However, that would obviously be a right not connected with any medical necessity.

It can be easily understood that the basis of such a discussion cannot be equality. The questions that arise are even tougher:

Under which conditions such a single man’s right could be introduced if it led to the establishment of a new family scheme?

Is the man’s personal right to develop his personality through the acquisition of a child and through the creation of a family contradictory to the child’s interest to have a child?

Are there any substantial and crucial interests, principles, and values of the legal order that are being disturbed, violated, or jeopardized?

Lastly, should the legal order integrate and recognize everything that is scientifically feasible?

\textbf{Conclusion}

According to the current-existing legislative framework, for the reasons that have been already explained, it seems that the recognition of the signle man’s right to the artificial reproduction with the use of a surrogate mother is feasible only with very shaky interpretive constructions and with transgressions of questionable correctness of the legislator’s choices.

Apart from this, there are serious doubts about whether such a possibility would be in favor of the interests of the child that will be born, or about whether this

\textsuperscript{18} Kounougeri-Manoledaki, supra note 8.

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is just a case of the simple fulfillment of a man’s atomistic fantasies and selfish pursuits. Furthermore, it is not clear to what extent there is social acceptance and consensus for the legitimization of such a practice, while the moral dilemmas are intensively posed, too.

The balancing is not an easy task. It should take into account not only the personal right to reproduction and a person’s individual desire, but also the interest of the child that is going to be born and the side-effect social consequences of such a choice. Furthermore, it also requires an integrated vision of all the parameters, the avoidance of obsessions and stereotypes and a dispassionate and rational assessment of the consequences that any possible choice could have, not only for the interests of the involved parts, but also for the society as a whole and for the functioning of the legal order.
The argument of equality