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## Wrongful life (bioethical and legal implications)

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### Abstract

Prenatal screening is a critical process that aims to diagnose genetic, chromosomal and other fetal abnormalities early. However, there are cases in which mistakes can occur, with serious consequences for both the parents and the child. This prenatal misdiagnosis can lead to the physician's criminal and civil liability and to infringement of the pregnant woman's constitutional rights. In addition to the conditions applicable under the Greek legal system, the ones recognized in European legal systems should also be considered.

**Key words:** Prenatal misdiagnosis, karyotype, wrongful life, criminal and civil liability, constitutional rights, Europe and wrongful life

### Introduction

Prenatal screening encompasses a wide range of tests performed either before pregnancy (during pre-implantation screening) or during pregnancy, in order to ensure the health of both the pregnant woman and the fetus.<sup>2</sup> It usually involves the detection and diagnosis of serious birth defects, as well as interventions using therapeutic techniques either intrauterine or postpartum, based on research protocols. Healthcare professionals involved in prenatal screening often face ethically demanding situations in daily clinical practice, which they must manage with the aim of providing optimal care not only for the fetus but also for the parents. It should be

emphasized that, at present, there is not sufficient prenatal treatment available. For this reason, the importance of prenatal screening is not only limited to identifying potential risks, but also extends to prevention and informing future parents.

Prenatal misdiagnosis can lead to both criminal and civil liability of healthcare professionals. When they act negligently through the breach of generally recognized standards of medical science or the standard of care and this behavior results in the birth of a child with a serious medical condition or even in the child's death, a criminal offense is established. At the same time, the healthcare professionals are held

liable and obliged to compensate the future parents because of the infringement of their personality rights. Additionally, this negligent medical conduct amounts to an infringement of the pregnant woman's constitutional rights. Finally, claims for compensation to children born with serious health problems because of prenatal misdiagnosis are not accepted in Europe with the exception of the Netherlands.

### **Purpose**

The purpose of this paper is to highlight the importance of prenatal screening, with a particular focus on karyotype analysis as a key tool for detecting genetic disorders. In addition, the consequences of incorrect prenatal testing are examined, as well as the bioethical and legal (criminal, civil and constitutional) issues arising from this application. Through the analysis of facts, the study aims to enhance the understanding of medical responsibility and the concept of fairness in clinical management.

### **Cases**

- 1) Cases of damage caused during prenatal screening. Cases of prenatal screening damage usually involve actions or omissions by the physician or other healthcare professionals, which can occur either before or during pregnancy. Examples include injury resulting from invasive procedures, psychological stress in the pregnant woman, incorrect medication, radiation exposure, or even biological hazards when collecting biological material.
- 2) Cases classified as "Wrongful Life". "Wrongful Life" cases concern situations in which the birth of a severely disabled child is not the result of medical intervention, but rather due to untimely diagnosis and information, thus depriving parents of the right to decide whether to continue or terminate the pregnancy. It is therefore accepted that, if the parents had been properly informed and aware of the child's serious genetic condition, they would

have chosen to legally terminate the pregnancy.<sup>1</sup>

### **Karyotyping process**

The karyotype procedure is a laboratory procedure that begins with the collection of the sample to be examined, which in the context of prenatal screening can consist of amniotic fluid, chorionic villus biopsy material or cell-free fetal Deoxyribonucleic Acid (cffDNA). The next step involves the creation of cell cultures under suitable growing conditions. When the cell population reaches the desired level, colchicine is added to each culture in order to stop cell division in the metaphase stage, allowing the chromosomes to appear more concentrated under the light microscope. After colchicine is added, a collection of chromosomes is performed. The cells are then transferred to a suitable tube, where they are centrifuged and treated with a Potassium Chloride (KCL) solution. After that, the chromosomes are released and fixed with a methanol-acetic acid solution. The chromosomes are then spread out on microscope slides and stained with specific stains to produce distinct banding patterns [Giemsa banding (G-banding)].<sup>3</sup>

### **Disadvantages of conventional karyotype compared to other molecular and non-molecular techniques**

One of the main disadvantages of conventional karyotype is that it cannot detect minor genetic abnormalities, such as minor deficiencies, microduplications, or mutations at the gene level. Conventional karyotype can only detect large chromosomal abnormalities, such as structural rearrangements, displacements, or numerical chromosomal abnormalities [eg (exempli gratia), trisomy]. The simultaneous development of molecular biology and bioinformatics techniques, combined with extensive research into the structure and function of the human genome – particularly in the last decade – has

radically transformed the prevention and detection of genetic disorders. These methodologies include comparative genomic hybridization in microarrays (molecular karyotype) and next-generation sequencing (parallel sequencing technology), which represent the main modern techniques that have revolutionized everyday clinical practice. Molecular karyotype offers significantly higher resolution through the analysis of copy number variations in DNA, allowing for the detection of much smaller abnormalities than those visible with the conventional karyotype. Next Generation Sequencing (NGS) mainly allows the detection of mutations in multiple or even large genes at the same time. Due to the complexity of the findings produced by these advanced techniques, the need and importance of clinical genetics and genetic counseling was re-emphasized, particularly for interpreting the results of genetic testing and relating them to the clinical manifestations of patients.<sup>4</sup>

### **Bioethical approach**

The bioethical issues arising from the prenatal screening process mainly concern the termination of pregnancy as a morally acceptable choice.

The principle of autonomy. Parents have the right to freely decide against the birth of a child with severe pathology. This issue is closely linked to the psychological and financial burden that the birth of such a child involves, as it is the parents who bear it. Therefore, the protection of their rights not to give birth to severely affected embryos should not be underestimated.

The principle of no harm. The prenatal screening process should not harm either the mother or the fetus. The principle of no harm ensures that the methods used in prenatal diagnosis do not endanger the mother or fetus. It creates a relationship of trust between parents and health professionals who carry out prenatal screening, as they know that the health of both the pregnant woman and the fetus is ensured.<sup>5</sup>

### **Prenatal misdiagnosis - Criminal law Criminal liability of a physician**

In the event of a medical malpractice, a physician may incur criminal liability either for negligent homicide or for negligent bodily harm. Criminal liability arises when the generally recognized standards of medical science are breached, the objectively required duty of care inherent in the practice of the medical profession is not exercised<sup>6</sup> and the result is attributable to ignorance or recklessness<sup>7</sup>. In the context of prenatal screening, a physician commits a misdiagnosis when, in violation of the generally recognized standards of medical science, he fails to diagnose a medical condition of the fetus during prenatal testing, resulting in the birth of a child with a serious medical condition or even in the child's death immediately after delivery<sup>8</sup>.

### **Negligence causing personal injury**

Under the Penal Code, bodily harm caused by negligence is established as an offence, with the legally protected interest being the bodily integrity of the human being<sup>9</sup>. The elements of the objective aspect of the offense are the breach of a duty of care (negligent behavior), the human being as the material object of the offense, bodily injury or damage to health as the result and the causation between the act and the result.

Negligent behavior may take the form of an act or an omission and involves an objective error. An objective error is understood as the violation of a rule of law, either one established by statute or one derived from common experience and general empirical rules<sup>10</sup>. Such a violation occurs when the offender acts differently from the average prudent person who belongs to the same social group and possesses the same level of knowledge.

In cases of omission, a special legal duty to prevent the result is required. This duty may arise from the law, from a contract, or from a prior dangerous act

of the person responsible<sup>11</sup>. In the case of physicians, this duty is based on the relationship established between the treating physician and the patient. However, situations of emergency, urgent cases, or mass disasters constitute exceptions, since a physician has a special legal duty to protect the patient's health regardless of medical specialty, even when the appropriate means for practicing medicine are not available.

Furthermore, the offense of bodily harm must be directed against another human being. A human being exists from the moment the newborn appears in the external world, or at least a part of their body does<sup>12</sup>. Therefore, the fetus does not fall within the broader legal category of "human being". Consequently, negligent bodily harm cannot be applied to the fetus, even if the harm becomes apparent after birth<sup>6</sup>, but for the new provisions introduced in 2019 as will be presented shortly.

The result of an act or omission is understood as bodily injury or harm to health. Bodily injury refers to an intervention in the physical integrity of the body, that is, the loss or alteration of the body's substance, such as wounds, abrasions, swelling, etc (et cetera)<sup>13</sup>. Harm to health is considered any effect on the human body that causes or leads to a deterioration in the condition of the internal organs<sup>14</sup>. Finally, the act or omission of the perpetrator must be causally connected to the resulting bodily harm. This occurs when the act or omission, either alone or in combination with the behavior of another person, is directly linked to the outcome.

Subjectively, negligence is required, which is divided into two categories: conscious and unconscious negligence. In the first, the perpetrator, due to a lack of attention that he or she should and could have exercised, foresees the result but believes it will not occur. In contrast, in the second, the perpetrator, due to a lack of attention that he or she should and could have exercised, does not foresee at all the

consequences of their act<sup>10</sup>. In Greek case law, in the vast majority of medical negligence cases, the relevant form of fault is unconscious negligence, by which the physician is generally held liable, as he or she does not foresee the result, even though they should have been in a position to do so<sup>15</sup>.

### ***Bodily injury to a fetus or newborn***

With the amendments introduced in 2019 to the Greek Penal Code, negligent bodily harm to a fetus or newborn was codified for the first time. This applies either during prenatal screening after the 20th week of pregnancy or during childbirth before the child appears in the external world, with the fetus as the object of the offense<sup>10</sup>. A fetus is defined as the entity from the moment it has been implanted in the uterus until it ceases to be a fetus, that is, at the beginning of human life<sup>16</sup>. It is necessary to clarify that, under this provision, the material object cannot be the newborn, because at the time of the act only a fetus exists, and the act is directed against it<sup>13</sup>. The conditions for the offense are the negligent behavior of the physician during prenatal screening, the fetus being beyond the 20th week of pregnancy, the causation between the medical malpractice and the result and the perpetrator acting with negligence, knowing that the woman is pregnant but not accepting as probable the occurrence of bodily harm<sup>10</sup>.

### **Case report**

Supreme Court of Greece case no 490/2000 dealt with the alleged omissions committed by the defendant physicians during prenatal screening, which allegedly resulted in the birth of a child with severe quadriplegia. The couple had already lost a child and, for this reason, sought medical examination by the defendants in order to ensure that a healthy child would be born in the future. The woman underwent medical examinations at two different points in time, prior to the second pregnancy and during its

course, without any health problem being detected. Nevertheless, a child with quadriplegia was born. Supreme Court, despite the contrary prosecutorial proposal recommending the quashing of the decision of Court of Appeal, rejected the appeal lodged by the two parents. Specifically, Court held that the objective elements of the offence of bodily harm were not fulfilled, since the defendants acted at stages during which no human being existed, that is, the material object of the offence was absent. The first defendant acted before the child was even conceived, while the second acted during pregnancy, with the result that negligent bodily harm to an unborn or unconceived child could not be legally established. Furthermore, it was held that the internationally recognized method applicable at the time had been used for diagnostic purposes and, therefore, there was no breach of the internationally recognized standards of medical science.

In conclusion, under the legislation in force at the time, Supreme Court correctly ruled, since at the time of the alleged conduct when the physicians were required to act there was no living human being in existence, as required by the objective elements of the offence of negligent bodily harm<sup>17</sup>. The unborn fetus and the unconceived do not fall within the legal concept of a "human being." It is of interest to examine whether the defendants could have been punished under the provision concerning negligent bodily harm to a newborn or a fetus. The first defendant would likewise incur no criminal liability in this case, as there was no fetus at the time the examinations were carried out. By contrast, the second defendant acted at a stage when a fetus did exist however, the factual circumstances do not clearly establish the week of gestation at which the examination of the pregnant woman took place. Consequently, if the examination was conducted after the 20th week of pregnancy, the conduct would fall within the scope of the new regulation if, however, the act occurred prior to the

20th week, no criminal liability would arise.

***Medical civil liability in cases of newborns with genetic disorders (Wrongful life)***  
***Introduction to medical civil liability***

Medical malpractice is a prerequisite for establishing a physician's liability for damages<sup>18</sup>. The elements of extracontractual liability (tort) involve an illegal act or omission, fault (intent or negligence), damage (harm), causation between the act or omission and the damage<sup>19</sup>. Damage is divided into economic damages and non-economic damages. Non-economic damages refer to the moral goods of the individual that are closely connected to their personality and cannot be clearly quantified in monetary terms<sup>20</sup>. This claim consists in alleviating the mental suffering, pain and emotional distress caused to the injured party through the award of reasonable compensation<sup>21</sup>.

When a physician violates the standards associated with the medical practice, they act illegally. Wrongfulness (illegality), in the broad sense, also includes the breach of the expected standard of care, also known as reasonable physician standard. The physician should proceed with such reasonable caution as a prudent man of the same specialty would have exercised under such circumstances. Medical malpractice is defined as medical conduct that falls short of the conduct required by the medical profession under the circumstances. Moreover, it is a violation of the medical standard of care or a non-compliance with the guidelines of evidence-based medicine<sup>8</sup>.

In the event of a violation of the established standards and principles of medical science, or of the standard of care, the physician's conduct is illegal and culpable<sup>22</sup>. Ultimately, as consistently held by Greek case law, a physician is held liable for medical negligence when the undesired outcome results from a breach of the fundamental and established standards of medical science and practice, thus violating the 'lege artis' principle. The physician is

liable if they have failed to act in accordance with the duty of care<sup>23</sup>.

### ***Prenatal misdiagnosis and medical malpractice – Wrongful life***

Prenatal screening, which aims to diagnose genetic abnormalities of the fetus, is recommended due to the legitimate interest in having a healthy child<sup>24</sup>. Prenatal screening may, at times, be omitted, not conducted according to the standards of medical science, or the results of the prenatal testing may not be properly assessed. As a result, the mother will not be informed of the actual medical condition of the fetus and will be deprived of the possibility of terminating the pregnancy for eugenic reasons. In cases where the physician failed to provide the necessary information for conducting prenatal testing, the mother was not informed in time that the fetus suffered from a severe disease. This resulted in the loss of the opportunity to undergo a voluntary termination of the pregnancy<sup>25</sup>.

### ***Is there a causation between the disability and the medical act?***

According to Supreme Court of Greece case no 154/2011 the parents filing a lawsuit on behalf of their child, claimed that the birth of their child with tetraplegia was due to gross negligence of the defendant microbiologist. Because of a lack of attention required under such circumstances and expected of the medical profession, the physician arrived at a misdiagnosis and failed to apply internationally established standards of medical science and the most advanced methods of cytogenetics. Additionally, the physician did not refer the patient to a specialized center with expert cytogenetic physicians.

Court of Appeal held that the lawsuit was not legally valid because of the lack of causation between the congenital and unavoidable health problem of the child and the medical act. The plaintiff's medi-

cal condition was congenital, linked to extra genetic material on chromosome 13 and unrelated to the prenatal screening<sup>23</sup>. The health problem was inherent in the child's genetic identity. For this reason, court decided not to award any compensation for non-pecuniary damages. These are cases of wrongful life. The birth of a child with a severe disease or disability is not directly linked to the medical act itself, but results from the failure to timely diagnose the medical condition.

The causation between the illegal and culpable conduct of the physician and the birth of a disabled child is indirect<sup>26</sup>. The medical act does not cause the child's health problem, which was either congenital or irreversible, but it prevents the parents from averting the birth through a legal abortion. The parents originally intend to have a child, but they would have made a different choice had they known about the child's medical condition<sup>18</sup>.

### ***Claims of the child***

It is crucial to determine the identity of the injured party; namely, whether the child, the mother, or the father has suffered damages<sup>24</sup>. The child's claims seeking compensation for pecuniary loss and non-economic damages associated with their disease or disability are generally rejected. Medical malpractice occurred during prenatal screening is not causally connected to the impairment of the child's health or their disability. The disability constituted an inherent and irreversible condition; therefore, no injury is deemed to exist in the first place. Had the medical malpractice not occurred, the child would not have avoided any harm or damage; it simply would not have existed at all. Similarly, regarding compensation for non-pecuniary damages, no claim can be conceived for relief from the pain and suffering the child endures because of its mere existence<sup>18</sup>. If such a claim for compensation were accepted, it would be based on the child's right not to be born. However,

the birth of a child with genetic abnormalities does not constitute damage compared to their non-birth<sup>27</sup>.

Additional theoretical constructs have been put forward to resolve the above issue. The question has been raised as to whether life with a disability could be considered an infringement of the child's personality rights. If so, this could give rise to a claim for compensation for the non-economic damages (pain and suffering) that the child sustained. Life with a disability cannot be causally connected to the misdiagnosis, as mentioned above. It is assumed that a third party has caused a wrongful infringement on the personality rights of the individual; in this case, that the physician caused the disability. However, in this case, the physician only caused, in a sense, the child's unfortunate existence. The mere existence of an individual cannot be regarded as an infringement of their own personality rights, and therefore compensation cannot be awarded to the child themselves<sup>28</sup>.

Nonetheless, it is also expressed that the child's claim for infringement of their personality rights and compensation for non-pecuniary damages is founded on the fact that the physician deprived their parents of the right to exercise parental care for the child's benefit. By preventing them from legally terminating the pregnancy, the physician thereby prevented the parents from averting the birth of a child with a genetic disorder<sup>27</sup>.

### **Parents' claims**

It is considered more appropriate to link the parents' claims to the infringement of their own personality rights<sup>18</sup>. An individual who has suffered a wrongful infringement on their personality rights has the right to claim the cessation of such infringement as also the non-recurrence thereof in the future. A claim for compensation is not excluded. The infringement of personality rights must constitute an illegal conduct, involve fault and result in economic

damages. There must be causation between the infringing act and the resulting damages. Furthermore, there may also be a claim for compensation for non-economic damages aiming at alleviating the mental pain and psychological distress suffered<sup>29</sup>.

Of particular interest is Supreme Court of Greece case no 10/2013 according to which a genetic laboratory failed to diagnose cystic fibrosis mutations on both chromosomes of the fetus at the Cystic Fibrosis Transmembrane Conductance Regulator (CFTR) gene locus, resulting in the birth of a child with severe malformations<sup>18</sup>. This case led to the conclusion that the infringement of personality rights of a pregnant woman is established when a third party, by act or omission, prevents her from exercising her right to motherhood; specifically, when the pregnant woman is deprived of the possibility of terminating the pregnancy in case of eugenic indications. She is deprived of the right to family planning; that is, the ability to freely decide whether to continue the pregnancy due to the legitimate interest in having a healthy child<sup>30</sup>. There is a violation of the woman's right to self-determination and reproductive autonomy regarding whether or not to become the mother of a disabled child. Consequently, this violation constitutes an infringement of her personality rights<sup>24</sup>.

Mental health and emotional well-being may be affected by an illegal act directed at another person. This applies when the individual experiencing the grief or pain is closely connected to that person. Hence, the husband has the same claim, even if he is not directly affected. These are reflexive consequences of the infringing act, as the husband also experiences emotional distress from the birth of a child with a congenital disorder. It is assumed that the decision to terminate the pregnancy is a matter that falls within the shared decision-making of married life. It is also assumed that there exists a close marital relationship with the pregnant woman. In

the aforementioned case (Court of Appeal of Piraeus, case no 242/2012, Greece) compensation for non-pecuniary damages of €250,000 was awarded to each parent<sup>30</sup>.

Therefore, the father is also entitled to compensation for non-pecuniary damages as an indirectly affected party. Besides, the decision about terminating the pregnancy is not solely a personal matter for the pregnant woman, but a matter of marital life, provided that there is a close marital relationship with her<sup>24</sup>. The future father contributes through his reasoning and emotional stance to issues concerning the continuation or termination of pregnancy. In the event of prenatal misdiagnosis, he is also deprived of the right not to have a newborn with a congenital disorder. Accordingly, Greek courts rightly recognize him as entitled to compensation<sup>28</sup>.

Claims for compensation for pecuniary loss and pain and suffering sustained by parents are often wrongly rejected on the grounds that they are considered indirectly injured; that is, indirectly affected in body and health by the physician's negligent conduct (Court of Appeal of Athens, case no 5152/2002, Greece: child born with phocomelia). Consequently, in this case compensation was denied. However, the distinction between directly and indirectly injured parties is incorrect, since there is no direct damage to the child's health. In any case, the parents as a result of the infringement of their personality rights are deprived of the opportunity to legally terminate the pregnancy. This is why they are considered 'directly injured parties' and are entitled to compensation<sup>18</sup>.

#### ***Prenatal misdiagnosis from a constitutional and European perspective Constitutional level***

At the constitutional level, the constitutional rights of the three people involved in prenatal screening, the pregnant woman, the fetus and the physician, will be analyzed.

#### ***The pregnant woman***

The first constitutional right is the right to her personal autonomy and development. It is defined as "the totality of qualities, abilities and circumstances that, on the one hand, arise from the human being's essence as a rational and conscious being and, on the other hand, individualize a specific person"<sup>31</sup>. This right has various manifestations. For Supreme Court of Greece case no 490/2000 (Criminal Division), the most important of these manifestations is the freedom for reproduction in its negative dimension, ie (id est), the right of people to not have children<sup>32</sup>. Therefore, in case of an incorrect diagnosis or failure by the physician to provide information to the pregnant woman about her unborn child's health, her right stated above is infringed. It occurs, since she is deprived of the choice to continue or not the pregnancy if the fetus has a severe disease. Furthermore, dealing with a situation for which she was not adequately prepared may cause her emotional distress and uncertainty, thereby affecting her mental health, which is an element of her personal autonomy and development. So, the direct consequence of this practice is the encroachment of the right.

The second constitutional right is the protection of her life, honor and liberty. According to this right, any form of discrimination regarding these legally protected interests between nationals and foreigners is prohibited. In fact, it guarantees absolute protection for them, with the only exception of those provided for in international law<sup>31</sup>. However, there is an issue; whether unborn but conceived life is included in the concept of life by this constitutional right. Greek legal theory has addressed this issue by formulating two contrary views. These views will be analyzed below, because they are of a higher significance for the fetus' rights than the pregnant woman's ones. This occurs due to the fact that she is a born and living organism and she is obviously the holder of the right mentioned above.

The third constitutional right, which is related to the pregnant woman, is the protection of her health and genetic identity. This was added with the Constitutional Revision in 2001 in order to protect the genetic material and health of individuals from medical interventions which violate the Bioethics' principles and the recognized standards of medical science<sup>33</sup>. According to the World Health Organization (WHO), "health is defined as a state of complete physical, mental, intellectual and social well-being"<sup>33</sup>, and "the totality of inherited genetic characteristics" defines a person's genetic identity<sup>31</sup>. In regard to prenatal screening, when the physician fails to inform the pregnant woman about the health of her unborn child or makes an incorrect/incomplete diagnosis, her health and genetic identity are infringed. This occurs because she is the only one eligible for deciding on matters related to her health and for being informed about the genetic characteristics that may be inherited through her future children. Consequently, the pregnant woman has the right to terminate the pregnancy whenever she wants when a severe abnormality is detected in the fetus. Any medical practice in contrast to what was mentioned above constitutes an encroachment of her constitutional right.

The fourth constitutional right is the protection of her private and family life. Every person has the right to shape their life and make decisions concerning matters of family interest<sup>33</sup>, such as the decision to have a child. This is a choice involving many obligations and consequences for the future parent, which requires consideration of all parameters, in order to be free and conscious. Therefore, it is reasonable to wish they should be informed of the fetus' health via properly conducted prenatal screening, since medical malpractice at this stage substantially restrict the pregnant woman's right to decide on the course of the pregnancy if a serious abnormality is detected. Thus, this physician's negligent conduct may not only disrupt and reverse the entire family planning, but

also affect future reproductive choices.

### ***The fetus***

The first constitutional right is the protection of its human dignity. Human dignity characterizes each person, assigns him as the holder of constitutional rights and obligations<sup>33</sup> and prohibits his 'instrumentalisation', ie, his treatment as a means to achieve any kind of purposes<sup>31</sup>. Hence, medical practice such as reproductive cloning, that changes the purpose of medical science, which consists of fighting disease off and improving living conditions, undermines its human dignity<sup>33</sup>. However, this cannot be argued for prenatal screening, as it enables prospective parents to be appropriately informed about their unborn child's health, thus contributing to the improvement of their living conditions. Regarding the fetus, the prevailing and most accurate legal view claims that it should not be included in this right's holders, which protects only born and presently existing life. Nevertheless, an opposite view illustrates that this right provides protection for any kind of human life, even unborn but conceived life<sup>31</sup>. This has been contended because human dignity prevails over any consideration of the fetus' inclusion or exclusion in the legal concept of the person and its consequently inclusion or exclusion within the scope of constitutional rights' protection.

The second constitutional right is the protection of its life, honor and liberty. On the one hand, a legal view supports that the holder of this right is any person, including the unborn child, since the opposite view would contradict the protection of human dignity, as previously analyzed. Despite that, this view recognizes that the fetus enjoys different protection and it is not generally the holder of constitutional rights<sup>34</sup>. On the other hand, the prevailing and most accurate legal view claims that the fetus is not the holder of the life's right, since this article is enforced only to born people, as per all constitutional

articles<sup>31</sup>. The concept of autonomy is crucial to constitutional rights and this is not fulfilled in the case of the fetus. As long as this is completely dependent on its mother, autonomy is not realized and, thereby, it is not the holder of constitutional rights<sup>34</sup>, but it requires special legal protection.

### **The physician**

The only constitutional right that is relevant to the physician is the protection of the freedom of their science. Science is defined as “the attempt to acquire complete, precise and comprehensive knowledge”<sup>31</sup>. There are various manifestations of scientific freedom protected by the Constitution. The most important of them is the application of the most appropriate scientific method in accordance with the generally recognized standards of medical science. This right provides protection for both the expression of scientific opinions by the physician/medical scientist and the performance of medical practice. Besides, this right’s protective scope encompasses any practice capable of contributing to the advancement of medical data and findings<sup>33</sup>, such as prenatal screening, which must be conducted properly by the physician.

In Supreme Court of Greece case no 490/2000 (Criminal Division), the two physicians were acquitted of the charges brought by the parents of a child born with a disability. This judgment was made, because they informed the parents that a normal karyotype does not rule out the possibility of a child’s birth with a disability or severe disease. They also indicated parents’ obligation of performing ultrasound scans during pregnancy. The first physician instructed them to do so in a future pregnancy, while the second one in an existing one, so that abnormalities could be detected. Finally, the method used to examine the fetus’ health was the most internationally reliable. Hence, these medical procedures did not infringe the pregnant woman’s rights. It is noteworthy that the judgment was issued in 2000 and, at that time,

the health’s and genetic identity’s right had not been enshrined in the Constitution, but this case would have had the same outcome.

Since the physicians acted lawfully, the fetus’ constitutional rights were not encroached. However, the attempt to resolve the conflict between the rights of the pregnant woman mentioned above and the ones of the unborn child is a matter of great interest. The solution may be provided through “the practical harmonization of the conflicting rights”. This has been realized in the Greek Penal Code via the established unambiguous conditions and time limits of the permissibility of pregnancy termination<sup>31</sup>. In this way, it protects not only the pregnant woman, but also the unborn child. Consequently, the fetus’ legal protection is suitable for this in view of its particular nature in relation to human life, whose legal protection is justifiably broader. In fact, based on the family’s medical history, the physicians applied their medical knowledge. Then, they advised the parents on the necessity of conducting the appropriate medical examinations and did not assure them of a healthy child’s birth. Finally, the scientific method used to examine the health of the fetus was considered as an internationally reliable medical procedure, demonstrating that they acted within the bounds of their scientific freedom. So, Supreme Court adjudicated correctly.

### **European level**

Last but not least, the handling of claims for compensation to children born with a disability or severe disease due to prenatal misdiagnosis at a European level is a very important part of this paper. According to the national legislations of France, Germany, the Netherlands and Italy, the prevailing situation in each country will be presented.

In France, the issue was raised in the Perruche case. While the mother was pregnant, she contracted rubella that was not diagnosed by the physicians dur-

ing prenatal screening. The child was eventually born with severe health problems. During the litigation, Orleans Court of Appeal rejected the child's claim for compensation, seeing the health problems of it were the result of the rubella infection and not of the medical malpractice. In addition, it emphasized that the existence of fetus' health problems, for which the mother was not given the option of terminating the pregnancy did not constitute damages. In contrast, Supreme Court of Cassation ultimately upheld this claim, but the issue was addressed through the enactment of a national law recognizing that claiming damage on the grounds of having been born is not lawful for an individual<sup>35</sup>.

In Germany, Federal Supreme Court's response to the award of compensation to the mother for economic loss and non-economic damages due to prenatal misdiagnosis is affirmative, despite the contrary view of Federal Constitutional Court. However, with regard to claim for compensation to a child born with a disability or severe disease, Federal Supreme Court responded negatively, since such recognition would undermine the concept of life itself<sup>36</sup>. To the contrary, another view has also been expressed. According to this, the child has the right to claim compensation because of the so-called contract between the physician and the pregnant woman with protective effect in favor of a third party. The third party is considered to be the fetus, whose health must be protected by the physician, although this view has not been applied yet<sup>35</sup>.

In the Netherlands, the issue of awarding compensation to a child born with a disability due to prenatal misdiagnosis was resolved by Dutch Supreme Court case on March 18<sup>th</sup>, 2005. A child, Kelly Molenaar, was diagnosed with severe health problems at a young age. Her mother asked her physician to perform specific medical examinations due to her family's medical history in order to detect possible abnormalities in the fetus. In addition, she stated

that she wished to terminate the pregnancy if the diagnosis was positive. Ultimately, Dutch Supreme Court awarded compensation to Kelly not only for pecuniary damages, but also for the emotional distress she had suffered. Moreover, Court pointed out that in order for a child to be awarded compensation, the comparison is not between life with disability and non-existence, which is clearly impossible. It is between the actual situation in terms of the child's living costs and the hypothetical situation in which no medical malpractice had been made. Certainly, awarding compensation to the parents due to infringement of their right to self-determination is also accepted by Dutch Court, because the physician's failure to provide complete information about the health of the fetus deprived them of their right to decide whether or not to continue the pregnancy<sup>36</sup>.

In Italy, the recognition of a child's claim for compensation due to prenatal misdiagnosis has been the subject of contradictory judgments. In 2009 Supreme Court of Cassation rejected the claim for compensation to a child born with severe disease due to incorrect physician's assessment of its father's medical tests. On the contrary, in 2012 it accepted the same claim for non-pecuniary damage to a child with trisomy 21. The answer was given by the United Sections of Supreme Court of Cassation case no 25767 on December 22<sup>nd</sup>, 2015. It emphasized that a born child can claim compensation for damages suffered during its mother's pregnancy, but it can be achieved only if the two states (before and after the negligent medical conduct) are comparable. However, in the aforementioned cases, the comparison consists of life with disability and non-life, which is unattainable, as non-life is not a comparable interest. Additionally, Italian law referring to the permissibility of abortion does not imply any discrimination between healthy and unhealthy life. Consequently, a claim for compensation is not accepted to the child on the grounds of having been born, but only to the parents for the

infringement of their right to self-determination<sup>37</sup>.

### Discussion

In case no 490/2000, Supreme Court of Greece rejected the appeal of the parents of a child born with quadriplegia due to prenatal misdiagnosis, holding that the offence of negligent bodily harm had not been committed, since, at the time of the defendants' conduct, no human being existed. It concluded that, under the applicable legislation, neither the unborn fetus nor the unconceived child fell within the legal concept of a "human being". Criminal liability for negligent bodily harm to a fetus would arise only under newer provisions of the Greek Penal Code if the negligent medical act had occurred after the 20th week of pregnancy.

Prenatal misdiagnosis may deprive the mother of the opportunity to terminate the pregnancy for eugenic reasons. In such cases, her personality rights are thereby infringed, as she is denied the right to family planning, reproductive autonomy, and self-determination regarding whether or not to become the mother of a child with a severe disability. The physician is held liable for compensation. Furthermore, this violation affects the father who participates in the shared decision-making process concerning the continuation or termination of the pregnancy. As an indirectly affected party who suffers emotional distress from the birth of a child with a congenital disorder, the father is also entitled to compensation for non-pecuniary damages.

In France, the Perruche case led the Supreme Court of Cassation to initially recognize the child's claim for damages on the ground of having been born with severe disabilities, but this outcome was later overturned by the national legislation prohibiting child's claims based on the mere fact of having been born. In Germany, the Federal Supreme Court awarded compensation to the mother for economic and non-economic damages, yet rejected the child's

claim on the ground that recognizing such a right would undermine the concept of human life itself. In contrast, in 2005 the Dutch Supreme Court (Kelly Molenaar case) awarded compensation to both the child and their parents, reasoning that the comparison is not between life with disability and non-existence, but between the actual living costs of the child and the hypothetical situation that medical malpractice had not occurred. Finally, in 2015 the United Sections of Supreme Court of Cassation of Italy clarified that a child's claim for compensation is not accepted on the basis of having been born with a disability, since life cannot be compared to non-life. Only the parents may claim for compensation because of the infringement of their right to self-determination.

### Conclusion

In conclusion, the role of prenatal screening is obvious, since specialized methods are used to check the health of both the pregnant woman and the fetus detecting potential genetic diseases and genetic mutations. Proper diagnosis requires special care on the part of the physician, who is obliged to consider the indications of prenatal diagnosis so as not to make mistakes or proceed on unjustified actions. The ever-increasing development of medicine has brought to light a new method that is more effective than the conventional karyotyping, the molecular karyotyping. Thanks to its special technology, molecular karyotyping makes it possible to detect more and rarer cases of genetic disorders. Thus, more and more parents will be able to obtain information about the health of their unborn child, while the principles of Bioethics will contribute positively to the resolution of medical issues with ethical dimensions.

As analyzed, the lack of information or an incorrect diagnosis of the fetus' health incurs the criminal liability of the physician. This is reasonable, because they must protect the legally protected interest in the fetus' life and act in accordance with the gener-

ally recognized standards of medical science and the duty of care. Therefore, when the physician acts negligently, causing the death or physical injury of the fetus, they are liable under the articles of the Greek Penal Code that protect the rights of the unborn child. The legislator provides a different level of protection for the fetus which is not as broad as the born individual's one. At the same time, the negligent physician is also liable under civil law, since they infringe the personality rights of future parents through their medical malpractice during the prenatal screening. However, only the parents' claim is accepted in Greek practice, as evidenced by case law examples, since recognizing the child's own claims would lead to the acceptance of the position that non-life takes precedence over life.

Finally, the three parties involved in prenatal screening (the pregnant woman, the fetus and the physician) enjoy constitutional protection and are the holders of different constitutional rights. However, in practice, it is common to observe a conflict between these rights, which requires a satisfactory resolution for all rights holders. This is achieved through the so-called practical harmonization. According to this, whenever there is a conflict between constitutional rights, an effort is made to balance and reconcile them, so that neither is sacrificed in favor of the other, but both are upheld to the greatest possible extent. Ultimately, the prevailing situation in other European legal systems with the exception of the Netherlands is quite similar to the one in Greece, as it only recognizes the possibility for parents to claim compensation for prenatal misdiagnosis.

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### Conflict of interest

There is no conflict of interest to declare.

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