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The Unbearable Lightness of Informed Consent in Post Mortem Fertilization

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Abstract: The current increase in global infertility rate and the consequent access to medically assisted procreation have contributed to the fragmentation of the reproductive process. This is also due to the development of cryopreservation techniques for gametes and embryos, whose use is therefore progressively delayed over time, sometimes even after the death of one of the partners. However, few European countries permit post mortem fertilization. Following a reconstruction of the legislation of those EU Member States allowing the practice, this contribution focuses on the jurisprudential reaction in countries, such as France, Germany and Italy, where post mortem fertilization is prohibited by the legislature. In doing so, the role of informed consent is highlighted, especially where it was not expressed by the deceased, due to an unexpected and sudden fatal event, and the surviving partner wants a child from the deceased. Based on a comparison with the findings of US scholars, this article elaborates further on the advantages of the default option in gamete retrieval for procreative purposes, which is increasingly requested also by parents looking for genetic continuity. Perceived differently outside the Western legal tradition, the lack of offspring opens the doors to recognize the interest of pursuing by post mortem fertilization a family genetic heritage.

Résumé: L'augmentation actuelle du taux mondial d'infertilité et l'accès qui en résulte à la procréation médicalement assistée ont conduit à la fragmentation du processus de reproduction, également grâce au développement de techniques de cryoconservation des gamètes et des embryons. Leur utilisation est donc de plus en plus retardée dans le temps, parfois même après le décès de l'un des partenaires. Cependant, peu de pays européens autorisent la fécondation post mortem. Après avoir reconstitué la législation des États membres où la pratique est autorisée, cette contribution se concentre sur la réaction jurisprudentielle des pays où elle n'est pas admise, comme la France, l'Allemagne et l'Italie, à un enfant conçu en dehors de leurs règles. Ce faisant, le rôle du consentement éclairé est mis en évidence, surtout si ce dernier n'a pas été exprimé par la personne décédée en raison d'un événement fatal inattendu et soudain, et que le partenaire survivant souhaite toujours avoir une progéniture. En se basant sur une comparaison avec les constatations des chercheurs américains, cet article élabore plus avant les avantages de l'option par défaut dans la récupération des gamètes à des fins de procréation, qui est de plus en plus demandée également par les parents à la recherche d'une continuité génétique. Perçu différemment en dehors de la tradition juridique occidentale, le manque de progéniture ouvre les portes pour reconnaître l'intérêt à un patrimoine génétique familial.

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Zusammenfassung: Die derzeitige Steigerung der globalen Unfruchtbarkeitsrate und der damit verbundene Zugang zu medizinisch unterstützter Fortpflanzung haben zur Zersplitterung des Fortpflanzungsprozesses beigetragen. Diese Tendenz ist auch auf die Entwicklung von Kryokonservierungstechniken für Gameten und Embryonen zurückzuführen, deren Verwendung sich daher im Laufe der Zeit immer weiter verzögert, manchmal sogar nach dem Tod eines der Partner. Nur wenige europäische Länder gestatten jedoch eine postmortale Befruchtung. Nach einer Zusammenstellung der Gesetzeslage solcher EU-Mitgliedsstaaten, richtet sich dieser Beitrag auf die rechtswissenschaftliche Reaktion derjenigen Staaten, in denen die postmortale Befruchtung gesetzlich unzulässig ist, wie Frankreich, Deutschland und Italien. Hervorgehoben wird dabei die Rolle der informierten Einwilligung, insbesondere wenn diese vom Verstorbenen aufgrund eines unerwarteten und plötzlichen Todesfalles nicht geäußert wurde und der überlebende Partner ein Kind von der verstorbenen Person wünscht. Gestützt auf einem Vergleich mit den Erkenntnissen US-amerikanischer Wissenschaftler werden die Vorteile der Standardoption bei der Gametenentnahme zu Fortpflanzungszwecken, die zunehmend auch von Eltern auf der Suche nach einer genetischen Kontinuität gewünscht wird, näher beleuchtet. Gegenüber der Sichtweise der westlichen Rechtstradition, öffnet das Fehlen von Nachkommenschaft die Tore zur Anerkennung des Interesses an einem familiären genetischen Erbe.

1. Introduction

The 'reproductive question' is now more than ever at the centre of the social and health debate. Globally, but especially in the Western world, people are on average not only having fewer children but are also older.[1] There are various reasons for this delayed parenthood[2]: the time of natural reproduction is often intentionally postponed, whereby the ticking biological clock runs out and it becomes necessary to use Medically Assisted Reproduction techniques (hereinafter MAR[3]). Heterosexual and homosexual couples may have recourse to reproductive medical

1 In Australia/New Zealand and in Europe and Northern America the levels of fertility in 1990 were already below an average of two live births per woman over a lifetime and they remain so today, with 1.8 live births per woman, on average, in Australia/New Zealand in 2019 and 1.7 in Europe and Northern America. See United Nations, Department of Economic and Social Affairs, Population Division (2019). World Population Prospects 2019, p 27. See Fertility indicators within EU, www.ec.europa.eu/eurostat/statistics-explained/index.php?title=Fertility_statistics (accessed 29 Nov. 2021).

2 A. Genovese, 'How to Write Feminist Legal History: Some Notes on Genealogical Method, Family Law and the Politics of the Present', in D. Kirby (ed.), *Past Law, Present Histories* (Canberra: ANU Press 2012), p 144.

3 The expressions 'Medically Assisted Procreation' (MAP), 'Assisted Reproductive Technology' (ART) and 'Medically Assisted Reproduction'(MAR) are often used interchangeably in common language, but technically ART is used when referring to non-donor fertility treatments, while MAP and MAR are used in case of homologous and heterogonous fertility treatments. See F. Zegers-Hochschild et al., 'International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) revised glossary of ART terminology', 92.

support, as well as individuals who wish to preserve their fertility for medical or social reasons, through the cryopreservation of their gametes.[4]

As procreation can be detached from sexual intercourse thanks to medical and technological advances, it has become possible to have a child without engaging in sexual intercourse through *in vitro* fertilization. Furthermore, procreation may be delayed for years through egg or sperm retrieval or embryo creation. Although biomedical innovations are rapidly shared by the scientific community, restrictive national regulations can limit the access thereto. Citizens are increasingly seeking out the desired therapeutic services by attending healthcare facilities in countries with more permissive regulations. Such access is subject to rules that raise several bioethical issues. Comparative law is thereby becoming increasingly important in this field.[5]

Whenever a child has been conceived or born abroad in order to bypass national regulations, obtaining recognition of the status of the newborn as the child of the deceased may be impeded by legal and administrative difficulties.[6] This issue has arisen with the advent of MAR technologies.[7] However, it is with these technologies that the issue of parentage has forcefully entered into public debate concerning posthumous reproduction; although this matter is not (yet) a high-priority issue, it is already raising ethically important concerns, such as whether new life can be created from the biological material of a deceased person. This article aims to analyse, in a comparative perspective, the need to strike a balance between individuals' autonomy to make decisions about their own reproduction and the best interests of the prospective child.[8]

Where a child is taken to its home country after being born to a father who died before the inception of the natural gestation period (in European Civil Codes this is often fixed at 300 days after the end of the marriage, in this case as a result of death), the courts of those Member States that do not permit this practice are

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Fertil Steril (Fertility and Sterility) 5 Nov. 2009, p 1520, https://doi.org/10.1016/j.fertnstert.2009.09.009 (accessed 29 Nov. 2021).

4 M. Alikni, 'Cryostorage of human gametes and embryos: a reckoning', 37. *Reprod Biomed Online (Reproductive BioMedicine Online)* 1 July 2018, p 1.

5 A. Benshushan & J.G. Schenker, 'The right to an heir in the era of assisted reproduction', 13 *Hum. Reprod. (Human Reproduction)* May 1998 p 1407; M. Graziadei & S. Praduroux, 'Il biodiritto nello specchio della comparazione', *Biolaw J. (BioLaw Journal)* 2019(2) p 361; C. Casonato, *Introduzione al biodiritto* (Torino: Giappichelli, 3rd edn 2012).

6 See B. Pasa, 'Legal translation within the EU and the Shift of National Legal Paradigms', in A. Janssen & H. Schulte-Nölke (eds), *Researches in European Private Law and Beyond, Contribution in Honour of Reiner Schulze's Seventieth Birthday* (Baden-Baden: Nomos 2020), p 193.

7 A. Harding, 'Global Doctrine and Local Knowledge: Law in South East Asia', 51. *Int Comp Law Q (The International and Comparative Law Quarterly)* 2002, p 35.

8 T.L. Beauchamp & J.F. Childress, *Principles of Biomedical Ethics* (Oxford: OUP, 5th edn, 2001); G. Pennings et al., 'ESHRE Task Force on Ethics and Law: The welfare of the child in medically assisted reproduction?', 22. *Hum. Reprod.* 2007, p 2585.

requested to recognize the biological child born abroad. This puts national courts in the difficult situation of having to apply rules that are likely to be detrimental to those who deserve maximum protection, namely the children who are born posthumously as a consequence of a MAR procedure. Posthumous reproduction (hereinafter PR) raises a tension between the interests of the unborn child, which are arguably impaired *ab initio* by a conception under such circumstances, and the desire of those who have taken steps to ensure that the child was born, normally the surviving spouse or the child's ascendants.[9] In the EU, post mortem fertilization is allowed in four Member States (Belgium, Greece, the Netherlands, and Spain) plus the United Kingdom.

Written informed consent is a fundamental legislative requirement for accessing this medical treatment.[10] However, it is eroded by the presumed intent gleaned from the actions or statements of the deceased. In most cases, PR involves people who died suddenly, without having provided their consent according to the strict legal procedures required to permit the practice and the surviving spouse wants a child, especially if fertility treatments has already begun.[11]

An analysis of the case law of common law jurisdictions, which are more willing to evolve through the cases brought before the courts as these generally bring out any discrepancies between the existing rules with social reality, points to the growing importance of ascendants.[12] Following the death of a child, the hopes of grandparents that their children may in turn have children of their own may have been dashed, and they are hence increasingly determined to use all opportunities offered by medicine to ensure 'genetic continuity'.[13]

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9 J.L. Epker, Y.J. de Groot, & E.J. Kompanje, 'Ethical and practical considerations concerning perimortem sperm procurement in a severe neurologically damaged patient and the apparent discrepancy in validation of proxy consent in various post-mortem procedures', 38. *Intensive Care Medicine* 2012, p 1069.

10 S. Fainzang, *La relation médecins-malades: information et mensonge* (Paris: PUF 2007); A. Akabayashi-Slingsby, 'Informed Consent Revisited: Japan and the US', 6. *Am. J. Bioeth.* (*American Journal of Bioethics)* 2006(1), p 9; M. Graziadei, 'Il consenso informato e i suoi limiti', in L. Lenti, E. Palermo & P. Zatti (eds) *I diritti in Medicina*, Trattato di Biodiritto directed by S. Rodotà & P. Zatti (Milano: Giuffrè 2011) p 191 ff.; O. Guillod, *Le consentement éclairé du patient: autodétermination ou paternalisme* (thèse Neuchâtel 1986).

11 F. Shenfield, 'Consent and intent in assisted reproduction treatments', in M. Freeman & A. Lewis (eds), *Law and Medicine* volume 3 (Oxford: Oxford Scholarship Online 2012), p 317 DOI:10.1093/acprof:oso/9780198299189.003.0019.

12 W.M. Landes, 'An economic Analysis of the Courts', 14 *J. Law and Economic* 1971, p 61; M. Shapiro, 'Toward a theory of "Stare Decisis"', 1. *J. Legal Stud.* Jan. 1972, p 125.

13 S. Simana, 'Creating life after death: should posthumous reproduction be legally permissible without the deceased's prior consent?', *J. Law Biosci. (Journal of Law and the Biosciences)* 2018, p 329.

2. Medically Assisted Reproduction in the Western Legal Tradition

The importance of parentage varies between legal cultures and the bioethical dimension plays a significant role in encouraging, or discouraging, access to MAR techniques.[14]

A lack of offspring is also perceived differently across the globe and solutions also differ.[15] Nonetheless, the human desire to become a parent is universal, and the various legal findings reflect this fact.[16]

The issue of childlessness has been addressed differently by the legal traditions: Islamic polygamy represents one of the traditional remedies to a marriage without children, and thus allows the desire to have offspring to be satisfied, without necessarily dissolving the marriage bond between an infertile couple. In Christian Europe, however, concubinage was illegal and any children born out of wedlock were illegitimate. This concept has a legacy even in the most secular countries, although one must also remember the options available to childless couples in the antiquity: until the fourth century in Rome, as well as in Greece and Israel, a concubine could provide an heir to childless couples, if they were affected by sterility or infertility.[17] In this sense, surrogacy is certainly not a new practice.[18] In many Euro-Asiatic societies, concubinage was allowed and the children born from such a union could indeed be legitimate heirs. The Chinese perception of family offers a good example of the importance of lineage

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14 R. Cotterrell, 'Comparative Law and Legal Culture', in M. Reimann & R. Zimmermann (eds), *Oxford Handbook of Comparative Law* (Oxford: OUP 2006), p 441 ff.; S. Ford, 'A Comparative Study of Human Reproduction' (New Haven: Yale University Press 1945); M.A. Al-Bar & H. Chamsi-Pasha, *Contemporary Bioethics Islamic Perspective* (Berlin: Springer 2015), p 173. H. Willekens, 'Long Term Developments in Family Law in Western Europe: An Explanation', in J. Eekelaar & T. Nhlapo (eds), The Changing Family (London: Hart 1998), p 53.

15 F. Van Balen (ed.) *Infertility around the Globe. New thinking on Childlessness, Gender and Reproductive Technologies* (Berkeley: University of California Press 2002), p (3) at 5; A. Benshushan & J.G. Schenker, 'The right to an heir in the era of assisted reproduction', 13. *Hum. Reprod.* May 1998, p 1407.

16 C.S. Ford, *A Comparative Study of Human Reproduction*; M.A. Al-Bar & H. Chamsi-Pasha, *Contemporary Bioethics Islamic Perspective.* G. Therborn, 'The Family Systems of the World: are they converging?', in J. Treas, J. Scott & M. Richards (eds), *The Wiley Blackwell Companion to the Sociology of Families* (Hoboken: Wiley 2014), p 4.

17 J. Goody, *Famiglia e matrimonio in Europa. Origini e sviluppi dei modelli familiari dell'occidente* (Milano: Arnoldo Mondadori 1984), p (245); Even the Romans practiced the *locatio ventris*, or the transfer of the wife to another man for purposes procreative: emblematic in this regard is the story of Cato l'Uticense, who grants the wife Marzia to his friend Ortensio Ortalo, so that the latter can also secure the lineage.

18 See biblical story of Hagar, a slave of Sarai, wife of Abraham, with whom the latter conceived the child who did not arrive with Sarai. Genesis, Ch. 16, 2 'The Lord has kept me from bearing children. Have intercourse, then, with my maid; perhaps I shall have sons through her'. Abram heeded Sarai's request.

that ensures the continuity of two extended lines. According to an old Chinese proverb, 'there are three things that are not dutiful to your parents, and not bearing offspring is the worst'.[19]

In this context, Medically Assisted Procreation (MAP) is a modern solution in order to treat reproductive pathologies, even if it involves bioethical choices affected by religious views. For instance, Christian religious teachings reject the recourse to MAP techniques that involve the formation of the embryo outside the body.[20] On the other hand, the pro-birth Islamic tradition has been more inclined to accept these techniques as a Shariah-compliant tool to fight high rates of infertility and realize a large *Ummah.*[21] Proof of this is the fact that demand for such treatment has resulted in an increase in specialist health facilities in the Middle East.[22] In China, problems related to infertility have greatly increased in recent decades due to pollution and stress, with the result that the use of these techniques has become more popular, thus raising a need for standardized regulation.[23] In 2003, China regulated these practices, indicating an awareness of the problem on the part of the authorities, although the legal status of the embryo has not yet been regulated.[24] In some cases due to childlessness and in

19 M.M. Dawson, *The Ethics of Confucius* (Hawaii: University Press of the Pacific 2002); E.M. Cline, *Families of Virtue: Confucian and Western Views on Childhood Development* (New York: Columbia University Press 2015). W. Danning, 'Fertility Transition and the Transformation of Working Class Family Life in Urban China in the 1960s', in C. Kwok-bun (ed.), *International Handbook of Chinese Families* (New York: Springer 2013), p 249.

20 L. Ferrajoli, 'Diritti fondamentali e bioetica. La questione dell'embrione', in S. Rodotà & M. Tallachini (eds), *Ambito e fonti del biodiritto*, in Trattato di biodiritto, directed by S. Rodotà & P. Zatti (Milano: Giuffrè 2010), p 231.

21 From a theological point of view, medicalization of infertility and its acceptance are not different in value. M.C. Inhorn & F. van Balen (eds), *Infertility around the globe. New Thinking on Childlessness, Gender, and Reproductive Technologies* (Berkeley: University of California Press 2002), p 3; F. Sona, *New Parenthood and Childhood Patterns, Principles and Praxes in Muslim Realities* (Bologna: Il Mulino 2019), p 129 ff.

22 G.I. Serour, M. El Ghar & RT Mansour, *'Infertility: A health problem in the Muslim world', Popul Sci* 1991(10), p 41; D. Atighetchi, *Islamic Bioethics: Problems and Perspective* (Heidelberg: Springer Netherlands 2007); M.C. Inhorn, *Globalization and gametes: reproductive 'tourism', Islamic bioethics, and Middle Eastern modernity*, 18. *Anthropol Med* 2011(1) p 87 ff.

23 A. Wahlberg, *Good quality: The routinization of sperm banking in China* (Oakland: University of California Press 2018).

24 The measures on the Administration on Assisted Human Reproductive Technology are different. China's Ministry of Health (hereinafter CMHO) issued in 2001 and 2003 regulations cited in J. Qiao & H.L. Feng, 'Assisted reproductive technology in China: compliance and non-compliance', 3. *Translational pediatrics* 2014(2), p 91; L. Jiang, 'IVF the Chinese Way: Zhang Lizhu and Post-Mao Human In Vitro Fertilization Research East Asian Sci.', 9. *Technol. Soc.* 2015(1), p 23; On the augmentation of fertility treatment see L. Hu et al., 'Assisted Reproductive Technology in China: Results Generated From Data Reporting System by CSRM From 2013 to 2016', *Front. Endocrinol.* 2020(11), p 458. In 2016, the CMHO has issued new Ethics principles for human assisted

others as a result of the one-child policy,[25] increasing numbers of Chinese citizens are seeking to benefit from the development of MAR techniques, turning to the solutions offered by reproductive medicine.[26] This has given rise to various cases that have made international headlines, also due to delay in adopting regulations[27]: although there is no specific law in this area, the Court of Wuxi in Jiangsu Province has recognized the right of prospective grandparents to 'custody and disposition' of the embryos of their son and daughter-in-law who died in a car accident, which were subsequently implanted into the uterus of a surrogate mother.[28] Although it did not define the legal status of an embryo, the Court provided various reasons as to why the embryos should be placed under the grandparents' custody, including the traditional and cultural function of the Chinese family, which highlights reproduction as an important aspect of family relations, and sympathy towards the parents who had lost their only child.

More generally, the development of MAR techniques combined with separation and divorce rates has led to problems related to the ownership of embryos and gametes. As a result, it has been necessary to strike a balance between principles that are equally deserving of protection, and yet irreparably conflicting with one another, in some cases relying on theologically-founded arguments.[29]

Within the Western legal tradition, individual freedom and respect for autonomy is emphasized, and the principle of informed consent is thus recognized with respect to PR as well.[30]

Even in the European judicial area, national and supranational courts are increasingly recognizing the desire for parenthood a right based on respect for private and family life. The case studies examined by the European Court of Human

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reproductive technology and human sperm bank. See F. Bai et al, 'Assisted reproductive technology service availability, efficacy and safety in mainland China', 35. *Hum. Reprod.* 2020(2), p 446 ff .

25 B.H. Settles et al., 'The One-Child Policy and Its Impact on Chinese Families', in *International handbook of Chinese families*, p 627.

26 L. Handwerker, 'The Politics of Making Modern Babies in China: Reproductive Technologies and the "New" Eugenics', in M.C. Inhorn & F. van Balen (eds), *Infertility around the globe* (Berkeley: University of California Press 2002), p 298; A. Wahlberg, 'The birth and routinization of IVF in China', *Reprod. Biomed. Soc. Online* (*Reproductive BioMedicine and Society Online)* 2016(2), p 97.

27 L. Fei & P. Zhou, 'The Law Itself Is Not Above Human Beings: Comments on China's First Case on Frozen Embryos', 29. *Int'l J.L. Pol. & Fam (International Journal of Law, Policy and the Family)* 2015(3), p 260.

28 *Shen Xinnan & Shao Yumei* v. *Liu Jinfa & Hu Xinxiang*, Intermediate People's Court of Wuxi, Jiangsu Province (2014) Xi Min Zhong Zi no. 01235, cited in L. Fei & P. Zhou, 29. *Int'l J.L. Pol. & Fam* 2015(3), p (260) at 261.

29 See Nahmani v. Nahmani [1995–6] Isr. L. Rev. 1; The Court makes the woman's right to procreation prevail over the right not to become a parent of her husband, axiologically assimilating parenthood to life (see point 40).

30 V.K. Blake & H.L. Kushnick, 'Ethical Implications of Posthumous Reproduction', in J.M. Goldfarb (ed.), Third-party reproduction: a comprehensive guide (New York: Springer 2014), p 197.

Rights have concerned both heterologous fertilization and surrogacy. PR has only recently come under the scrutiny of the ECtHR, which has ruled that it could not be included in the protection provided by Article 8 ECHR 'in the current state of the court's jurisprudence'.[31]

3. Posthumous Reproduction in the EU

Although EU law now regulates some aspects of 'bio-law', it often relies on the competences of Member States, leaving the discussion to a purely domestic level. National measures in allowing or prohibiting fertility treatments are also subject to control by the ECHR, when they exceed the margin of appreciation granted to them.[32]

Freedom of movement offers EU citizens the opportunity to travel with relative ease to a Member State where posthumous fertilization is legally permitted, most advanced and (why not) cheapest. Specifically, posthumous reproduction can involve the implantation of embryos already formed at the time of death, which are subsequently implanted, or through the posthumous use of gametes, which are then used to form embryos for subsequent implantation into the uterus of the mother, whether biological or gestational. The former scenario generally arises in cases in which medical treatment had begun prior to death, interrupting an existing path towards parenthood, to which the prospective parents had specifically consented.[33] The latter scenario is more delicate, as in many cases consent has not been specifically given by the deceased, especially in cases where the legislation requires the involvement of a notary and the role of parents or partners is crucial. The desire for continuity concerns both the surviving spouse and the ascendants of those who have died, especially if they are only children, which prevents the parents from having a biological descendant.

The possibility of a posthumous heir also has consequences for the principles of inheritance, since it creates uncertainty as to who will inherit prior to his or her birth and affects the respective capacities of the various heirs.[34] In fact, the actual birth of a posthumous heir depends not only on the decision to use MAR techniques but also, where this has occurred, on the specific possibilities that the

31 ECtHR, 12 Nov. 2019, 23038/19, *Petithory Lanzmann/France*, hudoc.echr.coe.int/eng?i=002-12688 (accessed 29 Nov. 2021). See H. Fulchiron & C. Bidaud-Garon, 'Reconnaissance reconstruction? À propos de la filiation des enfants nés par GPA, au lendemain des arrêts Labassée, Mennesson et Campanelli-Paradiso de la Cour européenne des droits de l'homme', *R.C.D.I.P. (Revue critique de droit international privé)* 2015(1), p 1.

32 M. Dubois, 'Bioétique et droit Internationa',46. *Annuaire française de droit international* 2000, p 82; K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge: CUP 2015).

33 B.A. Koch (ed.), *Medical Liability in Europe. A comparison of Selected Jurisdictions* (Berlin-Boston: De Gruyter 2011).

34 A. Fusaro, 'I diritti successori dei figli: modelli europei e proposte di riforma a confronto', *Nuova Giurisprudenza Civile Commentata* 2012(12), p 747.

child will be born.[35] Within the European Union, some Member States have regulated the post mortem fertilization process, while others such as Ireland have refrained, though have not prohibited the practice.[36]

In Belgium, the *loi* of 6 July 2007, *relative à la procréation médicalement assistée et à la destination des embryons surnuméraires et des gamètes* permits both the use of gametes as well as the implantation of embryos over a period of between six months and two years after death. An agreement must be signed, under which access to fertilization is provided for, and provision is made about what should happen to the embryos in the event of separation or divorce, or following the death of one of the parents.[37] The practice is also expressly provided for in Greece. Although Greek society tends to be conservative, the general legal framework for medically assisted human reproduction was put in place by Law 3089/2002 and Law 3305/2005, which introduced certain innovations inspired by the pragmatism of wanting to encourage reproduction[38]: MAR treatments are seen as a 'medical necessity' in cases in which natural procreation has been limited. Post mortem fertilization is permitted if the man provided his written consent to the use of his sperm after death. As in Belgium, artificial fertilization is permitted between six months and two years after the donor's death. In particular, Article 1457 of the Greek Civil Code provides that post mortem fertilization is only lawful where one of the partners has fallen ill, and is subject to the prerequisite of notarized consent: moreover, judicial authorization is required in all cases.[39] Insemination must be performed no earlier than six months and no later than two years after the death of the spouse or partner, and as a result the child attains status as an heir of the deceased parent.[40] However, Greek courts found the practice to be illegal in a case

35 See the contrasting position of notaries in France N. Baillon-Wirts, 'La contribution du notariat aux États généraux de la bioéthique', 23. *DEFRÉNOIS* 2018(6), p 27.

36 Posthumous assisted reproduction will be regulated in Part 4 of the General Scheme of the 2017 Bill. For a commentary see K. O'Sullivan, 'Posthumously Conceived Children and Succession Law: A View from Ireland', *International Journal of Law, Policy and the Family*, 2019, 33, p 380.

37 See Arts 44 and 45 *loi 6 juillet 2007*. For a general assessment, see M.N. Derèse & G. Willems, 'La loi du 6 juillet 2007 relative à la procréation médicalement assistée et à la destination des embryons surnuméraires et des gamètes', *Revue trimestrielle de droit familial* 2008(2), p 279.

38 Law on medically assisted human reproduction no. 3089/2002 and Law on Medically assisted reproduction techniques, no. 305/2005. See G. Leon, A. Papetta & C. Spiliopoulou, 'Overview of the Greek legislation regarding assisted reproduction and comparison with the EU legal framework', 23. *Reprod Biomed Online* 2011(7), p 820.

39 See Art. 1456 and Art. 1457 Greek Civil Code, newly inserted through Act 3089/2002, Government Gazette 327, 23 Jan. 2002.

40 'A child born after post-mortem fertilization, given that there is the judicial authorization required by Art. 1457 Greek Civil Code, is also considered to be a child born in wedlock. If the child was born after the three hundred days from the dissolution or annulment of marriage, the burden of proof for paternity of the husband lies with the person who relies on it. The same applies when the artificial fertilization took place after the death of the husband, despite the absence of judicial

involving a mother who had illegally taken her son's sperm and had four grandchildren with two surrogate mothers in Russia.[41] The Court of First Instance of Thessaloniki rejected the request for recognition of the adoption of the four children on the grounds that the practice was contrary to Greek public order.[42] Although provision has been made to regulate the matter, express consent to post mortem fertilization is a rigid form of consent under Greek law and must be given before a notary public; any consent expressed by testament is invalid.[43]

Spain has always been one of the most liberal legal systems in terms of bio-rights issues: Article 9 of *Ley 14/2006, de 26 de mayo, sobre Técnicas de Reproducción Humana Asistida* allows post mortem fertilization subject to the father's consent up to twelve months after death: this consent must be expressed in a public instrument, testament or document containing prior instructions, and is presumed to have been given where treatment has already started.[44] If the couple is married, the child is deemed to have been born into the marriage; for unmarried couples, it is possible to register the birth or to launch a legal action for the recognition of paternity.[45] The provision is only applicable following the death of the man, since surrogacy is prohibited.[46] The post mortem child will be granted the father's surname and nationality, in accordance with the criteria set out in Articles 17 ff. of the Civil Code. From a succession perspective, there is an inconsistency between the principle that the heirs must outlive the deceased (Article 745) and the

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authorization': see L. Papadopoulo, 'Parenting and legal family formats in Greece', in K. Waaldijk et al. (eds), *The Laws and Families Database – Aspects of legal family formats for same-sex and different-sex couples* (Paris: INED 2017) www.ined.fr/Xtradocs/lawandfamilies/LawAndFamilies-GR-Section3.pdf (accessed 29 Nov. 2021); K. Kipouridou & M. Milapidou, *The legal framework of post mortem fertilization in Greece and Sweden*, 4. *Bioethica* 2018(1), p 55.

41 In Russia, posthumous fertilization is not permitted and in a similar case the biological grandmother of the child could not boast any kind of claims on the child. See M. Leidig, 'Russian Woman May Lose Grandson Conceived from Dead Son's Frozen Sperm', 332. *BMJ (British Medical Journal)* 2006, p 627.

42 CoFI of Thessaloniki 7013/2013, in A. Kotzabasi, 'Bonds of love or bonds of blood? children on the borderline of social and natural kinship', 5. *Culture and research* 2016, p (225) at 230.

43 Athens Court of First Instance 5146/2007 in D. Papadopoulou Klamaris, 'Post mortem artificial fertilization and surrogacy in practice', 5. *Culture and research* 2016, p 81.

44 A.M. Rodríguez Guitán, 'La reproducción artificial post mortem en España: Estudio ante un nuevo dilemma jurídico', 20. *Revista Boliviana de derecho* 2015, p 292. M. Pérez Monge, 'Filiación derivada del empleo de las técnicas de reproducción Asistida', in F. Lledó Yagüe, A. Sánchez Sánchez & Monje Balmaseda (eds), *Los 25 temas más frecuentes en la vida práctica del derecho de familia* (Madrid: Dykinson 2011), p 578; P. Escribano Tortajada, 'Algunas cuestiones que plantea la reproducción asistida "post mortem" en la actualidad', 69. *ADC (Anuario de derecho civil)* 2016 (4), p 1259.

45 See Art. 44, para. 8 of *Ley* 20/2011 of 21 July *del Registro Civil* in BOE 175 of 22 July 2011.

46 P. Enguer Gosálbez & F. Ramón Fernández, 'Dilemas bioéticos y jurídicos de la reproducción asistida en la sociedad actual en España', 18. *Rev.lationam.bioet (Revista Latinoamericana de Bioética)* 2015(1), p 104.

principle that the child conceived must benefit from all rights available to those already born at the time of death (Article 29). The problem does not arise in the case where there is already an embryo at the time of death, although the position is more doubtful where fertilization has not yet occurred,[47] although the mechanism provided by the rule allowing absentee succession may help.[48] In any event, the recognition of a future heir by testament makes the succession process easier, provided that the period required by law has elapsed before the succession is opened.[49] If an heir is not designated in the testament but rather in *instrucciones previas* or in a notarized instrument, the opening of the succession will be declared if the woman declares that she wishes to undergo post mortem fertilization. In such cases, the ethics committees of healthcare facilities play an important role in deciding whether to provide treatment.[50] Spanish law has the merit of clarity, even though there are some grey areas, such as the issue of the recognition of the child born post mortem following the insemination of a widow with an embryo obtained from a donor, or the number of permitted attempts in order to bring about a pregnancy (or potentially multiple pregnancies), as well as the time limit allowed in order to begin treatment.[51] The law also refers to reproductive material, without specifying whether gametes or embryos are intended, although the doctrine and the courts have always interpreted the expression broadly.[52]

In the United Kingdom, the Human Fertilisation and Embryology Act 2008, enacted to amend the Human Fertilisation and Embryology Act 1990 and the Surrogacy Arrangements Act 1985, expressly regulates the 'use of sperm, or transfer of embryo, after death of man providing sperm' (section 39). As regards post mortem fertilization, a man whose sperm has been used after his death may only be regarded as the father of the child if he gave

47 It is the case of *hijo superpóstumo*, because not only born but also conceived after the death of his father. It has been effectively defined 'hijo del fantasma' by M.E. Cobas Cobiella, 'La llamada reproducción asistida post mortem. Algunas reflexiones', *Actualitad Civil* 2017(6), p 68.

48 P. Escribano Tortajada, 69. *ADC* 2016(5), p (1259) at 1260.

49 J.J. Iniesta Delgado, 'Los derechos sucesorios del hijo nacido de fecundación post mortem', 29. *Revista de Derecho y Genoma Humano* 2008, p 13.

50 See the role of the *Comité de Ética Asistencial of the Ramón y Cajal Hospital* which denied treatment to the young widow of a Spanish citizen on the basis of the invalidity of the deceased's informed consent to the posthumous use of his genetic material. R. Núñez, 'Caso clínico, fecundación post mortem', 52. *EIDON* 2019, p 75.

51 The law states of one year from the death of her husband but does not specify whether the time limit concerns the actual commencement of the treatment or merely the decision to undergo treatment.

52 See A.M. Rodríguez Guitán, 20. *Revista Boliviana de derecho* 2015, p 292. For a reconstruction of these problems, see I. Santolaria Baig & F. Ramón Fernández, 'La fecundación post mortem en España: problemas y límites jurídicos y bioéticos', 13. *Revista Iberoamericana de Bioética* 2010, p 1. M. Fernández-Arrojo, 'El impacto de las técnicas de reproducción asistida en el derecho de filiación en España. Desafíos y contradicciones ante el interés superior del menor', in *JUS-Online* 2020(3), p 98.

written consent to the use of his sperm after death. The Code of Practice developed by the Human Fertilisation and Embryology Authority (hereafter HFEA, established under section 5 of the Human Fertilisation and Embryology Act 1990) may not be legally binding but, through explicit government approval, has acquired de facto legal status.[53] Posthumous reproduction is allowed, but requires explicit written consent. In the absence of such consent, the laws and guidelines governing medical care apply, and decisions regarding incapacitated patients, such as those in a coma, must be made in their best interest by their next of kin. Although gametes are organic material, they do not fall under the jurisdiction of the Human Tissue Act 2004[54] and it expressly stated that the next of kin, friends or close relatives of the deceased cannot give consent to procure, retain or use them in the same way as they can for other human organs and tissues. The UK courts have been particularly active when ruling on the cases submitted to them. The leading case on this matter is *R* v. *HFEA, ex parte Blood*,[55] where the Court of Appeal ruled in favour of the widow of a man who – after the irreversible loss of consciousness, due to meningitis that led to his death in a very short time – had sperm removed without any prior declaration of consent, but in compliance with a specific request formulated by his wife for procreative purposes. The reasoning of the Court was focused on the right of the widow to access a MAP abroad and her husband's genetic material was the assumption. Another prominent ruling is *R* (*on the application of M)* v. *HFEA*, because the application was brought by the deceased's parents, who were seeking to use her cryopreserved eggs.[56] This case turned on whether appropriate consent had been given for the storage and use of these eggs for the purpose of fertilization with donor sperm outside the country. Surprisingly, the Court of Appeal ruled in favour of the deceased's parents, who had exported the eggs in question to the US. The HFEA has broad discretion to permit export, which is different from retrieval and storage. Another paradigmatic case is *Y* v. *A Healthcare NHS Trust & Ors*, in which the consent given by the incapacitated person's wife was held to be sufficient to allow the extraction of sperm for procreative purposes.[57] Even if The Human Fertilisation and Embryology Act 1990 prohibits gamete use without consent, courts have overcome this prohibition by allowing gametes to be exported outside of the United Kingdom. There is also a rather grey area

53 Compare HFEA Code of Practice, 9th edn Jan. 2019, www.hfea.gov.uk (accessed 29 Nov. 2021).

54 *L* v. *HFEA* [2008] EWHC 2149 (Fam).

55 *R* v. *HFEA ex parte Blood* [1997] 2 WLR 806 (CA); [199] Fam.151.

56 *R (on the application of M*) v. *HFEA* [2016] EWCA Civ 611 (CA).

57 Section 16 of the Mental Capacity Act 2005 ['the Act'] directing that a suitable person should sign the relevant consent form. In *Y* v. *A Healthcare NHS Trust & Ors* [2018] EWCOP 18 the Court stated that it was lawful and in best interests for the incapacitated man's sperm to be retrieved and stored prior to his death.

concerning people who lack capacity: prior to a declaration of death, a patient must be treated in his or her best interests, although after death the rules are less clear.[58]

The Netherlands has recently regulated this area through guidelines issued by the Dutch Association for Obstetrics and Gynaecology with the Model Regulation Embryo Act (referred to below as the '*Modelreglement*'), chapter 5, which complements the Embryo Act 2002. Although not legally binding, the document is influential and is expected to be followed by practitioners. It suggests that explicit, written (prior) consent of the deceased is required for the use of his or her gametes and embryos after death.[59] Post mortem conception clearly refers to fertilization after the death of the person from whom the embryo or gametes originated. However, the extraction of gametes from a deceased person is not regulated in detail and the courts have broad room for manoeuvre, even though the requirement of consent to their use is not dispensed with. The acquisition of consent remains a critical issue, which is difficult to resolve in the event of sudden death. There is similarly broad room for manoeuvre for healthcare personnel, who can refuse to perform treatment, even though conscientious objection is not clearly listed among the reasons for abstention. The *Modelreglement* 2018 takes into account the current state of the art in fertility preservation treatments, i.e., cryopreservation of female gametes, and overcomes the distinctions drawn between the sexes under the previous *Modelreglement* 2004. However, it reduces to one year the period during which it is possible to use the gametes of the deceased, and discourages their use within the context of surrogacy.[60]

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58 See *L* v. *HFEA* [2008] per Charles J at [144]: 'The Court does not have common law power (...) to enable it to supply a consent or modify a licence, in connection with storage and subsequent use of gametes (...). I have based these conclusions on the proposition that such matters have been covered by Parliament with the result that any common law jurisdiction in respect of them has been replaced by a statutory one', but HFEA, as seen before, has considerable discretion in this field.

59 See Art. 2(3)f, 7 and 8 (3) Dutch Embryos Act, Staatsblad (Bulletin of Acts and Decrees) 2002, 338.; T.A. Te Braake, 'The Dutch 2002 embryos act and the convention on human rights and biomedicine: Some issues', 11. *Eur. J. Health L.* 2004(2), p 139; See also Ch. 5 (Posthumous reproduction) of professional guidelines issued by Dutch Association for Obstetrics and Gynaecology, Model Regulation Embryo Act (27 Aug. 2018), www.nvog.nl/wp-content/uploads/2018/08/Modelreglement-Embryowet-NVOG-en-KLEM-definitief-augustus-2018.pdf (accessed 29 Nov. 2021). N. Hyder-Rahman, 'Regulating posthumous reproduction in the Netherlands and the UK', *Family & Law* Apr. 2020, DOI: 10.5553/FenR/.000046; B.C. Lewis, *The Ethical and Legal Consequences of Posthumous Reproduction: Arrogance, Avarice and Anguis*h (London: Routledge 2016), p 30.

60 In particular, posthumous donation of frozen eggs for fertility treatments or for research purposes has been positively encouraged as a way to address egg shortages.

4. National Case-Law Prohibiting Posthumous Reproduction

Post mortem fertilization entails the artificial insemination of a woman with the cryopreserved sperm of her deceased partner, or the implantation of an embryo formed when the members of the couple were both alive. However, problems arise in relation to the birth of a child conceived through post mortem fertilization, especially in those countries that do not provide for the practice, such as Germany, Italy, and France. These countries were chosen mainly because the consequences of posthumous reproduction, such as the attribution of the paternal surname, are brought to the attention of their courts. In those countries, this prohibition is established from the letter of the law.[61]

In Germany, fertilization with sperm from a deceased man is expressly prohibited, as is the fertilization of an egg from a deceased woman. On the other hand, if death occurs after fertilization, the prohibition does not apply, and the destruction of any embryos depends on the degree of their development.[62] In 2016, the Higher Regional Court of Karlsruhe had to rule on a man's request to be allowed to transfer embryos conceived with his first wife, who had since died, into the uterus of his second wife. The Court dismissed the case against the University Hospital of Freiburg, which was not allowed to release the 15 fertilized oocytes at the pronuclear stage. According to the 'contract on cryopreservation and subsequent processing of oocytes in the 2PN stage and their custody' concluded between the then couple and the clinic, the oocytes could only be released to the couple jointly. A separate statement signed by the man and his deceased wife stated that frozen oocytes in the pronuclear phase could not be stored beyond the death of one of the partners. The German Embryo Protection Act (*Embryonenschutzgesetz*) prohibited the release of oocytes as requested by the plaintiff.[63]

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61 See Art. L 2141-2, *Code Santé Publique* modified by *loi* no. 2019-222 23 Mar. 2019; § 4(1)3 of Embryo Protection Act (*Embryonenschutzgesetz*—ESchG hereinafter referred to as EPA) of 13 Dec. 1990, Bundesgesetzblatt 1990 Part I p 2746, amended by Art. 1 of the Act of 21 Nov. 2011 (Bundesgesetzblatt 2011 Part I p 2228) 'anyone will be punished with up to three years imprisonment or a fine, who (...) knowingly fertilizes artificially an egg cell with the sperm of a man after his death'. In Italy, see Art. 5, act 19 Feb. 2004, n. 40.

62 See OLG München 22 Feb. 2017, which criminalizes those who use post mortem sperm. OLG Rostock, ruling of 7 May 2010, no. 7 U 67/09, BeckRS 2010, 12238 = MedR 2010, 874. However, the guidelines require the destruction of embryos in the event of the unexpected death of the spouses. See commentary on point 5.2 (cryopreservation) of 2006 amendment of Guidelines of the German Medical Association on assisted reproduction available at www.aerzteblatt.de/archiv/51526/Bekanntmachungen-(Muster-)Richtlinie-zur-Durchfuehrung-der-assistierten-Reproducktion-Novelle-2006 (accessed 2 Dec. 2021) H.-L. Günther, J. Taupitz, & P. Kaiser (eds), *Embryonenschutzgesetz* (Stuttgart: Kohlhammer, 2nd edn 2014); U. Gassner et al., *Fortpflanzungsmedizingesetz* (Tübingen: Mohr Siebeck 2013), p 38.

63 OLG Karlsruhe, 17 June 2016, no. 14 U 165/15.

In Italy, where post mortem fertilization is banned by Article 5 of Act 40/2004,[64] the *Corte di cassazione* has held the consent of the husband or partner to a procreation technique, if not withdrawn, constitutes an adequate basis for establishing legal status as a legitimate child. This is because consent to abortion was granted before the dissolution of the marriage due to the death of the husband, even though the law clearly states that people who access PMA must be alive (although it is silent on until when they must remain alive).[65]

The time lag between the expression of intention and the birth of the child creates a misalignment between the relevant applicable prescription of the Italian Civil Code and the provisions of Act 40/2004.[66] This discrepancy has resulted in a conflict between the best interests of the child and public order, and is particularly apparent in relation to the registration of foreign birth certificates in relation to children born through surrogacy services.[67] As regards civil registry documentation, Presidential Decree 396/2000 provides that the registration in Italy of a civil status document issued abroad is not permitted where it would run contrary to public order.[68] This aspect concerns not so much the completeness, validity and authenticity of the foreign document, but rather the effects of its registration in Italy.

Following the death of her husband, a woman underwent medically assisted fertilization treatment in Spain and gave birth to her own daughter in Italy, where a registrar refused to transcript the paternity of the deceased spouse. The Italian *Corte di cassazione* has noted the difficulty encountered by the law in adapting to technological innovations that relate to ethically sensitive issues, holding that:

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64 Legge 19 febbraio 2004, n. 40, *Norme in materia di procreazione medicalmente assistita*, in GU Serie Generale n. 45.

65 A. Cordiano, 'Post-Mortem Homologous Fertilization: Parental Patterns in the Dialectical Comparison Between the Constraints of Biology and Rules on Consent', *ItaLJ (The Italian law journal)* 2020 (1), p 341.

66 In fact, the Court had to decide whether to apply the provisions of the Civil Code (and therefore the presumption established by Art. 232 of the Italian Civil Code) or the rules found in the act 40/2004 on assisted procreation (particularly Arts- 8 and 9). See *Corte di cassazione civ.* 15 May 2019, no. 13000. In this judgment the Court stressed the centrality of the express consent to access assisted procreative techniques and analyses the consequences that derive from it; I. Riezzo et al., 'Italian law on medically assisted reproduction: do women's autonomy and health matter?', *BMC Women's Health* (2016), p 16.

67 See European Parliament, *A comparative Study on the regime of surrogacy in EU Member States* (2013), www.europarl.europa.eu/RegDATA/etudes/STUD/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf (accessed 2 Dec. 2021). The best interest of the minor is also a parameter of evaluation of the contrariety or not to international public order. S. Tonolo, 'La trascrizione degli atti di nascita derivanti da maternità surrogata: ordine pubblico e interesse del minore', 50. *Rivista di diritto internazionale privato e processuale* 2014(1), p 81.

68 See *Corte di cassazione civ.* 31 Mar. 2021, no. 9006 ECLI:IT:CASS:2021:9006CIV, which admitted the transcribability of the adoption of a son by two fathers, since the fact that the family unit of the adoptive minor child is homogenitorial is not an obstacle to international public order.

> procreation has a particular dynamism, subordinate to the specific interests that it is intended to satisfy. Even through the application of MAR techniques after the death of one of the two partners ends up transcending the earthly boundary of the marital union, it cannot however ignore the important role of parental responsibility, which ranges from exercising a right to procreation to the performance of a parental function.[69]

First instance courts also tend to disregard the letter of the law in the face of the reality of a (posthumous) child. The limit of public order is in fact a fuzzy notion and must be considered within the framework of the general principles laid down by EU law, as well also as the broader community of countries adhering to the ECHR. The effects of a foreign rule will therefore be either accepted or rejected 'on the basis of an evaluation of the compatibility with constitutional values and with those shared with the international community, and not with individual imperative norms'.[70]

Post mortem fertilization is also banned in France: both the posthumous transfer of embryos (where embryos were conceived before the death of one of the members of the couple) and post mortem insemination are thus prohibited. Thus, the gametes of a man who has died in the run-up to MAR treatment involving donation to a sterile couple or surrogacy must be disposed of. Article L. 2141–11-1 of the *Code de la Santé Publique* also prohibits the export of gametes for the purpose of post mortem procreation. The *loi bioetique* discussed in French Parliament is in line with the prohibition laid down under the previously applicable legislation.[71] Two recent judgments have confirmed this approach. In 2014, however, the *Conseil d'Etat* has recognized the prevalence of the law of the state of origin of the surviving person over the more restrictive one in force in France: only a real link with the importing country of gametes and the absence of fraudulent intent may constitute special circumstances justifying the exclusion of the application of French law and authorizing the export of gametes. In that case, judges have allowed a Spanish national to obtain the transfer of the gametes of her French husband who died of cancer to Spain, where post mortem fertilization is legal.[72]

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69 *Corte di cassazione civ.* 15 May 2019, no. 13000 points 7.3.2.1 ECLI:IT:CASS:2019:13000CIV.

70 Trib. Napoli, decree 1 July 2011; M. Castellaneta, 'Dietro l'interesse del minore si nasconde il rischio di un turismo procreativo', *Fam. min.* 2005, p 66 ff.

71 F. Chaltiel, 'La bioéthique à l'aube de nouvelles lois. À propos de la procréation médicalement assistée', 223 *LPA (Les petites affiches)* 2019, p 3.

72 *Conseil d'Etat*, ord. réf., 24 Jan. 2020, no. 437328, ECLI:FR:CEORD:2020:437328.20200124, Inédit au Recueil Lebon (rejet appel c/ TA Rennes, 20 Dec. 2019); *Conseil d'Etat*, 28 Feb. 2020, no. 438852, ECLI:FR:CEORD:2020:438852.20200228 and *Conseil d'Etat*, 28 Feb. 2020, no. 438854, ECLI:FR:CEORD:2020:438854.20200228, which confirm a *Conseil d'État, Assemblée*, 31

However, in France as in Italy, court decisions tend to protect the best interests of the child, which acts as a counter-limit to public order and should be taken into account even in cases where the parents' actions constitute fraud under the law of the forum. The *Cour de Cassation* has refused to recognize a parent-child relationship established abroad as a result of a surrogacy contract, invoking the limitation of *fraude à la loi,*[73] but has also ruled that surrogate motherhood alone cannot justify the refusal to transcribe into French birth registers the foreign birth certificate of a child who has one French parent.[74] The *Cour de Cassation* has recently recognized the right of the child to be adopted by the intended mother if the rules of foreign law have been observed,[75] while the *Corte di Cassazione* has recently affirmed the transcription of the foreign birth certificate of the child of a homosexual male couple.[76]

As regards the issue of post mortem fertilization, all three countries have had to grapple with rules that conflict with outcomes of biomedical technologies permitted elsewhere. The solutions adopted leveraged the same mechanism as that used in relation to heterologous fertilization: countries that wish to maintain the prohibition should also not permit the registration of children born abroad in national public registers, even in cases involving couples where the woman was medically unable to carry the child to term herself. This issue generated a long discussion, and the ECtHR ruled in its famous judgment in *Mennesson* v. *France*[77] that France was under an obligation to allow the registration in its civil registers of children born abroad (through surrogacy).[78]

May 2016, no. 396848 ECLI:FR:CEASS:2016:396848.20160531. In *Conseil d'état 437328/2020*, judges ruled that *Toutefois, il n'est pas contesté que la demande de déplacement en Espagne n'est fondée que sur la possibilité légale d'y faire procéder à un transfert d'embryon post-mortem, Mme A … , de nationalité française, n'entretenant aucun lien avec l'Espagne et ne faisant état d'aucune circonstance particulière. A cet égard, le fait que l'objet du litige concerne non les gamètes de son mari mais les embryons conçus grâce à ses propres gamètes ne constitue pas une circonstance de nature à établir que la décision contestée porterait une atteinte excessive aux stipulations de l'Art. 8 de la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales.* See F. Rogue, 'Refus d'exportation de gamètes vers un pays autorisant la PMA post mortem', *LEFP (L'essentiel droit de la famille et des personnes)* 2020(4), p 2.

73 Cour de Cassation 1re civ, 19 Mar. 2014, no. 13-50005, www.legifrance.gouv.fr/juri/id/JURITEXT000028759346/ (accessed 2 Dec. 2021).

74 Cour de Cassation Assemblé plénière, 3 July 2015, no. 619 14-21.323, www.legifrance.gouv.fr/juri/id/JURITEXT000030841802/ (accessed 2 Dec. 2021).

75 Cour de Cassation 1re civ, 4 Nov. 2020, FS-P+B+I, no. 19-15.739, www.legifrance.gouv.fr/juri/id/JURITEXT000042524892 (accessed 2 Dec. 2021).

76 Corte di Cassazione civ, sez. un., 31 Mar. 2021, no. 9006, which reiterates the importance of the primary interest of the minor in the determinations that affect his or her right to identity, emotional, relational and family stability.

77 ECtHR 26 June 2014, 65941/11, Mennesson/France.

78 Articles 16-7 French Civil Code. 'Every contract which regards substitution or surrogacy by third parties is null and void'.

Specifically in relation to the disputes that have come before the ECtHR, the Court has recently declared that it lacked jurisdiction to rule on an application brought by a French woman who wished to take her dead son's sperm to Israel in order to ensure a descendant.[79] Dominique Pethitory Lanzmann's son, Felix, died of cancer after having deposited his gametes at a Paris hospital to preserve his fertility for chemotherapy. His mother asked to transfer her son's sperm to either the United States or Israel in order to have a grandchild through surrogacy. The *Conseil d'Etat* rejected Felix's mother request, because the dossier did not show that Felix neither had a precise parenting project nor it was clear that he had explicitly consented to the posthumous use of his gametes.[80] The ECtHR also rejected her request, as the right to genetic continuity does not fall under the umbrella of the right to private and family life, and she could not even claim the right to become a parent for her own child, as it belongs to the category of non-transferable rights. Furthermore, the Courts agreed that there was no evidence of her son's consent to posthumous procreation and ECtHR and stated that 'however worthy her personal aspiration to continue the family line, the fact remained that under the Court's current case-law Article 8 of the Convention did not encompass a right to become a grandparent'.[81]

5. Informed and Presumed Consent: The Role of Genetic Continuity

Post mortem procreation is mainly discussed in relation to two aspects: informed consent[82] and the best interests of the prospective child.[83] In the absence of any written informed consent, some commentators argue that posthumous sperm procurement is detrimental to the principle of self-determination which constitutes one of the foundations of human dignity[84] while others believe that it should be permitted due to the fact that, absent any unequivocal directive to the contrary, the request by the surviving partner should be accepted.[85] The latter position is based on the principles applicable to organ donation, which many countries allow even in

79 ECtHR, *Petithory Lanzmann/France.* H. Hurpy, 'Procréation post mortem et droit à une descendance pour des grands-parents', 369 *Gaz. Pal.* 2020(5), p 28.

80 *Conseil d'Etat*, 4 Dec. 2018, no. 425446, ECLI:FR:CEORD:2018:425446.20181204.

81 ECtHR, *Petithory Lanzmann* v. *France*, p 20.

82 S. Hostiuc & C.G. Curca, 'Informed consent in posthumous sperm procurement', 282. *Arch. Gynecol. Obstet. (Archives of Gynecology and Obstetrics)* Oct. 2010, p 433.

83 P.S. Appelbaum, C.W. Lidz & A. Meisel, *Informed Consent: Legal Theory and Clinical Practice* (New York: Oxford University Press 1987); Y. Hashiloni-Dolev & S. Schicktanz, 'A cross-cultural analysis of posthumous reproduction: The significance of the gender and margins-of-life perspectives', *Reprod. Biomed. Soc. Online*, 4 June 2017, p 21.

84 S. Hostiuc & C.G. Curca, 282. *Arch. Gynecol. Obstet.* Oct. 2010, p 433. G. Giaimo, La volontà e il corpo (Torino: Giappichelli 2019), p. 180.

85 K. Tremellen & J. Savulescu, 'A discussion supporting presumed consent for posthumous sperm procurement and conception', 30. *Reprod Biomed Online* 2015(1), p 6.

the absence of written consent.[86] It is also based on the interests of the deceased in the continuity of the family genetic 'bloodline', as well as the mediated interest in making possible something that will benefit the entire family unit: the surviving spouse, the parents and the prospective child.[87]

The emerging position is a compromise with the theory of presumed consent, based on the spouses' reasonable expectation in not seeing their desire for biological parenthood frustrated, even in the absence of their explicit consent, and the restrictive approach, based on the finding that respect for the deceased is granted if individual autonomy and procreative rights are safeguarded.[88] This hypothesis is based on the reasonably inferred consent of the decedent, not to be confused by proxy consent from family members, which is however likely to misrepresent some points of view and create intra-family tensions because the evident interest in the possibility of a prospective child. In an increasing number of cases, ascendants attempt to give birth to offspring through MAR techniques, seeking to assert a right to continuity.[89]

Whatever the prevailing thesis, it is undeniable that, at least statistically, the choice of posthumous conception is influenced by the cultural and religious context of the deceased and by the possible existence of other children.[90]

Common law countries are pioneers in defining the contours of a right that is subordinate to the development of MAR techniques and has been influenced by the growing number of people with access thereto.[91] Empirical studies show a tendency of Americans to use cryopreserved gametes even without the explicit consent of the deceased.[92] There is no US federal or state law governing

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86 A.M. Rosenblum et al., 'Worldwide variability in deceased organ donation registries', 25. *Transplant international* 2012(8), p 801.

87 Research shows that a very high percentage of those who cryopreserve their genetic material are in favour of its posthumous use. See A.W. Pastuszak et al., 'Posthumous sperm utilization in men presenting for sperm banking: an analysis of patient choice', *Andrology* 2013(1), p 251 ff.

88 See K.D. Katz, 'Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying', *University of Chicago Legal Forum* 2006, p (289) at 301, www.chicagoun bound.uchicago.edu/uclf/vol2006/iss1/11/ (accessed 2 Dec. 2021). C.M. Rothman, 'Live Sperm, Dead Bodies', 20. *J. Andrology* 1999(4), p 456.

89 L.W. Morgan & H.G. Morgan, 'The Legal and Medical Ethics of Post-Mortem Sperm Retrieval on Behalf of Grandparents', 33 *J. Am. Acad. Matrim. Law (Journal of the American Academy of Matrimonial Lawyers*), 2020(67), p 67; N.Y. Gan-Or, 'Securing Posterity: The Right to Postmortem Grandparenthood and the Problem for Law', 37. *Colum. J. Gender & L.* 2019, p 109.

90 For an overview of positions for and against the aforementioned technique see K. Tremellen & J. Savulescu, 30. *Reprod Biomed Online* 2015(1), p 6; Genetic continuity wish was also important in famous case *In re Baby M*, 537 A.2d 1227, 109 N.J. 396 (N.J. 1988).

91 J.D. Hans, 'Attitudes Toward Posthumous Harvesting and Reproduction', 32. *Death Studies* 2008 (9), p 837 ff.

92 J.D. Hans & B. Dooley, 'Attitudes Toward Making Babies ... with a Deceased Partner's Cryopreserved Gametes', 38. *Death Studies* 2014(6–10), p 571.

posthumous sperm retrieval (PSR): section 708 of Uniform Parent Act of 2017 clearly stated that to be recognized as father in case of PR an individual must have consented in a record or his consent has to be established by clear-and-convincing evidence.[93] National intestacy law and probate law are endeavouring to regulate such matters, since the birth of a child without consent could in the majority of cases prevent the grant of child status.[94] However, there is considerable room for manoeuvre in the opinion of physicians[95] who grant or refuse PSR requests on a case-by-case basis. This results in some variation in the number of requests received by healthcare facilities, which are subject to the guidelines adopted and implemented by individual hospitals[96]: inhomogeneous protocols leads to considerable differences in the applicable rule and consequent results, because they could be inspired by 'limited-role' approach, that encompass a strict consent by requiring the explicit consent of the deceased, or by the 'family-centred' approach, which places a higher value on the expectations of the surviving partner and allows for PSR based on a implicit consent.[97] In addition, courts often distinguish between the practices of gamete retrieval (which is often allowed) and gamete use (which is more difficult to authorize).[98]

The turning point came in 2018, when the Ethics Committee of the American Society for Reproductive Medicine published guidelines that allow PSR in cases where the practice is ethically justifiable, creating a non-compulsory common frame of reference. Written documentation must have been obtained from the deceased person authorizing the procedure. The guidelines recognize that the practice should ideally have been authorized in writing by the deceased, after having been adequately informed.[99] If this did not occur – as is often the case following sudden death – only requests made by the wife or cohabiting partner can

93 The Uniform Parentage Act (2017) provides States with a uniform legal framework for establishing parent-child relationship. It has currently been enacted in Rhode Island, California, Vermont, Washington and it has been introduced in Nevada, Maine, Pennsylvania, Connecticut and Massachusetts.

94 J.B. Evans, 'Post-Mortem Semen Retrieval: A Normative Prescription for Legislation in the United States', 1. *Concordia Law Review* 2016, p (133) at 140; It is not this case in Portugal, where even if PR is forbidden but if there is a previous written parental project embryo might be transferred. E. Dias Costa, 'Post mortem insemination and embryo transfer, best interests and the child's rights: a review of Portuguese law and public policy', 13. *Quaestio Iuris* 2020(3) p 1219.

95 See Ethics Committee of the American Society for Reproductive Medicine, 'Posthumous Retrieval and Use of Gametes or Embryos: An Ethics Committee Opinion', 110. *Fertil Steril* 2018(1) p 45.

96 J.A. Tash et al., 'Postmortem sperm retrieval: the effect of instituting guidelines', 170. *J Urol (The Journal of urology)* 2003(5), p 1922; N.J. Waler et al., 'Policy on Posthumous Sperm Retrieval: Survey of 75 Major Academic Medical Centers', 113. *J Urol* 2017, p 45 ff.

97 J.B. Evans, 1. *Concordia Law Review* 2016, p (133) at 144 ff.

98 *In re D. T. Christy*, no. EQVO68545 (Johnson County 14 Sept. 2007).

99 S. L. Crockin & G.A. Debele, 'Ethical Issues in Assisted Reproduction: A Primer for Family Law Attorneys'*, 27 J. Am. Acad. Matrim. Law* 2015, p 289 ff.

be taken into account. Biological descent is a sufficiently ethically compelling interest if there is a surviving partner. If there is a conflict between the wishes of the deceased and the partner, the former prevails. Hospitals should decline any PSR requests from other persons, including ascendants, as they do not have a legally protected interest.[100]

In 2019, however, following the death of Peter Zhu, a 19-year-old organ donor student, the New York Court of Appeals allowed a request for sperm retrieval made by his parents, which relied on his explicit consent to organ donation, finding his sperm to be equivalent to a retrievable organ[101]: the consent of the deceased was in fact replaced by his presumed intent, or rather by the convincing evidence of the deceased's consent,[102] as understood by the family. Previously, the US courts had engaged with the issue of ownership of gametes previously retrieved and stored by giving preference to the wishes of the deceased, who was found to have a unique right of ownership.[103] In any case, the finding that sperm was equivalent to an organ and the imputation by Peter's parents of his desire for genetic continuity (parenthood and cultural tradition), in the absence of any specific consent, constitute a rare departure within the common law panorama.[104] The problem of sperm retrieval is in fact one of consent,[105] as well as entitlement to request such a procedure.[106]

Three distinct positions can be identified. The first, narrow approach requires that the deceased must have executed an advance directive 'that explicitly

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100 Ethics Committee of the American Society for Reproductive Medicine, 110. *Fertil Steril* 2018(1), p (45) at. 46.

101 See s. 4301 and s. 4302 New York Public Health Law (PHL) and s. 4-1.1 Section Estates, Powers and Trusts Law (EPTL) for guidance on interpreting the decedent's presumed intent as applied by New York Supreme Court *in re Zhu*, 103 NYs. 3d 775, 776 (NY Sup. Ct. 2019). See M.K. Sapp, 'In re Zhu: Implied Consent to Posthumous Sperm Retrieval', 23. *SMU Sci. & TECH. L. REV (SMU Science and Technology Law Review)* 2020(1), p 89 ff. At point 780 of the discussed judgment, the Court cites *In re Daniel Thomas Christy*, in which a family had authorized the extraction of semen for procreative purposes from their deceased son in favour of his fiancée. The extraction was done as an anatomical gift and was based on the Iowa intestacy laws. The Sixth District Court of Iowa specifically ruled in favour of posthumous sperm retrieval for procreative purposes, finding the procedure authorized under the Uniform Anatomical Gifts Act.

102 R.D. Orr & M. Siegler, 'Is Posthumous Semen Retrieval Ethically Permissible?', 28. *J. Med. Ethics* (2002)(5), p 299.

103 *In re Estate of Kievernagel*, 83 Cal. Rptr. 3d at 316; Hecht, 16 Cal. App. 4th at 838.

104 The Court stressed that 'Peter evinced an intent to leave for future disposition rather than destroy certain bodily parts, tissues, and by extension, bodily fluids that survived him' and that 'the disposition of Peter's genetic material be made in the first instance by his parents'. See *In re Zhu*, 103 NYs. 3d at 780; See *In re Estate of Nikolas Colton Evans*, Deceased, no. C-1-PB-09-000304, 2009 WL 7729555 (Tex. Prob. Ct. 7 Apr. 2009).

105 M.K. Sapp, 23. *SMU Sci. & TECH. L. R*EV 2020(1), p 89 ff; S. Hostiuc & C.G. Curca, 282. *Arch. Gynecol. Obstet.* Oct. 2010, p 433.

106 NY Gan-Or, 37. *Colum. J. Gender & L.* 2019, p 110.

indicates his or her willingness to have the procedure performed in these specific circumstances': procreative autonomy survives death.[107] The second, is the above mentioned 'reasonably inferred consent', which is capable of fulfilling the requirement of consent.[108] The third, hybrid approach requires participation by the deceased in the reproductive project, and not only his consent to the collection and storage of gametes.[109] Both of these forms share the fact that there must be a prima facie indication of the consent of the deceased in order to be able to ground a request that seeks to bypass his absence.[110] Since there was no explicit statement in the *re Zhu* case from which to infer consent to a highly personal act such as procreation, this decision should not be regarded as a leading case.

In general, the choice over whether or not to accept presumed consent depends on the reality of which outcome one wishes to favour. Nudge strategies are the basis for this choice. The case of organ donation offers a good example of this theory, which enables the availability of organs to be increased in order to save lives. PSR on the other hand follows a different logic, in aiming to create new life based on the presumed wishes of the deceased parent. In the former case, the consent of the relatives may be sufficient, absent any legislative provision to the contrary, in order to realize the noble aim of increasing the chances of another person's survival, even in the absence of any explicit statements by the deceased. However, the same logic cannot also be applied to the highly personal act of procreation, since in cases involving MAR techniques the provision of consent entails the assumption of parental obligations, and cannot be presumed, although many authoritative studies are starting to favour this as a default option.[111]

The recent case of *Robertson* v. *Saadat*[112] stresses both the requirements of consent, which must be explicit in the case of posthumous conception, as well as the position of the parents of the deceased, who are not entitled to obtain

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107 It is also the reasoning of the majority of Chinese courts that are willing to allow the widowed women to have access to posthumous implantation procedure. See L. Zhu, 'Procreative rights denied? Access to assisted reproduction technologies by single women in China', *J. Law Biosci* 2021, doi.org/10.1093/jlb/lsaa084.

108 The Israeli policy is based on the assumption of 'presumed wish', namely, that a man who lived in a loving relationship with a woman would wish her to carry his child after his death. See V. Ravitsky, 'Posthumous reproduction guidelines in Israel', 34. *Hastings Cent. Rep.* 2004(2), p 6; FAR 22 Dec. 2016, no. 7141/15 *Anonymous* v. *Anonymous.*

109 C. Strong, 'Ethical and Legal Aspects of Sperm Retrieval After Death or Persistent Vegetative State', 34. *Journal Law Med & Ethics* (1999), p 347 at 352. H. Young, 'Presuming Consent to Posthumous Reproduction', 27. *Journal of Law and Health* 2014(1), p 68. See also K. Tremellen & J. Savulescu, 30 *Reprod Biomed Online* 2015(1), p 6.

110 See K.D. Katz, *University of Chicago Legal Forum* 2006, p (289) at 297.

111 R.B. Korobkin, 'No Compensation' or 'Pro Compensation': Moore v. Regents and Default Rules for Human Tissue Donations, 40. *J. Health Law* 2007(1), p (1) at 9; C.R. Sunstein, 'Deciding by Default', 162. *U. Pa. L. Rev. (University of Pennsylvania Law Review)* 2013, p 1.

112 California Court of Appeal 1 May 2020, *Robertson* v. *Saadat.* 262 Cal. Rptr.3d 215 (Cal. Ct. App. 2020).

compensation for the inability to have offspring. The widow of Aaron Stevenson, acting jointly with his parents, claimed damages from the clinic where his sperm was stored on the grounds that it had been lost, rendering posthumous reproduction impossible. The Court refused to award compensation on the grounds of inadequate consent, as the expression of a desire for motherhood and to continue the family legacy were not considered to be equivalent to specific consent by her late husband to posthumous parenthood.[113]

Nonetheless, some Israeli courts have begun to set out the contours of a right to continuity as a protected interest of grandparents (although they are still being overruled by higher courts).[114] Children and parents have a common interest in the continuation of the family's genetic heritage, and parents can subrogate into their children's interests by obtaining donated gametes or using gametes through surrogacy services. Of course, the newborn baby can satisfy the grandparents' desire to maintain a bond with their deceased child. However, grandparents are also vested with expanding rights, under the umbrella of the best interests of the child.[115]

6. Conclusions

Procreation is, now more than ever, a politically sensitive issue as it concerns the (political) decision to entrust the transmission of human life to artificial mechanisms that have made it possible to overcome the limits imposed by nature.

Both the legislator and the courts influence the most intimate choices of citizens by favouring, or declining to favour, the realization of the desire to become a parent. The law must define the limits to parenthood, which are no longer only natural but increasingly the result of a self-determining will.

If parenthood is not the result of sexual intercourse, the moment of consent – along with the aspects of gestation and childbirth – take on particular importance. Through the successes in segmenting the reproductive stages, many options previously unthought-of are now plausible. In cases involving PR, consent must be written, and is sometimes subject to enhanced formal requirements: in Greece and Spain a notarized instrument is required, while in Belgium, the Netherlands, and the United Kingdom this is not necessary. The period within which treatment must commence also differs, although efforts are made in each

113 *Robertson* v. *Saadat* at 223.

114 Family Court (Petah Tikva) 27 Sept. 2016, File no. 16699-06-13, *Shahar* v. *Attorney General of Israel*, overruled by District Court (Central District) File no. 45930-11-16 district Court (Central District) 29 Jan. 2017, *State of Israel* v. *Shahar* and finally decided FAR 15 Aug. 2017 1943/17 *Shahar* v. *State of Israel.* These judgments are analysed by N. Y. Gan-Or, 37. *Columbia Journal of Gender and Law* 2019(2), p 109 ff. See also minority opinion of Justice Hanan Melcer, in LFA Supreme Court (Jerusalem) 22 Dec. 2016, File no. 7141/15.

115 S. Simana, *J. Law Biosci* 2018, pp 329 ff.

case to identify a compromise between the need for certainty of succession and the period required to process grief.

In United States, courts are more inclined to venture beyond the limits of written consent, while in the United Kingdom the courts have sometimes allowed travel abroad to carry out treatment that is forbidden at home. As has been shown, in some cases the courts have not followed the legal requirement for prior consent, although they do require clear evidence of an agreement by the deceased to post mortem reproduction. The requirement of written consent is increasingly creaking under the weight of sudden adverse events, and common law systems are more inclined to infer presumed consent. In this regard, the view that presumed consent should become the default position in allowing posthumous conception does not seem to be unfounded. Presumed consent is more objective than implied or proxy consent and is configured differently, depending upon whether or not there are any embryos, whether there are only frozen gametes or whether they must be extracted from a corpse, as it is easier to ascribe their existence to clear evidence.

Common law courts are also more inclined to assess the overall context of an individual case, overcoming the lack of written consent where treatment is requested by the spouse of the deceased. On the other hand, they are more reluctant to do so where requests for gamete retrieval or use are made by the parents of the deceased. Indeed, parents and grandparents hold a similar interest in the continuation of a family's genetic heritage. Within this context, the absence of explicit opposition to the procedure could legitimize its use, on the basis of a common interest. Moreover, the possibility that, after an initial refusal, even the supranational courts will begin to recognize the right to continue the family project of those left behind should not be excluded.

In keeping with this assumption, those involved in the cases reported are often of Chinese or Jewish origin: genetic continuity is a causally decisive consideration in these cultures. The main differences between the legal systems concern their liberal tradition, the differing intensity of their responses to bioethical issues, and the influence of religious factors.

In Europe, PR is relatively rare. However, as social awareness of the practice increases, it is reasonable to expect requests to increase: rising access to MAR by larger numbers of people will imply the storage of more embryos and gametes, which can then be used in the event of the death of their owner. Countries where posthumous procreation is regulated have fewer conflicts, since hospital ethical committees often resolve problems and only a few cases reach the courts. In countries lacking any specific legislation in this area, the courts are required to fill the gaps in the law and to deal with living proof of the unlawful actions of their citizens. They are beginning to accept that artificial parentage constitutes an alternative form of parentage to standard legal parentage, since the concurrence of gestation, genetic profile and a family project are presumed, albeit subject to a growing number of exceptions.