

The Regulation of Surrogate Motherhood in Greece

by Aristides N. Hatzis¹

1. Some Definitions

In this paper, with “surrogacy” I mostly mean “gestational (partial) surrogacy”, i.e. the form of artificial insemination which applies the method of In Vitro Fertilization (IVF), whereby a doctor implants the fertilized (by her partner’s sperm) eggs of a woman into the surrogate’s uterus. The child may also be conceived via home artificial insemination using fresh or frozen sperm or impregnated via IUI (intrauterine insemination), IVF or ICSI which is performed in a fertility clinic. The surrogate in a gestational surrogacy is not the genetic mother of the child, since there is no genetic link. The reason that surrogacy is needed is that the female partner is unable to carry a pregnancy to term because of hysterectomy, congenital defects, vaginal agenesis, unexplained habitual abortions, many miscarriages, failure of the embryo to implant or a pelvic disorder. Some women experience problems such as dangerously high blood pressure, a heart condition or liver disease, so that pregnancy would entail a serious health risk for them. Surrogate gestational pregnancies after IVF have been reported since 1985.

There is also the traditional (full) surrogacy² where the surrogate mother is also the genetic mother (who contributes both the ovum and the womb) and the male partner of the couple that is unable to procreate (intentional/commissioning parents) offers his sperm.³

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² Traditional surrogacy was widely practiced before gestational surrogacy became available. A more complicated (and rare) procedure can be the one where there is also egg donation: the intentional mother cannot carry a baby and she cannot also ovulate.

³ In the most extreme case of surrogacy, both intentional parents are not genetic parents (the eggs and the sperm are provided by donors). These parents, who are not biologically related to the child, become nurturing parents directly. This form is the most akin to adoption. Thus, it is possible that a child can have three mothers (social, surrogate, egg donor) and two fathers (social, sperm donor).

Social surrogacy is the type of gestational surrogacy, where a woman decides to have another woman bear her child by choice (for cosmetic or career reasons), even though she is able to carry the child herself at no significant risk.

Gay surrogacy is the type of surrogacy where a gay male couple (for whom surrogacy is the only way of becoming the genetic parents of a child) wishing to have a baby, rent the services of a surrogate mother who offers her womb and sometimes her ovum. One of the two fathers provides the sperm.⁴

Gestational surrogacy (as well as any other type of surrogacy) can also be categorized into altruistic surrogacy (when the surrogate receives no payment for her services) and commercial surrogacy (when the surrogate receives payment for her services).

In most jurisdictions worldwide all types of surrogacy are prohibited by law and even when gestational surrogacy is permitted, in most cases the contracts between the genetic parents and the surrogate mother are not enforceable. In these cases, only altruistic surrogacy is permitted, but with many restrictions and requirements. This situation is creating a major problem in federal countries like the United States, where some states permit and some others restrict surrogacy contracts. The same holds true for the European Union, where most countries do not enforce surrogacy contracts.

2. The Regulation of Surrogacy in Greece

Since 2002 the altruistic gestational surrogacy is legal in Greece after a special permission of the court. All other kinds of surrogacy are prohibited.

Traditional, Commercial and Social Surrogacy are explicitly prohibited by the Law and Gay Surrogacy is implicitly prohibited in a country where civil unions between same-sex couples are not recognized by the law.

⁴ If the sperm also comes from a donor then this cases resembles adoption more than surrogacy.

Surrogacy is regulated in Article 1458 of the Greek Civil Code introduced with article 8 of the Law 3089/2002:

Article 1458. The transfer of a fertilized ova into the body of another woman (the ova should not be hers) and the pregnancy by her is allowed by a court authorization granted before the transfer, given that there is a written and, without any financial benefit, agreement between the persons wishing to have a child and the surrogate mother and in case that the latter is married of her spouse, as well. The court authorization is issued after an application of the woman who wants to have a child, provided that evidence is adduced not only in regard to the fact that she is medically unable to carry the pregnancy to term but also to the fact that the surrogate mother is in good health and is able to conceive.

Three years after the regulation of surrogacy, Law 3305/2005 (“Enforcement of Medically Assisted Reproduction”) was introduced. The law regulates assisted reproduction and surrogacy in more detail. However the more important articles for surrogacy are arts. 13 and 26.

Article 13. Surrogate Motherhood.

1. Surrogate motherhood is permitted only under the conditions of the art. 1458 of Greek Civil Code and art. 8 of Law 3089/2002.
2. The woman who is going to carry the child should be medically examined (according to art. 4)⁵ and should incur a thorough psychological evaluation.
3. Art. 4 §§2 and 3 are applied for the examination of the health of prospective parents.
4. The agreement for the surrogacy should be made without financial compensation. The following are not considered as financial compensation:
 - a. The payment for any expenses necessary for the artificial insemination procedure, the pregnancy, the delivery and the childbed.
 - b. The restitution for any damages incurred and lost wages by the surrogate because she left her work or she took an unpaid leave of absence during the periods (and because) of insemination, pregnancy, delivery and childbed.

The amount of the expenses covered is going to be regulated by the National Independent Authority for Medically Assisted Reproduction.

⁵ She should be medically examined for HIV-1 and HIV-2 (Human Immunodeficiency Virus), Hepatitis B and C and Syphilis. In case the surrogate or the commissioning parents are HIV-positive the surrogacy will be permit-

For those who do not conform to the above rules, art. 26§8 proscribes the criminal sanctions:

Article 26. Criminal Sanctions.

8. Whoever participates in a surrogacy procedure where the requirements of art. 1458 of Greek Civil Law, art. 8 of Law 3089/2002 and art. 13 of this law, are not met, is liable to imprisonment for a term at least of two (2) years and a fine of at least €1.500. The same sanction applies to:

- whoever publicly, with the circulation of documents, images or representations, introduces, draws attention to or advertise (even covertly), the procurement of a child through a surrogate mother
- or he/she provides professional services as a middleman for any kind of financial consideration
- or he/she offers, in the same way, his/her services or the services of another for the attainment of this goal.

According to these two Laws and other related minor regulations, surrogacy is only permitted after a judicial decision issued by the district court where the commissioning parents and the surrogate mother reside. The commissioning mother should apply to the court and the insemination procedure can only take place after the publication of the judicial decision.

The court will issue the authorization to surrogacy under the following conditions:

- (a) The commissioning mother should prove that she is unable to carry the child to term.
- (b) The commissioning mother should not exceed the age of fifty (50).⁶
- (c) The surrogate mother should prove to the court that she is medically and mentally fit.
- (d) The parties should submit their written agreement to the court.
- (e) The agreement could allow for compensation of expenses. The payment for services and any kind of financial benefit is strictly prohibited.
- (f) In case that the surrogate mother is married, her husband should also consent in writing by signing the written agreement.

ted only after a special authorization by the National Independent Authority for Medically Assisted Reproduction.

⁶ Law 3305/2005, art. 4§1. For some scholars this requirement is unconstitutional for several reasons, one of the being that there is no similar restriction for the commissioning father.

(g) The fertilized ova should not belong to the surrogate mother.⁷

(h) The surrogate mother and the commissioning parents should be Greek citizens or permanent residents.⁸

Despite the outright prohibition of commercial surrogacy, most surrogacies in Greece are indeed commercial. This is evident in the published judicial decisions where it is more than obvious (as we will see below) that in most cases the surrogate mother and the commissioning parents were total strangers before the agreement. However the judges give their permission to the surrogacies without investigating further into the existence of a close relationship, following a formal bureaucratic procedure. Case law is extremely formalistic in these cases (the decisions look like administrative decisions, not judicial judgments) despite the fact that it is evident to all the parties involved and the judges that these surrogacies are not altruistic, i.e. are illegal according to the Greek Family Law.

As we saw above, there is no distinction in art. 26 (which introduces the criminal sanctions) between the surrogate, the middleman and the commissioning parents. However, until now, nobody has been convicted or even prosecuted for breaking the law regulating surrogacy, even though it is more than obvious that most surrogate mothers are paid for their services. For the Hellenic Police these cases are of very low importance and I seriously doubt that any cases of commercial surrogacy is going to be brought to a criminal court in the future – with two possible exceptions of concurrent offenses: (a) a case where the surrogate is a victim of human trafficking, or (b) a case where the commissioning parents or the surrogate mother are being blackmailed.

Another rather peculiar characteristic of the law is that there is no provision for the child born after an illegal commercial surrogacy. What is going to happen to a child when her social parents and surrogate mother are in prison for at least two years? Is she going to be adopted, given to foster care, enter an orphanage? In all these cases the best interests of the child rule out any ideas of actually enforcing the harsh criminal sanctions in simple commercial surro-

⁷ The law is not clear as to whether the ova could belong to a third person. Most commentators agree that in this case the three-mother (genetic mother, birth mother, social mother) gestational surrogacy is also permitted.

⁸ Law 3089/2002, art. 8.

gacies if the two commissioning parents and the surrogate mother are not involved in other criminal activities.⁹

It is obvious that both the prohibition of commercial surrogacy and the criminal sanctions are purely declaratory (with the ambition of an educative and expressive function for the law). The only real legal consequence is that commercial surrogacy contracts are not to be enforced by the Greek courts. We have thus a paradoxical situation where most surrogacies are commercial and the parties do not have an incentive to draw a real contract for delimiting and securing their rights for such an important and complex arrangement.

The commissioning parents become legal parents of the child right after the birth, the same way the biological parents do (an exception to the rule *mater semper certa est*). According to the art. 1464 of the Greek Civil Code, “in case of artificial insemination where there is a surrogate mother, provided that the conditions of art. 1458 have been met, as mother of the child is presumed the commissioning mother who obtained the court’s authorization.” However, within six months after the birth, the surrogate mother or even the commissioning mother can challenge the establishment of legal kinship if they can prove that the surrogacy was traditional (full). After the final irrevocable court decision the surrogate mother becomes retrospectively the legal mother.

The obstetric hospital follows the typical procedure for issuing the birth certificate (recording of course that this is a case of surrogacy) and the social parents should submit the certificate to the civil registrar and declare the birth of “their” child in ten days (as any other couple). However they should also submit to the registrar office a copy of the judicial decision who gave to the commissioning mother the license to have a child with the help of the surrogate mother. The procedure is entirely administrative in its nature and form.

Despite the fact that the regulation of commercial surrogacy is unjust, inefficient and ineffective the academic discussion on it is totally formalistic. All the papers published in the Greek law reviews, all the books and commentaries on artificial insemination are just describing the

⁹ There is no similar provision in the Greek Civil Code or in any of the laws regulating surrogacy with the one in Dutch law for the cases where a judge might be confronted with a *fait accompli* - and then have no option but to pronounce (citing Article 3 CRC) the adoption or guardianship over the child to the social parents who have the child illegally.

legal procedure and the legal requirements trying to clarify and explain it, without any reference to the philosophical or social science literature. The fact that the law has been violated from the very beginning is not discussed – it’s a non issue! Greek lawyers are totally interested in doctrinal consistency but totally indifferent to the efficacy of the law.

According to a recent rough estimate of a newspaper (based on an interview with a lawyer specializing in surrogacy cases)¹⁰ more than 100 decisions have been published giving authorization for surrogacy. According to the same newspaper in 90% of the cases the surrogate mothers are not relatives but “best friends”. Needless to say that ours (Hatzis 2010) is the only empirical study of surrogacy in Greece. We are afraid that even after its publication the situation of a “non-issue” will remain the same.

3. The Process of the Regulation of Surrogate Motherhood in Greece: A Lost Opportunity

It is interesting to discuss a little further the process of the regulation of surrogacy in Greece. The failure of establishing a more realistic, fair and efficient system is illustrative of three regrettable characteristics of Greek legal theory and practice: legal moralism, legal paternalism and legal formalism.

The regulation was part of a major reform of the Family law book of the Greek Civil Code, which was first put into effect in 1946. This was the second most important reform in Greek family law after the one which took place in 1983, enforcing equality of the sexes.

On November 22, 2000 the Greek minister of Justice Mihail Stathopoulos¹¹ appointed a Committee (working group) to study the effects of biotechnology and genetics to civil and particularly family law. The committee had to deal with issues like therapeutic and reproductive cloning, surrogate motherhood, *post mortem* insemination, etc.

¹⁰ See Roula Tsoulea. “The grandmother who gave birth to ...her grandchild.” *Ta Nea* (August 31, 2010).

¹¹ Mihail Stathopoulos is not a politician; he is an Emeritus Professor at the University of Athens Law School, former Rector of the University, the leading expert on Greek civil law.

The committee appointed by Stathopoulos had nine (9) members, all professors of civil law.¹² There were also two assistants (both lawyers and civil law scholars). The appointed President of the Committee, the late George Koumantos was a major figure in post-war Greek legal theory and a prominent liberal intellectual. George Koumantos was also the President of the National Bioethics Commission at the time (for more see Agallopoulou & Koutsouradis 2004).¹³

The committee convened 17 times during a period of 14 months and the discussion that took place was quite interesting. In the second meeting, some of the members suggested that a good idea could be to have a biologist or geneticist attending their sessions, but at the end the members of the committee decided to invite as special counsels in some special sessions:

- George Maniatis, a university professor of genetics and associate president of the National Bioethics Commission for 2 sessions, and
- Vassilis Tarlatzis, a university professor of Gynecology for only one session

During these sessions, the members of the committee asked them to clarify some technical issues but they did not participate in the drafting of the law. There was also no kind of participation or advising by a philosopher, sociologist, economist or any other social scientist. The draft law prepared by this particular committee was quite progressive if we compare it with similar legislation in Europe and North America.

The problem of how the law should treat surrogacy contracts came up in the third session. The members were immediately divided. Five of them believed that the law should not prohibit the financial benefit of the surrogate mother and four that it should clearly prohibit it.

In the ninth session the members decided that a prohibition of the financial benefit should not be included in the article. This was a wise decision since it satisfied both camps. According to them, the courts will most probably nullify contracts with financial benefit in them based on the bastion of legal moralism in the Greek Civil Code, Article 178: *A legal act that is against conventional morality is null.*

¹² All the members of the committee had a special academic interest in Family Law. Most of them taught regularly and they had published extensively on Family Law. The committee included all the major figures working on the area.

¹³ Under Koumantos leadership the Greek “National Bioethics Commission” reached some very progressive, liberal and reproductive-technology-friendly decisions.

They also decided to include (in the introductory report of the law) the statement that these contracts are of course immoral. But they didn't. The rationale was obvious...they passed the ball to the courts: The courts would have the discretionary power to decide if these contracts are immoral or not. Apparently the first decisions would cancel the financial benefit clauses but then, if social norms changed, the courts could interpret the law in an opposite way, allowing financial benefit or setting some limits but not absolutely prohibiting it.

This was actually a very good deal. The committee managed, despite the moralistic tendencies of some of its members, to prepare a quite progressive law and especially a very progressive article on surrogacy where even traditional surrogacy could be accommodated if there were no second thoughts by the surrogate mother (who had six months to change her mind).

The committee submitted the draft law to the Ministry of Justice and it was introduced to Parliament in early November of 2002. The Minister of Justice at the time, Philipos Petsalnikos, tried to defend the most progressive aspects of the law but most of the time unsuccessfully. When the law was introduced to the Parliamentary Committee on "Public Administration, Public Order and Justice" the first thing the members of the committee did was to change article 1458:

Article 1458. The transfer of a fertilized ova into the body of another woman (**the ova should not be hers**) and the pregnancy by her is allowed by a court authorization granted before the transfer, given that there is a written **and, without any financial benefit**, agreement between the persons wishing to have a child and the surrogate mother and in case that the latter is married of her spouse, as well. The court authorization is issued following an application of the woman who wants to have a child, provided that evidence is adduced not only in regard to the fact that she is medically unable to carry the pregnancy to term **but also to the fact that the surrogate mother is in good health and is able to conceive.**

The members of the Parliament made the **red additions** to the article prepared by the committee.

As we saw above, they manifestly prohibited traditional surrogacy, they prohibited financial benefit and they also added a reasonable clause concerning the health of the surrogate mother.

The discussion in parliament was the apotheosis of bipartisan legal paternalism and legal moralism combined (Hatzis 2009) extending from the far Left to the far Right.

The law passed as Law 3089/2002 and the Family Law Book of the Greek Civil Code was amended accordingly.

In less than two years the problem of compensation had become more than obvious since the great majority of surrogacies were commercial. So the Greek Government reacted with a new law (Law 3305/2005) emphasizing again that financial benefit is prohibited but allowing for a reasonable “compensation” of the surrogate mother.

However since the law does not consider a financial benefit the compensation for the costs of artificial insemination, pregnancy, and the post partum period as well as the compensation for her lost salaries because of the surrogacy, one wonders how this compensation can be measured since Greek judges are not aware of economic concepts and tools as the “opportunity cost”. Since this could essentially lead to financial benefit the law instituted an independent authority to define the amount of compensation.¹⁴ At the same time, it criminalized financial benefit setting a sentence of at least two years in prison and at least a €1.500 fine for everyone involved (prospective social parents, surrogate mother, third persons involved).

4. Conclusions: Law in Action

Before our conclusion I wish to discuss briefly a major empirical study under publication (Hatzis 2010). Our research team found most of the decisions published by the district court of Athens from the promulgation of the law in early 2003 to the summer of 2010 (with the exception of some decisions published in 2009 that were unavailable due to book-binding

¹⁴ The “National Independent Authority for Medically Assisted Reproduction” was established in early 2006. Even though the members of the Authority did their best to serve the goals of the Law, the Greek state abandoned them from the very beginning. Not only removed from them any authority by enforcing none of their proposals but it did not cover any related expenses (salaries of the members, administrative cost, travel expenses, research expenses, etc). In several cases the other government agencies treated the Authority with hostility and contempt. This resulted to an essential abrogation of the Authority. Its members issued a declaration in June 2010 decrying this situation. According to this declaration, they had drafted a proposal for the regulation of the compensation of the surrogate mothers. However this had the same fate with all their other proposals.

procedures) as well as several decisions from other district courts in Greece. The results are quite impressive but not unexpected.

We found 92 decisions in total (63 from Athens and Piraeus, 12 from Thessaloniki and 17 from other cities) giving authorization to surrogacy. Only in 13 of these cases the surrogate mother was a close relative. In all other cases the surrogate mother was “the best friend” of the mother, often an immigrant from Eastern Europe with an age difference from her “best friend” extending from 10 to 20 years. In one case the request by the couple was rejected because the court decided that the partners did not try hard enough to have their child “the normal way.” There is no reference in any of these cases to evidence submitted to court as to the close friendship that could lead a woman to offer her womb altruistically. It is also characteristic that most cases were published after the second law (3305/2005) which explicitly permitted compensation for expenses.

According to the estimates, there are many more cases of surrogacy in Greece. Apparently many procedures take place illegally to avoid all the hassles, the restrictions and the expenses of the court procedure.¹⁵ But even from the published decisions it is more than obvious that surrogacy is not an altruistic deed and that there is financial benefit involved in the form of payments “under the table.” The situation is so loose as to allow even advertisement of commercial surrogacy services (offered by fertility clinics) on the internet despite the clear prohibition of the law.¹⁶

¹⁵ In November 2006, after my lecture at the Panhellenic Conference of Midwives, many of them approached me to inform me that they have witnessed not only commercial but also unreported surrogacies in their hospitals (both private and public). According to them it is quite easy to have an unreported surrogacy: the surrogate gives birth to the child in the hospital and the certificate is issued under the name of the commissioning mother posing as the biological mother. Some of them even insisted that unreported surrogacies are more frequent than the reported ones.

¹⁶ In one of these web sites we can read the following: “Americans, Canadians and Europeans seeking Surrogacy procedures no longer have to worry about exaggerated costs, limited or no health insurance coverage, and long waiting lines. The current condition of medical care in developed countries has paved the way for medical tourism abroad. Highly qualified doctors and surgeons in Greece, who have been educated in some of the top universities in America and elsewhere, hold clinical positions at state-of-the-art medical facilities that cater mainly to medical tourists. Greece’s medical institutions utilize the newest medical technology and are run by some of the most skilled and qualified medical professionals.” A former client of mine, an American citizen, asked my opinion for having a child through surrogacy in Greece. When I informed him on the conditions and the prohibitions he was amazed. In his correspondence with a fertility clinic in Greece the issue of non residency never came up and the problem of the surrogate mother was not an issue. The fertility clinic had even a catalogue with possible candidates.

However almost all legal commentators agree that financial benefit is immoral, it is against conventional morality and this is why it should be prohibited. With the exception of a constitutional law scholar (Vidalis 2007), there isn't a single legal scholar in Greece criticizing this prohibition from a liberal or any other similar ethical stance. Even the scholars of the working group who thought that financial benefit should not be prohibited, did not criticize the change of the article by the parliament.

This façade of legal paternalism, moralism and formalism (Hatzis 2009) have been ridiculed by the behavior of the parties involved, not only the commissioning parents and the surrogate mothers but also by the physicians, the fertility clinics, the lawyers and the judges.

References and Further Reading

- Agalopoulou, Penelope Ch. and Achilleas G. Koutsouradis (eds.) 2004. *Artificial Insemination and the Law 3089/2002*. Athens-Thessaloniki: Sakkoulas Publications. [in Greek]
- Chliaoutakis, Joannes E. 2002. "A Relationship Between Traditionally Motivated Patterns and Gamete Donation and Surrogacy in Urban Areas of Greece." *Human Reproduction* 17: 2187-2191.
- Chliaoutakis, Joannes E., Sophia Koukouli and Maria Papadakaki. 2002. "Using Attitudinal Indicators to Explain the Public's Intention to Have Recourse to Gamete Donation and Surrogacy." *Human Reproduction* 17: 2995-3002.
- Hatzis, Aristides N. 2003. "'Just the Oven': A Law & Economics Approach to Gestational Surrogacy Agreements." In *Perspectives for the Unification or Harmonisation of Family Law in Europe*. Katharina Boele-Woelki (ed.) Antwerp: Intersentia. pp. 412-433.
- Hatzis, Aristides N. 2009. "From Soft to Hard Paternalism and Back: The Regulation of Surrogate Motherhood in Greece." *Portuguese Economic Journal* 8: 205-220.
- Hatzis, Aristides N. 2010. "Surrogate Motherhood Contracts in Greek Legal Courts: An Empirical Study." working paper.
- Kounougeri-Manoledakis, Efi. 2005. "Surrogate Motherhood in Greece (According to the New Law on Assisted Reproduction)." *International Survey of Family Law* 2005: 267-278.
- Tarlatzis, I., B.C. Tarlatzis, I. Diakogiannis, J. Bontis, S. Lagos, D. Gavriilidou and S. Mantalenakis. 1993. "Psychosocial Impacts of Infertility on Greek Couples." *Human Reproduction* 8: 396-401.
- Vayena, Effy, Patrick J. Rowe and P. David Griffin. 2002. *Current Practices and Controversies in Assisted Reproduction*. Geneva: World Health Organization.
- Vidalis, Takis. 2007. *Biolaw: The Person*. Athens-Thessaloniki: Sakkoulas Publications. [in Greek]