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8 The fertility treatment time forgot: What should be done about surrogacy in the UK?

Kirsty Horsey and Katia Neofytou

Introduction

When the UK's Department of Health announced a wholesale review of the UK's Human Fertilisation and Embryology Act 1990 (hereafter 'the 1990 Act'), with the aim of making it 'fit for purpose' in the twenty-first century (Department of Health, 2005), this was welcomed by many scholars, practitioners and others who assumed – wrongly for the most part – that such a review and 'updating' of the legislation would include matters relating to surrogacy. Prior to the announcement there had been academic and other criticism of the way that the law on surrogacy operated in the UK, particularly given that it had become, by the twenty-first century if not before, a practice relatively culturally embedded and socially accepted (Horsey and Sheldon, 2012). However, when the time came, the public consultation document leading to the passage of the Human Fertilisation and Embryology Act 2008 ('the 2008 Act') asked only about extending the way legal parenthood is acquired following a surrogacy arrangement to those who were in civil partnerships or enduring relationships, mirroring legal changes elsewhere that it would seem could never have been ignored, whatever the outcome of the consultation.¹ The consultation did not question any of the assumptions on which the current law on surrogacy rests, such as by asking whether it is desirable to continue to discourage the practice by prohibiting any commercialisation of surrogacy and the payment of surrogates, or whether surrogacy arrangements should continue to be unenforceable. Nor did it ask whether assumptions about parenthood – and motherhood in particular – following surrogacy were correct, even where those who commission a surrogate may both be the resulting child's genetic (as well as intended) parents (Horsey, 2010).

This chapter considers the regulatory approach to surrogacy in the UK and some of the pitfalls of this model in the modern day. It starts by briefly looking at how we got to where we are, and why. It then looks at what we label '21st Century surrogacy problems' which stem not only from an increasing globalisation brought

¹ Prior to the public consultation, a report from the House of Commons Science and Technology Committee (2004) had said that the regulation of surrogacy should be reviewed, including the possibility of new, separate, surrogacy legislation.

about by developments in technology and communication, but also from the UK's own inertia with respect to surrogacy regulation, which remains 'hazy' after 30 years (Horsey and Sheldon, 2012) and 'thoroughly confused' (Warnock, 2002). The building momentum in support of surrogacy law reform from academic commentators, practitioners, the judiciary and some parliamentarians is then noted, giving weight to the impression that something ought to have been done about surrogacy in 2008. In the final section, we look at potential models of regulation from other jurisdictions – notably Greece and Israel – that the UK might consider when deciding how to reform surrogacy law, before concluding with some recommendations for the future.

Surrogacy in the UK

Though it had a rocky past, with its emergence into the public consciousness around the early 1980s, the public image of surrogacy underwent much transformation through the latter years of the last century. Early judicial comments in surrogacy cases were acerbic, reflecting an antipathy towards the practice and a sense that surrogacy agreements were contrary to public policy.² The Warnock Committee, in 1984, decried surrogacy as objectionable, a 'risky undertaking' that distorts the mother–child relationship and 'the wrong way to approach pregnancy' (Warnock Committee Report, 1984; chapter 8). The Committee ultimately recommended that the use of surrogacy as a treatment for infertility should be actively discouraged and that commercial activities relating to surrogacy be criminalised.³ Warnock's recommendations resulted in the Surrogacy Arrangements Act 1985 (hereafter 'the 1985 Act'), which remains in force today. The 1985 Act, which had dual goals of protecting vulnerable women and discouraging surrogacy (Jackson, 2001; 262), makes it a criminal offence to advertise for or as a surrogate or to facilitate surrogacy on a commercial basis.

Later legislative provisions affecting surrogacy were put in place with the 1990 Act. Section 36 of the 1990 Act inserted section 1A into the 1985 Act, rendering all surrogacy agreements wholly unenforceable (something that the Warnock Committee had originally recommended). Sections 27 and 28 of the 1990 Act designated the legal parents of children born following the use of assisted reproductive technologies (ART) which, when it was undertaken in a clinical context using IVF procedures and/or donated gametes, would also encompass surrogacy. Section 30 of the 1990 Act established the Parental Order, a legal mechanism whereby a court could transfer legal parenthood of a surrogate-born child to the commissioning parents when certain conditions are met.

In 1998, a further review of surrogacy in the UK was commissioned by the

2 In particular see *A v C* (1978) 8 Fam Law 170; [1985] FLR 445, though contrast *Latey J* in *Re C (a minor)* [1985] FLR 846.

3 Though notably the published report included an annex containing a dissenting opinion written by three of the Committee. In later years, Baroness Warnock changed her views on surrogacy, coming 'to think that probably [the] minority was right' (Warnock, 2002).

government, largely to look into the money aspect of surrogacy arrangements. It had by that time become apparent that some surrogates could receive quite large sums of money for their services, notionally at least in the form of expenses. The new Committee, chaired by Professor Margaret Brazier, thus focused mainly on the issue of payments to surrogates and the way in which the law should be reformed in order that it 'continued to meet public concerns' (Brazier Committee Report, 1998: [1.1]), including via making changes to the provisions of the 1985 and 1990 Acts.⁴ The Brazier Committee recommended that payments to surrogates should be prohibited, with the exception of reimbursement of 'genuine and verifiable' expenses incurred by the surrogate as a direct result of the pregnancy (Brazier Committee Report, 1998: [5.25]), which should be defined in legislation. Arguably the Committee's more important recommendation was that the 1985 Act and Section 30 of the 1990 Act should be repealed and a new Surrogacy Act created in their place. This new Act should continue to render surrogacy agreements unenforceable and maintain the prohibitions on commercial surrogacy, and would require the establishment of a statutory Code of Practice for non-profit surrogacy agencies that would be registered with the Department of Health. The Code would be binding on all agencies and any party entering a surrogacy arrangement (Brazier Committee Report, 1998 [7.18]-[7.19]). The Brazier Committee also envisaged that a revised Parental Order scheme would continue to operate, adding the condition that commissioning couples would only be eligible for a Parental Order if they had complied with all the provisions of the new Surrogacy Act. The Committee's concerns regarding payments to surrogates meant it also recommended that payments (other than those reimbursing 'genuine and verifiable' expenses) would not in future be able to be retrospectively authorised by a court (Brazier Committee Report, 1998 [7.22]).

However, nothing came of the Brazier Committee's recommendations and no new Surrogacy Act was passed. The practice of surrogacy continued as it had done before and very little was heard of it in the courts for some time. For a while at least, surrogacy was off the radar: it was the fertility treatment that time forgot.

As indicated above, the limited treatment of surrogacy in the public consultation leading to the HFE Act 2008 meant that little changed in the way surrogacy is regulated, despite the Science and Technology Committee's 2004 recommendations. Empirical studies published a little before the Department of Health's consultation document, which indicated that children and parents in families created through surrogacy fare well (Golombok et al, 2005),⁵ yet this also appears not to have made the need for better regulation more pressing. Instead, the 2008

4 By this time, the medical profession, as represented by the British Medical Association (BMA) had changed its mind about surrogacy. In 1984 it had recommended that its members did not get involved in surrogacy at all. In 1990, it had said that surrogacy would be ethical as a means of treating infertility in couples where other forms of treatment had failed. But in 1996, the BMA published guidance acknowledging surrogacy as an acceptable reproductive option 'of last resort' (British Medical Association, 1996).

5 Follow-up longitudinal studies conducted when the children were older also support this: see e.g. Golombok et al (2011); Jadva et al (2012).

Act merely extended the ability to apply for a Parental Order to same-sex couples and those in an enduring family relationship,⁶ rather than just married couples; none of the other Parental Order requirements changed. While this is welcome, it hardly marks wholesale reconsideration of parenthood following surrogacy (Horsey, 2010) and indeed has been criticised as simply maintaining or replicating the ‘spirit’ of the 1990 provisions (McCandless and Sheldon, 2010). The 2008 Act also exempted the operation of some not-for-profit surrogacy services from the criminal provisions of the Surrogacy Arrangements Act 1985 and allowing them to recoup financial costs involved in the provision of their services,⁷ though it might be said that such piecemeal reform does not go far enough and that it would be better to have surrogacy agencies working on a proper, though regulated, commercial basis, in the interests of all parties concerned. Rather than ‘tinkering with the existing legal provisions’ (Fox, 2009), serious consideration should be given to how surrogacy operates in reality this century and how best to facilitate those arrangements while extending the protections deemed necessary to safeguard the interests of the parties involved. This was clearly not achieved by the 2008 Act.⁸

More recently, we have seen a spate of surrogacy cases in the courts, the majority of which concern issues arising from cross-border surrogacy arrangements, which have become increasingly common in an era of easy-access online information and easy travel. In addition, impetus stirred by some of these cases has led to advancements being made in relation to the way some aspects of surrogacy are dealt with domestically, including the introduction of maternity leave rights in 2015 for those who achieve parenthood through surrogacy, in recognition that commissioning parents perform the actual role of parent from birth.⁹ At the time of writing there is impetus in parliament, supported by practitioners and interest groups, among others, towards re-regulation. The Human Fertilisation and Embryology Authority (HFEA) has also started to update the information it provides about surrogacy, but there remains a long way to go to make the law fit for the twenty-first century, which has seen a whole new set of problems emerge and likely to continue.

Twenty-first-century surrogacy problems

The biggest problem currently arising from surrogacy is that many people are travelling to other countries to engage women there as surrogates. There are a

6 Parental Order provisions now contained in section 54.

7 Section 59 inserts S2A into the Surrogacy Arrangements Act 1985.

8 As was acknowledged by the pre-legislative scrutiny committee, which reviewed the changes proposed in the draft legislation: it said the changes were not enough ‘to protect both children born as a result of surrogacy and surrogate mothers’ (House of Lords, House of Commons Joint Committee (2007), at [289]).

9 See *RKA v Secretary of State for Work and Pensions* [2012?]. The Children and Families Act 2014 allows parents through surrogacy and eligible/intending to apply for a Parental Order the same rights to time off work to care for their new children as those adopting children, broadly in line with that for other parents. Regulations in 2015 will provide the framework in which applications can be made. It represents the first legal recognition that intended parents are responsible for their children from birth.

handful of other nations where engaging a surrogate, even across language barriers, is made easy for those from the UK, as well as from other countries from which people might travel. There are many reasons why putative parents might travel for surrogacy. It is often easier (particularly when information about the services offered can be accessed via the internet – see Jackson, this volume), cheaper (in the long run) and quicker than trying to find a surrogate at home. For some who travel for surrogacy (though not those from the UK), it is because surrogacy is prohibited at home. For others, restrictions placed on the legal operation of surrogacy in the home country might encourage commissioning couples to go elsewhere. This potentially includes some parents from the UK, where ‘clinical’ surrogacy using IVF procedures is heavily regulated in ways that might not suit everyone’s needs, all arrangements are precarious and unenforceable, and even private arrangements may potentially fall foul of any payments made to the surrogate (though seemingly not in practice, judging from the amount of retrospectively judicially authorised payments).¹⁰ Describing the cross-border surrogacy trend in 2013, one lawyer who has worked on many of the most recent international surrogacy cases to come before the UK courts, said ‘it always amazes me quite the lengths people will go to, and how impossible it is to stop this happening’ (Prosser, 2013). It is not only the home nation’s rules or prohibitions that encourage cross-border surrogacy. In many of the destinations where those travelling for surrogacy tend to go, the practice of surrogacy is as yet, unregulated. In others, it is commercialised to the extent that those accessing surrogacy there are more like consumers. Some, such as the US (notably California and Illinois), India, Ukraine, Georgia and Thailand have become well-known as ‘open’ surrogacy destinations¹¹. Others are emerging, including Russia, Mexico and Canada (on the latter, see White, this volume). Though each country has its own laws (which obviously vary state by state in the US) relating directly and/or indirectly to surrogacy, each allows surrogates to receive payments (making surrogates easier to find) and often there are commercial agencies or similar willing to match prospective parents with surrogates for a fee.

Whatever the reason for travelling, it would appear that cross-border surrogacy (in the same way as for many other medical and other services) is here to stay, particularly if no change is made to our domestic law. However, crossing borders to access easier, cheaper and faster surrogacy brings with it its own set of problems,

10 See as far back as *Re Q (Parental Order)* [1996] 1 FLR 369, then more recently *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030; *Re L (a minor)* [2010] EWHC 3146 (Fam) and others. It should be noted that the Human Fertilisation and Embryology (Parental Orders) Regulations 2010 confirmed that in granting orders a child’s welfare must be paramount. As Hedley J pointed out in *Re X and Y*, ‘it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of the child... would not be gravely compromised at the very least) by a refusal to make an order’ (at [24]).

11 Note, however, that the situation in Thailand seems likely to change following a recent parliamentary vote in favour of banning commercial surrogacy, in the wake of the ‘Baby Gammy’ saga and other controversies. A final version of the proposed new law should be debated in early 2015 (Ahmad and Brooks, 2015; Sharpe, 2014).

as has been illustrated in case law here and abroad, alongside media representations of how surrogacy is conducted in other countries and in particular in cases where things go badly wrong.¹² While we do not and cannot know exactly how many people travel abroad from the UK to access surrogacy (Natalie Gamble Associates, 2014), we have indications that the use of surrogacy in general is increasing, for example because of the number of applications for Parental Orders being made (Crawshaw et al, 2012). Correspondingly, there have been more cases being brought before the courts, including a significant number of cases where the surrogacy has taken place overseas, as well as more anecdotal evidence about the number of people seeking legal advice on this (Prosser, 2013) and numerous reports in the media. The first of a flurry of international or cross-border surrogacy cases in the UK were decided in 2007–8.¹³ These – and subsequent cases – illustrate some of the many legal problems that cross-border surrogacy can generate, not only for potential parents, but also for the children born to surrogates overseas. This is not to mention the additional practical, personal (including financial) and social problems that might be faced.¹⁴

Further, hidden in the subtext of any discussion of cross-border surrogacy are some unpalatable issues and difficult questions. Inevitably there is concern about which women volunteer to be surrogates in countries where payment is allowed, and indeed whether they can truly be said to have volunteered at all. Does paying women reduce them to vessels and/or amount to the commodification of pregnancy, childbirth and even children? Or, might being paid for surrogacy in some way liberate women, allowing them financial independence or gains they might otherwise not have been able to achieve? And, notwithstanding how we feel about paying the women themselves, how can we justify allowing agencies and other intermediaries to trade in the misery of infertility by sourcing women to be surrogates?

For these reasons and more, it becomes imperative that we closely examine our surrogacy laws. We argue that the careful drafting of more facilitative regulation in the UK, which better recognises the realities of modern day surrogacy, including its internationalisation and the fact that payments are made,¹⁵ would benefit commissioning parents, surrogates and children alike. Further, it should – if done well – put an end to judicial tinkering which, though welcome in those cases where it has occurred, serves only to indicate the law is not currently as it

12 Perhaps most recently illustrated by the ‘Baby Gammy’ situation, where one of a pair of twins born to a surrogate in Thailand was rejected by the commissioning couple for having Down syndrome and left in the hands of the surrogate (Callaghan and Newson, 2014) – as well as subsequent stories in the media piggy-backing on this unfortunate case.

13 *Re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814; *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030.

14 Such as those illustrated by lawyers/MPs in the debate, etc. with regards being stuck overseas, waiting, etc.

15 Note that similar concerns have been raised elsewhere: see e.g. van Zyl and Walker (2013); Millbank (2014) and Stuhmcke, this volume.

should be (Rozenberg, 2014).¹⁶ Recent findings indicate that the regulation of surrogacy varies significantly not only around the world but also within Europe (McCandless et al., 2013). The analysis below offers an insight into two regulatory regimes – those of Greece and Israel – regarding the practice of surrogacy. These two models provide a basis for fruitful comparison for two reasons: first, in both countries surrogacy is condoned by comprehensive legislation; secondly, in both countries surrogacy contracts are legal and enforceable.

The Greek regulatory model on surrogacy

Greece is one the only European country that adopts (since 2002) a novel approach allowing for altruistic gestational surrogacy arrangements based on enforceable surrogacy contracts that are reviewed and authorised by the national courts prior to conception, and which potentially lead to automatic transfer of legal parenthood after the birth of the child. Though the Greek regulatory model for surrogacy has provided a complete response to issues concerning the relationship of the parties to a surrogacy arrangement, issues of payments, and legal parentage of the surrogate-born child, its legal stipulations have been poorly explored by the international literature. Moreover, a considerable lack of sociological data is available thus far, which makes it difficult to evaluate the effectiveness of the law in Greek society.

Greece is one of the few countries that officially recognises a constitutional right to procreate and parent a child (grounded on the individual freedom of expression),¹⁷ even through the use of ARTs. Greek society can generally be described as placing great importance on the institution of the family, and reproduction within the family – whether natural or assisted – is endorsed by the Christian Orthodox tradition, the most popular religion in the country¹⁸. Low birth rates, together with high rates of infertility affecting almost 15 per cent of the adult population (Ravdas, 2010) and low IVF success rates, led the Greek legislature to suggest surrogacy as an alternative way of reproduction. Fearing

16 See e.g. *Re D and L* (2012), where the consent of the surrogate was waived, as she could not be found and, most recently, *Re X (a child) (surrogacy: time limit)* [2014] EWHC 3135 (Fam) in which Sir Justice Mumby, President of the Family Division, criticised the rigidity of the rules governing the Parental Orders, in particular the requirement that applications for an order must be made within six months of a child's birth, and allowed a late application to be made. In a blog post commenting on the case, Natalie Gamble Associates (2014), say that it 'demonstrates yet again, just how out of date the UK's surrogacy laws are' and describes the law as 'creaking under the strain' of modern surrogacy practice.

17 Article 5(1), Greek Constitution. See also Trokanas, T. (2011) 'Human Reproduction – Personal autonomy and its limits' (in Greek), Sakkoulas Publications, Athens-Thessaloniki, Greece: 91; Kounougeri-Manoledaki, E., (2005) 'Assisted reproduction and Family Law. The Greek regime: Laws 3089/2002 and 3305/2005' (in Greek), Sakkoulas Publications, Athens-Thessaloniki, Greece: 8.

18 The Church is against donor IVF, and having children outside the marriage. Where married heterosexual couples suffer from infertility, the Church suggests adoption. However, it has not expressed any opinion against surrogacy *per se*.

concerns relating to exploitation and commodification, and in order to protect the interests of the parties to a surrogacy arrangement (most importantly, of the surrogate-born child), in 2002 the Law 3089/2002 on Medically Assisted Human Reproduction was passed by the Greek Parliament, which facilitates surrogacy. In 2005, law 3305/2005 was passed to establish an express prohibition on payments for surrogacy (article 13(4)), and to impose criminal sanctions (article 26).¹⁹

The specific provisions of the Law are incorporated into the Greek Civil Code (hereafter *GCC*), and more precisely into article 1458 *GCC*, which introduces an exception to the presumption of maternity grounded on gestation and birth (article 1463 *GCC*). Thus, a woman who has been granted a pre-conception court order approving the agreement between her and another woman (the gestational carrier) can be presumed to be the legal mother of the surrogate-born child immediately after birth. Her parental right is based on her intention to have and raise the child.

Under Greek law, surrogacy is available to single or married women, or women in *de facto* relationships, who have been medically diagnosed as unable to conceive, or bring a pregnancy to term, or to women who might transmit a dangerous hereditary condition to the child (such as sickle cell anaemia, or HIV/AIDS, among others). Although article 1458 refers to women, for reasons of gender equality (guaranteed by article 4(1) of the Constitution), surrogacy might also be an option for single men.²⁰ However, it is not, currently, for same-sex couples.

The intended mother must seek approval from the national court before the fertilisation of the surrogate takes place. She must submit the written surrogacy agreement, and affidavit from a doctor affirming her inability to carry or give birth to a child, as well as the good physical health of the potential surrogate, psychiatric assessments confirming the good emotional state of both women, as well as consent forms signed by the two women's co-habitants or husbands, if they have one. The latter is required because in Greece paternity is determined based on the man's relationship with the legal mother of the child (1463 *GCC*). Consequently, the partner or husband of the legal mother of the child, will be presumed to be her legal father.²¹

19 The criminal sanctions refer to the intended mother and the surrogate carrier, as well as the medical staff, and any paid intermediaries who will assist the performance of surrogacy against the legal provisions. Moreover, advertising for surrogacy is illegal. The penalty is the payment of a fine up to 1,500 euros and at least 2 years of imprisonment. However, there has been no case where sanctions have been imposed by the Greek courts. The importance of the 'best interests of the child' arguably makes it very unlikely for any surrogacy contract not to be approved, even in retrospect, or for any actions to be considered as willingly circumventing the law.

20 The Greek court authorised surrogacy for a single man in 2008 and 2009 (One-Member Court of First Instance of Thessaloniki decision no. 2827/2008 and 13707/2009). Nevertheless, the Appeal Court in 2010 overturned the decision deeming the first decisions illegal, since the letter of the law clearly refers to a woman. Since the judges in Greece are not bound by legal precedent, they are free to make broad interpretations of the law, and approve a future application of a single man to surrogacy based on his constitutional right to procreate and the principle of gender equality. See also Kounougeri-Manoledaki, E., (2010): 2–3 (in Greek). The single man should prove his infertility and the need for surrogacy, as a woman would have to.

21 This presumption is rebuttable.

Furthermore, until 2014, the intended mother's application had to prove that both she and the surrogate-to-be were domiciled in Greece (article 8, Law 3089/2002). This requirement was supposedly included to eliminate the possibility of 'reproductive tourism' and international surrogacy arrangements, which may render the child parentless and stateless. However, in July 2014 the Greek Parliament passed a new amendment to the law allowing for non-permanent residents to come to Greece, get treatment for surrogacy and be recognised as the legal parents of the child under the Greek law. More specifically, article 17 of Law 4272/2014 provides that either the surrogate or the intended mother in a surrogacy arrangement should at minimum be temporary residents in Greece, which then leaves open the possibility for foreign couples to seek surrogacy in Greece. This amendment could obviously place Greece as yet another popular destination to those willing to travel for international surrogacy.²²

Importantly, the law states that the egg to be fertilised for the purposes of surrogacy should not belong to the surrogate. Only gestational surrogacy is allowed in Greece, and, therefore, the egg must either come from the intended mother, or a donor, meaning that in all cases the resulting child has no direct genetic relation to the surrogate. As for the sperm, it can either come from the commissioning father, if there is one, or a donor. Accordingly, the Greek law accepts the case of full social parenting, since the surrogate-born child can potentially be genetically unrelated to her parent(s). Moreover, it becomes apparent that the only way to achieve a surrogate pregnancy is through IVF, which must be performed by specialised medical personnel in a hospital or fertility clinic licensed by the National Authority for Medically Assisted Reproduction (hereafter NAMAR).²³

The intended mother must also prove that the surrogacy arrangement is altruistic, and that no payment will be made to the surrogate during pregnancy or after childbirth, except for 'reasonable expenses'. Article 13(4) of Law 3305/2005

22 Stéphane Kovacs, 'La Grece, L'Eldorado de la GPA' *Le Figaro* (3/10/2014) (in French) <<http://www.lefigaro.fr/mon-figaro/2014/10/03/10001-20141003ARTFIG00288-en-grece-l-eldorado-de-la-gpa.php>> .See also Génétique, 'Greece. The New Eldorado for infertile couples' (11/08/2014) <<http://www.genethique.org/en/greece-new-eldorado-infertile-couples-61946.html>>.

23 NAMAR started operating in 2005, but ceased functioning in 2010. Former members of NAMAR reported that it was never able to fully operate, due to the State's continuous refusal and/or tardiness in approving its decisions, as well as the lack of state funding (Kaiafa-Gbandi et al (2012): 181, 183). The new law has re-established the Greek NAMAR (the equivalent of the HFE Authority) and it re-started its operations mid-October 2014. All Greek fertility clinics (67 in total) have in the interim been working without the necessary licence from and control of NAMAR. According to recent press announcements by the newly appointed President of NAMAR, the Authority will first and foremost focus on documenting and performing stringent controls on all the Greek fertility centres (Karatira, P., 'Without license the 67 fertility clinics in Greece' (in Greek), Newspaper Proto Thema (15/10/2014) <<http://www.protothema.gr/ugeia/article/418527/horis-adeia-oi-67-monades-upovoithoumenis-anaparagogis-sti-hora-mas/>> . See also Vasiliki Aggouridi, 'NAMAR has been "resurrected"' (16/10/2014) <<http://www.virus.com.gr/site/index.php/health/health-and-pharma-news-reports/item/4164-anastithike-i-ethniki-arxi-iatrikos-ypovoithoumenis-anaparagogi%E2%80%A6>>.

further stipulates what these might include: expenses relating to the accomplishment of pregnancy through the use of ARTs, namely the costs of IVF treatment; the costs of pregnancy clothing, drugs and any other medical treatment the pregnant woman might need; the costs for childbirth and post-natal care of the surrogate and the child; as well as any wage loss that the surrogate might incur during pregnancy and immediately after birth. NAMAR had in 2008 suggested a set payment of 10,000 euros,²⁴ but empirical evidence shows that the amount paid might reach 12,000 euros, or even more, since the law has introduced no mechanism for state monitoring of potential ‘under the table’ payments (Hatzis, 2009, 2010; Ravdas, 2010).

The judge, after reviewing all the aforementioned documentation and evidence,²⁵ and guided by the ‘best interests’ of the child principle, may approve the surrogacy agreement and authorise the fertilisation of the surrogate. Any clauses that seem to unjustifiably limit the surrogate’s freedom during pregnancy are deemed invalid and illegal (179 *GCC*). In this light, any restrictions to the surrogate’s lifestyle, or any duty to conform with a certain lifestyle, or any prohibition on her right to a lawful abortion,²⁶ or a non-consensual obligation for the surrogate to undergo invasive medical procedures during pregnancy, such as amniocentesis, are illegal and invalid. Immediately after the birth of the child, the surrogacy contract becomes legal and enforceable. The intended mother is presumed to be the legal mother of the child. This presumption can, however, be rebutted if the surrogate, within six months after the birth of the child, presents to the court sufficient proof that the child is in fact genetically related to her and her partner/husband (article 1464(2) *GCC*).

The court-authorised surrogacy arrangement can be described as a contract for the provision of services, operating as a mandate to the surrogate to relinquish the child to the intended mother. In case the surrogate then fails to hand the child over to the intended – and now legal – mother, the latter can apply to the court and force her to adhere to the terms of the agreement (article 946, Code of Civil Procedure). The legal mother is also entitled to compensation for breach of contract.²⁷ On the other hand, though this is highly unlikely, the intended mother has no right to refuse to take the child up. In twelve years that the law has been in place, however, no application to resolve parenthood following surrogacy has reached the national courts.

24 NAMAR decision, no. 36/2008 – Official Government Gazette 670/B’/16.04.2008.

25 The judge has little discretionary power; he/she is required to only review the validity of the agreement and determine whether the legal conditions have been met, without investigating the reasons for choosing this method. Consequently, the court approval can be depicted as more of a formal bureaucratic procedure requirement, a ‘rubber stamp’, rather than a process for full judicial review of surrogacy arrangements.

26 Article 304, Greek Criminal Code (*GCrimC*). However, the surrogate that has aborted the foetus has to return any money that the intended mother might have given her up to that point, and might also be liable for compensation to the intended mother due to breach of contract.

27 If the surrogate runs away with the child, she will be held criminally liable for the criminal offence of child abduction (article 324 *GCrimC*).

Within ten days of her birth, the child must be registered in the national registry under the name of the intended/legal mother, and the name of her partner or husband, if he had consented to the procedure. Law 344/1976 governing the National Birth Registry does not introduce any special requirements regarding the registration of surrogate-born children. The legal mother must submit a copy of the court decision that had authorised the surrogacy procedure to the registrar (article 20, Law 3089/2002).²⁸ No other legal process, such as adoption or an application for parental order, needs to be followed.

Greek Law thus offers a novel approach to surrogacy. It provides for a mechanism that is relatively simple and fast. The law allows for altruistic gestational surrogacy and is available to infertile single women (and possibly single men), married women, or women co-habiting with a (male) partner. In its current state, surrogacy is not an option for same-sex couples, but many scholars have stressed the need for a relevant legal reform. State interference in the process is limited to a court authorisation of the surrogacy agreement before the fertilisation of the surrogate. The Law includes requirements for the good physical and emotional state of the surrogate carrier, and declares the paramountcy of the 'best interests' of the child. It also allows for an automatic transfer, or better yet, a presumption of maternity in favour of the intended mother based on a contract that is enforceable, and functions as a 'safety net' for the interests of the parties to the agreement, as well as the interests of the child. Finally, the Greek model protects the surrogate's autonomy rights during pregnancy, and endorses a modern approach to family, one based purely on intention, rather than biology, since the surrogate-born child might not be genetically related to either of her parents. Two potential disadvantages could be said to exist: first, there is no mechanism to ensure that the relationship between the parties is indeed altruistic (Hatzis, 2009, 2010; Stoll, 2013); and second, there is no possibility to re-evaluate the arrangement, if the situation changes after it has been authorised by the court (Stoll, 2013: 318). However, in considering the Greek model as a way of guiding reform in the UK, these issues could be considered.

The Israeli regulatory model on surrogacy

Israel can be described as 'a pronatalist society whose Jewish Israeli population will try anything in order to have a child' (Schenker, 2003: 251; Teman, 2003a: 261–2). Israeli policy seems to actively foster and promote a duty for Israeli Jews to reproduce, including through the use of ARTs, which are both legal and state-funded (Birenbaum-Carmeli, 2007; Kahn, 2000; Shalev, 1998; Stoll, 2013; Teman, 2003b). The pronatalistic ideology is deeply rooted in various religious, historical and political factors, including the centrality of the biblical directive 'to be fruitful and multiply' (Sperling, 2010); the power of Judaic authorities on society and the law (Birenbaum-Carmeli, 2007: 24); the Holocaust and immigration

²⁸ There is no requirement for the surrogate's name to be included in the registry. The identity of any gamete donors remains undisclosed (article 1460 GCC).

trauma; the emotional needs of a society that is in a constant war-state (Teman, 2003b: 80); and demography politics. It is, therefore, not surprising that surrogacy in Israel is legally condoned and its practice is facilitated, although with careful state monitoring.

In 1996, the Israeli Parliament (the Knesset) passed a comprehensive law entirely devoted to surrogacy, the Surrogate Motherhood Agreements Act (hereafter 'the SMA Act'). Israel became the first country in the world to allow pre-conception surrogacy arrangements that, if approved by the Government-appointed approvals committee, are legal and enforceable and can lead to an after-the-birth transfer of parentage to the commissioning couple. The SMA Act is designed to protect the interests of the parties to such an arrangement, and the child, doing so from a religious standpoint, and, more specifically, from a Jewish standpoint (Dorner, 2000: 194). The Act is divided into two parts: one concerning the approval of the agreement and the second regarding the determination of parentage.

The SMA Act introduces a mechanism of intense state control throughout the surrogacy process (Benshushan and Schenker, 1997). The most important features of the law are: a public committee authorises and monitors each case; surrogacy, at this point, is only available to married heterosexual couples;²⁹ only full surrogacy, where at least the sperm of the commissioning father is used, is permitted; the agreement is altruistic, and only reasonable expenses approved by the committee can be paid to the surrogate; the surrogate must be single or divorced, of the same religion as the commissioning couple, and not a relative of one of the commissioning parents; both the surrogate and the commissioning couple must be domiciled in Israel; the surrogate retains a very limited right to withdraw from the agreement; after the birth of the child the contract becomes enforceable; the transfer of parentage to the commissioning couple is subject to the issuance of an after-birth parentage order. Between the time immediately after the birth and the issuance of the order, the child is in the custody of the commissioning couple, but a social worker holds legal guardianship of the child.

The Approvals Committee is appointed by the Health Minister and comprises of seven members, including medical professionals, one lay member, a social worker and a clergyman (SMA Act Ch 2. S.3(a)(1)-(7)). The role of the Committee is to review all applications for surrogacy, check whether all statutory requirements relating to the surrogate or the commissioning parents have been met, and that all necessary documents have been submitted and, if so, approve agreements.

29 Under the current law, single men and women and same-sex couples cannot have a child through surrogacy in Israel, and have to travel abroad. Popular destinations for Israeli gay couples seeking surrogacy are India and Thailand. If they successfully have a child through a surrogate abroad, they then must face the Israeli government's reluctance to legally recognise their children as Israeli citizens, resulting in many legal hurdles concerning the return of the child to Israel and her registration in the country's birth registers (María Victoria Rivas Llanos, 2013). The Knesset is now considering the passing of a Surrogacy Bill for singles and same-sex couples (Harkov, 2014). The decision could not have been timelier, since Indian authorities have announced that surrogacy will only be available to heterosexual couples that have been married for at least two years (Vyas, 2014).

In deciding whether to approve a certain agreement, the Committee takes into consideration the future child's welfare (Ch. 2 S.5(2)-(3)). If the couple proceeds to the fertilisation of the surrogate without the Committee's approval, penalties of up to one year in prison can be incurred (Ch. 3 S.19(a)-(b)).

The requirement that the surrogate must either be single or divorced (Ch. 2 S.2(3)(a)) is for the prevention of potential adultery. As Shalev (1998: 65) explains, this requirement is based on the religious legal (*halakhic*) principle that a child born within marriage that is not genetically related to the woman's husband is a *mamzer* (a bastard). A *mamzer* will have to face the consequence to later be only able to marry a *mamzerim* or convert. However, the Act provides an exception to the requirement of the surrogate being unmarried. If the commissioning couple has made reasonable efforts to find an unmarried potential surrogate, but has failed, the Committee might still approve their agreement (Ch. 2 S.2(3)(a)). Moreover, the surrogate must not be related to either of the intended parents (Ch. 2 S.2(3)(b)). The reason for this is the prevention of coercion potentially exerted on a female relative to act as a surrogate (Schenker, 2003). Surprisingly, though, adoptive relatives are permitted to act as surrogates and, thus, there exists the danger that they might be emotionally pressured to accept to enter into the agreement in an effort to "repay" for the benefit of being adopted (Frenkel, 2001: 611).

Another important requirement of the Act is that the surrogate must be of the same religion as the commissioning mother. This is because Jewishness is determined matrilineally (Shalev, 1998) and, hence, a Jewish child must have been gestated by a Jewish woman. This is, again, based on *halakhic* rationale, as is the requirement for the sperm of the commissioning father to be used for the surrogate conception (Ch. 2 S.2(4)). According to Shalev, Israeli family law provides that '[p]aternity is established at conception' (1998: 68), and, therefore, the child must be genetically related to her father. Shalev contends that this also 'stems... from *halakhic* considerations as to the certainty of paternity...[b]ut at the same time it poses the genetic continuity of the man at the centre of attention' (1998: 92). Based on the *mamzerut* rule, the commissioning couple is prohibited from using the surrogate's ova for the fertilisation. As becomes apparent, the Israeli surrogacy-conception is a fully medicalised procedure necessarily involving IVF, as is the case in Greece.

Another similar feature of the Israeli law is that, together with the surrogacy agreement, the intended couple must submit medical reports proving the inability of the intended mother to achieve pregnancy or bring it to term, and the suitability of the potential surrogate. They must also submit the results of psychological assessments of the parties. The difference in Israel is that the intended parents must additionally provide a statement that they have received professional counselling, in which they explored other alternatives to parenthood.

If all requirements have been met, the Approvals Committee will authorise the agreement. It then continues to supervise the surrogacy procedure by reviewing and approving the payment of 'reasonable expenses' including 'medical costs, costs for insurance, legal consultation, loss of time and income, suffering or any other reasonable expenses'. Such a broad approach to the content of 'reasonable

expenses' raises concerns about the pure altruistic character of the arrangement that seems to more closely resemble a commercial arrangement. Nevertheless, any payments must be scrutinised and approved. Payments to intermediaries are, however, legal: the amount to be paid is left to the discretion of the commissioning couple and the surrogacy broker.

The most important similarity between the Israeli and the Greek model is that pre-approved surrogacy arrangements are legal and enforceable. The surrogate has an express statutory right to have an abortion (Ch 4 S.18), if she wishes to, but, if she decides to continue with the pregnancy and childbirth, she must then relinquish the newborn to the commissioning parents. This takes place in the presence of a social worker, who must be notified of the event of the delivery within twenty-four hours. From then onwards, the child will be in the custody of the commissioning couple, who must apply within seven days after the delivery to the court for a parentage order so they may be acknowledged as the child's legal parents. Until the granting of the order by the court, legal guardianship belongs to the social worker, and the parties retain their right to change their minds and withdraw from the agreement (Ch 3 ss.13–14). They will, however, have to convince the court of a change in circumstances that justifies that, and the welfare officer must agree that this is in the child's interests (Ch 3 S.11(b)). To this end, the surrogate has very limited chances to renege on the agreement and keep the child. After the parentage order has been made, the Act does not permit withdrawal from the surrogacy agreement. The surrogate-born child's birth must, however, be entered into a special register (Ch 3 S.16(b)). As Shalev notes, this creates 'the danger of stigmatisation of the children' born following surrogacy (1998: 90).

In conclusion, the Israeli surrogacy law is unique, not only because it provides such a complete response to surrogacy; its provisions are also in line with the particular cultural and *halakhic* traditions of Israel. It has facilitated freedom to enter surrogacy arrangements, albeit within state-defined limits and controls in every step of the process. These are thought to effectively protect the interests of both the parties to the arrangement and the child, and also 'promote the state's religious and pronatalistic agendas' (Stoll, 2013). However, Israeli law does not make surrogacy available to same-sex couples, or single parents. This is now, though, under consideration by the Israeli Parliament, and it is to be hoped that important changes are forthcoming (see Cassidy, 2014; Oryszczuk, 2014).³⁰

Conclusion

Prohibiting payments for surrogacy in the UK in the way the Brazier Committee recommended was always likely to be counter-productive in the sense that it

30 Patricia Cassidy 'Israel's Cabinet approves surrogacy for same-sex couples and single people', BioNews 757, 09/06/2014 (accessed 20/07/2014): http://www.bionews.org.uk/page_427299.asp; Stephen Oryszczuk, 'Israel surrogacy for gay couples one step closer', Jewish News Online, 28/10/2014 (last accessed 3/11/2014).

would drive more people to ‘underground’ and completely unregulated surrogacy services (Freeman, 1999). These days, any restrictions on surrogacy, whether on access, payments or even to the acquisition of legal parenthood is likely to drive those who want to use surrogacy to find ways around their particular problem. People will turn increasingly to the internet to find surrogates in this country via ‘introduction sites’ or social media, resulting in them making arrangements that are potentially illicit and almost certainly unwise (see Jackson, this volume).³¹ Beyond that, people seeking ‘easy’ access to surrogates are likely to continue to go overseas, to those destinations where it is known surrogacy can be bought for a price, via agencies or businesses that facilitate arrangements on a commercial basis and where the surrogate herself will be incentivised by the prospect of payment. If we are genuinely concerned about the harms that internationalised surrogacy may bring, such as exploitation of potentially vulnerable or underprivileged women who act as surrogates in countries where they have little or no protection, or the problems that conflicting laws on legal parenthood and nationality have been shown to bring about for the children born from such arrangements,³² then perhaps making surrogacy more attractive in the UK is the answer.

Further, it would appear that at least in some instances, there is evidence that not only those commissioning surrogates but also some agents acting on their behalf in the UK simply do not know enough about the law as it stands.³³ To have your dreams of parenthood shattered when you have done things right but someone else who you seek advice from or you place your trust in has not must be incredibly difficult. However, the hardships encountered in such cases would arguably be removed if we were to move to a more facilitative regulatory model, perhaps containing some aspects found in the Greek and/or Israeli models, but which certainly must at least consider the idea that parenthood might presumptively rest with the commissioning parents, that payments (perhaps within a regulatory framework) be recognised for what they are and that dedicated agencies and advisors ought to be able to receive payment for professionalised advice. When judges retrospectively authorise payments beyond reasonable expenses on a routine basis, because not to do so would contravene the principle that the child’s best interests are paramount, and even go so far as to extend the period of time in which a Parental Order can be applied for from that outlined in statute, this is surely an indication that our laws on surrogacy are deeply flawed,

31 Note also that ‘partial’ surrogacy arrangements, where the surrogate uses her own egg and is inseminated outside of a clinical setting, are totally unregulated by UK law, indicating another potential danger of too-restrictive regulation.

32 Notably, France has recently been held to have been in violation of Article 8 of the European Convention on Human Rights in its failure to grant citizenship and/or recognition of legal parenthood to children born to surrogates in the US: *Mennesson v France* (application no. 65192/11) and *Labassee v France* (no. 65941/11). French law is set to change accordingly, though the actual practice of surrogacy will remain illegal.

33 See e.g. Hedley J’s comments in *Re G* [2010], at [29] and the recent case *JP v LP & Others* (Rev 1) [2014] EWHC 595 (Fam).

or not adequate to meet the demands posed by twenty-first century surrogacy. Momentum for change is picking up, with increasing academic criticism mirrored by those experiencing surrogacy in day-to-day practice (Gamble, 2014; Ghevaert, 2014; Prosser, 2013), and with surrogacy taken up as an issue in Parliament in October of 2014,³⁴ with indications from the Minister for Public Health (Jane Ellison MP) that government will consider January 2015 whether UK surrogacy law should be reviewed, after hearing opinions from other MPs. The European Parliament has already commissioned its own study on surrogacy laws and practice across Europe (McCandless et al, 2013), further indicating that surrogacy law in this country is ripe for review.³⁵

There will never be universal agreement about surrogacy. Our nearest neighbours on the European continent think it abhorrent and protest about it on the streets. But all recent signs indicate that the law regulating surrogacy in the UK is not 'fit for purpose' and that a big opportunity for informed debate leading to reform was missed when the 1990 Act was updated. Reform is necessary in order to offer commissioning parents from the UK the safest and fairest route to parenthood through surrogacy and it may be that in considering future directions, we should consider all options, as well as look to learn from the facilitative legislative models of Greece and Israel.

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34 Hansard, 14 October 2014, Column 1WH.

35 Additionally, The Hague Conference on Private International Law has been conducting a long-term investigation into the possibility of creating a new *global* convention on international surrogacy, taking into account information gleaned from those working with surrogacy about issues arising from international surrogacy arrangements. It recently published its report on the 'desirability and feasibility' of taking the project forward (Hague Conference on Private International Law, 2014).

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