Heine Law Review

2025
VOL. 2(2)

Heine Law Review

Advisory Council

Editors

VOL. 2 ISS. 2

Heine Law Review

Contents

Editorial

Articles

Case Review

Editorial

Good ol'fashioned parliamentary immunity

Rareş Chioreanu[*]

Parliamentary immunity – that is the impediment for criminal prosecution without Parliament's approval – is seen today as something old, maybe even outdated. It is said to be only a theoretical concept as, in a developed democracy, there would be no need for protection of popular representatives against an absolute monarch. The German Bundestag seems to agree, as, at the beginning of every legislature, it generally waives the immunity from criminal prosecution of its members pursuant to Art. 46 Sec. 2 of the Basic Law. This authorization does not include, however, indictments, search warrants or arrests. Here, the Parliament reserves its right to approve any prosecutorial measures. In any case, pursuant to Art. 46 Sec. 4 of the Basic Law, prosecution must be discontinued upon request of the Bundestag.

New developments in the United States show that even to this day, parliamentary immunity is a powerful tool against retaliatory criminal prosecution and guarantor of the independence of the Legislative Branch: Recently, the former astronaut and current Senator for the State of Arizona Mark Kelly posted a video in which he, together with five other Democratic lawmakers, informed members of the armed forces that they are allowed to disobey illegal orders and asked them to do so.

President Donald Trump called this video "seditious behavior, punishable by death" and Defense Secretary Pete Hegseth emphasized that the "Seditious Six" were encouraging members of the armed forces to ignore orders. Consequently, the Pentagon opened an investigation into Senator Kelly who, as a former Navy captain, falls under military jurisdiction. At the same time, the FBI opened investigations into the other five legislators. As the disobedience of illegal orders is well established in American military law, these investigations have been criticized as retaliatory. Should Members of Congress be afraid to contradict the President because he might order a criminal investigation against them?

Notably, there has not been any request made to Congress asking for permission to prosecute, as there need not be any. The American Constitution follows the common law

[*] The author is Research Assistant at HHU Düsseldorf and Head of the Department for Public Law at Heine Law Review.

tradition and offers Members of Congress only limited protection against criminal prosecution. While e.g. German parliamentary immunity comprises every aspect of criminal liability and can be waived by a decision of Parliament, the American counterpart only bars civil arrest while Congress is in session. Another type of immunity, the "speech or debate clause" of Art I Sec. 6 of the U.S. Constitution, includes only legislative, but not communicative action. The interpretation of legislative action has been very strict, so that speeches outside of Congress as well as social media activity have not been deemed to be protected. In this sense, it resembles the German parliamentary indemnity (Indemnität) of Art. 46 Sec. 1 of the Basic Law which has a similar scope and does not protect conduct outside of Parliament.

Surely, restraining immunity only in the intra-parliamentary sphere sounds like a good idea. No one should be above the law; no corrupt politician should, therefore, be shielded by his peers. But what if, as has happened to Senator Kelly and his colleagues, the executive branch were to launch multiple investigations into uncomfortable parliamentarians, possibly leading to the paralysis of their activities or ruining their reputation? There need not even be any conviction; simply an investigation or the threat of investigation might silence the opponent, as the Trump administration has shown e.g. in connection with news and media companies. Since it is very easy to construct accusations with no connection to parliamentary activities, it becomes clear that even in the absence of an absolute monarch, there is a threat to the independence of parliamentarians. This is the point where, by vesting Parliament with the power to stop criminal investigations into its members, the true power of parliamentary immunity comes to light, securing the independence of the First Branch of Government. Parliamentary immunity is, therefore, not old-fashioned, but more relevant now than ever.

Articles

Restoring Europe's Seas: Legal Duties and Institutional Gaps in the EU Climate Framework

Denys Med[*]

Abstract

This paper examines the legal and institutional framework governing the European Union's marine environment, focusing on the Marine Strategy Framework Directive (2008/56/EC) and the Nature Restoration Regulation (EU) 2024/1991. It analyses how these instruments interact within the EU climate framework, revealing structural gaps between planning obligations and enforceable restoration duties. The study highlights the persistent fragmentation of national implementation and the Union's limited capacity to translate environmental commitments into measurable results. Anchored in recent advisory opinions of ITLOS (2024) and ICJ (2025), it argues that the EU must strengthen due diligence, prevention, and transboundary cooperation to transform its marine governance into a coherent, result-oriented system.

[*] The author is a law student at HHU Düsseldorf..

A. Introduction

The European marine environment is among the world's most rich and diverse, sustaining over 40 % of the EU's population and forming the backbone of its blue economy.[1] However, the continuing degradation of the marine environment triggered by climate change and other issues is severely affecting Europe's coastal and maritime regions. What was once a question of environmental stewardship has become a matter of economic survival and collective resilience, as the accelerating degradation of marine and coastal environments directly threatens the stability of Europe's coastal communities.[2]

The marine environment has therefore become a decisive test of the EU's capacity to translate its environmental commitments into tangible action, demanding immediate and coordinated efforts before further degradation becomes irreversible. In this research, we analyse the current extent of marine environmental degradation in Europe, assess the effectiveness of the existing EU's legal and institutional frameworks, and propose measures to strengthen their implementation and resilience.

B. The Core of EU Marine Governance

Two legislative acts constitute the central legal structure for the EU's marine environmental policy: Directive 2008/56/EC (Marine Strategy Framework Directive) and Regulation (EU) 2024/1991 on Nature Restoration.

[1] European Environment Agency, *European Climate Risk Assessment* (EEA Report 01/2024, Publications Office of the European Union 2024) 104.
[2] ibid 21.

The Marine Strategy Framework Directive (MSFD)[3] establishes a framework for Member States to achieve or maintain Good Environmental Status (GES) in all EU marine waters by 2020.[4] It applies an ecosystem-based approach to ensure that human activities remain within ecologically sustainable limits.[5] The Directive obliges Member States to develop and implement Marine Strategies consisting of an initial assessment, GES determination, environmental targets, monitoring programmes, and programmes of measures.[6] These must be regionally coordinated under Regional Sea Conventions[7] such as HELCOM,[8] OSPAR,[9] and Barcelona.[10] The MSFD thus functions as a procedural and cooperative framework, integrating national strategies while maintaining flexibility in implementation. It prioritizes coordination and adaptive management,[11] but does not impose uniform or binding restoration targets, which limits its direct enforceability.

By contrast, the Nature Restoration Regulation (EU) 2024/1991[12] introduces binding quantitative obligations. It requires Member States to restore degraded terrestrial and marine ecosystems, aiming to recover at least 20 % of EU land and sea areas by 2030 and all ecosystems in need of restoration by 2050.[13] The Regulation explicitly ties marine restoration to achieving or maintaining GES as defined in the MSFD.[14] It obliges Member States to adopt national restoration plans[15] reviewed by the Commission for compliance[16] and subject to regular monitoring and reporting.[17] This framework strengthens accountability through enforceable targets, uniform indicators, and oversight mechanisms, ensuring measurable ecological improvement.

Formally, the MSFD and the Nature Restoration Regulation should operate on parallel tracks, exposing a gap between planning instruments and enforceable restoration obligations. The MSFD attempted to provide the structural framework, while the

---

[3] Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive) [2008] OJ L164/19.

[4] ibid art 1(1).

[5] ibid art 1(3).

[6] ibid art 5(2).

[7] ibid art 6.

[8] Convention on the Protection of the Marine Environment of the Baltic Sea Area (adopted 9 April 1992, entered into force 17 January 2000) 1507 UNTS 167 (HELCOM).

[9] Convention for the Protection of the Marine Environment of the North-East Atlantic (adopted 22 September 1992, entered into force 25 March 1998) 2354 UNTS 67 (OSPAR)

[10] Convention for the Protection of the Mediterranean Sea against Pollution (adopted 16 February 1976, entered into force 12 February 1978) 1102 UNTS 27 (Barcelona Convention).

[11] ibid art 17

[12] Regulation (EU) 2024/1991 of the European Parliament and of the Council of 24 June 2024 on nature restoration and amending Regulation (EU) 2022/869 [2024] OJ L199/1.

[13] ibid art 1(1).

[14] ibid art 5(1)(d).

[15] ibid arts 14-15.

[16] ibid art 17.

[17] ibid arts 20-21.

Regulation attempted to operationalize it through measurable duties and timelines. But practically, effectiveness of both instruments ultimately depends on how Member States transpose and implement them domestically. The MSFD leaves broad discretion to national authorities, resulting in divergent interpretations of what constitutes Good Environmental Status and uneven enforcement across regions. The Nature Restoration Regulation attempts to narrow this gap through binding restoration targets, yet national implementation remains fragmented and largely dependent on voluntary coordination under regional sea conventions. In light of this, the following examines the national level, assessing how Member States have implemented these obligations.

C. Regional Implementation

I. Baltic Sea Basin

The environmental situation in the Baltic Sea Basin remains critical. Pollution pressures persist at high levels, with hazardous substances being widespread across most subregions. Biodiversity continues to decline, many species and habitats remain in poor condition, and several key fish stocks keep decreasing. Climate change exacerbates these pressures, and urgent, coordinated measures are now vital to strengthen ecosystem resilience.[18]

Across the Baltic Sea Basin,[19] several Member States have made progress in improving the structure and coordination of their marine programmes. Encouragingly, the region has accelerated its biodiversity commitments, advancing toward the objective of securing 30% of its marine environment under protection by 2030.[20] The following illustrates the advances made by several Member States:

- *Germany and Sweden*: updated measures under the HELCOM Baltic Sea Action Plan 2021-2030, improving coherence between regional and national governance.[21]
- *Finland and Sweden*: enhanced technical precision of marine actions with clearer timelines, spatial scope, and operational objectives.[22]

[18] European Commission, 'Report from the Commission to the Council and the European Parliament on the Commission's Assessment of the Member States' Programmes of Measures as Updated under Article 17 of the Marine Strategy Framework Directive (2008/56/EC)' COM (2023) 5 final, 5.

[19] Concerning the Member States of Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Poland, and Sweden.

[20] European Commission (n 18).

[21] European Commission, Commission Staff Working Document Accompanying the Document 'Report from the Commission to the Council and the European Parliament on the Commission's Assessment of the Member States' Programmes of Measures as Updated under Article 17 of the Marine Strategy Framework Directive (2008/56/EC)' SWD (2025) 3 final, 126–135, 234–241.

[22] ibid 126–135.

- *Estonia*: introduction of a comprehensive cost-environmental analysis and transparent funding identification for each measure, linking design and implementation.[23]

Despite policy progress, implementation across the region remains inconsistent and, in many areas, insufficient:

- *Germany*: for contaminants, many actions are unimplemented and their impact unquantified; marine-litter targets are only partly operational, with unsecured funding and missing timelines.[24]
- *Sweden*: national measures lack operational clarity; biodiversity goals are set but rarely translated into enforceable actions.[25]
- *Finland*: several actions under the Baltic Sea Action Plan remain unimplemented; there is no quantified definition of Good Environmental Status (GES) for marine litter.[26]
- *Estonia*: strong planning is noted, but measures lack quantified benefits and climate impact analysis; contaminants remain insufficiently addressed.[27]
- *Latvia*: no new measures for underwater noise, fish stocks, or marine litter; biodiversity protection remains underdeveloped.[28]
- *Lithuania*: fails to reach GES for marine litter; unclear spatial scope and weak coordination between objectives and measures.[29]
- *Poland*: fragmented approach with unjustified withdrawal of measures; no quantified contribution to GES and limited focus on biodiversity.[30]

In summary, while regional cooperation has strengthened, most Baltic programmes still fail to deliver policy ambition into concrete, measurable environmental outcomes.

II. Mediterranean Sea Basin

Marine litter remains a major concern in the Mediterranean, as only a small share of monitored beaches has reached GES. In addition, oil spills and other acute pollution incidents persist in zones of intense maritime activity, which reflects the region's heavy

[23] ibid 136-144.
[24] European Commission (n 21) 126-135.
[25] ibid 234-241.
[26] European Commission (n 21) 154-162.
[27] European Commission (n 21) 136-144.
[28] ibid 185-193.
[29] ibid 193-200.
[30] ibid 208-218.

shipping pressure. At the same time, fishing pressure has declined consistently over the past decade and has reached its lowest point in twenty years. However, habitat degradation still undermines the resilience of coastal ecosystems. Furthermore, rising sea temperatures and frequent marine heatwaves have caused large-scale mortality among marine species and have increased the spread of non-indigenous species, which adds further pressure on the Mediterranean environment.[31]

Member States in the Mediterranean Sea Basin[32] in recent years have made some progress in improving their marine governance frameworks, though the scale and depth of these improvements vary:

- *Italy*: established a partial linkage between new measures and operational targets for non-indigenous species, providing clearer spatial information on their application.[33]
- *Cyprus*: maintained measures addressing major contamination sources, particularly from industrial and agricultural discharges.[34]
- *Slovenia*: strengthened biodiversity protection, introducing 18 new measures in the biodiversity area, which is a notable step given its short coastline.[35]

Notwithstanding moderate policy alignment, the Mediterranean countries continue to face major deficiencies in the implementation of marine measure:

- *Italy*: existing measures have not been updated, and new ones are insufficiently detailed and not linked to operational targets, creating uncertainty about practical results. [36]
- *Slovenia*: measures on biodiversity and contaminants are only partially connected to concrete objectives; the framework fails to show how current actions can reduce pressures or address emerging socio-economic challenges.[37]
- *Cyprus*: faces similar weaknesses: most environmental targets are undefined, no new measures have been adopted for micro-litter or species protection, and earlier programs remain largely unchanged.[38]

Although Mediterranean countries show more tangible practical progress than those in the Baltic, their marine governance still has a long way to go before matching the Union's

[31] European Commission (n 18) 6.
[32] Meaning Spain, France, Italy, Slovenia, Croatia, Greece, and Cyprus.
[33] European Commission (n 21) 178-185.
[34] ibid 120-126.
[35] ibid 242-250.
[36] European Commission (n 21) 178-185.
[37] ibid 242-250.
[38] ibid 120-126.

environmental ambitions.

III. North-East Atlantic Basin

The North-East Atlantic Basin, encompassing nine Member States,[39] continues to face widespread environmental degradation despite notable progress achieved over the past decade. Most subregions remain in poor condition regarding hazardous substances in marine species. Inputs of pollutants from agriculture, wastewater and industry have fallen considerably, yet contamination persists along several coastal areas. Marine litter levels remain high, and although beaches show slight improvement, the seafloor remains heavily polluted. Although overfishing has decreased markedly since 2003, the combined effects of fisheries and other human pressures continue to threaten biodiversity. Although targeted measures exist, climate change and ocean acidification persist as major drivers of reduced ecosystem resilience.[40]

However, some progress has been achieved across the North-East Atlantic Basin through closer alignment of national programmes with OSPAR objectives and EU environmental law:

- *France and Spain*: introduced additional actions to improve fisheries management and reduce pressure on commercial stocks; both countries revised environmental targets to align with GES requirements.[41]
- *The Netherlands*: adopted nine modified and five new measures, alongside eleven existing ones, focused on marine litter reduction and waste management in coastal and offshore zones.[42]
- *Belgium*: advanced in contaminant control, introducing restrictions and bans on hazardous substances.[43]
- *Portugal*: strengthened biodiversity reporting, specifying where and when new marine protected area measures will apply, and linking them to operational environmental targets.[44]
- *Ireland*: shows potential to reach GES across pollution, non-indigenous species, and hydrographical conditions, underpinned by regional cooperation frameworks.[45]

[39] Belgium, Denmark, France, Germany, Ireland, the Netherlands, Portugal, Spain, and Sweden.
[40] European Commission (n 18) 7.
[41] European Commission (n 21) 162-169, 144-154.
[42] ibid 204.
[43] ibid 114.
[44] ibid 222.
[45] ibid 170-177.

Still, these developments have not been sufficient to address structural weaknesses in national implementation, particularly in relation to monitoring, pollution control and biodiversity protection:

- *Belgium*: lacks effective coordination between environmental and fisheries authorities; MSFD-specific measures are only partly linked to operational targets, showing limited implementation progress.[46]
- *France*: adjusted its targets but shows no clear progress toward GES; focuses on preventing new marine litter while neglecting legacy litter, and fails to link contaminant measures to GES outcomes.[47]
- *The Netherlands*: has not updated key pollution control measures and leaves major gaps in assessing seabird and pelagic habitats.[48]
- *Ireland*: introduced generic measures lacking baseline data, timelines, and focus on fisheries or marine litter reduction.[49]
- *Spain*: provides detailed reporting yet relies too heavily on monitoring and knowledge-gathering instead of actions that directly reduce pressures.[50]
- *Portugal*: continues to face serious implementation challenges; measures are only partially adequate to achieve GES objectives.[51]

Overall, national programmes remain too fragmented to ensure real progress toward GES.

IV. Black Sea Basin

The Black Sea Basin continues to face some of the most severe ecological pressures in Europe. Data collected under recent EU-supported assessments reveal that its coastlines record the continent's highest levels of marine litter.[52] Chemical contamination remains critical, as concentrations of hazardous substances exceed those measured in the Mediterranean and the North-East Atlantic by severalfold.[53] Moreover, the ongoing Russian aggression against Ukraine has added major transboundary pollution from oil, heavy metals, and war-related debris, worsening the condition of marine life and

[46] ibid 111-119.
[47] ibid 162-169.
[48] ibid 205.
[49] ibid 175.
[50] ibid 144-154.
[51] ibid 218-226.
[52] J Slobodnik, M Arabidze, M Mgeladze, A Korshenko, A Mikaelyan, V Komorin and G Minicheva, *EMBLAS Final Scientific Report – Joint Black Sea Surveys 2016–2019* (2020) 309-333.
[53] European Commission Joint Research Centre, *2021 Scientific Survey of the North-East Atlantic, Mediterranean and Black Seas: The Cruise of Three European Seas Carried Out in the Framework of the EU4EMBLAS Project with JRC Support* (2021).

habitats.[54]

The EU Black Sea Basin includes two Member States: Romania and Bulgaria. However, Bulgaria failed to submit its updated report within the required timeframe and was found in infringement of EU law by the Court of Justice for not reviewing or updating its marine strategy.[55] As a result, Romania remains the only country in the basin with an assessed programme under the Directive. It introduced a few new measures that help close some existing gaps, especially in the area of marine litter. However, most measures from the first cycle are still pending, and updates on contaminants, biodiversity, and non-indigenous species lack clarity and operational depth.[56] The programme does not fully specify pressures, funding, or coordination mechanisms, which creates significant uncertainty about how effectively it will be implemented and how much progress will be made toward GES.

Across the EU, progress under the MSFD and other Directives remains slow, fragmented, and largely insufficient to achieve GES. Member States have largely treated the Directive as a policy coordination platform, focusing on drafting strategies and aligning documents rather than implementing concrete, result-oriented actions. Most national measures remain descriptive or procedural, lacking quantifiable targets, defined budgets, or enforcement mechanisms. This policy-heavy, action-light approach has turned the MSFD into a reporting exercise, where progress is measured by compliance with administrative deadlines rather than by actual improvements in marine ecosystems.

This pattern of weak implementation is also evident in enforcement practice. Between 2012 and 2022, this pattern of weak implementation was reflected in enforcement trends: the Commission launched 39 infringement proceedings for late or missing reporting under the MSFD, which led to nine reasoned opinions and one referral to the Court against Bulgaria.[57] As noted earlier, the Court found Bulgaria in breach for failing to review and update its marine strategy. Although the country has since adopted a new strategy for 2022-2027,[58] this delay reflects a wider pattern of slow and reactive implementation across the EU.

---

[54] Dimitar Bechev, 'Tackling the Russia-Ukraine War's Environmental Damage in the Black Sea' (Carnegie Europe, 24 February 2025) <https://carnegieendowment.org/posts/2025/02/tackling-the-russia-ukraine-wars-environmental-damage-in-the-black-sea?lang=en> accessed 1 November 2025.

[55] Case C-510/20 *Commission v Bulgaria* (ECJ, 28 April 2022) para 49

[56] European Commission (n 21) 226-233.

[57] European Commission, 'Commission Staff Working Document Evaluation of Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 Establishing a Framework for Community Action in the Field of Marine Environmental Policy (Marine Strategy Framework Directive)' SWD (2025) 51 final, 24.

[58] Ministry of Environment and Water (Bulgaria), 'Today the Council of Ministers adopted the updated river basin management plans for the Danube, Black Sea, East Aegean, and West Aegean Basin Management Regions, and the Marine Strategy of Bulgaria for the period 2022–2027' (Press Release, 30 December 2024) <https://www.moew.government.bg/en/> accessed 28 October 2025.

These shortcomings expose a fundamental gap in the EU's marine governance. The MSFD still lacks a clear identity: it is uncertain whether it operates as a binding legal instrument or remains only a policy-planning tool.[59] This confusion weakens enforcement and allows degradation to continue across European seas. In practice, as shown earlier, the Directive is so broad and procedural that it fails to give Member States a clear understanding of how to act. At a deeper level, the ambiguous nature of the MSFD illustrates a deeper issue in the lack of unity among EU Member States regarding marine protection overall.

D. Recommendations and Conclusion

The solution is clear: the EU must bring coherence and strength to its marine governance. It has built an impressive framework for biodiversity and environmental protection, yet unity and real action remain missing. To close this gap, the Union should consider the available means on an international level, including the most recent jurisprudence of the International Court of Justice (ICJ) and International Tribunal for the Law of the Sea (ITLOS).

In its 2024 Advisory Opinion,[60] ITLOS was asked to clarify the specific obligations of States Parties to prevent, reduce, and control marine pollution resulting from climate change impacts, and to protect and preserve the marine environment from ocean warming, sea-level rise, and acidification under the framework of the United Nations Convention on the Law of the Sea (UNCLOS).[61] The Tribunal has taken the relevant UNCLOS provisions to mean that states must take all necessary measures, individually or jointly, to address such pollution by employing the best practicable means available to them, thereby affirming the obligation of due diligence.[62] The bottom line of the said Advisory Opinion shall be treated as UNCLOS requiring States to safeguard fragile ecosystems and the habitats of threatened species from the effects of ocean warming and acidification. [63]

The 2025 Advisory Opinion of ICJ[64] reinforced this interpretation and drew directly on the reasoning developed by ITLOS.[65] The Court clarified that due diligence in the climate context means more than adopting legislation, demanding effective enforcement and

[59] See this dichotomy in Case C-461/13 *Bund für Umwelt und Naturschutz Deutschland eV v Bundesrepublik Deutschland* (ECJ, 1 July 2015), Opinion of AG Jääskinen, para 4.
[60] ITLOS, Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Advisory Opinion, 21 May 2024).
[61] ibid para 139.
[62] ibid para 243.
[63] ibid para 406.
[64] ICJ, Obligations of States in respect of Climate Change (Advisory Opinion, 23 July 2025).
[65] ibid para 338.

administrative oversight.[66] The obligation extends to mitigation, through sustained emission reductions, and adaptation, through measures that reduce the risk of harm.[67]

In other words, due diligence now has content: measurable prevention, restoration, and adaptation. Together, the two advisory opinions offer a clear solution to the European Union: to transform its broad marine environmental commitments into enforceable restoration obligations rooted in due diligence, prevention, and transboundary cooperation. Therefore, taking into account the foregoing analysis, this paper sets out the following recommendations:

Firstly, the EU should amend the Marine Strategy Framework Directive to include enforceable restoration thresholds aligned with the Nature Restoration Regulation and the preventive logic of Article 192 UNCLOS. This amendment should transform the Directive from a procedural coordination tool into a substantive legal mechanism ensuring measurable restoration outcomes. The Commission should define uniform indicators and binding targets that compel Member States to deliver quantifiable ecological recovery rather than administrative compliance.

Secondly, the EU needs to codify transboundary responsibility for shared marine basins through joint enforcement and liability mechanisms. Pollution, acidification, and greenhouse gas emissions are inherently transboundary, therefore, Member States must be held collectively accountable where individual inaction causes regional harm. The EU should establish a legal framework for cross-border enforcement and introduce regional compliance reviews modelled on infringement procedures.

Finally, the EU should integrate greenhouse-gas mitigation and ocean adaptation directly into marine governance instruments. States are obliged to prevent atmospheric pollution affecting the marine environment, under law of the sea. The EU should therefore embed emission-reduction obligations into the MSFD and Nature Restoration Regulation implementation cycles, ensuring that climate action and marine restoration operate as a single, legally coherent system.

[66] ibid para 138.
[67] ibid paras 281-282.

Articles

Revising the legal status of surrogacy. An evaluation having regard to bioethical principles and legal comparisons

Timo Spiwoks[*]

Abstract

This paper describes both traditional and gestational forms of surrogate motherhood and the motivations behind them. The author analyses them through a bioethical lens and with reference to fundamental rights in German constitutional law, emphasising especially the human dignity of the child and the carrying mother, while the role and the importance of reproductive freedom is acknowledged as well. Highlighted among bioethical principles are the principles of autonomy and justice. This leads to reservations towards commercialised surrogacy and to an assumed need for procedural or institutional safeguards concerning e.g. the option of the carrying (biological) mother to retain the child or the right of a child that has been given away to know of its parentage later in life.

Moreover, the author explains the current legal situation related to surrogacy in German civil and criminal law, extending to the consequences of surrogacy tourism. This situation is contrasted with the law as applicable in jurisdictions with an altruistic model of surrogacy (specificially the United Kingdom, Greece, and Israel) and those viewing surrogacy primarily as a negotiable service (e.g. California or Ukraine). In conclusion, a strictly regulated legalisation of altruistic surrogacy is recommended as a last resort against medically induced childlessness.

[*] Law student, HHU Düsseldorf. Student Assistant, Chair of German, European and International Private Law and Civil Procedure (*Lehrstuhl für deutsches, europäisches und internationales Privat- und Verfahrensrecht, Prof. Dr. Lugani*). The author gives his thanks to Prof. Dr. Anne Schneider and Michel Hoppe. All opinions, errors and omissions are entirely the author‘s.

A. Introduction

About one in ten couples is involuntarily childless.[1] For many couples, the diagnosis of sterility represents a deep crack in their life planning. The revelation often leads to depressive moods, feelings of helplessness or guilt, as well as alienation from one's own body and partner.[2] Given these circumstances, it is not surprising that a large number of German couples resort to assisted reproduction. This frequently extends to surrogacy. Surrogacy is an arrangement where a woman carries a child for the intended parents. As this practice is prohibited in Germany, many couples engage in 'surrogacy tourism', travelling to foreign jurisdictions with more liberal legal frameworks to circumvent domestic bans.[3]

I. Overview of the legal, political and ethical status quo

While the acts necessary for the inducement of surrogacy are punishable in this country, in particular by section 1 paragraph 1 numbers 1, 2, 6, and 7 of the Embryo Protection Act (*Embryonenschutzgesetz* - ESchG),[4] there are more liberal regulations that favour such tourism in numerous other nations.[5] In Germany, the prevention of split motherhood was

[1] Jacky Boivin and others, 'International estimates of infertility prevalence and treatment-seeking: potential need and demand for infertility medical care' (2007) 22 Human Reproduction 1506, 1509; Petra Haag, Norbert Hanhart and Markus Müller, *Gynäkologie und Urologie: Für Studium und Praxis* (5th edn, Medizinische Verlags- und Informationsdienste 2010) 235; Anjali Widge, 'Sociocultural attitudes towards infertility and assisted reproduction in India' in Effy Vayena, Patrick J Rowe and P David Griffin (eds), *Current Practices and Controversies in Assisted Reproduction – Report of a WHO Meeting* (World Health Organization 2002) 60, 60.

[2] cf Alexander Diel, *Leihmutterschaft und Reproduktionstourismus* (Wolfgang Metzner Verlag 2014) 25; Viola Frick-Bruder, 'Das infertile Paar' in Gerhard Bettendorf and Meinert Breckwoldt (eds), *Reproduktionsmedizin* (Fischer 1989) 399, 403; Bernhard Strauss and Dagmar Ulrich, 'Psychologische Betreuung von Sterilitätspatienten; Aufgaben, Probleme und konzeptionelle Überlegungen' in Elmar Brähler (ed), *Psychologische Probleme in der Reproduktionsmedizin* (Springer 1991) 127, 129–132.

[3] cf Diel (n 2) 25; Frick-Bruder (n 2) 403; Strauss and Ulrich (n 2) 129–132.

[4] cf BT-Drs 11/5460, 9 (government proposal); Jan Backmann, *Künstliche Fortpflanzung und internationales Privatrecht: Unter besonderer Berücksichtigung des Persönlichkeitsschutzes* (C.H. Beck 2002) 18; Hans-Ludwig Günther, Jochen Taupitz and Peter Kaiser (eds), *Embryonenschutzgesetz Kommentar* (2nd edn, Kohlhammer 2014) section 1 paragraph 1 number 1, paras 1–2.

[5] See below under E.II.

the main justification for the ESchG, which came into force in 1991.[6] In the current legal policy discourse, however, an amendment to reproductive law is often being demanded, also in view of surrogacy tourism.[7] This discourse was recently reflected on considerably in the (now expired) coalition agreement for the 20th legislative period (2021-25). That programme provided for the legalization of embryo donation and elective single embryo transfer, as well as the establishment of a commission to examine egg donation and altruistic surrogacy.[8] However, legislative implementation failed to materialize.

The discourse is triggered by the fundamental constitutional and thus ethical questions raised by surrogacy. Article 1 paragraph 1 of the German constitution (*Grundgesetz* or Basic Law) protects the human dignity of all those involved, including the (surrogate) mother and the child-to-be,[9] and prohibits the commercialisation of the human body and the exploitation of women.[10] At the same time, Article 2 paragraph 1 guarantees the free development of one's personality,[11] which may also include the right to freely decide on family planning.[12] Furthermore, surrogacy affects other fundamental rights, such as the protection of marriage and family under Article 6 paragraph 1 of the Constitution,[13] which, according to certain opinions, includes the right to freedom of reproduction.[14] The right to physical integrity of the parties involved under Article 2 paragraph 2 sentence 1 is also affected.[15] It can thus be stated that the topic of surrogacy is located in a tense relationship between various fundamental legal ethical principles, which manifests itself in a lively legal policy discourse.

---

[6] cf BT-Drs 11/5460, 7, 15.

[7] cf Heribert Kentenich and Klaus Pietzner, 'Probleme der Reproduktionsmedizin in Deutschland aus medizinischer und psychosozialer Sicht' in Henning Rosenau (ed), *A Contemporary Reproductive Medicine Act for Germany* (Nomos 2012) 13, 31; Jens Kersten, 'Regulatory mandate for the state in the field of reproductive medicine' (2018) 37 NVwZ 1248, 1251; Günther, Taupitz and Kaiser (n 4) B.I. para 8.

[8] cf Coalition Agreement 2021–2025 between the Social Democratic Party of Germany, Alliance 90/The Greens and the Free Democratic Party, <https://www.spd.de/fileadmin/Dokumente/Koalitionsvertrag/Koalitionsvertrag_2021-2025.pdf> accessed 8 March 2025, 92.

[9] Udo Di Fabio, 'Art 2 GG' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz-Kommentar* (105th supplement, C.H. Beck 2025) para 17; Hartmut Kreß, 'Leihmutterschaft: Normative Eckpunkte für rechtliche Klärungen ' (2022) 40 MedR 881, 885.

[10] So-called "Objektformel". See BVerfGE 9, 89 = NJW 1959, 427 (Federal Constitutional Court); Matthias Herdegen, 'Art 1 GG' in Dürig, Herzog and Scholz (n 9) para 36.

[11] BVerfGE 9, 89 = NJW 1989, 2525; Friedhelm Hufen, *Staatsrecht II – Grundrechte* (10th edn, C.H. Beck 2023) section 14 para 5; Stefan Rixen, 'Art 2 GG' in Michael Sachs (ed), *Grundrechtskommentar* (10th edn, C.H. Beck 2024) para 42.

[12] cf Wolfgang Eichberger, 'Art. 2 GG' in Peter Huber and Andreas Voßkuhle (eds), *Grundgesetz Kommentar* (8th edn, C.H. Beck 2024) para 29; Gerrit Manssen, *Staatsrecht II – Grundrechte* (20th edn, C.H. Beck 2024) para 265.

[13] Hufen(n 11) section 16 para 14; Hans Jarass, 'Art 6 GG' in Hans Jarass and Bodo Pieroth (eds), *Grundgesetz für die Bundesrepublik Deutschland Kommentar* (18th edn, C.H. Beck 2024) para 9; Manssen (n 12) para 482.

[14] Dagmar Coester-Waltjen, 'Reproduktive Autonomie aus rechtlicher Sicht' in Claudia Wiesemann and Alfred Simon (eds), *Patient Autonomy – Theoretical Foundations – Practical Applications* (Mentis 2013) 222, 223; Hufen (n 11) section 16 para 14; Ralf Müller-Terpitz, 'Art 2 GG' in Andreas Spickhoff (ed), *Medizinrecht Kommentar* (4th edn, C.H. Beck 2022) para 10.

[15] Hufen (n 11) section 10 para 7; Hans Jarass, 'Art 2 GG' in Jarass and Pieroth (n 13) para 123; Manssen (n 12) para 316.

II. Structure, objectives and methodology of this thesis

This article aims to contribute to finding a solution concerning the need for regulation of surrogacy. In order to analyse the legal and ethical implications, as a basis for a proposed solution, it is first necessary to take a detailed look at the medical-legal foundations of surrogacy (B.). Building on this, the article is dedicated to ethical areas of conflict, such as the autonomy of the intended parents or the best interests of the child (C.). Subsequently, the German legal situation is presented, relating to its weaknesses in criminal and civil law, and contrasted with the ethical assessment carried out earlier (D.). This is followed up on by a legal comparison of selected legal regimes, in order to obtain suggestions for the necessary reforms of surrogacy law (E.). Finally, the results are summarized and potential regulatory possibilities for a law on reproductive medicine are highlighted (F.).

B. Medical-legal foundations of surrogacy

The following section discusses the basic medical aspects to surrogacy, including their legal context (I.). Furthermore, indications, associated risks, and success rates are presented (II.).

I. Conceptual foundations and typology of surrogacy

First of all, it is advisable to differentiate between the different types of surrogacy procedures (1.). These must also be distinguished from other types of reproductive medicine procedures (2.).

1. Systematization of different medical forms of surrogacy

Surrogacy is an assisted reproduction procedure in which a woman - the surrogate mother - carries a child for another person or a couple - the intended parents.[16] There are two main forms of surrogacy: traditional and gestational surrogacy.[17] In traditional surrogacy, the surrogate mother is fertilized with the sperm of the intended parent or a donor. The surrogate mother is thus the genetic mother of the child.[18] Although traditional surrogacy does not fall under the penal provision of section 1 paragraph 1 number 7 of the

[16] cf Heribert Kentenich, 'Sollte die Leihmutterschaft verboten werden?' (2023) 51 gynäkologische praxis 187, 189; Christoph Markwardt, 'Art 22 EGBGB' in Beate Gsell and others (eds), *Beck-online. GROSSKOMMENTAR Zivilrecht* (C.H. Beck September 2025) para 33.

[17] Marion Depenbusch and Askan Schultze-Mosgau, 'Leihmutterschaft' in Klaus Diedrich, Michael Ludwig and Georg Griesinger (eds), *Reproduktionsmedizin* (Springer 2013) 297, 298; Kentenich (n 16) 189; Sarah Tschudin and Georg Griesinger, 'Leihmutterschaft' (2012) 10 Gynäkologische Endokrinologie 135, 135.

[18] Kentenich (n 16) 189; Tschudin and Griesinger (n 17) 135; Olga van den Akker, 'Psychological trait and state characteristics, social support and attitudes to the surrogate pregnancy and baby' (2007) 22 Human Reproduction 2287, 2287.

ESchG,[19] its mediation in particular nonetheless constitutes a breach of section 13a number 1 variant 2, sections 13b and 13c of the Law on Adoption Placement (*Adoptionsvermittlungsgesetz* – AdVermiG) and may be criminally sanctioned pursuant to section 14b of the same law.[20] It therefore remains undesirable in the eyes of the legal system.[21]

In gestational surrogacy, on the other hand, the egg of the intended parents or a donor is fertilized *in vitro* with the sperm of the intended parent or a donor.[22] The cells or the embryo are then transferred to the surrogate mother's uterus. The surrogate mother is therefore not the genetic mother of the child.[23] This form of surrogacy is expressly prohibited under section 1 paragraph 1 number 7 ESchG.[24]

2. Related terms and procedures in reproductive medicine

To be distinguished from surrogacy medically and legally, but still closely related to the topic, are egg and embryo donation, in which the intended mother herself takes on the pregnancy with corresponding genetic foreign material.[25] The actions necessary for this purpose are punishable under section 1 paragraph 1 numbers 1 and 6 ESchG.[26] Just like surrogacy, egg donation in particular is often the focus of liberalization debates.[27] Elective single embryo transfer (eSET), which is not a form of donation but an *in vitro* fertilization procedure, should also be mentioned. In that case, the egg cells are evaluated in the various stages before and after *in vitro* fertilization for their timely development.[28] The aim is to identify the embryo that has optimal development potential, and to transfer only this embryo.[29] In contrast to so-called preimplantation genetic diagnosis, which is

[19] Ralf Müller-Terpitz, '§ 1 ESchG' in Spickhoff (n 14) para 20; Luise Paetow, 'Sollte die Leihmutterschaft in Deutschland zulässig sein?' (2022) 5 KriPoZ 346, 347.

[20] cf OLG Hamm NJW 1985, 2205 (Higher Regional Court of Hamm); Hans-Joachim Lutz, '§ 13a AdVermiG' in Georg Erbs and Max Kohlhaas (eds), *Strafrechtliche Nebengesetze* (54th edn, C.H. Beck 2025) para 4; Paetow (n 19) 348.

[21] cf BT-Drs 11/4154, 9 (government proposal).

[22] Eva Schumann, 'Familienrechtliche Fragen der Fortpflanzungsmedizin im Lichte des Grundgesetzes' in Rosenau (n 7) 155, 169–170.

[23] Kentenich (n 16) 189; Tschudin and Griesinger (n 17) 135.

[24] Müller-Terpitz (n 19) para 21; Paetow (n 19) 347.

[25] cf Bundesärztekammer (German Medical Association), 'Richtlinie zur Entnahme und Übertragung von menschlichen Keimzellen oder Keimzellgewebe im Rahmen der assistierten Reproduktion' (2022) 119(10) Deutsches Ärzteblatt A10.

[26] Jan Backmann, *Künstliche Fortpflanzung und internationales Privatrecht: Unter besonderer Berücksichtigung des Persönlichkeitsschutzes* (C.H. Beck 2002) 15; Taupitz Günther, Taupitz and Kaiser (n 4) section 1 paragraph 1 number 1, paras 2–3.

[27] cf Heribert Kentenich, 'Eizellspende und Leihmutterschaft – Sollte dies aus psychischen und ethischen Gesichtspunkten verboten bleiben?' (2025) 20 Ärztliche Psychotherapie 20, 20–22. See also Lina Wendland, 'The Legalisation of Egg Donation' (2024) 1 HeineLR 58.

[28] Uwe Körner, 'In-vitro-Kultur menschlicher Embryonen. Medizinische Möglichkeiten und Konsequenzen' (2003) 15 Ethik in der Medizin 68, 69; Hartmut Kreß, 'Kultivierung von Embryonen und Single-Embryo Transfer' (2005) 17 Ethik in der Medizin 234, 234.

[29] Günther, Taupitz and Kaiser (n 4) section 1 paragraph 1 number 3, paras 5–7.

punishable under section 3a paragraph 1 ESchG,[30] the eSET is based on pure observation and no genetic examinations of the embryo are carried out.[31] Whether eSET can be reconciled with the ESchG, which according to its conception rejects arbitrary embryo selection, is controversial.[32]

Finally, most procedures relating to medically assisted reproduction are associated with cryopreservation.[33] After removal, gametes are frozen directly in liquid nitrogen and thus permanently preserved ("cryopreserved") in their vitality.[34] The ESchG does not comment directly on the question of whether cryopreservation is permissible, although the doctors' reservation pursuant to section 9 number 4 ESchG implies its general admissibility.[35]

II. Medical indication, risks, and success rates of treatment

For a well-founded legal-ethical analysis, it is crucial to understand the medical motivation behind surrogacy (1.) as well as its risks (2.), and evaluate them (3.).

1. Causes of medically induced childlessness

Medically induced childlessness and thus the need for surrogacy result primarily from the infertility of the intended parents.[36] Globally, about 10% of couples are affected by infertility.[37] The absolute numbers of surrogacy are relatively low.[38] While 30% of infertility cases are due to genetic disorders in men and negative factors on the female side of the equation such as fallopian tube defects or hormonal disorders play a role in about 55% of cases, the cause remains unclear in the remaining cases.[39] In such cases, section 27a of the German Social Code, Book 5 (*Sozialgesetzbuch Fünftes Buch* - SGB V) grants couples the right to at least partial reimbursement of the costs of fertility

[30] cf Ralf Müller-Terpitz, '§ 3a ESchG' in Spickhoff (n 14) para 5; Hartmut Kreß, 'Präimplantationsdiagnostik und Fortpflanzungsmedizin angesichts des ethischen Pluralismus' (2010) 43 ZRP 201, 201.

[31] Jochen Taupitz, 'Welche Möglichkeiten bietet die moderne Auslegung des Embryonenschutzgesetzes?' (2009) 42 Der Gynäkologe 502, 502; Kreß (n 28) 234.

[32] Against: Hans Lilie, 'Neue rechtliche Konfliktfelder der Reproduktionsmedizin: Probleme der Dreierregel' (2006) 100 Zeitschrift für ärztliche Fortbildung und Qualitätssicherung 673, 674; Joachim Renzikowski, 'Embryonenauslese und "Dreierregel"' (2004) 2 Gynäkologische Endokrinologie 172, 176; In favour: Monika Frommel, 'Auslegungsspielräume des Embryonenschutzgesetzes' (2004) 1(2) Journal für Reproduktionsmedizin und Endokrinologie 104, 104–106; Taupitz (n 31) 503.

[33] cf Karl-Heinz Möller, 'Rechtliche Regelung der Reproduktionsmedizin in Deutschland' in Michael Ludwig and Georg Griesinger (eds), *Reproduktionsmedizin* (Springer 2013) 583, 596.

[34] cf Jürgen Liebermann and Frank Nawroth, 'Kryokonservierung' in Michael Ludwig and Georg Griesinger (eds), *Reproduktionsmedizin* (Springer 2013) 233, 234.

[35] Adolf Laufs, 'Nr. 3250' in Hans-Jürgen Rieger (ed), *Heidelberger Kommentar Arztrecht Krankenhausrecht Medizinrecht* (68th supplement, C.H. Beck 2017) para 1; Rüdiger Zuck, '§ 68' in Michael Quaas, Rüdiger Zuck and Thomas Clemens (eds), *Medizinrecht* (4th edn, C.H. Beck 2018) para 85.

[36] cf Kentenich (n 16) 190–191; Francoise Shenfield and others, 'ESHRE Task Force on Ethics and Law 10: Surrogacy' (2005) 20 Human Reproduction 2705, 2705

[37] Boivin and others (n 1) 1509; Widge (n 1) 60.

[38] cf Kentenich (n 16) 191; German National Academy of Sciences Leopoldina, *Fortpflanzungsmedizin in Deutschland – für eine zeitgemäße Gesetzgebung. Stellungnahme* (Leopoldina 2019) 79.

[39] Leopoldina (n 38) 20.

treatments under certain circumstances.[40] Convenience or lifestyle reasons, on the other hand, are only rarely the reason for surrogacy.[41]

2. Risk assessment, chances of success, and psychological impact

According to the majority of findings, gestational surrogacy carries medical risks for the surrogate mother and the child that are similar to a natural pregnancy.[42] They show rates of miscarriage comparable to other methods of artificial insemination, leading to parenthood in 30-70% of cases.[43] It also seems that the prenatal relationship with the surrogate mother does not give rise to any fear of developmental psychological damage.[44] In contrast, individual studies indicate an increased incidence of abnormal prenatal ultrasound findings or an increased fetal mortality.[45] Psychological studies have so far shown hardly any negative effects of surrogacy on the relationship between child and intended parents, although the data available is limited.[46] Some surrogate mothers experience psychological problems in the weeks after giving birth, but these subside and hardly cause any long-term stress.[47] The contact between surrogate mother and child is described by the surrogate mothers, if any, as predominantly harmonious.[48]

3. Final assessment and conclusion for further consideration

According to current medical evaluation, surrogacy thus has respectable success rates with justifiable medical risks. However, a final risk assessment requires further investigations on a broader data basis.[49] Against the background of the previous statements, however, there is currently professional agreement that the implementation of surrogacy does not generally violate the principle of *non nocere* (non-maleficence).[50] In this respect, from a medical perspective, no well-founded objections can currently be raised against regulated surrogacy.

---

[40] Christian Lang, '§ 27a SGB V' in Ulrich Becker and Thorsten Kingreen (eds), *SGB V – Gesetzliche Krankenversicherung* (9th edn, C.H. Beck 2024) para 1; Uwe Nebendahl, '§ 27a SGB V' in Spickhoff (n 14) para 1.

[41] Leopoldina (n 38) 78.

[42] Kentenich (n 16) 190; Shenfield and others (n 36) 2705; Viveca Söderström-Anttila and others, 'Surrogacy: outcomes for surrogate mothers, children and the resulting families – a systematic review' (2015) 22 Human Reproduction Update 260, 262.

[43] cf Söderström-Anttila and others (n 42) 262.

[44] cf Axel Schölmerich, 'Entwicklungspsychologische Aspekte der Leihmutterschaft' in Edward Schramm and Michael Wermke (eds), *Leihmutterschaft und Familie. Impulse aus Recht, Theologie und Medizin* (Jena 2018) 209, 211–212, 214.

[45] cf Rhea Chattopadhyay and others, 'What patient factors affect success in women utilizing frozen donor eggs? A SART database analysis' (2020) 114(3) Fertility and Sterility 274.

[46] Vasanti Jadva and others, 'Surrogacy: the experiences of surrogate mothers' (2004) 18 Human Reproduction 2196, 2202; Tschudin and Griesinger (n 17) 137; Van den Akker (n 18) 2294.

[47] Susan Golombok and others, 'Surrogacy families: parental functioning, parent–child relationships and children's psychological development at age 2' (2006) 47 JCPP 213, 219; Jadva and others (n 46) 2203.

[48] cf Golombok and others (n 47) 219; Jadva and others (n 46) 2201.

[49] See also Schölmerich (n 44) 214.

[50] cf Kreß (n 9) 883. See also below under C.II.1.

C. Ethical conflicts of values and ways to overcome them

Building on the medical evaluation, this section examines the conflicting principles of surrogacy in the light of the Constitution (I.) and bioethical principles (II.), concluding with a final evaluation (III.).

I. Field of conflict between self-determination and the best interests of the child

Ethically, it is necessary to weigh the reproductive freedom of persons who wish to have children (1.) against the protective rights of the pregnant woman (2.) and the well-being of the future child (3.), in order to arrive at a value-based judgment (4.). As the German Basic Law, through its fundamental rights, establishes an objective value system by providing universally binding principles that guide law, politics, and society,[51] the constitutional foundations of these positions are analysed in the following section.

1. The reproductive autonomy of the participants

The concept of reproductive autonomy, which is also recognised in jurisdictions other than Germany,[52] deals with ensuring reproductive health and individual freedom of choice over reproduction.[53] As a fundamental rights guarantee, the right to reproductive autonomy includes the freedom to decide for oneself on the "whether" and "how" of one's own reproduction.[54] It thus also extends to medically assisted reproduction.[55] The dogmatic derivation of this right is controversial.[56] The right to reproductive autonomy is at least partly founded in the general freedom of action under Article 2 paragraph 1 of the Basic Law.[57] However, since reproduction deeply interferes with the human self-image and has a close connection to human dignity, this derivation is not entirely convincing. The same applies to justification by way of Article 6 paragraph 1 of the Basic Law, which is sometimes advocated for.[58] More convincingly, that article only protects the raising of

[51] On the constitution as an objective value order: BVerfGE 9, 89 = NJW 1958, 257; Anne Katrin Diefenbach, *Leihmutterschaft – Rechtliche Probleme der für andere übernommenen Mutterschaft* (thesis, University of Frankfurt 1990) 119.

[52] cf Laura Klein, 'Reproduktive Freiheiten unter dem Grundgesetz' (2023) 56 KJ 9, 10; Kreß (n 9) 884.

[53] cf United Nations, *Programme of Action adopted at the International Conference on Population and Development* (1994) para 7.2.

[54] Ulrich Gassner and others, *Fortpflanzungsmedizingesetz – Augsburg-Münchener-Entwurf* (Mohr Siebeck 2013) 31; Klein (n 52) 10; Josef Franz Lindner, 'Verfassungsrechtliche Aspekte eines Fortpflanzungsmedizingesetzes' in Rosenau (n 7) 144.

[55] Dagmar Coester-Waltjen, 'Reformüberlegungen unter besonderer Berücksichtigung familienrechtlicher und personenstandsrechtlicher Fragen' (2002) 18 Reproduktionsmedizin 183, 188; Ulrich Gassner, 'Legalisierung der Eizellspende?' (2016) 49 ZRP 126.

[56] cf Dana-Sophia Valentiner, *Das Grundrecht auf sexuelle Selbstbestimmung* (Nomos 2021) 402.

[57] See also Coester-Waltjen (n 14) 226; Ulrich May, *Rechtliche Grenzen der Fortpflanzungsmedizin* (Springer 2003) 171.

[58] See also Hufen (n 11) section 16 para 14; Ralf Müller-Terpitz, 'Art 6 GG' in Spickhoff (n 14) para 2.

children by their parents, not the prior formation of a family.[59]

Instead, in view of its influence on one's way of life, starting a family, including procreation, is an aspect of personality development and therefore falls within the scope of protection of the general right of personality under Article 2 paragraph 1 in conjunction with Article 1 paragraph 1 of the Basic Law. The normative reference to Article 1 paragraph 1 of the Basic Law illustrates the high abstract value of the right to reproductive autonomy.[60] From this reference also follows that a restriction of the general right of personality, as is the case with the provisions of the ESchG already discussed,[61] is either inadmissible or can only be justified under strict proportionality requirements,[62] depending on the classification within the "sphere theory" developed by the Federal Constitutional Court. That theory outlines three levels of protection: intimate sphere (absolute personal freedom in the innermost matters), private sphere (limited interference in private relations), and social sphere (where the state can regulate for general welfare).[63]

In summary, the right to reproductive autonomy is a legal interest of paramount importance.[64] Both the intended parents and the pregnant woman are entitled to developing and keeping their personalities. Subject to classification within the private sphere, restrictions of this right are permissible only if conflicting important legal interests of constitutional status are affected.[65]

2. The protective rights of the pregnant woman and her availability

Such a conflicting legal interest could be constituted by the human dignity of the surrogate mother under Article 1 paragraph 1 of the Basic Law. This guarantees the protection of the individual from being degraded by the state or third parties to a mere object or instrument of alien interests.[66] With regard to possible violations of human dignity, there are differences in character between gestational (a.) and traditional surrogacy (b.).

---

[59] Peter Badura, 'Art 6 GG' in Dürig, Herzog and Scholz (n 9) para 2; Christian von Coelln and Johanna Fontana, 'Art 6 GG' in Sachs (n 11) para 45.

[60] cf Karl-Heinz Möller and Kyrill Makoski, 'Rechtliche Regelung der Reproduktionsmedizin in Deutschland' in Klaus Diedrich, Michael Ludwig and Georg Griesinger (eds), *Reproduktionsmedizin* (Springer 2020) 585, 585.

[61] Peter Häberle, '§ 1 ESchG' in Erbs and Kohlhaas (n 20) para 1; Müller-Terpitz (n 19) para 20.

[62] On the sphere theory: BVerfGE 34, 238 = NJW 1973, 891; BVerfGE 65,1 = NJW 1984, 419 (Federal Constitutional Court).

[63] BVerfGE 35, 202; with further references: Di Fabio (n 9) paras 158–160; Eichberger (n 12) para 173.

[64] See also Leonie Laubacher and Felix Ruppert, 'Mehr Selbstbestimmung in der Reproduktionsmedizin? Eizellspende und Leihmutterschaft im Abschlussbericht der Kommission' (2024) 57 ZRP 132, 135.

[65] Di Fabio (n 9) para 134; F Hufen (n 11) section 11 para 24.

[66] cf Herdegen (n 10) para 29; Udo Steiner, 'Art 1 GG' in Spickhoff (n 14) para 1.

a. Violation of human dignity in gestational surrogacy

In the case of gestational surrogacy, a violation of human dignity in the person of the surrogate mother could already result from the artificial nature of the procedure.[67] The restriction of the role of the gestational surrogate mother to the supplier of bodily functions in the absence of genetic kinship with the child, as well as her potential interchangeability, testify to a certain instrumentalization.[68] However, it is questionable whether the degree of instrumentalization reaches the level of a violation of human dignity.

An answer to this question can be provided by a comparison with living organ donation.[69] According to section 8 paragraph 1 of the Organ Transplantation Act (*Transplantationsgesetz* – TPG), living organ donation is permissible if it is medically justifiable, there is a prospect of success, and the donor is of legal age and capable of giving consent.[70] In the case of the removal of non-regenerative organs, the majority of cases,[71] a close relationship between donor and recipient is also required.[72] In surrogacy, an organ, namely the uterus, is also made available for a certain period of time. However, unlike living organ donation, the organ remains in the surrogate mother's body and is not given away permanently.[73] Rather, it is merely a temporary use for the sake of carrying of a child. Since the legislature has recognised the much more invasive procedure of living organ donation as permissible under strict conditions, a fundamental legislative value decision may be derived therefrom, making surrogacy appear to be compatible with human dignity.[74] However, whether gestational surrogacy in all conceivable forms is compatible with human dignity and which restrictions are necessary analogous to living organ donation requires further legal-ethical clarification by the legislator.

b. Violation of human dignity in traditional surrogacy

The accusation of a violation of human dignity is less serious in the case of traditional surrogacy, especially with regard to the woman's right to self-determination over her own

---

[67] See also Dagmar Coester-Waltjen, *Die künstliche Befruchtung beim Menschen – Zulässigkeit und zivilrechtliche Folgen, 2. Teilgutachten zum 56. Deutschen Juristentag* (C.H. Beck 1986) 91; Diefenbach (n 51) 150.

[68] For church positions, see the statement of the Protestant Church in Germany: Evangelische Kirche in Deutschland, *Zur Achtung vor dem Leben – Maßstäbe für Gentechnik und Fortpflanzungsmedizin* (EKD 1987) 4.3.

[69] Kreß (n 9) 885.

[70] cf Thomas Gutmann, '§ 8 TPG' in Ulrich Schroth, Peter König, Thomas Gutmann and Fuat Oduncu (eds), *Transplantationsgesetz Kommentar* (1st edn, C.H. Beck 2005) paras 7–9.

[71] cf Karl Heinz Schulz and Silvia Kröncke, 'Psychologische Evaluation und Beratung im Vorfeld einer Organ-Lebendspende' in Arnd May and others (eds), *Patientenverfügungen: Handbuch für Berater, Ärzte und Betreuer* (Springer 2016) 413, 414; Tschudin and Griesinger (n 17) 136.

[72] cf Gutmann (n 70) para 26.

[73] See also Kreß (n 9) 885.

[74] Contra Diefenbach (n 51) 153.

body.[75] Even in traditional surrogacy, the fact that the fertility of the surrogate mother is exploited comes into play. However, the surrogate mother remains genetically formative as an individual in this procedure, the choice of another surrogate mother necessarily resulting in the conception of a different child.[76] The woman therefore does not just function as a mere "incubator."[77]

In these cases, it is then incumbent on the public authorities, according to Article 1 paragraph 1 sentence 2 of the Basic Law, to safeguard the dignity of the women carrying the child.[78] However, the state does not have to protect a woman from herself as long as she voluntarily opts for the procedure.[79] Whether an objectification is apparent and thus human dignity is violated in both forms of surrogacy depends decisively on the extent to which the pregnant woman is influenced by others, for example through commercial incentives.[80] If the surrogate has been unduly influenced by others, her autonomy must be given priority due to the inalienable character of human dignity.[81] Even allowing for such surrogacy would then be contrary to human dignity. Consequently, the legislature would violate its constitutionally required duty of protection if it were to be legalised.

3. The protective rights of the unborn child

Concerning the child, questions of legal ethics first arise as to whether unconceived life enjoys protection at all (a.). It is then discussed which legal positions of the child are affected (b.).

a. The protective status of the developing life

Since contractual agreements, for example, are already made before conception, it must first be clarified to what extent life that has not yet been conceived also comes under the protection of human dignity. In any case, it is recognised that the protection of human dignity is afforded from the time of nidation, or implantation.[82] A widespread consensus affirms protection in the form of a claim to respect from conception onwards, since genetic individuality is already established at this point in time.[83] However, in view of

[75] cf Coester-Waltjen (n 67) B80–81; Commission on Reproductive Self-Determination and Assisted Reproduction, *Report* (Federal Ministry of Justice, 2024) <https://www.bmj.de/SharedDocs/Publikationen/DE/Fachpublikationen/2024_Bericht_Kom_218_StGB.html> accessed 8 March 2025, 464.

[76] cf Diefenbach (n 51) 150.

[77] Diefenbach (n 51) 150.

[78] cf Christian von Coelln and Michael Sachs, 'Art 20 GG' in Sachs (n 11) para 111; Kreß (n 9) 884; Tobias Linke, 'Die Menschenwürde im Überblick: Konstitutionsprinzip, Grundrecht, Schutzpflicht' (2016) 56 JuS 888, 892.

[79] cf Diefenbach (n 51) 125; Alexandra Goeldel, *Leihmutterschaft – eine rechtsvergleichende Studie* (Peter Lang 1993) 160–161.

[80] See also Diefenbach (n 51) 153; Goeldel (n 79) 160–161; Kreß (n 9) 885.

[81] Herdegen (n 10) para 73; Hufen (n 11) section 10 para 29.

[82] cf BVerfGE 39, 1 = NJW 1975, 573, 573 (Federal Constitutional Court); Rixen (n 11) para 143.

[83] cf Herdegen (n 10) para 71; Rixen (n 11) para 223b.

reproductive medicine developments, especially *in vitro* fertilization, a further advance of protection before conception is necessary, for example to condemn manipulations of germ cells.[84] Since such techniques are specifically geared towards the emergence of human life, they must affect the scope of protection of human dignity.[85] According to the view taken here, Article 1 paragraph 1 of the Basic Law therefore applies to reproductive medical measures even before conception, ensuring that a child planned in the context of surrogacy is also constitutionally protected. Human dignity is not linked to the individual bearer but to the "essence of the human being" as a species, adapting in its level of protection accordingly.[86]

b. Affected fundamental rights of the expected child

The legislator justifies the existing ban on surrogacy with the prevention of "split motherhood", which could endanger the well-being of the child.[87] In order to clarify the term, it must be noted that there is no universally valid definition of the term "best interests of the child."[88] Depending on the context in which the law is applied, the best interests of the child can also be dogmatically located in different constitutional provisions.[89] The normative demarcations between individual cases are controversial.[90] In the end, however, the best interests of the child can probably be summarised as the enabling conditions for child-friendly physical, mental and mental development rooted in the child's fundamental rights.[91] Which fundamental rights guarantees are hidden behind the concept of the child's best interests and are therefore relevant in the given context must be examined separately for each individual case.[92]

In the case of surrogacy, this could be, on the one hand, the right to physical integrity of the child under Article 2 paragraph 2 sentence 1 of the Basic Law. However, a violation of this right would probably only come into consideration if the circumstances of surrogacy

---

[84] cf Christian Starck, *Die künstliche Befruchtung beim Menschen – Zulässigkeit und zivilrechtliche Folgen, 1. Teilgutachten zum 56. Deutschen Juristentag* (C.H. Beck 1986) A17.

[85] See also Hartmut Kreß, 'Menschenwürde vor der Geburt. Grundsatzfragen und gegenwärtige Entscheidungsprobleme' in Hartmut Kreß and Hans-Jürgen Kaatsch (eds), *Menschenwürde, Medizin und Bioethik* (Aschendorff 2000) 11, 23; Starck (n 84) A17.

[86] On the differing level of protection: Herdegen (n 10) para 69. On the concept of human dignity more generally: Rixen (n 11) para 145b.

[87] cf BT-Drs 11/5460, 7, 15.

[88] cf Uwe Diederichsen, 'Zur Reform des Eltern-Kind-Verhältnisses' (1978) 25 FamFR 461, 468; Joachim Gernhuber, *Neues Familienrecht – Eine Abhandlung zum Stil des jüngeren Familienrechts* (Mohr Siebeck 1977) 104.

[89] cf Katharina Auer, *Kindeswohl im Fortpflanzungsmedizinrecht* (Duncker & Humblot 2024) 50.

[90] ibid 48–49.

[91] See also Bernd Jeand'Heur, *Verfassungsrechtliche Schutzgebote zum Wohl des Kindes und staatliche Interventionspflichten aus der Garantienorm des Art. 6 Abs. 2 Satz 2 GG* (Duncker & Humblot 1993) 17.

[92] On Article 2 paragraph 2 sentence 1 of the Basic Law: BVerfGE 162, 378 = NJW 2022, 2904, 2907 (Federal Constitutional Court); Auer (n 89) 65; Gerhard Robbers, 'Art 6 GG' in Huber and Voßkuhle (n 12) para 45.

regularly and unreasonably impair the medical development of the child.[93] According to the current state of research, there are no reliable indications of this sort.[94] Consequently, the implementation of surrogacy does not lead to a violation of the rights of the child under Article 2 paragraph 2 sentence 1 of the Basic Law.[95]

A further violation of a fundamental right guarantee could be seen in the instrumentalization of the child as a commodity, contrary to its human dignity. Through the contractual surrogacy agreement, the child could become the object of economic interests, which calls into question its intrinsic value and its self-purposefulness.[96] An impermissible violation of human dignity would therefore always be assumed if the specific surrogacy agreement disregards the intrinsic value of the child.[97] This must be taken into account when discussing possible commercial liberalization approaches to surrogacy.

Finally, another relevant legal position of the child is the right to know its parentage under Article 2 paragraph 1 in conjunction with Article 1 paragraph 1 of the Basic Law.[98] The existence of this right is justified by the fact that the development of identity and health, especially with regard to hereditary diseases and the avoidance of incestuous connections, are inextricably linked to parentage.[99] Therefore, when considering liberalizing surrogacy, adequate transparency in the interest of the child-to-be is essential.

4. Final assessment on the basis of constitutional interests

The right to reproductive autonomy is a highly valued, but not an absolutely protected, legal good, and can be restricted by conflicting constitutional interests. Limits can lie in the human dignity of the woman carrying the child. However, a differentiated consideration of the various design options is still necessary in this regard. Furthermore, the child also enjoys protection of their human dignity, even before conception. Above all, commercialization of the child in the context of the conclusion of the contract opposes to human dignity. In the case of a possible liberalisation, the child's potential knowledge of parentage would also have to be legally ensured.

---

[93] On the level of protection under Article 2 paragraph 2 sentence 1 of the Basic Law: Rixen (n 11) paras 147–148, 223b.

[94] See above under B.II.2.

[95] cf Goeldel (n 79) 158.

[96] cf Diefenbach (n 51) 144–145; Silvia Dietrich, *Mutterschaft für Dritte* (Peter Lang 1989) 458; Goeldel (n 79) 159.

[97] See also Goeldel (n 79) 159.

[98] cf Diefenbach (n 51) 140.

[99] BVerfGE 79, 256 = NJW 1989, 891, 892 (Federal Constitutional Court); Di Fabio (n 9) para 212.

II. Surrogacy in the light of bioethical principles

In addition to the constitution, the bioethical principle model conceived by *Beauchamp* and *Childress* can serve to resolve the legal ethical tension described above.[100] They comprise the principles of respect for autonomy (the right to informed self-determination), non-maleficence (the obligation to do no harm), beneficence (the obligation to act in the patient's best interest), and justice (fairness in the distribution of burdens and benefits). These four, in terms of biomedicine globally recognised principles provide a framework for argumentation and ensure that all relevant perspectives are included in the consideration.[101] Less extensively discussed below are the principles of non-harm and beneficence (1.) in view of the medical assessment that has already been made. Instead, the focus should be on the principle of respect for autonomy (2.). This is followed by a consideration of the principle of justice (3.) and a summary of the findings (4.).

1. Surrogacy and the principle of non-harm and care

The principle of non-harm (*primum non nocere*) states that no avoidable harm may be inflicted on anyone.[102] The principle of beneficence (*principium beneficentiae*) complements the principle of non-harm by demanding not only the avoidance of harm, but also the active promotion of the well-being of others.[103] Medically not indicated interventions for the benefit of third parties, such as in the case of surrogacy, require special justification.[104] Taking into account the high importance of the reproductive autonomy of the intended parents, as described, a voluntarily assumed risk of harm to the woman or child can be justified, provided that the risk of harm that does exist remains within the medically justifiable framework, as is the case here.[105] Surrogacy is therefore ethically justifiable in principle with regard to the principle of non-harm, but would have to be limited to the extent necessary for the medical protection of the surrogate mother or the child, for example in the case of existing risk-increasing diseases.[106]

In addition, the setting of age limits should be considered in order to avoid medical and psychological risks for the child that may arise from an advanced age of the intended parents or the person carrying the child. This necessity to impose conditions like age limits is directly dictated by the principles of non-maleficence and beneficence, which

---

[100] cf Tom L Beauchamp and James F Childress, *Principles of Biomedical Ethics* (8th edn, OUP 2019) 12.
[101] cf Tom L Beauchamp, 'Principles of Biomedical Ethics' in Nikola Biller-Andorno, Christian Lenk and Jochen Vollmann (eds), *Medizinethik* (Springer 2002) 71, 84.
[102] Beauchamp and Childress (n 100) 117–118.
[103] ibid 166–168.
[104] cf Commission on Reproductive Self-Determination and Assisted Reproduction (n 75).
[105] cf Kentenich (n 27) 23. See also above under B.II.2.
[106] cf Rixen (n 11) para 174.

impose a primary ethical obligation to shield the child from foreseeable medical and psycho-social risks, thus ensuring the child's well-being is the ultimate limiting factor on parental reproductive autonomy.[107]

2. Surrogacy and conceivable conflicts with the principle of autonomy

The principle of patient autonomy (*salus ex voluntate aegroti suprema lex*) is a principle of medical law enshrined in section 630d paragraph 1 sentence 1 of the German Civil Code (*Bürgerliches Gesetzbuch* – BGB), among others.[108] It is essentially based on the concept of *informed consent*.[109] In the context of surrogacy, the basic conditions of *informed consent* with regard to free will (a.) and the absolutely necessary extent of patient information through counselling (b.) will now be examined in order to arrive at an intermediary conclusion (c.).

a. Economic interests and their contravention of informed consent

The basis of not just *informed consent* but all consent is that a patient decides to undergo treatment out of their freely determined will.[110] However, assuming an act of free will is problematic when socio-economic motives guide action.[111] There must therefore be a distinction between commercial (aa.) and altruistic surrogacy (bb.).

i. Autonomy in commercial surrogacy

A person acts commercially when they intend to make a profit in offering a good or service.[112] As already indicated in the context of human dignity, the pursuit of economic gain carries the risk that the surrogate mother will be degraded to an instrument of commercial purposes and *de facto* lose her self-determination.[113] The concept of dignity itself is already distinct from purely economic considerations.[114] No material value may be attributed to a truly dignified being.[115] In particular, precarious financial circumstances, social and structural dependencies or a lack of knowledge can prompt women to opt for surrogacy.[116] If commercialization were allowed in the context of a liberalization of

[107] cf Kentenich (n 27) 24.

[108] cf BVerfGE 115 25 = NJW 2006, 891 (Federal Constitutional Court); BSG NZS 2020, 590, 597 (Federal Social Court); Beauchamp and Childress (n 100) 63.

[109] Beauchamp and Childress (n 100) 80; Alexandra Esser, *Ist das Verbot der Leihmutterschaft in Deutschland noch haltbar?* (Nomos 2018) 103–104.

[110] Beauchamp and Childress (n 100) 59.

[111] ibid 60–61.

[112] cf Commission on Reproductive Self-Determination and Assisted Reproduction (n 75) 486.

[113] Dietrich (n 96) 331–332; Hande Ince, 'Leihmutterschaft – Ein Überblick' in Claude Arditta and others (eds), *Retortenmütter – Zum Problem der Leihmutterschaft* (Campus 1987) 75, 89.

[114] Kreß (n 85) 11, 13.

[115] ibid.

[116] cf François Isambert, 'Génétique et société' in *Actes du Colloque Génétique et Société* (Société Française de Sociologie 1987) 285, 295.

surrogacy, this would create the basis for exploitation, thus for violations of human dignity and the principle of autonomy. Incidentally, the prohibition of commercialisation is also legally indicated by Article 3 paragraph 2 letter c of the EU Charter of Fundamental Rights.[117]

In nations with the legal possibility of commercial surrogacy, such as Georgia or Ukraine, such abuse is evident.[118] There, social inequalities create the conditions for the abuse of the pregnant woman, which are often exploited by German citizens in the context of surrogacy tourism.[119] Permitting surrogacy where women are treated as disposable is therefore ethically unjustifiable with regard to the principle of autonomy.[120]

ii. Autonomy in altruistic surrogacy

On the other hand, the altruistic form of surrogacy appears to be more compatible with the principle of autonomy. Altruistic surrogacy means that the compensation of the surrogate mother only covers the pregnancy-related costs and is not aimed at profit.[121] The compatibility mentioned above can be illustrated by a comparison with the legal concept of organ donation. Pursuant to section 17 paragraph 1 sentence 1 TPG, it is not permissible to make an economic profit from the trade in organs or tissues, while the reimbursement of expenses is permissible according to section 17 paragraph 1 sentence 2 number 1 TPG.[122] There, the legislator denies the motive of obtaining a financial advantage through the donation. At the same time, however, the aim is to prevent the donor from being off worse after the donation.[123]

Such an approach protects the right to reproductive autonomy of the intended parents and the surrogate mother, without jeopardizing the autonomy and dignity of the surrogate mother.[124] Nevertheless, it must be critically questioned whether it is an inadmissible instrumentalization if the egg donor or surrogate mother does not receive adequate compensation at all.[125] If no financial compensation is offered, the surrogate

---

[117] Charter of Fundamental Rights of the European Union [2012] OJ C 326/02; cf Commission on Reproductive Self-Determination and Assisted Reproduction (n 75) 484.

[118] Commission on Reproductive Self-Determination and Assisted Reproduction (n 75) 425; Philipp Kvit and Andreas Spickhoff, 'Rechtliche Einordnung der Leihmutterschaft in Deutschland' (2023) 70 FamRZ 653, 654. See also below under E.III.

[119] cf Auer (n 89) 241; Diel (n 2) 17; Kentenich (n 16) 189; Commission on Reproductive Self-Determination and Assisted Reproduction (n 75) 482.

[120] See also Commission on Reproductive Self-Determination and Assisted Reproduction (n 75) 491; Leopoldina (n 38) 86.

[121] cf Andrea Büchler, 'Leihmutterschaft – Ein Thema für das Familienrecht' [2021] juridikum 331, 337; Commission on Reproductive Self-Determination and Assisted Reproduction (n 75) 486.

[122] Peter Häberle, '§ 17 TPG' in Erbs and Kohlhaas (n 20) para 3; Hans Scholz and Marc Middel, '§ 17 TPG' in Spickhoff (n 14) para 1.

[123] cf BT-Drs 13/4355, 15 (legislative proposal); BT-Drs 13/8017, 44 (committee proposal).

[124] cf Commission on Reproductive Self-Determination and Assisted Reproduction (n 75) 488; Leopoldina (n 38) 84.

[125] cf Commission on Reproductive Self-Determination and Assisted Reproduction (n 75) 488.

mother's burdens and expenses are sometimes not sufficiently appreciated.[126] However, remuneration beyond the expense allowance could be problematic, as it carries the risk that the child will become the object of contractual negotiation between the intended parents and the surrogate mother, impermissibly violating the human dignity of the child.[127] For example, it would be conceivable that the child would be measured by the price paid for it, or that conflicts on the child's back would arise from the remuneration agreement.[128]

Although economic motives do not exclude self-determination *per se*, the prospect of remuneration can promote abuse and exploitation in an unavoidable way and thus undermine the autonomy of the birth mother.[129] Any form of remuneration that goes beyond an expense allowance is to be rejected in this respect. Nevertheless, altruistic surrogacy in this sense appears to be principally ethically justifiable with regard to the principle of autonomy.

b. Necessity of and design options for guidance

The basis of medical action is advice and education, and their understanding of all medical and health aspects.[130] Comprehensive, independent and mandatory psychosocial counselling for all those involved in surrogacy would therefore be central to ensuring autonomous *informed consent*.[131] This counselling would have to take place before, during and after surrogacy, and include cases of failure or miscarriage. In order to exclude profit-oriented and thus autonomy-restricting interests, advice would have to be provided by independent, non-profit structures.[132] In terms of content, it would have to address medical, psychological and social risks, individual burdens, and the rights of the child in an interdisciplinary manner.[133]

The legal framework at home and abroad as well as alternatives to surrogacy such as adoption or foster care must also be addressed.[134] Supplementary social counselling would have to ensure that economic emergencies do not form the basis for decision-making.[135] In order to enable a reflected decision, a waiting period between the

[126] ibid 490.
[127] cf Dietrich (n 96) 458; Goeldel (n 79) 159. See also above under C.I.3.b.
[128] cf Goeldel (n 79) 159.
[129] On the influence of economic motives: Commission on Reproductive Self-Determination and Assisted Reproduction (n 75) 487–488.
[130] Kentenich (n 27) 24.
[131] See also Kentenich (n 16) 192; Leopoldina (n 38) 95; Paetow (n 19) 354.
[132] On the UK model: Kreß (n 9) 886.
[133] cf Commission on Reproductive Self-Determination and Assisted Reproduction (n 75) 469; Leopoldina (n 38) 95.
[134] Kentenich (n 16) 192.
[135] cf Leopoldina (n 38) 95.

consultation and the start of treatment should be considered.[136] It is therefore clear that in the event of a liberalisation of surrogacy, a legal regulation is needed that guarantees a comprehensive range of counselling services. This is the only way to protect the autonomy of those involved, instead of pushing intended parents into a surrogacy tourism that is poor in education, as is currently the case.[137]

c. Final assessment and conclusion for further consideration

Commercial surrogacy is ethically unjustifiable, as it unduly endangers the autonomy of the surrogate mother through economic constraints. Altruistic surrogacy, on the other hand, is compatible with the principle of autonomy, provided that comprehensive and independent advice is given by and to all parties involved.

3. Tensions between surrogacy and the principle of justice

Similar to Article 3 of the Basic Law, the principle of justice requires that people be treated equally and that burdens and benefits be distributed appropriately.[138] It can be subdivided into the three dimensions of distributive justice (a.) as well as procedural justice, and commutative justice (b.).[139]

a. Surrogacy and problems concerning distributive justice

Distributive justice describes the appropriate distribution of goods and burdens.[140] Commercial surrogacy would counteract distributive justice in such a way that access to surrogacy would be reserved for financially privileged people.[141] It can therefore be stated that commercial surrogacy is also ethically unjustifiable from the point of view of justice. In the case of altruistic surrogacy, the question arises as to whether the community of solidarity should also assume the financial burdens of altruistic surrogacy.[142] On the one hand, burden-sharing could reduce inequalities by making access independent from income. On the other hand, according to the legal concept of sections 27 paragraph 1 sentence 1, 27a paragraph 1 number 1 SGB V, only medically necessary treatments are covered by mandatory health insurance.[143] However, surrogacy might be considered

---

136 cf Kentenich (n 16) 192; Paetow (n 19) 354.

137 See also Auer (n 89) 254–255.

138 cf Beauchamp and Childress (n 100) 226–229; Hans Jarass, 'Art 3 GG' in Jarass and Pieroth (n 13) para 1; Ferdinand Wollenschläger, 'Art 3 GG' in Huber and Voßkuhle (n 12) para 67.

139 Beauchamp and Childress (n 100) 226–229; Tom L Beauchamp, 'Der „Vier-Prinzipien"-Ansatz in der Medizinethik' in Nikola Biller-Andorno and others (eds), *Medizinethik* (Springer 2021) 71, 79.

140 Beauchamp and Childress (n 100) 267–268; Barbara Prainsack and Alena Buyx, *The Principle of Solidarity* (Campus 2016) 39.

141 cf Esser (n 109) 143.

142 cf Friederike Wapler, 'Reproduktive Autonomie und ihre Grenzen – Leihmutterschaft aus verfassungsrechtlicher Perspektive' in Schramm and Wermke (n 44) 107, 134.

143 cf BAG NZS 1998, 477, 477; 1998, 525, 525 (Federal Social Court).

merely a medically unindicated wish fulfilment.[144] This could be countered by citing the fact that childlessness is usually based on the infertility of the parents due to illness.[145] As a compromise, the costs of independent advice could be covered in order to ensure informed consent and the protection of all parties involved.

b. Procedural justice and commutative justice

Transparent processes are required for procedural justice,[146] especially through the comprehensive and independent advice of all parties involved, which has already been discussed. Finally, commutative justice requires an equal exchange between the surrogate mother, the intended parents and the child.[147] This could be ensured by the surrogate mother's rights to information and communication, or mandatory meetings with the intended parents.[148] Financial dependencies in commercial surrogacy would once again be detrimental to a commutative relationship between the parties involved.[149]

4. Final assessment based on bioethical principles

While the principles of non-harm and care are upheld, the principles of autonomy and justice pose a problem in commercial surrogacy, as economic interests jeopardize voluntariness and fair distribution. Altruistic surrogacy, on the other hand, is compatible with all principles, provided that comprehensive and independent counselling is made mandatory and affordable.

III. Final ethical assessment of surrogacy forms

In the course of the constitutional and principle-oriented debate, it has become clear that commercial surrogacy is to be rejected. It contradicts both the principle of autonomy and the principle of justice, and holds considerable potential for injury to the human dignity of the surrogate mother and the best interests of the child. Altruistic surrogacy, on the other hand, both in gestational and traditional form, is justifiable under strict conditions, in particular comprehensive counselling. In any case, a liberalization of surrogacy requires regulations that prevent the instrumentalization of surrogate mother and child.

---

[144] cf Kentenich (n 16) 188.
[145] See B.II.1 on the causes of childlessness.
[146] cf Miriam Rose, 'Familie in der aktuellen kirchlichen Debatte' in Schramm and Wermke (n 44) 223, 228.
[147] cf Leopoldina (n 38) 94–95.
[148] ibid.
[149] cf Rose (n 146) 223, 228.

D. Current legal situation in the Federal Republic of Germany

In the following sequence, it will be shown to what extent the German legal situation deviates from this ethical assessment. To this end, the criminality of surrogacy (I.) is outlined first, then civil law regulations on surrogacy contracts (II.), and finally its treatment in family law (III.). Subsequently, the findings are critically contrasted with the previous ethical evaluation and examined with respects to their weaknesses (IV.).

I. The current criminal prohibition of surrogacy

In these next few paragraphs, the basics revolving around the criminal prohibition of surrogacy (1.) and the criminal consequences of surrogacy tourism (2.) are discussed.

1. Normative foundations, criminal offences, and groups of perpetrators

In Germany, there is no special law on reproductive medicine. Surrogacy is regulated by the ESchG and the AdVermiG. Section 1 paragraph 1 number 7 ESchG sanctions gestational surrogacy.[150] Section 13a AdVermiG complementarily covers natural insemination and thus also traditional surrogacy as surrogacy within the meaning of the AdVermiG, in order to comprehensively prevent their mediation.[151] According to sections 13c, 14b paragraph 1 AdVermiG, the surrogacy placement (the arrangement or brokerage of a surrogate mother to intended parents) is punishable, while the search or offer for one is an administrative offence according to section 14 paragraph 1 number 2 letter c AdVermiG.[152]

Perpetrators in the sense of section 1 paragraph 1 number 7 ESchG can be doctors or scientists. The surrogate mothers and intended parents go unpunished according to section 1 paragraph 3 number 2 ESchG. The legislator classifies their behaviour as unlawful (not justified or even excused), but nevertheless refrains from punishment.[153] This is justified by the arguments that surrogate mothers and intended parents cannot grasp the risks of reproductive techniques, that the surrogate mother develops an emotional bond with the child, and that the intended parents' desire to have their own child seems, while still not acceptable, at least somewhat understandable.[154]

---

[150] Müller-Terpitz (n 19) para 20; Paetow (n 19) 347.
[151] Lutz (n 20) para 4; Paetow (n 19) 348.
[152] cf Hans-Joachim Lutz, '§ 13c AdVermiG' in Erbs and Kohlhaas (n 20) para 1; Hans-Joachim Lutz, '§ 14 AdVermiG' in Erbs and Kohlhaas (n 20) para 1.
[153] cf Günther, Taupitz and Kaiser (n 4) section 1 para 30.
[154] cf BT-Drs 11/5640, 10.

2. Surrogacy tourism in the context of the applicability of German criminal law

In accordance with the territorial principle of section 3 of the German Criminal Code (*Strafgesetzbuch* – StGB), German criminal prohibitions apply in principle only to offences committed in Germany.[155] However, acts related to surrogacy carried out abroad can also be punishable under German law.[156] This applies to doctors who, in Germany, carry out preparatory acts for surrogacy taking place abroad, as the location of the participant is decisive for the criminality of participating in an offence (section 9 paragraph 2 sentence 1 StGB).[157] Doctors who, for example, pre-examine interested parties or recommend foreign contacts, can be liable to prosecution for aiding and abetting (section 27 StGB) an offence under section 1 paragraph 1 number 7 ESchG.[158] According to section 9 paragraph 2 sentence 2 StGB, this applies even if surrogacy is legal in the respective foreign country.[159]

Criminal liability requires that the doctor's actions are causal for the subsequent surrogacy, by supporting or fostering it.[160] The doctor must also be aware of the intended surrogacy, in order to act with intent.[161] Incitement to surrogacy carried out abroad can also be punishable, as per section 26 StGB.[162] This would be the case if a doctor suggests to his patients that surrogacy be carried out abroad, provoking the decision to commit that crime.[163] As a result, German doctors can also be prosecuted for various behaviours related to surrogacy carried out abroad.

II. The legal validity of surrogacy contracts

In cases of gestational surrogacy, the nullity of any contracts results from the explicit condemnation by the ESchG, in conjunction with § 134 BGB.[164] Although traditional surrogacy is not subject to the criminal provisions of the ESchG, contracts are voided due to immorality according to section 138 BGB, in view of the judgement felled by the

[155] Edward Schramm, 'Das verbotene Kind – Zur (straf-)rechtlichen Bewertung der Leihmutterschaft in Deutschland' in Schramm and Wermke (n 44) 61, 67.

[156] cf Leopoldina (n 38) 69.

[157] Martin Heger, '§ 9 StGB' in Karl Lackner, Christian Kühl and Martin Heger (eds), *Strafgesetzbuch Kommentar* (30th edn, C.H. Beck 2023) para 3; Dorothea Magnus, 'Kinderwunschbehandlungen im Ausland' (2015) 35 NStZ 57, 57–58.

[158] Schramm (n 155) 61, 67.

[159] cf KG Berlin MedR 2014, 498, 498 (Higher Regional Court for Berlin).

[160] cf Günther, Taupitz and Kaiser (n 4) section C.II. para 26.

[161] On intent on the side of the participants: BGH NStZ 1999, 399, 399-401 (Federal Court of Justice); Magnus (n 159) 59.

[162] cf Magnus (n 157) 60; Paetow (n 19) 347.

[163] ibid.

[164] AG Hamm BeckRS 2011, 25140 (Local Court in Hamm, North Rhine-Westphalia); BT-Drs 11/5460, 16; Nina Dethloff, 'Leihmütter, Wunscheltern und ihre Kinder' (2014) 69 JZ 922, 923.

AdVermiG.[165] Generally, a contract that regulates the placement of a child for remuneration and turns the child into a commodity violates human dignity and is thus deemed amoral in the sense of section 138 BGB.[166] The nullity results in claims of the intended parents to repayment under the law of unjust enrichment (*condictio indebiti*).[167]

III. Legal maternity and paternity in surrogate mothers

The status of legal parenthood carries far-reaching legal consequences, such as in relation to custody or a subsequent inheritance.[168] For this reason, legal maternity (1.) and paternity (2.) as well as the treatment of foreign status decisions (3.) are discussed below.

1. Legal maternity: *Mater semper certa est*

According to section 1591 BGB, the mother of any child is simply the woman who gave birth. This legal classification excludes the genetic mother from legal motherhood, even in the case of egg or embryo donation.[169] The intended mother or egg and embryo donors could only become legal mothers by way of adoption in accordance with sections 1741 and 1754 BGB.[170] Legally challenging the motherhood of the woman giving birth is as of yet impossible under German law.[171] In higher-ranking constitutional law, it is sometimes argued that the genetic mother should also enjoy the protection of motherhood and family welfare granted under Article 6 paragraph 4 of the Basic Law.[172] While current ordinary law excludes split motherhood, it is therefore considered conceivable in constitutional law.

2. Legal paternity: *Pater est, quem nuptiae demonstrant*

Legal paternity is governed by section 1592 BGB. If the surrogate mother is married, her husband is considered the legal father by current operation of law.[173] However, the intended father could contest the paternity of the husband under the conditions of sections 1599 and following.[174] If the surrogate mother is unmarried, the intended father could acknowledge paternity with the consent of the surrogate mother, in accordance

[165] cf OLG Hamm NJW 1986, 781, 782 (Higher Regional Court of Hamm); Marina Wellenhofer, '§ 1591 BGB' in Franz Jürgen Säcker (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 10: Familienrecht II* (9th edn, C.H. Beck 2024) para 21.

[166] cf Dethloff (n 164) 923.

[167] cf OLG Hamm (n 165) 782.

[168] cf Andreas Spickhoff, '§ 1591 BGB' in Spickhoff (n 14) para 1.

[169] Christine Budzikiewicz, '§ 1591 BGB' in Othmar Jauernig (ed), *Bürgerliches Gesetzbuch* (19th edn, C.H. Beck 2023) para 2; Wellenhofer (n 165) para 20.

[170] cf Dethloff (n 164) 930; Wellenhofer (n 165) para 21.

[171] Wellenhofer (n 165) para 21.

[172] Matthias Heider, 'Art 6 GG' in Ingo von Münch and Philip Kunig (eds), *Grundgesetz Kommentar* (7th edn, C.H. Beck 2021) para 75; Robbers (n 92) para 175.

[173] Andreas Spickhoff, '§ 1592 BGB' in Spickhoff (n 14) para 2; Marina Wellenhofer, '§ 1592 BGB' in Säcker (n 165) para 6.

[174] Wellenhofer (n 165) para 13.

with section 1592 number 2, sections 1594 and following.

3. Recognition of foreign status decisions

In some states such as Ukraine or California, the intended mother is immediately recognized as the legal mother.[175] According to the case law of the Federal Court of Justice, the domestic legal recognition of foreign court decisions that assign parenthood to intended parents does not violate *public policy*, at least if the child is genetically descended from an intended parent.[176] If, on the other hand, the parental status of the intended parents was established abroad by operation of law, parentage is assessed as per Article 19 paragraph 1 sentence 1 of the Introductory Act to the Civil Code (EGBGB) in accordance with the law of the child's habitual residence.[177] In the case of prompt entry, legal parentage is therefore subject to German law, with the result that the surrogate mother is the legal mother.[178] The intended mother can then only obtain parenthood through adoption.[179] If the child remains abroad for a longer period of time, foreign law remains applicable, with the result that the intended parents become the legal parents of the child.[180]

IV. Criticism of this legal situation, contrasted with the ethical assessment

In summary, the current German legal situation concerning surrogacy is characterized by criminal prohibitions, civil nullity of surrogacy contracts, and imponderable legal statuses. It is therefore not surprising that 80.2% of intended parents from Germany state that they go seek fertility treatment abroad for legal reasons.[181] The intended parents are pushed by the German legal situation into countries with lower standards of protection, where surrogate mothers are potentially exposed to exploitative conditions and thus violations of human dignity.[182] Furthermore, birth abroad creates uncertainties, especially with regard to legal parenthood.[183] The question of parenthood is not even solved in the best interests of the child, but depends solely on the habitual place of residence, which is irrelevant to the peculiarities of surrogacy.[184]

---

[175] cf Rolf Behrentin and Christoph Grünenwald, 'Leihmutterschaft im Ausland und die deutsche Rechtsordnung' (2020) 73 NJW 2057, 2057; Marko Oldenburger, 'Die Abstammung von Leihmütterkindern' (2020) 7 NZFam 457, 457–458.

[176] cf BGH DNotZ 2019, 54, 54; NJW 2015, 479, 479 (Federal Court of Justice).

[177] Nina Dethloff, 'Leihmutterschaft in rechtsvergleichender Perspektive' in Beate Ditzen and Marc Philippe Weller (eds), *Regulierung der Leihmutterschaft* (Mohr Siebeck 2018) 55, 64.

[178] cf Dethloff (n 164) 929–930; Wellenhofer (n 165) para 26.

[179] cf BGH NJW 2019, 1605 (Federal Court of Justice); Wellenhofer (n 165) para 21.

[180] Dethloff (n 177) 64.

[181] Francoise Shenfield and others, 'Cross border reproductive care in six European countries' (2010) 25 Human Reproduction 1361, 1361.

[182] cf Sophie-Marie Humbert, *Plädoyer für die Legalisierung der Leihmutterschaft* (Mohr Siebeck 2023) 453.

[183] See also Esser (n 109) 228–229.

[184] See also Dethloff (n 164) 930; Hartmut Kreß, 'Samenspende und Leihmutterschaft – Problemstand, Rechtsunsicherheiten, Regelungsansätze' (2013) 19 FPR 240, 243.

The danger to the child's welfare is evidenced by certain case law,[185] which has allowed the recognition of the parenthood of intended parents in some cases and thus de facto softened the ban on surrogacy.[186] The current legal situation also carries the risk that doctors in this country will refrain from providing comprehensive information to intended parents who are seeking surrogacy abroad for fear of prosecution.[187] This runs counter to the principle of autonomy. From an ethical and constitutional perspective, the prohibitive legal situation is generally not required, at least with regard to altruistic surrogacy.[188] For altruistic surrogacy, these arguments are currently only countered by the legislator's scientifically unsubstantiated objection of the harms of split motherhood.[189]

In this respect, the existing legal uncertainty and ineffectiveness contradicts the well-being of all parties involved and constitutes a need for legislative action, at least in the area of altruistic surrogacy.

E. Regulatory approaches in foreign legal systems

In order to design new legal regulations on surrogacy, a comparative analysis of foreign legal systems is advisable. Internationally, three regulatory models can be distinguished based on different ideas about the role of the surrogate mother, namely instrumentalization (I.), altruism (II.) and reproduction as a service (III.).[190] Their descriptions are followed by a conclusion as to which of these approaches could be implemented in Germany (IV.), focussing on the altruistic ideal type.

I. The surrogate mother as an instrumentalized and vulnerable woman

According to the first conception, surrogacy represents an instrumentalization of the surrogate woman. This view can be found in jurisdictions that prohibit surrogacy, such as Germany, Austria, Switzerland, France, Italy, Norway, and Portugal.[191] In these jurisdictions, surrogacy contracts are often void and medical assistance is punishable by law.[192] In terms of family law, regulations similar to the German regulations usually apply,

[185] cf BGH (n 179).
[186] See also Humbert (n 182) 60.
[187] See also Leopoldina (n 38) 69.
[188] See also Kreß (n 9) 885–886; Paetow (n 19) 354.
[189] cf Edward Schramm (n 155) 80.
[190] cf Michelle Cottier, 'Die instrumentalisierte Frau: Rechtliche Konstruktionen der Leihmutterschaft' [2016] juridikum 188, 188.
[191] cf Anna Lina Gummersbach, 'Die Leihmutterschaft im französischen Recht' in Ditzen and Weller (n 177) 101, 105.
[192] Andrea Büchler, 'Autonomie, Reproduktion und die Leihmutterschaft' [2021] juridikum 331, 338; Cottier (n 190) 192.

especially as regards the surrogate mother being considered the legal mother.[193]

II. The surrogate mother as an altruistic pregnancy donor

The second conception assumes that surrogacy is legitimate if it is done out of an altruistic motivation on the side of the surrogate mother.[194] Countries with this ideal type as a basis include the United Kingdom (1.), Greece (2.), and Israel (3.). In the following paragraphs, the legal situation of these countries is outlined in order to gain impetus for possible German reforms.

1. Main features and peculiarities of the legal situation in the UK

In the UK, the *Human Fertilisation and Embryology Act 2008* regulates altruistic surrogacy.[195] Commercial agreements are prohibited and the surrogate mother is initially the legal mother.[196] However, the intended parents can apply for a *Parental Order* after the birth in order to obtain legal parenthood, whereby same-sex couples also have the right to apply.[197] Meanwhile, the surrogate mother is paid significant sums of money as expense allowances.[198] At least one intended parent must also be resident in the UK.[199]

2. Main features and peculiarities of the legal situation in Greece

Greece allows altruistic surrogacy under Articles 1455 and following of the Greek Civil Code, but only under strict conditions.[200] Court approval before pregnancy is mandatory and both intended parents and surrogate mother must be residents of Greece.[201] In addition, the surrogate mother must not be genetically related to the child.[202] The compensation is limited to expenses and loss of earnings.[203] The intended parents also obtain legal parenthood provisionally with the approval.[204]

---

193 cf Lisa Engelhardt, 'Die Leihmutterschaft im schweizerischen Recht' in Ditzen and Weller (n 177) 93, 93–94.

194 Büchler (n 192) 337; Cottier (n 190) 195.

195 Sebastian Schwind, 'Regulierung der Leihmutterschaft im Vereinigten Königreich' in Ditzen and Weller (n 177) 117, 118.

196 Goeldel (n 79) 112–113.

197 Schwind (n 195) 120.

198 Dietrich (n 96) 195; Kreß (n 9) 882.

199 Schwind (n 195) 128.

200 Esser (n 109) 220.

201 Leon Grigorios, Angela Papetta and Chara Spiliopoulou, 'Overview of the Greek legislation regarding assisted reproduction and comparison with the EU legal framework' (2011) 23 Reproductive BioMedicine Online 820, 821–822.

202 Katharina Helena Hoffmeister, *Reproduktives Reisen und Elternschaft* (Nomos 2022) 98.

203 Aristides Hatzis, 'The Regulation of Surrogate Motherhood in Greece' [2010] SSRN Electronic Journal 1, 3, 10.

204 Esser (n 109) 221.

3. Fundamentals and peculiarities of the legal situation in Israel

In Israel, the *Embryo Carrying Agreements Law 1996* regulates altruistic surrogacy.[205] A state committee must approve the surrogacy agreement in advance, and the surrogate mother, who is necessarily unmarried, must belong to the same religion as the intended parents.[206] Only married couples, including homosexual ones, are admitted.[207] The surrogate mother receives compensation and the intended parents obtain legal parenthood by court order, provided that the surrogate mother agrees.[208]

III. The surrogate mother as a reproductive service provider

The geographic scope of the third concept, which follows the logic of the law of obligations, includes the US state of California and the nation of Ukraine.[209] Pregnancy and birth are provided in return for freely negotiated and legally unlimited financial compensation.[210] The surrender of the child is also enforceable. In California, for example, this is the case even before birth, by way of a court application for the determination of parenthood.[211] While this commercial approach offers the highest degree of legal certainty for the intended parents by securing their parenthood even before birth, it raises serious ethical and human rights concerns regarding the instrumentalization and potential exploitation of the surrogate mother, thereby contrasting sharply with the ethical foundations of the German constitutional order, which prioritises human dignity.

IV. Impulses from the legal comparison for a new German regulation

The comparative models provide essential impulses for a new German regulation of altruistic surrogacy, although a direct adoption of any single system is not feasible. To strike a necessary balance between the reproductive autonomy of the intended parents and the paramount principle of the child's well-being, the regulatory approach must include strict procedural and systematic safeguards. Specifically, the model of mandatory institutional approval before conception, established in jurisdictions like Greece and Israel, is highly convincing as it secures ethical and legal prerequisites early and prevents instrumentalization.

Furthermore, a new law must ensure the immediate establishment of parental status for the intended parents, preferably with an *ex tunc* effect (from the moment of conception)

---

[205] Ulrich May, *Rechtliche Grenzen der Fortpflanzungsmedizin* (Springer 2003) 42–43.
[206] Kreß (n 9) 882; May (n 205) 97.
[207] cf Kreß (n 9) 882; May (n 205) 188–189.
[208] Rhona Schuz, 'Surrogacy in Israel' in Claire Fenton-Glynn, Terry Kaan and Jens Scherpe (eds), *Eastern and Western Perspectives on Surrogacy* (Intersentia 2019) 166, 171, 177.
[209] cf Hoffmeister (n 202) 93–94.
[210] ibid.
[211] Esser (n 109) 218.

to avoid the legal uncertainties (the "limping" relationship) inherent in the post-birth *Parental Order* system used in the UK. Essential for a non-discriminatory and modern regulation is also the explicit inclusion of homosexual couples. Crucially, to preserve the altruistic character and prevent Germany from becoming a target for international commercial surrogacy, the regulation must include a residency requirement for at least one intended parent. These combined elements demonstrate that the ethical justification for liberalisation requires simultaneously the rigorous limiting of reproductive autonomy through legally established safeguards focused primarily on the protection of the child.

F. Conclusion

The current general ban on surrogacy is contrary to ethical and constitutional principles, in particular the right to reproductive autonomy. It drives intended parents into surrogacy tourism and the risks associated with it. There is therefore a need for well-regulated liberalization. As the constitutional, bioethical, and comparative legal analysis has shown, a new regulation should allow altruistic surrogacy as a medical *ultima ratio* under strict conditions, whereas the commercial form must remain prohibited. A future law on reproductive medicine should include core elements that are ethically and legally justified by the principles of non-maleficence and beneficence. More specifically, this includes admissibility being linked to a compelling medical indication; minimum ages and strict age limits for surrogate mothers and intended parents, designed to mitigate medical and psycho-social risks for the child; and health care being provided only in approved centres.

Procedural safeguards, taking inspiration from models like Greece and Israel, must consist of mandatory, independent and comprehensive psychosocial counselling for all parties involved, including the child, especially regarding their right to identity and information, as well as verification of voluntary consent by independent but state-controlled organisations. The contractual relationship must primarily ensure the immediate assumption of parenthood under family law by the intended parents, preferably with *ex tunc* effect from conception - a system preferred over the UK's post-birth *Parental Order* to avoid the legal uncertainties inherent in the latter. Furthermore, a short-term right of revocation of the surrogate mother after birth is necessary, functioning as a safeguard to protect the surrogate's dignity and fully voluntary consent, even if this compromises legal certainty for a brief period.

Transparency must be ensured by an obligation to document all relevant data, its reporting to a central register, and a right of the child to information. Violations, including breaches of documentation and information obligations, must be punishable. Crucially, the proposed regulation must include a residency requirement for at least one intended

parent to prevent reverse surrogacy tourism and to establish a safe, legal alternative for German citizens who currently resort to risky procedures abroad. Banning surrogacy tourism in its current form can, however, not solve the outlined ethical concerns. A new law should insofar serve as a structured, ethical, and constitutionally-based response to the international challenges of surrogacy.

Case Review

Inheritance tax liability on pension payments derived from the assets of a Liechtenstein family foundation

Review of Federal Tax Court, judgment from 11 December 2024

BFH, Urt. v. 11.12.2024 – II R 50/22, IStR 2025, 592

Jonas Franz[*]

The Liechtenstein family foundation is a proven instrument of asset protection.[1] In the present case, the German Federal Tax Court (*Bundesfinanzhof, BFH*) addresses the extent to which pension payments from the assets of a Liechtenstein family foundation are subject to German inheritance tax.

A. Simplified facts of the case

The claimant (C), a resident of Germany, is the daughter of the deceased (D), who passed away in 2015. In 1990, D established a family foundation (*Familienstiftung*) based in the Principality of Liechtenstein, whose legal relationships are subject exclusively to Liechtenstein law. The foundation mainly pursued family-related purposes. During her lifetime, D was the sole beneficiary of the foundation. Through a contract of mandate (*Mandatsvertrag*) with the Liechtenstein Trust and Administration Institution (*Treuhand- und Verwaltungs-Anstalt*) E, D retained the authority to direct the members of the foundation council (*Stiftungsrat*) appointed by E. The foundation council was the sole and supreme body of the foundation. Consequently, the provisions in the foundation's statute

---

[*] Law graduate (first state examination) and Head of the Department for Civil Law of the Heine Law Review.
The author gives his thanks to Prof. Dr. Lisa Guntermann for her valuable feedback.

[1] The advantages of a Liechtenstein family foundation compared to a German family foundation result from a comparatively low tax burden. Corporations in the Principality of Liechtenstein are taxed at a rate of 12.5% (Article 61 Liechtenstein Tax Act/*Steuergesetz* - SteG), while the corporation tax rate in Germany amounts to 15% (Section 23 paragraph 1 number 1 of the Corporation Tax Act (*Körperschaftsteuergesetz*, *KStG*). In addition, Liechtenstein does not levy commercial tax (*Gewerbesteuer*). Moreover, pursuant to Section 1 paragraph 1 number 4 of the Inheritance and Gift Tax Act (*Erbschaft- und Schenkungsteuergesetz*, *ErbStG*), German family foundations are subject to a so-called substitute inheritance tax (*Erbersatzsteuer*) every 30 years. This does not apply in Liechtenstein. A comprehensive overview of the taxation of Liechtenstein family foundations is provided by *Rüdiger Werner*, 'Die leichtensteinische Familienstiftung' (2020) 4 IStR 130.

(*Stiftungsstatut*) could only be amended with D's consent. Upon D's death, the contract of mandate expired. However, the composition of the foundation council remained unaffected.

According to the foundation's statute, C was entitled an annual pension funded by the foundation's assets. In 2010, the foundation's statutes were amended to stipulate that payments should commence during D's lifetime.

The defendant, the tax authority (*Finanzamt*) levied gift tax on the payments received during D's lifetime. Concerning the payments received upon D's death, it held that C's pension entitlement (*Rentenstammrecht*) against the foundation constitutes an acquisition by reason of a contract for the benefit of a third party (*Vertrag zugunsten Dritter*) pursuant to Section 3 paragraph 1 number 4 of the German Inheritance and Gift Tax Act (*Erbschaft- und Schenkungsteuergesetz*, ErbStG). According to the tax authority, the taxable enrichment does not lie in a transition of the foundation's assets but rather in C's pension entitlement against the foundation, which D had arranged in the foundation's statutes. However, C took the view that there was no contract for the benefit of a third party and that the pension payments are therefore not subject to inheritance tax.

The lower court (*Vorinstanz*), the Cologne Fiscal Court (*Finanzgericht Köln, FG Köln*), ruled that C's pension entitlement does not qualify as either an acquisition by reason of death pursuant to Section 3 paragraph 1 number 1 ErbStG, or an acquisition by reason of a contract for the benefit of a third party (Section 3 paragraph 1 number 4 ErbStG).[2]

B. The Court's decision

The *BFH* concurred with the opinion of the *FG Köln* and denied both an acquisition under Section 3 paragraph 1 number 1 ErbStG and under Section 3 paragraph 1 number 4 ErbStG. However, the Court held that, with respect to the benefit stipulated, a foundation statute conferring third parties an entitlement to benefits subsequent to the demise of the founder of a Liechtenstein family foundation may be classified as a gift upon death (Section 3 paragraph 1 number 2 ErbStG). The *FG Köln* did not determine whether the testator transmitted the required executory donation (*Schenkungsversprechen*) during her lifetime or whether the foundation transmitted it after her death. On that basis, the state of proceedings does not permit final judgement to be given. Pursuant to Section 126 paragraph 3 sentence 1 number 2 Finance Courts Code (*Finanzgerichtsordnung*, FGO) the *BFH* is entitled to task the *FG Köln* with determining the applicable inheritance law: German or foreign.

[2] FG Köln, Urteil vom 6.9.2022, Az. 7 K 2720/20, DStRE 2023, 1247.

I. Acquisition by reason of death, Section 3 paragraph 1 number 1 ErbStG

The tax liability for acquisitions under the ErbStG is based on the legal framework set out by the German Civil Code (*Bürgerliches Gesetzbuch*, BGB). In transnational cases, this initially raises the question of whether German or foreign inheritance law applies to the succession.

The *FG Köln* applied German inheritance law without providing any reasoning.[3] The *BFH* has expressed reservations regarding this, given that D did not have her habitual residence in Germany and did not possess German nationality (see Article 25 of the Introduction to the German Civil Code, EGBGB).[4] Since the *FG Köln* is the sole factual instance (*Tatsacheninstanz*), the *BFH* remitted the case to the *FG Köln* for the purpose of determining the applicable inheritance law. Under the application of foreign inheritance law, the BFH held that C's pension entitlement against the foundation may constitute an acquisition analogous to a German bequest (*Vermächtnis*, Sections 2147 and following of the BGB) and therefore may be subject to inheritance tax as outlined in Section 3 paragraph 1 number 1 alternative 2 ErbStG.[5]

However, assuming that German inheritance law is applicable, it could be considered that C's pension entitlement constitutes an acquisition by reason of death pursuant to Section 3 paragraph 1 number 1 alternative 1 ErbStG in conjunction with Section 1922 BGB. In the event of succession, according to German inheritance law, the deceased's assets pass in their entirety to the heir (*Gesamtrechtsnachfolge*). In the present case, a distinction can be made between the foundation's assets and C's pension entitlement.

If a foundation's council is found to have the factual and legal capacity to dispose of the foundation's assets, the foundation is deemed legally non-transparent. It is an established principle that the assets of a non-transparent foundation cannot be attributed to its founder (*Stifter*) and thus do not form part of the founder's estate (*Nachlass*).[6] Conversely, if the founder retains extensive powers to instruct the foundation council, as is the case here, then the foundation's assets are considered part of the founder's estate. However, for an inheritance tax liability to arise, a further prerequisite must be fulfilled: the deceased's powers of disposition over the foundation's assets must be inheritable. The authority D exercised over the foundation's council derived from the terms of the contract of mandate which expired upon her death. Accordingly, the foundation's assets did not form part of D's estate. The foundation itself is the successor of its assets.[7]

---

[3] ibid 1250 para 84.
[4] BFH, Urteil vom 11.12.2024, IStR 2025, 592, 594 para 19.
[5] ibid 594 para 27.
[6] BFH, Urteil vom 28.6.2007, DStRE 2007, 1170, 1171; BFH (n 4) 594 para 22.
[7] BFH (n 4) 594 para 22.

The same conclusion applies to C's pension entitlement. An acquisition by reason of death would have required that D had been the owner of the entitlement, which therefore would have formed part of D's estate. However, according to the foundation's statute, the entitlement vested directly in C in her capacity as beneficiary. Consequently, there was no corresponding right in D's estate that could have passed to C upon D's death. Thus, the Court denied an acquisition by reason of death pursuant to Section 3 paragraph 1 number 1 alternative 1 ErbStG in conjunction with Section 1922 BGB.[8]

Furthermore, the *BFH* considered an acquisition by reason of a bequest pursuant to Section 3 paragraph 1 number 1 alternative 2 ErbStG in conjunction with Sections 2147 and following BGB. Under Section 2147 sentence 1 BGB, only the heir or a legatee (*Vermächtnisnehmer*) may be burdened with a bequest. However, the foundation is neither D's heir nor a legatee and therefore cannot be subject to such an obligation.

II. Acquisition by reason of a contract for the benefit of a third party, Section 3 paragraph 1 number 4 ErbStG

Moreover, the pension payments are not subject to inheritance tax pursuant to Section 3 paragraph 1 number 4 ErbStG. This provision presupposes a contract for the benefit of a third party, i.e. a contract between the promisor (*Versprechender*) and the promisee (*Versprechensempfänger*) for the benefit of a third-party beneficiary. In this case, a contract must exist between the promisee D and the foundation as the promisor. According to Sections 145 and following of the BGB, a contract is a bilateral agreement consisting of two corresponding declarations of intent (*Willenserklärungen*). However, the foundation's statutes only constitute a unilateral declaration of intent and thus not a contract.[9] Given the unambiguous wording of Section 3 paragraph 1 number 4 ErbStG and the absence of a regulatory gap, the *BFH* rejected an analogy of the provision. Accordingly, the foundation statutes do not satisfy the requirements of a contract within the meaning of Section 3 paragraph 1 number 4 ErbStG.

III. Acquisition by reason of a gift upon death, Section 3 paragraph 1 number 2 sentence 1 ErbStG in conjunction with Section 2301 BGB

In its judgement, the *BFH* held that C's pension entitlement may nonetheless be subject to inheritance tax based on a gift upon death pursuant to Section 3 paragraph 1 number 2 sentence 1 ErbStG in conjunction with Section 2301 BGB.[10] A gift upon death is characterised by an executory donation that is made subject to the condition that the donee survives the donor (*Überlebensbedingung*). The purpose of this provision is to

[8] ibid.
[9] ibid 594 para 26.
[10] ibid 593 paras 13, 14.

safeguard the mandatory formal requirements of succession law and to prevent their circumvention through transactions which are structured as inter vivos dispositions but are intended to take effect only upon death. Therefore, in principle, pursuant to Section 2301 paragraph 1 sentence 1 BGB, the provisions governing dispositions mortis causa (Sections 1922 and following BGB), especially the according formal requirements, apply. However, if the gift has been performed by the donor during his lifetime, pursuant to Section 2301 paragraph 2 BGB this transaction is deemed as a gift inter vivos. A valid donation contract presupposes an agreement between the donee and the donor regarding the non-renumeration (*Unentgeltlichkeit*) of donation pursuant to Section 516 BGB.

In case the *FG Köln* determines that D has made an executory donation, the *BFH* emphasises, with reference to the case law of the Federal Court of Justice (*Bundesgerichtshof, BGH*), that D's executory donation would not be invalid due to non-compliance with the formal requirements of Sections 2247 and following, 2276 BGB.[11] Upon the death of the donor, the donee "automatically" may acquire an entitlement against the promisee. This would lead to the performance of the gift within the meaning of Section 2301 paragraph 2 BGB. The formal requirements of inheritance law set out in Sections 2247 following, 2276 BGB, thus do not apply to the legal relationship between D and C. The formal defect in the possible gift between D and C, which should in fact require notarisation pursuant to Section 518 paragraph 1 sentence 1 BGB, would be cured under Section 518 paragraph 2 BGB.

C. Commentary

The *BFH*'s judgment fits coherently within the dogmatic structure of the ErbStG, which is predicated on the legal framework set by civil law. In this regard, the denial of a contract for the benefit of a third party with reference to the concept of a contract – which is not satisfied in the case of a foundation's statute – is convincing. Moreover, the unambiguous wording of Section 3 paragraph 1 number 4 ErbStG precluded an analogy of the provision.

Likewise, the *BFH*'s consideration of a tax liability on pension payments by virtue of a gift upon death under Section 3 paragraph 1 number 2 ErbStG is compelling. The tax liability in this context hinges substantially on whether D conveyed an executory donation during her lifetime or whether the foundation's council conveyed it after her death. However, there is a counterargument to this construction. The argument is that it could lead to a "race between heirs and beneficiaries", as the heir could revoke the executory donation

[11] ibid 594 para 19.

established by the testator.[12] In accordance with Section 130 paragraph 1 sentence 2 BGB, the revocation of the executory donation is possible until it reaches the beneficiary. Nevertheless, these concerns do not arise where the heir and the beneficiary are the same person, as in the present case. Meanwhile, it remains unclear why the *BFH* was unable to determine the existence of an executory donation by D; it would have been reasonable to interpret the foundation's statutes as an implied executory donation by D in favour of C.[13] C's receipt of the payments would constitute the acceptance of this executory donation.

The Court's opinion that under the applicability of foreign inheritance law, there might be an acquisition analogous to a German bequest pursuant to Section 3 paragraph 1 number 1 alternative 2 ErbStG does not withstand critical scrutiny. For this interpretation to be tenable, the foundation would have to be burdened with a bequest under foreign inheritance law. As demonstrated, the foundation is not an heir to D. Additionally, it is important to note that the endowment granted to the foundation by D constitutes a gift inter vivos under civil law.[14] However, the recipient of a gift inter vivos cannot, in principle, be burdened with a bequest. This applies to German civil law[15] as well as to those of Austria[16], Switzerland[17] and Liechtenstein[18], as all of these jurisdictions maintain a distinction between transactions inter vivos and dispositions mortis causa. If the donor wishes to impose an obligation upon the donee, the gift may be made subject to a charge (*Auflage*).[19] Imposing a testamentary encumbrance on the donee would undermine the gift inter vivos by creating an obligation that was not defined at the time the gift was given.[20]

D. Conclusion

The present judgment underscores the necessity for a comprehensive assessment of both succession law and inheritance tax implications when advising on transnational foundation arrangements. If the *FG Köln* acknowledges the existence of an executory

[12] cf OLG Stuttgart, Urteil vom 29.06.2009, ZEV 2010, 265 para 87; Anton Löhmer and Daniel Heilmann, commentary on BFH, Urteil vom 11.12.2024 – II R 50/22 (2025) 16 IStR 592, 597.

[13] Likewise: Löhmer and Heilmann (n 12) 597.

[14] This classification is clearly regulated by the Liechtenstein Law on Person and Companies (*Personen- und Gesellschaftsrecht, PGR*), cf Article 552 Section 1 paragraph 1 PGR.

[15] See BGH, Urteil vom 06.03.1985, NJW-RR 1986, 164.

[16] According to Sections 649, 650 General Civil Code (*Allgemeines Bürgerliches Gesetzbuch, ABGB*) only the heir or legatee can be burdened with a bequest. Section 603 of the ABGB deals with the gift upon death and shows that the case of succession does not affect the legal treatment of the transaction as a gift inter vivos.

[17] cf Article 484 Swiss Civil Code (*Schweizerisches Zivilgesetzbuch, ZGB*).

[18] The General Civil Code of the Principality of Liechtenstein (*Allgemeines Bürgerliches Gesetzbuch, ABGB*) adopts the Austrian ABGB almost verbatim, cf Section 649 ABGB.

[19] cf Section 525 BGB, Section 709 ABGB (Austria), Article 245 OR (Swiss Code of obligations), Section 709 ABGB (Liechtenstein).

[20] cf BGH (n 15) 164; Löhmer and Heilmann (n 12) 596.

donation by D, a potential "tax trap" may arise, which should be avoided in similar circumstances. However, it appears unlikely that the *FG Köln* – under the application of foreign inheritance law – will impose tax liability under Section 3 paragraph 1 alternative 2 ErbStG. This is because the principle that the beneficiary of a gift inter vivos cannot be burdened by a disposition mortis causa is not merely a feature of German civil law.

Case Review

Update: Evidence obtained via Operation Trojan Shield (ANOM) not inadmissible on constitutional grounds

Review of Federal Constitutional Court, decision from 23 September 2025

BVerfG (3. Kammer des Zweiten Senats), Beschl. v. 23.09.2025 – 2 BvR 625/25; BeckRS 2025, 25383

Michel Hoppe[*]

A. Subject Matter

On 9 January 2025, the German Federal Court of Justice (BGH) first decided that a conviction arrived at by the Regional Court (*Landgericht*) of Tübingen by way of evidence obtained from the United States of America's Operation Trojan Shield or '*ANOM*' had indeed been lawful.[1] In a parallel procedure concerning a sentence handed down by the Regional Court of Mannheim from 31 January 2024, the BGH on 21 May 2025 referred to its earlier decision.[2] The Federal Constitutional Court (*Bundesverfassungsgericht*) now had to decide on a constitutional complaint (*Verfassungsbeschwerde*) filed by the convict against these decisions.

B. Procedural Background and Ruling

As per Article 94 paragraph 1 number 4a of the German Constitution (*Grundgesetz* – GG) and reiterated by section 13 number 8a of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz*/BVerfGG), anyone may raise such a complaint if they feel their basic rights to have been violated. Basic or fundamental rights in this sense include any of the rights laid down in Articles 1 to 19 (*Grundrechte* - fundamental rights

---

[*] Law student, HHU Düsseldorf. Head of the Department for Criminal Law. Student Assistent, Chair of German and Foreign Public Law, European Law and Public International Law (*Lehrstuhl für Deutsches und Ausländisches Öffentliches Recht, Völkerrecht und Europarecht*, Prof. Dr. Kreuter-Kirchhof).

[1] BGH BeckRS 2025, 23 = NJW 2025, 1584 = MMR 2025, 524. For a more in-depth explanation and criticism, see the earlier discussion in Hoppe, 'On the admissibility of evidence obtained via Operation Trojan Shield (ANOM)' (2025) 2 HeineLR 50.

[2] BGH BeckRS 2025, 4477.

in the narrower, proper sense) as well as the other rights enumerated in Article 94 paragraph 1 number 4a GG and section 13 number 8a BVerfGG (*grundrechtsgleiche Rechte*), such as voting rights in federal elections (Article 38 paragraph 1 sentence 1) or *habeas corpus* specifically as it relates to the need for a judicial warrant (Article 104).

Here, the complainant argued that admitting the evidence obtained via *ANOM* constituted a violation of their right to a fair trial (as the subjective component of the rule of law, Article 2 paragraph 1 in conjunction with Article 20 paragraph 3) and their general right of personality (Article 2 paragraph 1 in conjunction with Article 1 paragraph 1). Additionally, the BGH had exceeded the limits of its discretion in handling its duty to refer to the European Court of Justice according to Article 267 paragraph 3 TFEU, in light of questions surrounding the EIO Directive. Considering how the CJEU would, if that allegation turned out to be true, be the responsible judicial body, this omission would be in violation of the complainant's right to their lawful judge (Article 101 paragraph 1).

Any complaint has to be either accepted or refused by the BVerfG (sections 93a and 93b BVerfGG). Grounds for admittance are constituted either by a general constitutional significance of the complaint, or the complaint being appropriate to enforce the rights referred to above. (section 93a paragraph 2 BVerfGG). In and of itself, there is no discretion of the court in this regard. The complaint is dismissed if grounds within the meaning of section 93a paragraph 2 BVerfGG are lacking, and accepted if they are present.[3] In practice, the Court does possess considerable leeway in interpreting the grounds for admittance. Most importantly, any complaint must necessarily be sufficiently substantiated by the complainant (section 23 paragraph 1 sentence 2 and section 93 paragraph 1 sentence 1 BVerfGG). Here, the BVerfG held that these requirements had not been met, thus issuing a decision of nonacceptance (section 93b in conjunction with section 93a BVerfGG).

C. Reasoning

It is reiterated that evidence being rendered inadmissible must remain an exception to the general rule of admissibility, in order not to hinder the judiciary from handing down just verdicts. An exclusion of evidence may be derived either as an accessory to a breach of law in obtaining the evidence or, independently from such, from other principles that speak against the usage in and of itself. Still, inadmissibility may not be inferred from every breach of procedure, and even in the case at hand, the BGH is not to be corrected in having

[3] cf Fabian Scheffczyk, '§ 93a BVerfGG' in Christian Walter (ed), *BeckOK BVerfGG* (19th edn, C.H. Beck 1 June 2025) para 13; Hans Lechner and Rüdiger Zuck, *Bundesverfassungsgerichtsgesetz Kommentar* (8th edn, C.H. Beck 2019) section 93a para 5; Christofer Lenz and Ronald Hansel, *Bundesverfassungsgerichtsgesetz* (4th edn, Nomos 2024) section 93a para 25.

denied the general exclusion of ANOM data from the decision process.

The Constitutional Court reaffirms that, lacking any evidence to the contrary, neither the actions taken by the FBI nor the hitherto unknown third EU member state in which the servers hosting the sensitive personal data was located had breached the rule of law in a way that would result in a stand-alone exclusion of evidence. Most devastatingly, the BVerfG concludes on the basis of the complainant's own extensive description of the *ANOM* method that there was no critical lack of information and therefore no illicit deviation from indispensable fundamental rights standards, or an unfair trial. As expected, any exclusion on grounds of illegality solely according to the law of the foreign jurisdictions concerned is also rejected.

Lastly, the Court denies that the previous court's omission of a reference to the CJEU had been an obviously untenable choice, as the BGH had explicitly based its own decision on the European court's judgement in the *Encrochat* case from 30 April 2024,[4] and had not substantially deviated from that ruling.

D. Criticism

The abstract reasoning on the part of the Court is sound, and its decision leaves claims of inadmissibility within the hitherto recognized case groups unaffected. Among these are, for example, violations of the most intimate private sphere or violations of the rule of law in the form of the authorities themselves provoking criminal acts.[5] However, the decision upholds the restrictive approach taken by the BGH in monitoring the rule of law in cooperating jurisdictions, and in assessing whether administrative assistance is abused just in the individual case or even systematically for the sake of circumventing domestic legal requirements.

This laxity has to be criticized even more harshly, seeing how the apparently Lithuanian court decision authorizing the use of the aforementioned servers had been obtained by the FBI under false premises.[6] Crucially, the questionable assumption that the usage of encrypted communication in and of itself constitutes probable cause for surveillance is also just shrugged off.

[4] Case C-670/22 *M.N. (EncroChat)* (ECJ, 30 April 2024).

[5] cf Thomas C Knierim, 'Anmerkung zu BVerfG Beschluss vom 23.9.2025 – 2 BvR 625/25' (2025) 20 FD-StrafR 817256.

[6] Legal Tribune Online, 'Anom-Daten sind verwertbar' (LTO, 1 October 2025) <www.lto.de/recht/nachrichten/n/2bvr62525-bverfg-anom-daten-verwertbar-strafverfahren> accessed 25 November 2025.

Heine Law Review

Established 2023

Published by students at the Faculty of Law of the Heinrich Heine University in Düsseldorf.

Issues available at www.heinelawreview.de

We would like to thank our sponsor, the Student Parliament of the HHU.

Contributions

The Review welcomes contributions by legal scholars and practitioners, but primarily encourages the participation of students, especially at our Faculty.

Contributions are to be sent, in English, as a Microsoft Word (.docx) file to vorstand@heinelawreview. Term papers or seminar papers may be submitted, provided the grading or evaluation is attached. Unsolicited manuscripts will be considered for publication. Citations should conform to OSCOLA, Fourth Edition (2012) and the supplementary Heine Law Review Citation Guidelines, accessible on our homepage.

All articles will be reviewed by one of our editors, who will then make a preliminary decision about its publication. Consequently, they will suggest improvements or reconsiderations. Furthermore, all articles are scrutinized by a member of our Academic Council. This is doubly the case for term papers and seminar papers.

Contributors will be provided with the version of their article that is to be published, to make final amendments. After their permission to publish, the Review shall have exclusive rights of use and exploitation until the expiration of copyright. This includes the right to electronic and print publication without any additional consideration.