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*A Comparative Socio-Legal
Analysis of Responses to
Surrogacy in Greece and the UK*

Aikaterini Neofytou

A thesis submitted to Kent Law School for the degree of
Doctor of Philosophy in Law

University of Kent, Canterbury, April 2018

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ABSTRACT

Surrogacy is an alternative means of reproduction that has been described as a controversial practice raising important ethico-legal considerations relating to alleged risks to autonomy, welfare and justice. However, many arguments against it are made without support from empirical data or despite such evidence as exists. Surrogacy is governed by diverse regulation worldwide, but such regulation generally has not been shaped by the perspectives of those involved in it, while the incidence of surrogacy both at national and international levels is increasing.

In this thesis, I explore how surrogacy should be regulated in law through a sustained comparative socio-legal approach informed by a feminist perspective. I argue that respect for autonomy entails that individuals should be allowed to make use of surrogacy, provided that there are no good reasons for preventing them from doing so. I consider a range of such reasons – grounded in concerns for the welfare of the participants and social justice – and determine that surrogacy should be permitted, if it is properly regulated. I then go on to consider the parameters of good regulation using Greece and the UK as examples, and explore what, if anything, each regime might learn from the other and how they can most effectively reflect the experiences and protect the interests of the surrogacy participants.

Greece and the UK offer the basis for a novel, interesting and fruitful comparative socio-legal study. Greek law provides for an intention-based model of parenthood founded on altruistic gestational surrogacy agreements which, if pre-approved by the judiciary, can become enforceable upon the child's birth, leading to an automatic acknowledgement of the intended parents' parenthood. UK law allows gestational and traditional altruistic surrogacy arrangements, but only regulates those taking place in UK clinics. UK surrogacy agreements are unenforceable, parenthood is based on gestation and birth, and intended parents may acquire parenthood through a post-birth parental order granted by the courts if certain conditions are met.

Despite how unusual and novel the Greek legal approach is, it is poorly explored within the international literature. This thesis fills this gap. It also adds to the existing, limited data about people's experiences of surrogacy regulation in the UK, both confirming some findings of previous studies and challenging certain assumptions, as well as introducing a range of new concerns.

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ABBREVIATIONS

ACA	Adoption and Children Act 2002 (UK)
ARTs	Assisted Reproductive Treatments
BB	Brilliant Beginnings (UK surrogacy organisation)
BMA	British Medical Association
BSC	British Surrogacy Center (UK surrogacy organisation)
Cafcass	Children and Family Court Advisory and Support Service (UK)
CCG	Clinical Commissioning Group (UK)
CCP	Code of Civil Procedure (Greece)
CoP	Code of Practice
COTS	Childlessness Overcome Through Surrogacy (UK surrogacy organisation)
DoH	Department of Health (UK)
DHSC	Department of Health and Social Care (UK)
ECHR	European Convention of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
ECJ	European Court of Justice
GC	Greek Constitution
GCC	Greek Civil Code

HFE Act	Human Fertilisation and Embryology Act (UK)
HFEA	Human Fertilisation and Embryology Authority (UK)
HL	House of Lords (UK)
HRA	Human Rights Act 1998 (UK)
IM	Intended Mother
IP	Intended Parent
IVF	In Vitro Fertilisation
NAMAR	National Authority for Medically Assisted Reproduction (Greece)
NHS	National Health System (UK)
NICE	National Institute for Health and Care Excellence (UK)
NOPHS	National Organisation for the Provision of Health Services (Greece)
PO	Parental Order (UK)
SAA	Surrogacy Arrangements Act 1985 (UK)
SUK	Surrogacy UK (UK surrogacy organisation)
The 1990 Act	HFE Act 1990 (UK)
The 2008 Act	HFE Act 2008 (UK)
The 2002 Law	Law 3089/2002 (Greece)
The 2005 Law	Law 3305/2005 (Greece)
The 2014 Law	Law 4272/2014 (Greece)
UK	United Kingdom

WoC

Welfare of the Child

TABLES OF LEGISLATION

Table 1 - UK Legislation

Adoption Act 1976

Adoption and Children Act 2002

Births and Deaths Registration Act 1953

Children Act 1989

Children and Families Act 2014

Children and Young Persons Act 1969

Civil Partnerships Act 2004

Equality Act 2006

Human Fertilisation and Embryology Act 1990

Human Fertilisation and Embryology Act 2008

Human Rights Act 1998

Marriage (Same Sex Couples) Act 2013

Surrogacy Arrangements Act 1985

Surrogacy Arrangements (Amendment) Bill 1985

Table 2 – Greek Legislation

Citizenship Code

Civil Code

Civil Partnerships Law (Law 4356/2015 and Law 3719/2008)

Code of Civil Procedure

Constitution

Criminal Code

Doctors' Code of Conduct (Law 2251/1994)

NAMAR Code of Practice for ARTs (Government's Gazette B' 293/07.02.2017)

NAMAR Decree 36/2008 (Government's Gazette 670/B'/16.4.2008)

Law 3089/2002 (Government's Gazette A' 327/23.12.2002)

Law 3305/2005 (Government's Gazette A' 17/27.01.2005)

Law 3719/2008

Law 4272/2014 (Government's Gazette A' 145/11.07.2014)

Law 4356/2015

Table 3 - European Legislation

European Convention of Human Rights and Fundamental Freedoms

TABLES OF CASES

Table 1 – UK cases

An Adoption Application (Surrogacy), Re [1987] 2 All ER 826

A (Foreign Surrogacy: South Africa), Re [2015] EWHC 1756 (Fam)

A and others (Human Fertilisation and Embryology) (Legal Parenthood: Written consent), Re [2015] EWHC 2602 (Fam), [2016] 1 All ER273, [2015] WLR (D) 387

A and B (No 2 - Parental Order), Re [2015] EWHC 2080 (Fam)

A & B (Parental Order Domicile), Re [2013] EWHC 426 (Fam)

A & B (Children: POs: Time Limits), Re [2015] EWHC 911 (Fam)

AB v DE [2013] EWHC 2413 (Fam)

AD & Others Human Fertilisation and Embryology Act 2008, Re [2017] EWHC 1026 (Fam)

A v C [1985] FLR 445

A v R and Another (Declaration of Parentage) [2017] EWHC 396 (Fam)

B v B (Fertility Treatment - Paperwork Error) [2017] EWHC 599 (Fam)

C (A Child) (Parental Order), Re [2013] EWHC 2408 (Fam)

C (A Minor) (Wardship: Surrogacy), Re [1985] FLR 846

Case O (Human Fertilisation and Embryology Act 2008) [2016] EWHC 2273

Cases Y, Z, AA, AB & AC (Human Fertilisation and Embryology Act 2008), Re [2017] EWHC 784 (Fam)

CW v NT & another [2011] EWHC 33

D & L (minors) (surrogacy), Re [2012] EWHC 2631

Evans v The United Kingdom (Application no.6339/05)

G (Human Fertilisation and Embryology Act 2008), Re [2016] EWHC 729 (Fam)

G, Re [2007] EWHC 2814 (Fam)

G, M, Re [2014] EWHC 1561 (Fam)

G v G [2012] All ER (D) 138

H v S (Surrogacy Agreement) [2015] EWHC 36

JP v LP & Others (Surrogacy Arrangement: Wardship) EWHC 595 (Fam), [2015] 1 FLR 307

J v C [1970] AC 668

J v G [2013] EWHC 1432 (Fam)

L (a minor), Re [2010] EWHC 3146 (Fam)

L v HFEA & Secretary of State for Health [2008] EWHC 2149 (Fam)

M, Re [2016] EWHC 1572 (Fam)

M (Child), Re [2017] EWCA Civ 228

M v F & SM (Human Fertilisation and Embryology Act 2008) [2017] EWHC 2176 (Fam)

Mellor (The Queen on the Application of Mellor v. Secretary of State for the Home Department) [2001] 3 WLR 533

Montgomery v Lanarkshire Health Board [2015] SC 11 [2015] 1 AC 1430

N (A Child), Re [2007] EWCA Civ 1053

North West Lancashire Health Authority v A, D and G [2000] 1 WLR 977

P (A Child), Re [2007] EWCA Civ 105

P (Minors) (Wardship: Surrogacy), Re [1987] FLR 421

P-M, Re [2013] EWHC 2328 (Fam)

Q (Parental Order), Re [1996] 1 FLR 369

R v HFEA (ex parte Blood) [1997] 2 WLR 806

R & S v T [2015] EWFC 22

RKA v Secretary of State for Work and Pensions (2012)

S, Re [2009] EWHC 2977 (Fam)

Surrogate Parenting: Hearing on S.B. 1429 (April 10, 1987)

The Human Fertilisation and Embryology Act 2008 (Case I), Re [2016] EWHC 791 (Fam)

The Human Fertilisation and Embryology Act 2008 (Case J), Re [2016] EWHC 1330 (Fam)

The Human Fertilisation and Embryology Act 2008 (Case N), Re [2016] EWHC 1329 (Fam)

TT (Surrogacy), Re [2011] EWHC 33, [2011] 2FLR 392

W (Minors) (Surrogacy), Re [1991] 1 FLR 385

W, Re [2013] EWHC 3570 (Fam)

X (A Child) (Surrogacy: Time Limit), Re [2014] EWHC 3135 (Fam), [2015] 1 FLR 349

X (A Child: foreign surrogacy) [2018] EWFC 15

X (A Child), Re [2016] EWFC 54, [2016] EWFC 55

X (Children), Re [2011] EWHC 3147

X & Y (Foreign Surrogacy), Re [2008] EWHC 3030

X & Y v United Kingdom [1978] 12 DR 32

Y v Z & Ors [2017] EWFC 60

Z (A Child: Human Fertilisation and Embryology Act: Parental Order), Re [2015] EWFC 73

Z (A Child) (No 2), Re [2016] EWHC 1191 (Fam)

Table 2 – Greek cases

Appeal Court of Athens no.2171/2002

Appeal Court of Athens no.3357/2010

Multi-Member Court of First Instance of Athens no.6779/2000

Multi-Member Court of First Instance of Heracleion no.31/5803/176/1999

Multi-Member Court of First Instance of Heracleion no.678/2755/671/2003

Multi-member Court of First Instance of Patras no.248/2016

Single-member Court of First Instance of Athens no.1320/2004

Single-Member Court of First Instance of Athens no.2827/2008

Single-Member Court of First Instance of Chania no.122/2008

Single-member Court of First Instance of Heracleion no.678/2003

Single-member Court of First Instance of Katerini no.408/2006

Single-member Court of First Instance of Korinthos no.224/2006

Single-member Court of First Instance of Rodopi no.400/2007

Single-Member Court of First Instance of Thessaloniki no.27035/2003

Single-member Court of First Instance of Thessaloniki no.40820/2007

Single-member Court of First Instance of Thessaloniki no.395/2009

Single-Member Court of First Instance of Thessaloniki no.13707/2009

Single-member Court of First Instance of Thessaloniki no.16574/2009

Single-member Court of First Instance of Thessaloniki no.838/2010

Single-member Court of First Instance of Thessaloniki no.10350/2010

Single-member Court of First Instance of Thessaloniki no.10351/2010

Single-member Court of First Instance of Thessaloniki no.14946/2010

Supreme Administrative Court no.157/1999

Supreme Civil and Criminal Court of Greece (Areios Pagos) no.14/2004

ECtHR / ECJ

CD v ST (Surrogacy) Case C-167/12

Labassee v. France (application no. 65941/11)

Menesson v. France (application no. 65192/11)

Vallianatos and Others v Greece, ECtHR Application no.29381/09 and 32684/09,
7.11.2013

Cases from other countries

Court of Cassation, Plenary session, 3 July 2015, No 14-21.323, No 15-50.002

R v Morgentaler [1988] 1 SCR 30, 63 OR (2d) 281

The Matter of Baby M, NJ Supreme Court, Docket No. FM 25314-86E

CHAPTER 1

INTRODUCTION AND METHODOLOGY

1.1 Background and Rationale

Reproduction is perhaps the most intimate and private process in one's life, and of utmost significance to some individuals.¹ Additionally, decisions about human reproduction have social, religious, cultural, and ethico-legal dimensions;² they affect the future of society, and link to several ideological and socio-political concerns.³ In modern times, such decisions have a different, more active, and arguably more profound role than in the past, because, since the development and introduction of assisted reproductive treatments (ARTs) and contraceptive technology in the late 1970s,⁴ reproduction is a matter of choice, not chance.⁵

Surrogacy refers to the practice 'whereby one woman [(the surrogate) agrees to become] pregnant with the intention that the child should be handed over to the commissioning couple after birth'.⁶ For many people, surrogacy is a 'last resort alternative' to parenthood,⁷ for some it is the only way to (at least partial) biological parenthood,⁸ while others treat it as an alternative way of reproduction. Although

¹ Robertson JA, *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton University Press 1994) 24.

² Cook RJ, Dickens BM and Fathalla MF, *Reproductive Health and Human Rights: Integrating Medicine, Ethics, and Law* (Oxford University Press 2003) 3.

³ Home Office (1999) *Supporting Families*. London: Government Offices: 'Families are at the heart of our Society and the basis of our future as a country'; Cook *et al* (*ibid*).

⁴ The greatest development was IVF. Louise Brown, the first IVF-baby, was born in England in July 1978. She recently published an autobiography (Brown L, *My Life as the World's First Tube-Baby* (Bristol Books 2015).

⁵ Buchanan A and others, *From Chance to Choice: Genetics and Justice* (Cambridge University Press 2000); Robertson (n1).

⁶ Jackson E, *Regulating Reproduction: Law, Technology and Autonomy* (Hart Publishing 2001) 828. For the purposes of this discussion, the woman who gives birth to the child will be referred to as 'surrogate', and the person/people who enter into a surrogacy arrangement to have a child as 'intended parents' (IPs).

⁷ Kerian CL, 'Surrogacy: A last resort alternative for infertile women or a commodification of women's bodies and children?' (1997) 12 *Wisconsin Women's Law Journal*; Blyth E, 'Not a Primrose Path: Commissioning Parents' Experience of Surrogacy Arrangements in Britain' (1995) 13 *Journal of Reproductive and Infant Psychology* 188. Certainly, adoption is always a way to parenthood, but, due to the rising numbers of infertile persons, the demand for adoption is higher than the supply of children available to be adopted (Freundlich M, 'Supply and Demand: The Forces Shaping the Future of Infant Adoption' (1998) 2(1) *Adoption Quarterly* 21).

⁸ Namely same-sex couples, and women born without a uterus or other with other serious conditions rendering them unable to achieve or complete a healthy pregnancy.

surrogacy had existed before the introduction of ARTs,⁹ these treatments offered new prospects to those wishing to have a child through surrogacy. In the wake of the UK ‘*Baby Cotton*’ case,¹⁰ and the US ‘*Baby M*’ case,¹¹ surrogacy sparked vivid debate. It was viewed with suspicion, principally by some feminists, who believed it meant women were used only as a means of reproduction,¹² and by social traditionalists, who thought it challenged ‘traditional’ ideas about reproduction, the family, and the meaning of motherhood.¹³ Additionally, amid widespread fear and panic about the effects of surrogacy on society and women, scholars and regulators were concerned with whether surrogacy should be regulated and what this regulation should look like.

Due to fears that a surrogacy industry would develop, some countries banned all forms of surrogacy.¹⁴ However, some left it unregulated,¹⁵ while others, such as Greece, the UK,¹⁶ some states in the US and elsewhere, permitted the practice but with conditions.¹⁷ At the EU level, there is still no agreement as to the regulation of

⁹ References to surrogacy exist in The Bible (Genesis 16).

¹⁰ *Re C (A Minor)(Wardship: Surrogacy)* [1985] FLR 846; BBC News. '1985: Inquiry over 'baby for cash' deal' (4/01/1985) <http://news.bbc.co.uk/onthisday/hi/dates/stories/january/4/newsid_2495000/2495857.stm> accessed on 27/09/2015.

¹¹ *In The Matter of Baby M*, 217 NJ Super 313 (Ch Div 1987) rev'd 109 NJ 396(1988).

¹² Much like the story in Atwood’s dystopian novel: Atwood M, *The Handmaid's Tale* (Toronto, McClelland and Stewart 1985).

¹³ Hatzis says '[t]he recent attack on [surrogacy on] moral grounds is rather a result of the distrust of certain groups for reproductive technologies in general, and of an image of “unnaturalness” attributed to the surrogate mother’ (Hatzis A, *Just in the oven: A Law and Economics Approach to Gestational Surrogacy Contracts* (Boele-Welki, K. ed, Perspectives for the Unification and Harmonisation of Family Law in Europe, Intersentia 2003) 419). For a critique on traditional ideas about ‘the family’: Fineman M, *The Neutered Mother, The Sexual Family and other Twentieth Century Tragedies* (Routledge 1995).

¹⁴ Surrogacy can be commercial or altruistic, though the terms are contentious and can mean different things. Here, I use altruistic to mean not that the surrogate is entirely unpaid, but that she is neither out of pocket, nor does she profit financially for her agreement, and commercial to mean that the surrogate is being paid and profits from it financially. All forms of surrogacy are illegal in Finland, France, Iceland, Italy, Germany, Switzerland, Spain, Pakistan (Armour KL, 'An Overview of Surrogacy Around the World' (2012) 16(3) *Nursing for Women's Health* 231).

¹⁵ For example, Sweden, Czech Republic, Nigeria (*ibid*).

¹⁶ By ‘UK’ I mean England and Wales, since Scotland and Northern Ireland have a different approach to surrogacy, the exploration of which falls outside the remit of this thesis due to lack of space. The relevant literature makes mention to ‘the UK law’, and I follow this terminology throughout the thesis.

¹⁷ In Denmark, Ireland, Hungary, India, Israel, the Netherlands and Belgium, South Africa, New Zealand, some jurisdictions in Australia and Canada, Thailand, Vietnam altruistic surrogacy is legal with conditions.

surrogacy,¹⁸ and it is clearly difficult to reach any kind of global consensus on surrogacy.¹⁹

In the era of the Internet and of cheap and easy travelling, a total legal prohibition against surrogacy may risk IPs finding information and traveling to other jurisdictions, where surrogacy is legal, but may be less well-regulated or totally unregulated. This can be dangerous, and cause legal complexities.²⁰ Notably, lack of surrogacy-specific regulation does not necessarily mean that there is an area which is free of law. Rather, people can still form informal surrogacy arrangements, which may have problematic consequences,²¹ not least due to various general legal principles which impact on surrogacy but regulate it poorly. In other words, the choice is not between having a surrogacy law or not; it is between having inappropriate and ineffective law, or law that is specially designed, appropriate, and effective.

The key aim of this project is to explore how surrogacy should be regulated and to consider the law's role and purpose in relation to surrogacy. To this end, I chose to investigate two existing regulatory examples, namely those of Greece and the UK, and examine what, if anything, each jurisdiction might learn from the other. I also aim to evaluate how regulation can most effectively reflect the experiences and protect the interests of the parties in a surrogacy arrangement.

¹⁸ McCandless, J. *et al* (2013) (*A Comparative Study on the Regime of Surrogacy in EU Member States*), European Parliament [http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2013/474403/IPOL-JURI_ET\(2013\)474403_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf); ESHRE, 2010. Comparative Analysis of Medically Assisted Reproduction in the EU: Regulation and Technologies (SANCO/2008/C6/051) http://ec.europa.eu/health/blood_tissues_organs/docs/study_eshre_en.pdf. Recently, the Council of Europe rejected proposals about the regulation of surrogacy at EU level (Blackburn-Starza, A. 'Council of Europe rejects surrogacy guidelines' (17/10/2016) <http://www.bionews.org.uk/page_715312.asp> accessed on 19/10/2016). In Russia, Georgia, Poland, and the Ukraine commercial surrogacy is allowed, whereas altruistic surrogacy is allowed in Greece, the UK, and now in Cyprus, and Portugal (Raposo VL, 'The New Portuguese Law on Surrogacy - The story of how a promising law does not really regulate surrogacy arrangements' (2017) 21(3) *JBRA Assisted Reproduction* 230). Within the EU, surrogacy agreements are enforceable only in Greece.

¹⁹ The Hague Conference on Private International Law (2014) 'The Desirability and Feasibility of Further Work on the Parentage/ Surrogacy Project' *Preliminary Document No.3B, April 2014*.

²⁰ Jackson E, 'UK Law and International Commercial Surrogacy: 'the very antithesis of sensible'' (2016) 4(3) *JMLE* 197-214; Hudson N and others, 'Cross-border reproductive care: A review of the literature' (2011) 22 *Reproductive BioMedicine Online* 673-685; Whittaker A and Speier A, 'Cycling overseas': Care, commodification and stratification in cross-border reproductive travel' (2010) 29 *Medical Anthropology* 363-383; Crawshaw M, Blyth E and van den Akker O, 'The changing profile of surrogacy in the UK. Implications for national and international policy and practice' (2012) 34(3) *Journal of Social Welfare & Family Law*.

²¹ Jackson E, 'The law and DIY assisted conception' in Horsey, K. (ed), *Revisiting the Regulation of Human Fertilisation and Embryology* (Routledge 2015). Also, as will be seen later, this is evidenced by recent UK case law.

1.2 Importance and Contribution of the thesis

My research shows that many arguments against surrogacy are made without support from empirical data or despite what evidence exists.²² I argue that respect for autonomy entails that individuals should be allowed to make use of surrogacy, provided that there are no good reasons for preventing them from doing so, and that regulation can mitigate or eliminate any risks.

Many scholars have attempted to tackle on a theoretical level the puzzle of how best to regulate surrogacy. Some have done so by looking to international examples of regulation for inspiration. My research is the first to employ a detailed socio-legal comparison of the Greek and UK regimes. These two countries offer the potential for interesting and fruitful comparative study: they have both recognised the need to regulate surrogacy, but they vary significantly concerning the content of regulation, and present very interesting and significant points of convergence and stark divergence between them.

Greek law provides for an intention-based model of parenthood founded on altruistic gestational surrogacy agreements,²³ which, if pre-approved by the judiciary, can become enforceable upon the child's birth, leading to an automatic acknowledgement of the intended parents' (IPs') parenthood. Despite how unusual and novel the Greek legal approach is, it is severely under-researched by Greek scholars, and is typically missing from the international literature. This thesis attempts to fill this gap.

²² Empirical evidence shows that former UK surrogates have had positive experiences, and children face no adjustment or other psychological issues. See references in n27-29 below, and Blake L and others, 'Gay father surrogacy families: relationships with surrogates and egg donors and parental disclosure of children's origins' (2016) 106(6) *Fertility and Sterility* 1503; Jadvá V, Imrie S and Golombok S, 'Surrogate mothers 10 years on: a longitudinal study of psychological well-being and relationships between the parents and child' (2015) 30(2) *Human Reproduction* 373; Golombok S and others, 'Families Created Through Surrogacy Arrangements: Parent-Child Relationships in the 1st Year of Life' (2004) 40(3) *Developmental Psychology*; Golombok S and others, 'Surrogacy families: parental functioning, parent-child relationships and children's psychological development at age 2' (2006) 47(2) *Journal of Child Psychology and Psychiatry* 213; Golombok S and others, 'Non-genetic and non-gestational parenthood: consequences for parent-child relationships and the psychological well-being of mothers, fathers and children at age 3' (2006) 21(7) *Hum Reprod*; Golombok S and others, 'Families created through surrogacy: Mother-child relationships and children's psychological adjustment at age 7' (2011) 47(6) *Dev Psychol*; Readings J and others, 'Secrecy, disclosure and everything in-between: decisions of parents of children conceived by donor insemination, egg donation and surrogacy' (2011) 22(5) *Reproductive BioMedicine Online* 485; Jadvá V and Imrie S, 'Children of surrogate mothers: Psychological well-being, family relationships and experiences of surrogacy' (2013) 29(1) *Human Reproduction* 9.

²³ Surrogacy can be gestational (where the surrogate is not genetically related to the child and pregnancy can be attained only through IVF); and traditional surrogacy (where the surrogate is genetically related to the child, and pregnancy is attained in a clinic or at home).

In the UK, surrogacy has been partially regulated since 1985, but not as clearly and concisely as in Greece, which can potentially place IPs and children in an emotional and legal limbo.²⁴ As in Greece, UK law allows only altruistic surrogacy. It provides for both gestational and traditional, but only regulates surrogacy that takes place in UK clinics. Although there is regulation regarding ARTs in clinics, there is no specific formal regulation for the practice of surrogacy in clinics, (traditional) at-home surrogacy is wholly unregulated, and there is no state oversight before and during the surrogacy arrangement. Moreover, law only refers to legal parenthood after surrogacy, but it is not necessary to go through a clinic for the parenthood rules to apply. Parenthood following surrogacy is based on gestation and birth, and surrogacy agreements are unenforceable. IPs may acquire parenthood post-birth through a parental order (PO) granted by the courts if certain conditions are met. The UK regime has been heavily criticised as confusing, incomplete, unrepresentative of the modern realities of surrogacy, and in dire need of reform.²⁵

Problematically, good, up-to-date empirical data about people's experiences of surrogacy and its regulation are very limited in both countries, especially in Greece. Ragoné's 1994 study exploring the motivations and the experiences of US surrogates is still the most cited in texts discussing the accounts of surrogates,²⁶ but it is old, and focuses on the US context. Blyth's 1994 UK research leads the field of empirical evidence regarding the incentives of surrogates,²⁷ but that too is old. Other UK studies examine surrogates' emotional responses to relinquishment,²⁸ but do not offer a detailed depiction of people's experiences of surrogacy regulation. More recent

²⁴ Elsworth M and Gamble N, 'Are Contracts and Pre-Birth Orders the Way Forward for UK Surrogacy?' (2015) IF 157-161.

²⁵ For example: Fox M, 'The Human Fertilisation and Embryology Act 2008: Tinkering At the Margins' (2009) 17 *Feminist Legal Studies* 334; McCandless J and Sheldon S, 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family' (2010) 73(2) *Modern Law Review* 175,180; Horsey K and Sheldon S, 'Still Hazy After All These Years: The Law Regulating Surrogacy' (2012) 20 *Med Law Rev* 74; Horsey K, *Swept Under the Carpet: Why Surrogacy Law Needs Urgent Review*, vol 5 (Wrigley, A. and N. Priaux eds, Ethics, Law and Society, Ashgate 2013).

²⁶ Ragoné H., *Surrogate Motherhood – Conception in the Heart* (Westview Press, Colorado, USA 1994).

²⁷ Blyth E, "I wanted to be interesting, I wanted to be able to say 'I've done something interesting with my life'": Interviews with Surrogate Mothers in Britain' (1994) 12 *Journal of Reproductive and Infant Psychology*.

²⁸ Snowdon C, 'What makes a mother? Interviews with women involved in egg donation and surrogacy' (1994) 21(2) *Birth* 77–84; Baslington H, 'The social organization of surrogacy: relinquishing a baby and the role of payment in the psychological detachment process' (2002) 7 *Journal of Health Psychology* 57-71; van den Akker OBA, 'A longitudinal pre-pregnancy to post-delivery comparison of genetic and gestational surrogate and intended mothers: Confidence and genealogy' (2005) 26 *Journal of Psychosomatic Obstetrics and Gynecology*.

studies focus on the psychological aspects of surrogacy,²⁹ or on public attitudes towards it.³⁰

Furthermore, Busby and Vun's study of US and UK surrogates provides important and interesting evidence, but the discussion centres around suggestions for legal reform in Canada only.³¹ Lastly, Horsey's study is the only one that provides a more complete image of the participants' experience of legal processes around UK surrogacy, but it has a quantitative approach.³² In Greece, the availability of good empirical data with regards to surrogacy is even more limited.³³ One small-scale study explored public perceptions towards surrogacy,³⁴ and another provided interesting data based on transcripts of judicial decisions authorising surrogacy,³⁵ but did not examine how people experience the regulation.

While the exact number of surrogacy arrangements is unknown, and impossible to estimate,³⁶ surrogacy appears to be gaining social acceptance in the UK, as evidenced

²⁹ van den Akker O, 'Genetic and Gestational Surrogate Mothers' Experience of Surrogacy' (2003) 21 *Journal of Reproductive and Infant Psychology*; Jadva V and others, 'Surrogacy: The Experience of Surrogate Mothers' (2003) 18 *Human Reproduction*; Edelmann RJ, 'Surrogacy: The Psychological Issues' (2004) 22(2) *Journal of Reproductive and Infant Psychology* 123-136; Ciccarelli JC and Beckman LJ, 'Navigating Rough Waters: An Overview of Psychological Aspects of Surrogacy' (2005) 61 *Journal of Social Issues*; Jadva *et al.*, 'Surrogate mothers 10 years on' (n22).

³⁰ Pootte AE and van den Akker OBA, 'British Women's Attitudes to Surrogacy' (2009) 24(1) *Human Reproduction* 139-145; Appleton T, 'IVF (host) surrogacy' (1990) 4 *The British infertility counselling Newsletter* 7-15; Wiess G, 'Public attitudes about surrogate motherhood' (1992) 6 *Mich Sociol Rev* 15-27; Chliaoutakis J, Koukouli S and Papadakaki M, 'Using attitudinal indicators to explain the public's intention to have recourse to gamete donation and surrogacy' (2002) 17 *Hum Reprod* 2995-3002; van den Akker OBA, 'Psychological trait and state characteristics, social support and attitudes to the surrogate pregnancy and baby' (2007) 22(8) *Hum Reprod* 2287-2295; Jordan W, 'British Public: Legalise Paid Surrogacy' (08/08/2014) <<http://yougov.co.uk/news/2014/08/08/british-public-legalise-commercial-surrogacies/>> accessed on 27/09/2014.

³¹ Busby K and Vun D, 'Revisiting the Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers' (2010) 26 *Canadian Journal of Family Law*.

³² Horsey K, *Surrogacy in the UK: Myth busting and reform* (Report of the Surrogacy UK Working Group on Surrogacy Law Reform, Surrogacy UK November 2015) 49.

³³ Chliaoutakis JE, 'A relationship between traditionally motivated patterns and gamete donation and surrogacy in urban areas of Greece' (2002) 17(8) *Human Reproduction* 2187-2191; Hatzis A, 'From soft to hard paternalism and back: the regulation of surrogate motherhood in Greece' (2009) 49(3) *Portuguese Economic Journal* 205-220; Ravdas P, *Surrogate Motherhood: The legislator's expectations tested by statistical data* (Papachristou, T. K. and others eds, 21st Century Family Law: Coincidental and Fundamental Reforms - Law and Society in 21st century, Sakkoulas 2012); Papaligoura Z, *New Routes to Motherhood* (Papazisi 2013).

³⁴ Panagos K, *Surrogate motherhood. The Greek regulatory framework-criminal law perspectives* (Sakkoulas: Athens-Thessaloniki 2011) 113-128. This study presents the views of an extremely limited group of interviewees, students at a University in Greece, young (18-23 years old), and with no experience of either infertility or parenting.

³⁵ Ravdas (n33) explored 136 judicial approvals of surrogacy issued between November 2009 and December 2011.

³⁶ Teman E, 'The Social Construction of Surrogacy Research: An Anthropological Critique of the Psychosocial Scholarship on Surrogate Motherhood' (2008) 67 *Social Science and Medicine* 1104.

both by surveys exploring the public attitudes towards surrogacy,³⁷ and the increased number of PO applications in UK courts.³⁸ The situation in Greece appears to be quite similar; studies report that surrogacy has increased in recent years,³⁹ and that up to 67 fertility centres offer (or have offered) ARTs, including surrogacy.⁴⁰ Also, there may be more surrogacy arrangements which occur informally and remain unreported in both countries. All the above suggests a need for socio-legal research and for more experience-led regulation in this area.

Evidence from my empirical research casts light on how regulation in these countries is experienced by a range of key actors, including surrogates, IPs, representatives of surrogacy organisations, medical and legal practitioners, academics, and policy-makers. Especially regarding Greece, my work reveals facts and experiences we have almost no knowledge of. My UK evidence confirms findings of previous studies and enriches the existing literature by challenging certain assumptions (which have affected policy) and by introducing a range of new concerns.

Moreover, the questions addressed in my research are both important and topical. A 2014 reform of Greek surrogacy law lifted the domicile requirement, opening the possibility for foreign couples to seek surrogacy in Greece. This amendment could make Greece yet another popular destination to those willing to travel for international surrogacy,⁴¹ and renders the critical evaluation of Greek surrogacy law an imperative. In the UK, surrogacy is about to be reviewed by the Law Commission,⁴² having been

³⁷ Jordan (n30). A study by YouGov reported that 59% of British adults now approve of the process called gestational surrogacy, and only 21% disapprove it. http://cdn.yougov.com/cumulus_uploads/document/ubj8or4iat/InternalResults_140805_Surrogate_Mother.pdf accessed on 27/09/2014.

³⁸ Crawshaw *et al* (n20); Holly Rodger (Cafcass), *Cafcass Study of Parental Order Applications made in 2013/14* (July 2015) 3; Horsey's study (n32) 15,34.

³⁹ Ravdas (n33); Hatzis (n33).

⁴⁰ Note that these centres had been operating without monitoring and a licence for many years (Karlaira P. '67 fertility centres [operating] without licence in our country [Greece]' (15/10/2014) <http://www.protothema.gr/ugeia/article/418527/horis-adeia-oi-67-monades-upovoithoumenis-anaparagogis-sti-hora-mas/> accessed on 19/11/2014).

⁴¹ Stéphane Kovacs, 'Greece: the Eldorado of surrogacy' *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>

⁴² A project on surrogacy will feature as part of the Law Commission's 13th Programme of Law Reform (Law Com No.377, 2017). Also, in late 2017, the government submitted a proposal for a remedial order that, if approved, will extend PO eligibility to single IPs (Hansard, Written statement-HLWS282). Lastly, the Department of Health and Social Care (DHSC) recently published guidance to IPs, surrogates, and medical professionals about surrogacy, which is as evidence of the government's support behind the Law Commission review: DHSC, *Care in Surrogacy. Guidance for the care of surrogates and intended parents in surrogate births in England and Wales* (28/02/2018); DHSC, *The Surrogacy Pathway. Surrogacy and the legal process for intended parents and surrogates in England and Wales* (28/02/2018).

the subject of parliamentary debates over the past few years.⁴³ My findings might thus usefully feed into any such reform process.

1.3 Chapter Overview

In Chapter 2, I argue that autonomy grounds a *prima facie* right to have a child through ‘traditional’ or artificial means, including surrogacy, unless there is a reason, based on autonomy and harm concerns, to impose limitations. I also demonstrate that, while none of these objections can justify the prohibition of surrogacy, when taken together with justice considerations, they suggest a need for specially designed, appropriate, and effective regulation of surrogacy.

Drawing on existing theoretical and empirical literature, I proceed to envision the criteria of a ‘good’ surrogacy law. I suggest that these criteria relate to concerns regarding access to surrogacy, its regulation, and the determination of parenthood. In the chapters to follow, I use these three broad concerns as a way of structuring my socio-legal evaluation of the Greek and UK regulation of surrogacy, highlighting those aspects of the regulation that are interesting, significant, potentially problematic, and different between the two countries. These themes also served as the basis for the broad structure of my interviews.

In Chapters 3 and 4, I explore how and to what extent the Greek and UK surrogacy regimes, respectively, have attended to the concerns raised by the literature in the context of these three themes. I provide an overview of the historical development of each regime and examine the factors impacting on access to formal legal surrogacy, how each regulates issues arising during surrogacy arrangements, and how each determines parenthood following surrogacy.

In chapters 5, 6, and 7, I focus in more detail on the three themes of access, regulation, and parenthood. Drawing on my interview data and the literature, I offer a closer examination of how the Greek and UK laws work in practice. In Chapter 5, I explore the factors identified by my interviewees as influencing access to surrogacy in these countries and evaluate how and to what extent statutory limitations on autonomy and equality are justifiable in light of welfare concerns. I also examine a range of factors other than regulation which exert important influence on access to surrogacy in Greece

⁴³ House of Commons Debate (14 October 2014) Col 1WH; House of Lords Debate (14 December 2016) Vol 777.

and the UK. In Chapter 6, I discuss how and how well these regimes regulate issues that arise (or may arise) during a surrogacy arrangement, and whether the statutory limitations on autonomy and equality are justified by harm concerns. In Chapter 7, I explore how well the Greek and UK legal parenthood provisions work, and whether limitations on autonomy are appropriate, proportionate, and effective.

Finally, Chapter 8 offers a conclusion to the thesis and the opportunity to revisit the key arguments and findings of my research. I re-consider the strengths and the limitations of each regime, re-evaluate how each of them expresses and protects the interests of those involved in surrogacy arrangements, and reflect on what principles may underpin ‘good’ surrogacy regulation. I also discuss the wider contribution of my thesis and show how further socio-legal research is imperative.

1.4 Methodology and Research Design

My research is guided by a comparative socio-legal qualitative approach informed by a feminist perspective. This methodology offers the potential for rich insights into how we should strive to inform and reconstruct feminist socio-political ideas about surrogacy, family and regulation, and allows us to envision measures which will help modernise surrogacy law and make it more fit for purpose in Greece, the UK, and beyond.

1.4.1. Feminist perspective combined with ethical analysis

A feminist perspective combined with ethical analysis offers the basis for a sustained normative evaluation of surrogacy law, which pays particularly close attention to women’s experience, gendered harms and context. Christine Overall notes that, although feminist writers disagree on whether ARTs, including surrogacy, are harmful to women or if they offer an opportunity for women’s empowerment, it is important to continue feminist discussions in this field.⁴⁴ Moreover, feminist ethics in reproduction ‘acknowledges the significance of women’s experience in all areas of reproduction...[and] challenges perceived opinions about reproduction’.⁴⁵

As is further discussed in Chapter 2, much of the literature is frequently very dismissive of surrogacy due to a presumed harm to women and their sense of self

⁴⁴ Overall C, *Ethics and Human Reproduction: A Feminist Analysis*, vol 6 (Routledge Library Editions: Feminist Theory, Routledge 1987) 1, 116-118.

⁴⁵ *Ibid* 11.

without empirical evidence of such harm or, indeed, despite such evidence as does exist. I challenge these assumptions by citing specific empirical evidence demonstrating these claims are not only unfounded, but also unhelpful in advancing and resolving the surrogacy debate and in increasing reproductive autonomy and equality.⁴⁶ Far from a justification for banning surrogacy, these concerns rather suggest the need for appropriate and effective regulation informed by empirical evidence that takes account of, in particular, women's experience of surrogacy. Foregrounding the needs and experiences of women in this context might also serve to protect the interests of children, because they would most likely not have been born otherwise, and men, because, although they are not directly affected by the gender-related concerns arising from surrogacy and cannot bear and experience pregnancy directly, they, too, are involved in the surrogacy arrangement and possibly in need of protection.

My thesis is informed by a strong commitment to include the voices of women, allowing them to express their experiences, beliefs and ideas about surrogacy, its practice, and its regulation. This is done especially by contextualising the arguments against surrogacy within existing empirical research and supplemented by the findings of my own empirical research in Greece and the UK. This offers a more robust evidence-base for understanding the lived experience of surrogacy in Greece, the UK, and elsewhere. Although I interviewed a relatively small number of women (six women in Greece and five in the UK who are or have been surrogates or intended mothers (IMs)), their understanding is accompanied by evidence from other interviewees, who have extensive direct experience of working with surrogates and IPs or in designing regulatory framings. This evidence is particularly valuable regarding the Greek case, due to the scarcity of knowledge about the surrogacy experience. Additionally, my UK evidence helps update existing knowledge and understanding.

The feminist perspective of this research also informed its refusal to rely upon a typical theoretical binary classification of interviewees according to their presumed expertise and knowledge. Traditional theoretical understandings of empirical qualitative

⁴⁶ Sherwin argues that for medical ethics to be thought feminist, they must be put into a certain context and must attend 'to the effect of these practices on women's pursuit of greater power in a society that currently subordinates them' (Sherwin S, 'Feminist and Medical Ethics: Two Different Approaches to Contextual Ethics' (1989) 4(2) *Hypatia* 68).

sampling assume that evidence produced from interviews with people who would be considered 'experts' in the field carry more authority than those produced from interviews with 'non-experts' or lay persons,⁴⁷ which is why expert interviewing is very popular in empirical qualitative research.⁴⁸ In order to gain a deeper understanding of the surrogacy practice and regulation in Greece and the UK, I chose to recruit participants with a variety of experiences and different kinds of involvement with surrogacy.

Although I started from the assumption that the 'experts'/'non-experts' divide would work in this context, while talking to people who might be considered 'experts', I realised there were many aspects of the surrogacy practice and regulation of which they had very limited or no knowledge. In contrast, those who had direct experience as surrogates or IPs, and might be considered 'non-experts', often provided extremely valuable insights and detailed knowledge of relevant regulation, either because of their many personal experiences of surrogacy, and/or because they were actively involved in informal surrogacy practices, as for example volunteer work in UK surrogacy organisations which are unregulated, or non-clinical roles in fertility centres providing surrogacy.

Surrogacy is unusual in the sense that current flaws in regulation mean that surrogates and IPs are required to develop a high level of expertise in order to navigate it. Therefore, in this context, it was important to disrupt the 'experts'/'non-experts' divide and give equal weight to the evidence collected by my entire sample. Turner has suggested that this approach can be advantageous, because it attributes equal authority to those who would otherwise have been less heard, and allows for a more democratic and holistic empirical qualitative analysis.⁴⁹ Lastly, in another attempt to break down the divide between 'experts' and 'non-experts', I also asked surrogates and IPs to extrapolate from what they had learned from their own experience of

⁴⁷ Meuser M and Nagel U, *ExpertInneninterviews - vielfach erprobt, wenig bedacht. Ein Beitrag zur qualitativen Methodendiskussion* (Bogner, A., B. Littig and W. Menz eds, *Das Experteninterview*, Opladen: Leske & Budzich 2002) 46; Flick U, *An Introduction to Qualitative Research* (SAGE 2009) 165; Dorussen H, Lenz H and Blavoukos S, 'Assessing the Reliability and Validity of Expert Interviews' (2005) 6(3) *European Union Politics* 317; Bogner A, Littig B and Menz W, *Introduction: Expert Interviews - An Introduction to a New Methodological Debate* (Bogner, A., B. Littig. and W. Menz eds, *Interviewing Experts. Research Methods Series*, Palgrave Macmillan, London 2009) 2.

⁴⁸ Bogner *et al* (*ibid*) 1-2.

⁴⁹ Turner S, 'What is the Problem with Experts?' (2002) 31 *Social Studies of Science* 123-149.

surrogacy in Greece and the UK to offer more general reflections on appropriate, effective regulation, which yielded useful insights.

1.4.2. Socio-legal comparative methodology

Comparative methodology allows us to reflect on the specificity and contingency of the legal regimes under comparison and increases our understanding of social life and of policy issues.⁵⁰ Patrick Glenn argues that comparative law can be used as a tool of learning and knowledge; as a way to identify common evolutions, diachronic changes, and legal families; as a way to contribute to understand and develop one's own legal regime; and as a way to harmonise law.⁵¹ Ralf Michaels adds that comparing legal regimes allows us to build a system of rules, to determine the 'better' law, to unify law, and to produce a nuanced critical appraisal of it.⁵²

However, comparing only at the level of legislation and case law will not always provide the whole picture. Rather, a 'law in action' (as opposed to 'law in the books') approach offers a more nuanced and accurate understanding of how people experience law, and its effectiveness in practice.⁵³ Moreover, if one is interested in the study of legal transplants, namely in exploring which legal rules and concepts could be transferred into the legal system of a different country, and how this could be best accomplished,⁵⁴ one should adopt a socio-legal, law-in-context approach. This offers a more meaningful and accurate comparison of the different legal systems,⁵⁵ and a deeper understanding of how and why policies are similar and/or different, how they impact on people, and whether and to what extent some rules can be adopted by other jurisdictions.⁵⁶

⁵⁰ Banakar R and Travers M, *Studying legal culture* (Banakar, R. and M. Travers eds, *Theory and Method in Socio-Legal Research*, Hart Publishing 2005) 240.

⁵¹ Glenn PH, *The Aims of Comparative Law* (Smits, J. M. ed, Elgar Encyclopedia of Comparative Law, Edward Elgar, Cheltenham 2006) 57-65.

⁵² Michaels R, *The Functional Method of Comparative Law* (Reimann, M. and R. Zimmerman eds, Oxford Handbook of Comparative law, OUP 2006) 341,364-380.

⁵³ Roscoe Pound developed the 'Law in Action' theory (Pound R, 'Law in Books and Law in Action' (1910) 44(12) *AM L Rev*. Also, Van Hoecke M, 'Methodology of Comparative Legal Research' (2015) 12) *Boom Juridisch* 7,16).

⁵⁴ Michaels (n52) 341; Graziadei M, *The Functionalist Heritage* (Legrand, P. and R. Munday eds, *Comparative Legal Studies: Traditions and Transitions*, CUP 2003).

⁵⁵ Öricü calls this the 'functional institutional approach' (Öricü E, *Developing Comparative Law* (Öricü, E. and D. Nelken eds, *Comparative Law: A Handbook*, Hart Publishing 2007) 52); May T, *Social Research: Issues, Methods and Process* (3rd edn, OUP 2001) 203,208.

⁵⁶ Meuwese A and Versteeg M, *Quantitative Methods for Comparative Constitutional law* (Adams, A. and J. Bomhoff eds, *Practice and Theory in Comparative Law*, CUP 2012) 230-257.

Other than the potential for a fruitful study offered by the Greek and UK regimes, another factor for choosing them was my linguistic ability and general cultural awareness, which is valuable when pursuing comparative research.⁵⁷ Considering the scarcity of English-written research material regarding the Greek regime, this knowledge was necessary for the successful completion of this research.

1.4.3. Qualitative empirical methodology

My research employs a qualitative empirical methodology, which comprises of semi-structured interviews in Greece and the UK. I chose this approach because I was interested in how surrogacy regulation works in practice, not merely how it looks on paper. Moreover, up-to-date good qualitative evidence on people's experience of surrogacy regulation are either missing, as in the case of Greece, or very limited, as in the UK. I undertook my own qualitative research in both countries, drawing on the experiences of a range of key actors.⁵⁸ While I initially categorised my interviewees as 'experts' and 'non-experts', I later decided to disrupt this division, because this binary categorisation did not work for the entirety of my sample.

I chose in-depth individual interviews among other methods of qualitative research (such as focus groups, online surveys, or participant observation) for various reasons. This method allows the researcher to 'focus on the individual',⁵⁹ thus offering the 'opportunity for detailed investigation of each person's perspective, for in-depth understanding of the personal context within which the research phenomenon is located, and for very detailed subject coverage'.⁶⁰ Focus groups and group discussions give individuals less opportunity to express their personal accounts and experiences.⁶¹ In addition, research aiming to 'understand...motivations and decisions, or explor[e]

⁵⁷ Van Hoecke (n53).

⁵⁸ I decided not to interview surrogate-born children, because there is already plenty of evidence about the effects of surrogacy on children, specially through the series of research by the University of Cambridge Family and Child Psychology Research Centre (n22). Furthermore, children are considered a 'vulnerable group' (Tee SR and Lathlean JA, 'The ethics of conducting a co-operative inquiry with vulnerable people' (2004) 47(5) *Journal of Advanced Nursing* 536-543; Allmark P, 'The Ethics of Research with Children' (2002) 10 *Nurse Researcher* 7-19), and such interviews require a skilled researcher (Hewitt J, 'Ethical Components of Researcher-Researched Relationships in Qualitative Interviewing' (2007) 17(8) *Qualitative Health Research* 1153,1156). Lastly, I was able to find sufficient evidence about how regulation can better protect children's interests through other interviewees.

⁵⁹ Van Hoecke (n53).

⁶⁰ Lewis J, *Design Issues* (Ritchie, J. and J. Lewis eds, *Qualitative Research Practice. A Guide for Social Science Students and Researchers*, London: Sage 2003) 58.

⁶¹ *Ibid*

impacts and outcomes' are better dealt with in an individual interview context, rather than a group discussion.⁶²

Another aim was to seek depth, richness, and diversity of experience, allowing for depth of analysis, instead of possibly a larger number of responses. Therefore, I decided early on that a survey would not be appropriate. Further, a structured questionnaire could not possibly record the deeply personal experience of surrogates and IPs and would provide less space for participants to analyse the problems with the current regime, while offering less opportunity to discuss possible measures for future legal reform. Importantly, due to the lack of organised systems for surrogacy in both countries, especially Greece, it would have been difficult to disseminate the survey and get sufficient and significant quantitative evidence.

Furthermore, individual in-depth interviews were deemed more appropriate because this project touches upon very personal and delicate issues. Denscombe argues that in-depth interviews can be useful for gathering evidence on emotions, experiences, and feelings, especially when the topic to be explored is highly sensitive and personal.⁶³ Surrogacy is often a way of alleviating infertility, which is a distressful and devastating experience for some individuals.⁶⁴ Also, surrogacy is not an easy choice: IPs risk being harmed in various ways, and they often have to deal with labyrinthine laws and regulations, and lack of guidance and support by professionals. Surrogates may also experience harms.⁶⁵ This method of interviewing provided a safe space for deeply personal experiences to be expressed.

Lastly, I chose to use semi-structured interviews, because, compared to structured interviews, they allow more freedom to the researcher to 'seek both clarification and elaboration on the answers given' through probe questions.⁶⁶ This provides the opportunity, and advantage compared with other qualitative research methods, to

⁶² *Ibid*

⁶³ Denscombe M, *The Good Research Guide: For Small-Scale Social Research Projects* (OUP 2003). Also, May T.(n55) 120.

⁶⁴ Menning BE, 'The emotional needs of infertile couples' (1980) 34 *Fertil Steril* 313-9; Berger DM, 'Infertility: a psychiatrist's perspective' (1980) 25 *Can J Psychiatry*; Harrison RF and others, *Stress in infertile couples* (Bunnar, J. and W. Thomson eds, Fertility and Sterility, Lancaster: MTP Press 1984); Link PW and Darling CA, 'Couples undergoing treatment for infertility: Dimensions of life satisfaction' (1986) 12 *J Sex Marital Ther* 46-59; Pfeffer N and Woollet A, *The Experience of Infertility* (London: Virago Press 1983); Keye JWR, 'Psychosexual responses to infertility' (1984) 27 *Clin Obstet Gynaecol* 760-766.

⁶⁵ The possible harms to IPs and surrogates will be explored in Chapter 2.

⁶⁶ May T.(n55) 123; Lewis (n60) 58.

‘probe beyond the answers and...enter into a dialogue with the interviewee’.⁶⁷ Moreover, it gives room to the interviewees to ‘answer more on their own terms than the standardised interview permits’,⁶⁸ but still enables the researcher to have ‘a greater structure for comparability over that of the focused interview’.⁶⁹ In this context, it allowed for the distinctive elements of both regimes to be crystallised, and for suggestions for legal reform to be tested.

ISSUES RELATED TO THE QUALITATIVE PART OF THE PROJECT

1.4.3.1 Research sample - Recruitment and access:

The selection of my interviewees was a mixture of convenience and purposeful sampling,⁷⁰ aimed at representing the diversity of experience of surrogacy regulation in Greece and the UK. The most important criterion was the level of the participants’ involvement with surrogacy in those countries and the relevance of their experience to the theory. I was able to perform 28 interviews, 14 in each country, and my sample includes IPs, surrogates, academics from three different disciplines (law, psychology, and medicine), representatives of UK surrogacy organisations, policy-makers, and medical and legal practitioners.

This relatively small pool of evidence makes a significant contribution to the literature, particularly given the paucity of empirical work done in Greece.⁷¹ Though my sample cannot capture the full variety of experiences of surrogacy in these countries, it does serve to emphasise specific limitations of the current regulation. The diversity of experiences and knowledge within my sample enabled me to ‘develop the theoretical ideas that [emerge from my] theory and [my] data’,⁷² and achieve saturation. Despite this diversity, there was a high level of consensus among my interviewees. Furthermore, I was more interested in accomplishing depth of analysis rather than a

⁶⁷ Lewis *ibid*

⁶⁸ *Ibid*

⁶⁹ *Ibid*

⁷⁰ Ritchie R, Lewis R and Elam G, *Designing and Selecting Samples* (Ritchie, J. and J. Lewis eds, Qualitative Research Practice. A Guide for Social Science Research Students and Researchers, London: Sage 2003) 107. A complete list of interviewees is included in Appendix C.

⁷¹ For opinions about the optimal sampling size of a qualitative study see: S. E. Baker and R. Edwards, *How many qualitative interviews is enough?* (NCRM 2016) <http://eprints.ncrm.ac.uk/2273/4/how_many_interviews.pdf> accessed on 20/06/2016. Also, Kvale and Brinkmann mention that the usual size in interview studies is around 15, plus or minus 10 (Kvale S and Brinkmann S, *Interviews. Learning the Craft of Qualitative Research Interviewing* (2nd edn, London: Sage 2009) 113).

⁷² Edwards R and Holland J, *What is Qualitative Interviewing?* (Bloomsbury 2013) 6.

large sample, as this was more feasible in terms of time constraints and the aims of this project.

Overall, despite criticisms of certain aspects of the regulation in each country, my interviewees believed that surrogacy in Greece and the UK works well, but, in some cases, this was despite the regulation, not because of it. Nevertheless, I accept that there may be more dangerous and exploitative practices of surrogacy that I was unable to access. The vast majority of the surrogates I interviewed in both countries were repeat-surrogates, namely they had done surrogacy more than once, which also suggests they had positive experiences.

Although I later came to disrupt the ‘experts’/‘non-experts’ binary, I initially conceived of these as two separate groups and adopted different methods of recruitment. I contacted all key actor interviewees (medical and legal practitioners, academics, and clinicians) through email to ask about their interest to participate in my research and provided information about the content and aim of the research, the process and expected duration of the interview, and attached the information sheet (included in Appendix D). I then asked about their availability for interview, requesting they propose a location for the interview to take place. What was important and interesting as a research finding in itself was that many key actor interviewees in both countries, asked who else I had interviewed. When I revealed some of the names, excluding one lawyer who wished to remain anonymous, they suggested names of other individuals who I could and/or should contact. Therefore, they became gatekeepers. As Mikecz explains, ‘the researcher’s “track record” of interviews serves as proof of trustworthiness’,⁷³ and results in facilitating the research process.

Different methods were employed for the recruitment of IPs and surrogates. As I explain below, I recruited most through social media, through posts on other online sources,⁷⁴ through personal contact made either during surrogacy conferences I attended during my studies, and/or through personal acquaintances. These participants, then, put me in touch with other valuable contacts and potential interviewees. The next section discusses recruitment of research participants in the

⁷³ Mikecz R, 'Interviewing Elites: Addressing Methodological Issues' (2012) 18(6) *Qualitative Inquiry* 490.

⁷⁴ Kvale and Brinkmann (n71) 149; Fielding NG, Lee RM, Blank G (eds.), *The SAGE Handbook of Online Research Methods* (London: Sage 2008).

UK, followed by a section on recruitment of Greek interviewees. I end with a section on how interviews were conducted, and what ethical issues featured in this research.

Recruitment of research participants in the UK:

Regarding the choice of UK key actors to be interviewed, I was guided by my supervisors as to who would be most suitable for the purposes and objectives of my project. I approached key academics, representatives from all three reputable UK surrogacy organisations, and legal and medical practitioners that currently deal with UK surrogacy. Most of those contacted responded positively.

One rejection came from the Human Fertilisation and Embryology Authority (HFEA), the UK's independent regulator of treatment using eggs and sperm, and of treatment and research involving human embryos, with responsibility for monitoring and licensing UK clinics. As some surrogacies involve treatment in UK clinics, I assumed the HFEA has a role in monitoring those practices. However, an HFEA representative informed me that no one from the HFEA could provide any information about how surrogacy works in the UK.⁷⁵ This might be part of the HFEA's attempt to demarcate the boundaries of its remit in a way that clearly excludes surrogacy. Nevertheless, the lack of evidence from the HFEA does not reduce the significance of my findings; I gathered valuable evidence about the HFEA's role through a UK medical practitioner, and through representatives of UK surrogacy organisations.

I also approached the Children and Family Court Advisory and Support Service (Cafcass), a non-departmental UK public body that represents children in family court cases, including PO applications, with a view to interview one of their representatives. However, I was informed I would have to go through a quality assurance process via their research governance committee (RGC), and that it would take approximately four weeks to get a response. After reading the guidelines for the RGC application, I realised that my application would most likely be rejected.⁷⁶ Moreover, given that this was not an essential interview, it did not justify the bureaucracy involved. Instead, I aimed at collecting evidence about the role of Cafcass through IPs and surrogates who have gone through the PO process, and through legal practitioners.

⁷⁵ Evidence from personal communication with an HFEA policy director on 18/03/2016.

⁷⁶ Their policy stated '*PG students will not normally be supported*' (Cafcass Research Governance Framework, https://www.cafcass.gov.uk/media/214217/cafcass_research_governance_framework.pdf accessed on 01/10/2016)

I used various contact methods to recruit IPs and surrogates in the UK. First, I tried to recruit participants through three reputable UK surrogacy organisations: Surrogacy UK (SUK), Childlessness Overcome Through Surrogacy (COTS), and Brilliant Beginnings (BB). I believed this would yield positive responses, because these organisations generally promote openness and disclosure. I approached surrogates and IPs in conferences where they had shared their experiences, asking if they would be interested in being interviewed, and whether they could help me find me more potential participants. Three individuals agreed to be interviewed (Sarah and Natalie from SUK, and Marina from COTS), and assisted my search for further participants in two ways: firstly, they invited me to join their Facebook groups, where I posted about my research and shared my contact details with other members; secondly, they shared my information sheet on their message boards. This publicity attracted one SUK surrogate (Lauren), who then introduced me to her IPs (Simon and Steve), also SUK members.

Additionally, I sought to speak to members of COTS and BB to understand the similarities and differences concerning the processes, ethics, and values of each organisation. However, after posting on their social media and their message boards, I received only one response from a COTS surrogate. By that time, I already had evidence from Marina (COTS surrogate) and had completed all interviews in the UK. My research is missing insights from surrogates and IPs from BB, because no one responded to my interview invitation.

Lastly, I sought to interview surrogates and IPs who have chosen not to go through a surrogacy organisation and have (independent) informal surrogacy arrangements. As discussed in Chapter 4, this aspect of surrogacy practice is unregulated, and, in many instances, UK judges have warned against independent surrogacy and matching online. Also, it is often assumed that those involved in independent surrogacy arrangements are more prone to exploitation. Since there is almost no empirical evidence available, I was interested to see how such arrangements work in practice, and whether these assumptions are accurate. I joined a few Facebook groups that facilitate independent surrogacy in the UK,⁷⁷ and was successful in recruiting one surrogate (Jamie).

⁷⁷ Note that these groups are 'closed' (only open to members). To gain access, one needs to request to join. Subsequently, the group administrator contacts the applicant and asks the reasons for joining

In summary, I interviewed four experienced surrogates (Sarah, Marina, Lauren, Jamie),⁷⁸ each of whom had different involvement in UK surrogacy practice. Sarah is an experienced SUK surrogate and the organisation's Chair. Marina is an experienced COTS surrogate, member of the Board at COTS, and a professional counsellor. Lauren is a SUK surrogate and, finally, Jamie is an independent surrogate and an administrator of a Facebook group that provides a space for IPs and surrogates to meet each other, match, and support one another.

I also interviewed three IPs (Natalie, a mother of twins through SUK, who was also an SUK Trustee; and Simon and Steve, a gay couple who have become parents through SUK); two legal academics (Dr Kirsty Horsey, who recently performed a major quantitative study into UK surrogacy;⁷⁹ and Professor Margaret Brazier, who chaired the Brazier Committee for UK surrogacy), one psychology academic (Dr Vasanti Jadva, a research member of the University of Cambridge Family and Child Psychology Research Centre), one clinician (Dr Sue Avery), two legal practitioners experienced in surrogacy cases (Natalie Gamble, family law solicitor and co-founder of BB; and Andrew Powell, family law barrister), and Helen Prosser who has co-founded BB. Generally, in the UK, I experienced a high level of response to my invitations to interview, and a culture of openness and transparency regarding surrogacy. This is a point of stark difference between the UK and Greece, where I found a lot of secrecy.

Recruitment of research participants in Greece:

As regards the recruitment of surrogacy professionals in Greece, I first identified who would be more suitable, and contacted them directly through email. Since Greek surrogacy is not institutionalised through surrogacy organisations, as most UK surrogacy is, I had to employ a range of methods to engage IPs and surrogates. Even after extensive and continuous posting on social media (through Facebook groups and other infertility and parenthood online forums), on message boards of the largest fertility clinics in Greece, and promotion by the administrators of those groups and forums, I was able to interview only three surrogates and three IMs. Four interviewees

before allowing access. Therefore, these group administrators act as gatekeepers of access to independent surrogacy.

⁷⁸ Each had at least one successful surrogate pregnancy experience. As I explain below (under 'Anonymity'), I cite the first names of IPs and surrogates to (partially) protect their anonymity and offer the desired recognition.

⁷⁹ Horsey's study (n32).

(Lena, Aria, Katerina, Giota) were introduced to me through personal acquaintances; the others found my details on online forums and contacted me (Elina and Areti).

I interviewed two surrogates (Elina and Lena). Lena initially spoke under her role as a clients' manager in a large Greek fertility centre. She also agreed to help me find surrogates and IPs to interview through online forums. Three months later, because she saw that all my efforts to find potential interviewees had been fruitless, she revealed that she had twice acted as a surrogate and agreed to be interviewed. However, she only consented to an email interview, refusing a telephone or Skype interview,⁸⁰ because she was afraid of being overheard, putting her in breach of the non-disclosure agreement she had signed with her IPs.

After Lena's interview, I continued posting on online forums in search of other interviewees, and many months later I was contacted by Elina, who had been a surrogate for a couple in Greece. The IM was a Greek national who was medically unable to have a child and lived abroad with her (non-Greek national) husband. Additionally, I interviewed Katerina, a partner in a lesbian relationship, who acted as a 'surrogate' for her partner, because the clinic would not treat them otherwise.⁸¹ Furthermore, I spoke to three IMs (Giota, who was looking for a surrogate at the time; Areti, a mother of twins through formal legal surrogacy in Greece; and Aria, Katerina's partner).

Also, I spoke to four medical practitioners (Dr Konstantinos Pantos, Ms Alexia Chatziparasidou, Dr Basil Tarlatzis, and Mr Haris Cazlaris). Three of them were in charge of clinics practising surrogacy at the time (Dr Pantos, Ms Chatziparasidou, Dr Tarlatzis), and two had been involved in policy-making for ARTs and in the National Authority for Medically Assisted Reproduction (NAMAR), equivalent to the UK's HFEA (Dr Tarlatzis, Mr Cazlaris). Lastly, I interviewed one lawyer experienced in handling surrogacy cases in Greek courts, who asked to remain anonymous, one legal academic (Professor Aristides Hatzis), and a legal academic and advisor at the Hellenic National Bioethics Commission (Takis Vidalis). While my sample is small, the paucity of empirical research available about the surrogacy experience in Greece

⁸⁰ A face-to-face interview was impossible, since I was not in Greece at the time, and was unable to travel due to my teaching commitments in the UK.

⁸¹ Same-sex couples' access to ARTs is unregulated in Greece, and the only option available to this couple was surrogacy.

means that the evidence gleaned from my Greek interviewees is significant and enlightening.

As with the HFEA in the UK, I could not gather evidence from NAMAR. I emailed my request for an interview twice and called NAMAR's offices three times, and all remained unanswered. It is possible that NAMAR was under-resourced and understaffed at the time, since it had started operations only a year before I made contact. Moreover, NAMAR is probably less used to dealing with researchers than the HFEA. Alternatively, this could be an attempt for NAMAR to demarcate its remit, as with the HFEA.

Generally, there was significant reluctance to participate on the part of IPs and surrogates in Greece, despite my promise of full anonymity and confidentiality. This could be due to cultural grounds, and the popular Greek tradition pertaining that 'sexuality, reproduction, family relations belong to the realm of private domesticity',⁸² and should be kept secret from the public.⁸³ This may also explain why ARTs (and surrogacy, in particular) are so under-researched in Greece,⁸⁴ and *vice versa*; because ARTs are so under-researched, people are unwilling to participate.

1.4.3.2 Conduct of interviews:

Before I conducted my interviews in both countries, I sought and secured (June 2015) ethical approval from Kent Law School's Research Governance Committee. Since

⁸² A. Chatjoui, I. Daskalaki and V. Kantsa, *Out of Body, Out of Home. Assisted Reproduction, Gender and Family in Greece* ((In)FERCIT, University of the Aegean 2015) 23, in English. Secrecy regarding infertility by Greeks was also observed in an earlier study: Tarlatzis I and others, 'Psychosocial impacts of infertility on Greek couples' (1993) 8(3) *Human Reproduction* 398, in English (as I mention in Chapter 3 (n1), almost all written material about Greek ARTs and surrogacy cited in this thesis is in Greek, unless otherwise stated, and I translated the citations in English).

⁸³ This is based on the Greek popular proverb '*ta en oiko mi en dimo*', meaning that whatever happens at a household [oikos] should not be made public [dimos]. (Chatjoui *et al* (*ibid*)).

⁸⁴ Chatjoui *et al* (n82: 19) claim '*the majority of relevant research is about its legal dimensions with a few publications on its psychological aspects*' (for example: Abatzoglou G and others (eds), *Approaches to medically assisted reproduction* (Thessaloniki: University Studio Press 2006); Papaligoura Z, 'The Effects of In-Vitro Fertilization on Parent-Infant Communication' (PhD Thesis University of Edinburgh 1992), in English; Papaligoura (n33)). Ethnographic studies are still relatively rare: Paxson H, 'Reproduction as spiritual kin work: Orthodoxy, IVF, and the moral economy of motherhood in Greece' (2006) 30 *Culture, Medicine and Psychiatry* 481-505, in English; Kantsa V (ed), *Motherhood in the forefront. Recent research in Greek ethnography* (Alexandria 2013); Kantsa V, '*Late*', '*early*', '*never*': *Time, gender and technology in assisted reproduction* (Moravec, M. ed, *Motherhood Online*, Cambridge Scholars Publishing: Newcastle 2011); Tountasaki E, '*Biological*', '*genetic*' and '*socio-emotional*' *mother: Conceptualisations of motherhood and familiarity in Parliament discourse related to assistance in human reproduction* (Kantsa, V. ed, *Motherhood in the forefront. Recent research in Greek ethnography*, Alexandria 2013); Tountasaki E, '*The child growing inside you will take from you too*'. *Egg donation, motherhood and kinship* (Patakis 2015)).

ethical considerations should be an ongoing part of research,⁸⁵ I showed due respect of them throughout the research process, namely before, during and after research.⁸⁶ Only one interview raised questions about whether advance approval from the NHS Research Ethics Committee (REC) was necessary, namely with Dr Sue Avery, the Director of the Birmingham Women's Fertility Centre that is based at Birmingham Women's NHS Foundation Trust. Having first consulted the NHS REC guidelines,⁸⁷ as well as the Health Research Authority (HRA) guidelines,⁸⁸ I confirmed that such approval was unnecessary.⁸⁹

The interviewing process started in September 2015 (with two pilot interviews in Greece). The bulk of my Greek interviews were conducted by September 2016, with just one taking place later, in December 2016. The UK interviewing process started in March 2016 (with two pilot interviews) and was completed in June 2016. The interviewees that took part in the pilot interviews did not indicate that changes to the interview schedule were needed, and I continued with the same list of questions, probes and prompts for the rest of the interviews.

The interview schedule was structured around the themes identified in Chapter 2, but I also allowed space for new themes to arise from the interviews to avoid biased interpretations.⁹⁰ Due to the differences in surrogacy regulation in the two countries, I adopted slightly different interview schedules for each of them (Appendix F for the UK schedule, and Appendix G for the Greek one). To allow for comparability, I would explain the legal situation of surrogacy in the other country of research and ask interviewees to comment on the perceived and assumed strengths and weaknesses of both regimes. More importantly, I asked them whether they would consider adopting some elements of the other country's regime and why (or why not).

⁸⁵ Miller T and Bell L, *Consenting to what? Issues of access, gate-keeping and 'informed' consent* (Mauthner, M. and others eds, *Ethics in Qualitative Research*, London: Sage 2002).

⁸⁶ R. Wiles, S. Heath, G. Crow and V. Charles, *Informed Consent in Social Research: A Literature Review* (ESRC National Centre for Research Methods NCRM Methods Review Papers, NCRM/001, 2005) 279. Also, Guidance 6.5, *SLSA Statement of Principles of Ethical Research Practice* (2003) <http://www.slsa.ac.uk/index.php/8-general-information/4-slsa-statement-of-principles-of-ethical-research-practice> (hereafter *SLSA Guidance*).

⁸⁷ <https://www.hra.nhs.uk/planning-and-improving-research/policies-standards-legislation/governance-arrangement-research-ethics-committees/> .

⁸⁸ <https://www.hra.nhs.uk/approvals-amendments/what-approvals-do-i-need/hra-approval/>

⁸⁹ I confirmed this together with my supervisor on 10/11/2016 (private email communication with Professor Sally Sheldon). Also, official confirmation in Appendix B.

⁹⁰ Kvale and Brinkmann (n71) 236,238.

The prescribed time for the interviews was an hour to 90 minutes. With the exception of one interview that lasted only one hour, the rest of them lasted between 90 minutes to two hours, with two instances where the interview lasted more than two and a half hours. During the interviews, I used a digital recording device to record the conversation (if the participants agreed), and kept further notes to capture feelings, facial expressions and body language. Only one interviewee (the Greek lawyer) refused recording of our face-to-face interview but allowed me to take extensive notes of our conversation.

Due to the comparative socio-legal aspects of this project, the study involved travelling and conducting interviews within both Greece and the UK. The preferred method of interviewing was face-to-face interviews, because it allowed for the maximum level of active and simultaneous interaction between me and the research participants.⁹¹ With regards to Greece, I realised that the key actors I wished to interview all lived in the two major cities: Athens and Thessaloniki. All face-to-face interviews took place in these cities, except for my interviews with Lena, who agreed only to a telephone and email interview, and Areti, who agreed to a telephone interview, because she lived outside Greece at the time.

All key actor interviews in Greece took place in the participants' work offices, and most interviews with IPs and surrogates were conducted in the participants' homes, except for Elina's interview which took place in a quiet café Elina chose. Two other interviews took place virtually. My first interview with Lena, when she spoke as a clients' manager at a large Greek fertility clinic, was by telephone, because I was not in Greece at the time, and our second interview, when she spoke as a surrogate, through email. As well as the privacy aspect mentioned above, she preferred to talk about her experience through emails, as she could reply in her own time. As the literature notes, email exchanges are asynchronous, and 'the interviewer and interviewee are separated in time as well as space'.⁹² However, there were also important advantages. The interview required no transcription, and possibly allowed Lena 'greater scope to think about any questions asked and, (...) encourage[d] more descriptive and well-thought out responses'.⁹³

⁹¹ *Ibid* 82.

⁹² Edwards and Holland (n72) 49.

⁹³ Lewis J, 'Making order out of a contested disorder: the utilisation of online support groups in social science research' (2006) 3 *Qualitative Researcher* 5; Meho LI, 'E-Mail Interviewing in Qualitative

For the UK interviews, I found that most key actors were based in or near London, except for Professor Brazier (Manchester), Dr Sue Avery (Birmingham), and Dr Vasanti Jadva (Cambridge). All key actor interviews took place in the interviewees' offices, except for my interview with Dr Kirsty Horsey, which was conducted in a mutually agreed office space within the University of Kent in Canterbury. Most interviews with UK surrogates and IPs took place in their homes. Apart from Natalie, who lives in London, the rest lived quite far away from Canterbury, where I resided at the time of the interviews. For two of my interviews I travelled to the interviewees' homes, and one interview with a surrogate (Lauren) was conducted at my home at her request.⁹⁴ Some other interviews took place virtually, when a face-to-face meeting was not possible or desirable by the interviewee. One interview with a surrogate (Sarah) was conducted through telephone, and two through FaceTime (with Marina and Jamie), because they lived far away. The virtual interviews did not detract from the personal contact between the interviewer and the interviewee.⁹⁵ However, I did experience a problem with my telephone interview with Sarah. After it was completed, I realised that certain parts of the recording were inaudible as the phone interfered with the digital recorder. Luckily, I was able to partly fix the problem through the sound editing software 'Audacity'.

1.4.3.3 Ethical issues:

As in any social science research involving human participants, the study raised various ethical issues. Douglas mentions that professional ethics are useful as a guarantee against infringements on freedom of speech and research.⁹⁶ Tim May adds that ethics 'serve to remind social researchers about their obligation in the conduct of their work'.⁹⁷ However, there is a sensitive balance to be struck, as extensive and inflexible ethical rules and complex research governance processes may lead some researchers to believe it is better to refrain from social research altogether.⁹⁸

Research: A Methodological Discussion' (2006) 57(10) Journal of the American Society for Information Science and Technology 1284–1295.

⁹⁴ Issues of safety will be discussed in the 'Ethics' section below.

⁹⁵ Hanna P, 'Using internet technologies (such as Skype) as a research medium: a research note' (2012) 12(2) Qualitative Research 239–242.

⁹⁶ Douglas J, *Living morality versus bureaucratic fiat* (Klockars, C. and F. O'Connor eds, Deviance and Decency: The Ethics of Research with Human Subjects, London: Sage 1979) 32.

⁹⁷ May T (n55) 61.

⁹⁸ *Ibid*; Scraton P, *Speaking truth to power: experiencing critical research* (Smyth, M. and E. Williamson eds, Researchers and their 'Subjects': Ethics, Power, Knowledge and Consent, Bristol: Policy Press 2004); Coomber R, 'Signing your life away? Why Research Ethics Committees (REC)

Throughout this research study I followed the Society of Legal Scholars Association (SLSA) guidelines. These state that researchers 'should not undertake work of a kind that they are not competent to carry out'.⁹⁹ From the early outset of my studies, I sought training in qualitative research methodologies and in conducting interviews. I attended a module run by the School of Social Policy, Sociology and Social Research (SSPSSR) for one term, which included an overview of literature on various qualitative research methodologies, and training in conducting, transcribing, and analysing interviews.

Since my study involved interviews with human subjects, I was required to secure an ethics approval before I could go ahead. As mentioned above, this was sought and obtained in June 2015 (the clearance lasting until April 2017, as mentioned in Appendix A). I proceeded to contact potential research participants and performed two pilot interviews in each country to test my interview schedule (with Takis Vidalis and Aristides Hatzis in Greece, and with Vasanti Jadva, and Natalie in the UK). Attention to ethical issues was ongoing throughout the study.

I will now discuss the following ethical issues: informed consent, anonymity and confidentiality, protection of the participants from harm, and protection of the researcher from harm. This is in accordance with the SLSA guidance that researchers 'should strive to protect the rights of those they study, their interests, sensitivities and privacy, while recognising the difficulty of balancing potentially conflicting interests'.¹⁰⁰

Informed consent

The literature on ethics in social research highlights the importance of freely given informed consent of research participants prior to the conduct of such research.¹⁰¹ Informed consent requires that 'subjects have been provided with adequate information on what it is being asked of them, the limits of their participation, as well

shouldn't always require written confirmation that participants in research have been informed of the aims of a study and their rights-the case of criminal populations' (2002) 7(1) Sociological Research Online.

⁹⁹ *SLSA Guidance* 2.2.1.

¹⁰⁰ *Ibid* 6.4.

¹⁰¹ Holloway I and Wheeler S, *Qualitative Research for Nurses* (Oxford: Blackwell Science 1996); Tee and Lathlean (n58); Nelson RM and Merz JF, 'Voluntariness of consent for research: An empirical and conceptual view' (2002) 40(9 Suppl) *Medical Care* 69-80; Richards H and Schwartz L, 'Ethics of qualitative research: Are there special issues for health services research?' (2002) 19 *Family Practice* 135-139; Ritchie, Lewis and Elam (n70) 66,67,76; Mauthner M and others (eds.), *Ethics in Qualitative Research* (London: SAGE 2002); Miller and Bell (n85); Flick (n47) 37,38,41,43.

as any potential risks that may incur in taking part in research'.¹⁰² The *SLSA Guidelines* also note that the researcher has a responsibility 'to explain as fully as possible and in terms meaningful to participants, what the research is about, who is undertaking and financing it, why it is being undertaken, what risks, if any, are involved, what the research methods are and how it is to be disseminated'.¹⁰³ Other scholars add that it is equally important to make research participants aware of their right to refuse to participate, the limits of confidentiality and anonymity, and of their right to renegotiate consent during the research, for example by withdrawing from it completely at any point, or by refusing to respond to some questions.¹⁰⁴ This information can be communicated to the participants by way of a covering letter outlining the above.¹⁰⁵

Securing informed consent from the research participants in my study was extremely important, given that many of them would be talking about deeply personal issues. I created an information sheet (included in Appendix D) that contained all information about the purpose and aims of this research, information about ensuring and keeping anonymity and confidentiality, the process of interviewing, the duration of research, the collection and storage of the data, and the dissemination and publication of research results. I also informed participants of their right to withdraw at any time before, during, or after the interview without giving a reason, and to ask that any data relating to them be destroyed at any time before publication. Lastly, I informed them that they could refuse permission to record the interview.

The information sheet was sent to all participants prior to the interview via email, and other forms of online messaging (such as through Facebook private messaging). During the first few minutes of my interaction with the interview participants, I asked whether they had read the information sheet, and if they had any questions. If they had not read the sheet, I provided them with a copy and requested that they take some time to read it. I then provided the consent form (included in Appendix E), asked them to read it carefully, and consider signing it. The form requested the participants to check the following: whether they had read and understood the information sheet, whether

¹⁰² Hoong Sin C, 'Seeking Informed Consent: Reflections on Research Practice' (2005) 39(2) *Sociology* 279.

¹⁰³ *SLSA Guidance* 7.1.1.

¹⁰⁴ Orb A, Eisenhauer L and Wynaden D, 'Ethics in Qualitative Research' (2000) 33(1) *Journal of Nursing Scholarship* 96; Kvale S, *Interviews. An introduction to qualitative research interviewing* (CA: Sage 1996); Lewis (n60) 66; Kvale and Brinkmann (n71) 70; Munhall P, 'Ethical considerations in qualitative research' (1988) 10(2) *Western Journal of Nursing Research* 150-162.

¹⁰⁵ *SLSA Guidance* 7.1.1.

they had been given the opportunity to ask questions about the project and issues of confidentiality; whether they had been made aware that they can stop the interview at any point and/or withdraw from the research; whether they agreed for the interview to be recorded; and whether they agreed for quotations to be attributed to them in any publications, reports, web pages, and/or other research outputs.

Inclusion of quotations in research outputs was subject to participants having the opportunity to see and to revise any quotations before they were used. I considered this to be a significant component of consent, and an opportunity to form a balanced research relationship between interviewer and interviewee, based on trust, openness, and transparency.¹⁰⁶ Participants were also asked to provide a secure email address which would be used for the dissemination of the research results, and the approval of quotations. They were, however, reminded that, after the approval of the quotation, they could not amend or withdraw it. In fact, reviewing the full interview transcript was deemed important by many of my interviewees, and for some (especially key actor interviewees) a prerequisite to their provision of consent. For reasons of equality, I sent the full interview transcript to all my interviewees with specific indications about which quotations I intended to use for this thesis. In most cases, getting the participants' approval for the use of quotations was unproblematic and straightforward, but in three cases, all involving key actors (an academic, a clinician, and a legal practitioner), the participants made numerous amendments in the interview text, and asked that some quotations be deleted, meaning I could not use them in my research. This required some negotiation to happen between me and the interviewees, but, in the end, I was allowed to use most of the quotations on the proviso that some amendments would be made which addressed the interviewees' concerns.¹⁰⁷

Anonymity and confidentiality

Another important ethical concern relates to ensuring the confidentiality of research participants. As Lewis explains, 'anonymity means the identity of those taking part not being known outside the research team',¹⁰⁸ or, in the case of individual research, that the identity of the research subjects not being known to anyone apart from the

¹⁰⁶ Smyth M and Williamson E (eds), *Researchers and their 'Subjects': Ethics, Power, Knowledge and Consent* (Bristol: Policy Press 2004).

¹⁰⁷ For example, I was asked to delete names and business titles, and to refrain from publishing some controversial views.

¹⁰⁸ Lewis (n60) 67.

researcher. Confidentiality is related to ‘avoiding the attribution of comments, in reports or presentations, to identified participants’,¹⁰⁹ if they wished for their identity to remain unknown.

My interviewees were able to choose how they would like their personal information to be presented in my research. They could opt for complete anonymity, be ‘on the record’, or to allow some information (such as first name, place of residence and/or work, and professional affiliation relating to surrogacy practice, where appropriate) to be shared. As regards the IPs and surrogates, I gave them the option of complete anonymity, because I assumed they would want to keep their information private, particularly where that relates to intimate experiences or those that may carry some stigma. I also gave this choice to representatives of surrogacy organisations, because I assumed that it would be easier for them to disclose information about the practices in their organisations without fearing they could be identified. Lastly, the option of anonymity was given to key actor participants for reasons of equality and justice, though I expected that they would not object to speaking ‘on the record’, as this is usual practice.

All surrogates and IPs agreed for their first names to be known to readers of my current and future work. In fact, some agreed for their full names to be disclosed, because they felt proud of what they did, and wished to encourage others to do the same. As Parker notes, anonymity can protect participants, but it can also ‘deny them the very voice in the research’.¹¹⁰ To balance the concern for the interviewees’ welfare, and the concern for making their voices heard, I decided (after consultation with those interviewees during the rapport phase) to share their real first names and the way of their involvement with surrogacy, which offers them the desired recognition. Notably, it is possible that these details make some interviewees readily identifiable, but they approved this approach. Although it does not completely reject the ‘expert’/‘non-expert’ binary, it does disrupt it.

While the trustworthiness of the evidence is not compromised by not sharing the full names of these interviewees, it could be an issue in the case of key actor interviewees. Since the ‘expert’ interviewees in this study were purposefully chosen because of their expertise and high level of involvement in the regulation and practice of surrogacy in

¹⁰⁹ *Ibid*

¹¹⁰ Parker I, *Qualitative Psychology: Introducing Radical Research* (Buckingham UK: OUP 2005) 17.

Greece and the UK, their names and professional activities in surrogacy carry a particular weight, and possibly add reliability to the results of this research. All UK key actor participants agreed for their names and professional affiliations to be shared in this study and in subsequent publications. In Greece, one key actor, a Greek lawyer, did not consent to being named and did not wish for the interview to be recorded.

The unwillingness of the Greek lawyer to speak ‘on the record’ is interesting, and unusual, but also evidences the secrecy around surrogacy in Greece. As many of my interviewees indicated, legal (and medical) practitioners in Greece are gatekeepers of access to surrogacy. Therefore, the lawyer probably wanted to remain anonymous to protect his/her good name in the field, and not compromise his/her future involvement in surrogacy. Moreover, Greek law makes it a criminal offence to act as an intermediary for surrogacy. Hence, it is possible that this practitioner refused to speak ‘on the record’ in fear of being accused of acting as a mediator. This concern highlights the need for better regulation of surrogacy in Greece. Although anonymity removes the assumed authority that would accompany the evidence of a named key actor, the evidence provided is still important in helping to address the noteworthy scarcity of evidence about how Greek surrogacy works.

Furthermore, ensuring confidentiality does not only affect ‘what information should be available to whom’;¹¹¹ it also ‘has implications for data storage’,¹¹² meaning that documents relating to the empirical component of the research should not compromise the participants’ anonymity in any way. The interview recordings were not accessible to anyone apart from me, and all documents containing person-identifiable information were kept safe and locked away. All digitally saved data were saved in password-protected and encrypted folders on my personal laptop, and an external hard drive. My interview notes are locked in a drawer in my home office, in separate folders from consent forms and other documents containing person-identifiable information.

The recorded interviews were transcribed and, where appropriate, translated (from Greek to English) by me in full, and subsequently saved in my personal laptop in an encrypted folder, and stored separately from the recording and the rest of the person-identifying information (for those who asked to remain fully or partly anonymous). After the transcription was completed, I sent the interviewees the contextualised

¹¹¹ Kvale and Brinkmann (n71) 72.

¹¹² Lewis (n60) 68.

quotations, so that they could read them and decide if they wanted to amend them before being included in my work. I also ensured that I removed parts the interviewees explicitly told me during the interview not to include in my study, as well as potentially identifying details of third parties (for example, where names of people, firms, clinics, and other surrogacy organisations were mentioned). This was done not only to respect the limits that the participants themselves had placed on their consent, but also to protect third parties from potential harm in case someone could identify them without their consent.

Protection of the research participants from harm

Though risks relating to this project were deemed minimal, and while none of my interviewees belonged to a vulnerable group, I did take seriously the duty to ensure the interviewees' welfare and safety throughout this research.¹¹³ I assumed that participants with a professional involvement with surrogacy were unlikely to experience any distress, and in fact they did not, as they were not discussing personal experiences. It was, however, possible that some emotional distress could be caused if some individuals, particularly the surrogates and IPs, had had a bad experience of surrogacy and would find it hard to discuss.

However, the IPs that I interviewed in both countries were a self-selected group and none appeared to find it particularly hard to discuss their experiences. Where a small number of questions risked making participants feel uncomfortable (an unavoidable aspect of research into sensitive topics), I re-emphasised that everything said in the interviews was confidential and participants had the right to speak off the record whenever they wished. Also, I reminded participants about their right to set aside certain questions for later, or disregard questions in their entirety.

With regards to interviews with surrogates, although I mostly focused on their experiences with the legal aspects of the process, which are less emotionally charged, I anticipated that relinquishing a child could have been emotionally difficult. Nevertheless, I was struck by the way in which the surrogates who participated in my study experienced this process. Contrary to my expectations, they said they were not distressed by the experience, but had found it very affirming and fulfilling. The most

¹¹³ Bryman A, *Social Research Methods* (4th edn, OUP 2012) 129-155; Roberts C, 'Ethical Guidelines' (Social Research Association, 2003) <http://the-sra.org.uk/wp-content/uploads/ethics03.pdf>.

significant emotion displayed by the surrogates rather came out when they recounted how hard it was for the IPs to deal with their difficulty in having a child.

On two occasions of interviewing surrogates, one in Greece and one in the UK, the women teared up when discussing how difficult it was for the IPs to complete their journey to parenthood. In both cases, I immediately offered to stop the interview and take a moment to re-group, reminding participants that they could refuse to answer further questions, but both wished for the interview to continue as normal. Also, one IP in Greece became upset while discussing how hard it was for her to find a surrogate, given the lack of systems to help IPs to do so. Again, I offered her the option to pause for a moment or to stop the interview completely, but she refused, and we continued our discussion.

Protection of the researcher from harm

It is important to also consider the researcher's wellbeing during the conduct of research. Lewis notes that 'risk arises in different ways in public areas (such as when...travelling to appointments) and in private fieldwork venues (such as the participants' homes)'.¹¹⁴ As part of the location of research was outside the UK (where I was based at as a researcher), I had to become familiar with the UK government's foreign travel advice guidelines.¹¹⁵ Greece was not deemed to be a high risk country to travel to and, given that I am a Greek native, I was familiar with local customs and etiquette.

I also arranged to maintain contact with others before and after the end of each interview. My supervisors had knowledge of my interview schedule, and, depending on the location of research, other people were always aware of my whereabouts during the interviews. For interviews conducted in Thessaloniki, I had continuous contact (before and after the interviews) with my parents, who live there. The point of contact for the time spent researching in Athens was my partner who lives there. Lastly, when I conducted interviews in the UK, I maintained contact with my house-mate. I made sure that my phone was always charged and kept in close reach, and had also provided all the individuals mentioned above and the University with the name and telephone

¹¹⁴ Lewis (n60) 70.

¹¹⁵ <https://www.gov.uk/foreign-travel-advice>

numbers of my emergency contacts in Greece and the UK (my father and partner in Greece, and my supervisors and house-mate in the UK).

Given that one of the interviews was conducted in my own home, I took different measures to ensure my safety. My house-mate knew about my meeting and was awaiting a text from me as to whether the interviewee had arrived. My house-mate arrived at the house a little after the interviewee, but did not enter the living room, where the interview was taking place, so as not to disrupt us, and to avoid breaching the interviewee's confidentiality.

1.5 Conclusion

This chapter introduced the background and rationale of this doctoral research and provided a summary of the research questions and aims, as well as an overview of the thesis chapters. Furthermore, it offered a summary of the methodological approaches engaged in my study. The next chapter examines how surrogacy should be regulated in law and gives close attention to the principles of autonomy, harm, and justice.

CHAPTER 2

Surrogacy in Context – Normative Framework

2.1 INTRODUCTION

This chapter examines the major ethical considerations regarding surrogacy. I argue that respect for autonomy grounds a strong presumption that individuals should be free to enter surrogacy arrangements, unless there are good reasons for preventing them from so doing, and that any restrictions must be necessary and proportionate to the harm to be prevented. The autonomy principle is crucial in surrogacy because it can ‘tell us whether surrogacy should be legal, whether commercial surrogacy is an option, and what freedoms the pregnant woman should have to make decisions during pregnancy’,¹ which essentially covers most of the problematic issues relating to the practice.

I thus begin by setting out why we should care about autonomy in this context, before turning to explore a range of objections to surrogacy that purport to offer good reasons why autonomy should be limited. These ‘good reasons’ fall broadly into three grounds: first, it is claimed that the exercise of true autonomy is impossible in surrogacy; secondly, that surrogacy causes harm; and thirdly, that surrogacy practices offend against a concern with justice. I conclude that while none of these objections offers a convincing reason to go as far as to prohibit surrogacy, that between them, they raise a range of concerns suggesting the need for robust regulation, which can ensure autonomous choice, prevent harm, and promote equal, fair, and affordable access and practice of surrogacy. I end by summarising what responding to these disparate concerns requires of the work to be done by a ‘good’ surrogacy regime. These criteria subsequently form a basis in evaluating how well the Greek and UK legal models regulate surrogacy.

¹ Nelson E, *Law, Policy and Reproductive Autonomy* (Hart Publishing, Oxford and Portland, Oregon 2013) 334.

2.2 Autonomy in the context of reproduction

2.2.1 What is autonomy?

Autonomy is significant in debates relating to philosophy, law and policy, and an important tool in reproductive decision-making. A general definition refers to one's ability 'to live [one's] own life, in accordance with [one's] own values and desires';² simply put, one's ability to evaluate one's needs and desires, make decisions, and act upon them. While the literature on autonomy is enormous, 'there is little agreement about the nature of autonomy and its meaning in moral or political philosophy, applied ethics and law'.³ As Dworkin notes, 'autonomy' is a broad and abstract concept that has been employed

*'sometimes as an equivalent of liberty...[and] to self-rule or sovereignty, sometimes as identical with freedom of the will. It is equated with dignity, integrity, individuality, independence, responsibility, and self-knowledge. It is identified with qualities of self-assertion, with critical reflection, with freedom of obligation, with absence of external causation, with knowledge of one's own interests'.*⁴

Historically, the problematisation of the meaning and significance of 'autonomy' finds its origins in the Enlightenment and Immanuel Kant's philosophy on morals. Kant argues that autonomy is based on one's ability for practical reason,⁵ which, as Christman explains, refers to one's 'ability to use reasons to choose [one's] own actions',⁶ and one's ability to stay true to these self-imposed rules, so that they become universal moral law. Therefore, autonomy is not only limited to one considering what would make oneself happy; one also has to consider what other rational persons would choose to do if in that position, and how this decision might affect other people's ends.⁷ For Kant, autonomy is the ability of one's will to be a universal law that would treat other individuals with respect, as ends in themselves, 'never merely as a means to an end'.⁸

² *Ibid* 12.

³ *Ibid*

⁴ Dworkin G, *The Theory and Practice of Autonomy* (Cambridge, Cambridge University Press 1988) 6.

⁵ Kant I, *Grounding for the Metaphysics of Morals* (Ellington, J. W. (1993), 3rd edn, Hackett 1785).

⁶ Christman J, *Autonomy in Moral and Political Philosophy* (Zalta, E. N. ed, The Stanford Encyclopedia of Philosophy, 2011).

⁷ Trokanas T., *Human Reproduction – Personal autonomy and its limits*, vol 13 (Kaiafa-Gbandi, M., E. Kounougeri-Manoledaki and E. Symeonidou-Kastanidou eds, Publications on Medical Law and Bioethics, Sakkoulas, 2011) 10 (in Greek); Waldron J, *Moral Autonomy and Personal Autonomy* (Christman J and Anderson J eds, *Autonomy and the Challenge to Liberalism: New Essays*, CUP 2005) 307.

⁸ Kant (n5) 30.

However, more contemporary understandings of ‘autonomy’ appear to centre around individualism, namely the freedom of personal choice and one’s ability to govern one’s own life as suits one best.⁹ In *On Liberty*, John Stuart Mill argues that one ought to be free to do as one wishes, to be the author of one’s life.¹⁰ Mill contends that this freedom might justifiably be limited only when one’s actions pose harm to another individual (commonly known as ‘the harm principle’).¹¹ Furthermore, contemporary understandings of autonomy are closely related to liberalism, a theory that begs us to look at the relationship between the individual and the State, and protect the individual from unwarranted interventions from the State.¹²

In bioethics literature, autonomy is generally linked to patient autonomy, and to ‘liberal ideas about the self and about the individual’s role in making healthcare decisions’.¹³ Beauchamp and Childress, define autonomy as the patient’s freedom of choice in decision-making.¹⁴ They further argue that it is possible for one to be autonomous but unable to make an autonomous decision due to lack of information or to coercion, and that the determining factor of autonomy in healthcare settings relates to informed consent.¹⁵ While justifications for autonomy and its precise nature are contested,¹⁶ it is broadly accepted that autonomy is important.¹⁷

2.2.2 Prerequisites for autonomous decision-making and relational autonomy

Most theories of autonomy refer to two conditions enabling autonomous choice: authenticity and competency.¹⁸ As Nelson explains, authenticity is associated with ‘the ability to reflect on and endorse or identify with one’s “first-order” desires, so that one

⁹ Nelson (n1) 13; Dodds S and Jones K, 'Surrogacy and Autonomy' (1989) 3(1) *Bioethics* 1.

¹⁰ Mill JS, *On Liberty* (1859).

¹¹ Mill JS, 'The Contest in America' (1862) 24(143) *Harper's New Monthly Magazine*, Harper & Bros, New York 683–684.

¹² Christman and Anderson, *Introduction* (Christman, and Anderson eds, (n7) 1).

¹³ Nelson (n1) 16.

¹⁴ Beauchamp TL and Childress JF, *Principles of Biomedical Ethics* (6th edn, OUP, New York 2009).

¹⁵ This theorisation of autonomy has been criticised as being too narrow: Kukla R, 'Conscientious Autonomy: Displacing Decisions in Healthcare' (2005) 35(2) *Hastings Center Report*.; Walker RL, 'Medical Ethics Needs a New View of Autonomy' (2009) 33 *Journal of Medicine and Philosophy*; Dodds S, *Choice and Control in Feminist Bioethics* (McKenzie C and Stoljar N eds, *Relational Autonomy, Agency and the Social Self*, OUP 2000) 213.

¹⁶ *Ibid* and Foster C, *Choosing life, choosing death: the tyranny of autonomy in medical ethics and law* (Hart Publishing 2009) 19,103,121,161.

¹⁷ Mason JK and Laurie GT, *Mason & McCall Smith's Medical Law and Ethics* (8th edn, Oxford, OUP). Foster is the leading contemporary legal critic of autonomy, but even he accepts that it is important, suggesting merely that we have gone too far in accepting it as the primary, or only important, principle (*ibid*: 9,181).

¹⁸ Christman (n6); McLeod C, *Self-Trust and Reproductive Autonomy* (MIT Press 2002) 106-110.

is able to act on values that in some concrete sense are one's own'.¹⁹ Competency relates to other features and conditions enabling the individual to be autonomous and flourish;²⁰ these might 'include the capacity for "self-control", rational thought, and freedom from debilitating pathologies, systematic self-deception and so on'.²¹ Additionally, competency could be linked to one's ability to be 'relatively unimpeded' by circumstances preventing one to self-reflect, such as coercion, manipulation, and deception.²²

Also, some feminist accounts of autonomy emphasise the existence of social conditions that might either promote and increase autonomy, or impede autonomous action.²³ According to a feminist view, society creates conditions which are oppressive to women, and this impacts on our choices, which eventually are not or cannot be fully autonomous.²⁴ Yet, the mere existence of unequal and oppressive conditions does not completely rule out the possibility of autonomous action. What is critical is that social conditions are constructed to ensure and promote autonomy even within situations of more general oppression.²⁵

The conception of autonomy based on the socialisation of human conditions is defined as 'relational autonomy'.²⁶ It stems from the feminist struggles that aimed to give women the liberty 'to shape [their] own lives, to define who...each [of them] are, rather than accepting the definition given to [women] by others (namely men, and male-dominated society in particular)'.²⁷ Some argue that by recognising relational autonomy, we give women a voice, one that is arguably different from that of men,²⁸

¹⁹ Nelson (n1) 13. By 'first-order desires' Nelson refers to one's basic instincts; what comes natural to one to do or behave. Also, McLeod (*ibid*) 109-110.

²⁰ Meyers DT, *Self, Society and Personal Choice* (Columbia University Press 1989) 76.

²¹ Christman (n6), as cited in Nelson (n1) 14.

²² Friedman M, *Autonomy, Gender, Politics* (OUP 2003) 13-14.

²³ *Ibid* 17.

²⁴ Nedelsky J, 'Law, Boundaries, and the Bounded Self' (1990) 30 *Representations*.

²⁵ Nelson (n1) 25, citing Nedelsky (*ibid*) 167.

²⁶ Nedelsky J, 'Re-conceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 7 *Yale Journal of Law and Feminism* 8-9. Nedelsky is widely accepted as the developer of the relational autonomy theory.

²⁷ Nedelsky (n24); Nedelsky J, *Law's Relations: A Relational Theory of the Self, Autonomy and Law* (OUP 2011) 121; Sherwin S, *A Relational Approach to Autonomy* (Temple University Press 1998) 19; Donchin A, 'Understanding Autonomy Relationally: Toward a Reconfiguration of Bioethical Principles' (2001) 6 *Journal of Medicine and Philosophy* 365,367; Donchin A, 'Reworking Autonomy: Toward a Feminist Perspective' (1995) 4 *Cambridge Quarterly Healthcare Ethics* 44; McKenzie C and Stoljar N, Introduction: Autonomy Reconfigured (McKenzie, C. and N. Stoljar eds, *Relational Autonomy, Agency and the Social Self*, OUP 2000) 13-14.

²⁸ Gilligan C, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, Cambridge, MA 1982).

because the value women place on relationships is higher.²⁹ Lastly, relational autonomy is a useful tool, because it might help to develop ‘better laws and institutions’,³⁰ which will show more respect for women’s experiences.

Nevertheless, relational autonomy has been criticised for placing undue importance on relationships and less on individuals, namely it might lead one to think that ‘if you are not in the right kinds of relationships, or if you are in the “wrong” kinds, you are not autonomous’.³¹ Nelson proposes the adoption of ‘a more nuanced and contextualised understanding of autonomy’,³² which recognises the existence of oppressive socialisation but also places the individual at the centre of the debate. This conceptualisation involves both the ability and capacity to make choices, and the duty to ‘ameliorate the conditions that lead to oppressive socialisation by educating and counselling individuals making healthcare decisions’.³³

In other words, every individual who has the capacity to evaluate her values and desires and make her own choices should be free to do so, and the State has a corresponding duty to refrain from erecting unjustified barriers to the exercise of this choice, and, following Nelson, possibly also to promote the conditions that enable the exercise of autonomy.³⁴ This theorisation helps us better understand the meaning and importance of reproductive autonomy (and autonomy in surrogacy in particular), because it not only places the individual at the centre of the debate, along with social (and sometimes oppressive) conditions relating to reproductive decisions, which are complex and personal; it also poses the question about whether the State has not only a negative duty of non-interference but also a positive duty to ensure that all individuals can exercise their autonomy and do it freely, fairly and equitably.

2.2.3 What is ‘reproductive autonomy’ and why does it matter?

As discussed earlier, reproductive decisions are potentially the most intimate choices in human endeavour, and autonomy is very important in this context.³⁵ Formal legal

²⁹ Bartlett K, 'Gender Law' (1994) 1 Duke Journal of Gender Law 11.

³⁰ Nelson (n1) 24. However, Catharine McKinnon argues that true autonomy is impossible, because women’s ‘different voice’ is, again, shaped by and stems from male dominance (*Feminism Unmodified: Discourses on Life and Law* (Harvard University Press 1987) 38-39).

³¹ Nelson (n1) 29.

³² *Ibid* 30.

³³ *Ibid* 31.

³⁴ *Ibid*. Certainly, the facilitation of autonomous action is not only the role of the State. Every individual arguably has at least a moral obligation to respect other people’s autonomy.

³⁵ Robertson JA, 'Procreative Liberty and the Control of Conception, Pregnancy and Childbirth' (1983) 69 Virginia Law Review; Laufer-Ukeles P, 'Reproductive Choices and Informed Consent: Fetal

recognition of procreative freedom is found in the European Convention on Human Rights (ECHR),³⁶ and English common law, where it is not clearly stated but implied.³⁷ Other countries have acknowledged reproductive freedom as a fundamental constitutional right.³⁸ However, there is still much ambiguity as to what reproductive autonomy entails, and what the legal implications of the recognition of such a right may be.

A concern with reproductive autonomy may be seen as originating in the struggles for access to birth control from the mid-nineteenth century,³⁹ but, with advances in reproductive medicine and artificial reproduction, autonomy came to mean something more.⁴⁰ Robertson suggests that 'full procreative freedom includes both the freedom not to reproduce and the freedom to reproduce when, with whom, and by what means one chooses',⁴¹ either through 'traditional' or artificial means, limited only in cases where 'tangible harm [was caused] to the interests of others'.⁴² Also, as discussed above, according to more contemporary understandings of autonomy, the negative aspect of reproductive autonomy would include that the State does not erect any barriers on the individual's freedom of choice.

Drawing on the general definition of 'autonomy', 'reproductive autonomy' involves one's *prima facie* right and ability to make one's own choices regarding reproduction after having considered one's own values, needs and desires, and one's ability to act upon these decisions.⁴³ However, any such right should be balanced against harm that may be caused to others as a result. This concern is particularly important in the

Interests, Women's Identity, and Relational Autonomy' (2011) 37 American Journal of Law & Medicine; Madeira LJ, 'Woman Scorned? Resurrecting Infertile Women's Decision-Making Autonomy' (2012) 71 Maryland Law Review.

³⁶ Article 8 ECHR (right to respect for family life).

³⁷ The negative right to procreative freedom (freedom not to reproduce) was acknowledged, for example, in *Evans v The United Kingdom* (Application no.6339/05).

³⁸ Article 5(1) Greek Constitution recognises the freedom of expression, which includes the right to reproduce through traditional or artificial means (Trokanas (n7)). Canadian jurisprudence recognised a right to procreate in *R v Morgentaler* [1988] 1 SCR 30, 63 OR (2d) 281. Also, Robertson argues that US courts have accepted such a right (Robertson JA, *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton University Press 1994)).

³⁹ Robertson (n35) 405.

⁴⁰ O'Neil O, *Autonomy and Trust in Bioethics* (Cambridge University Press 2002) 57-58.

⁴¹ Robertson (n38) 16. However, liberty seems to have a much narrower meaning than autonomy, according to Nelson, '[Robertson's] approach fails to include in reproductive autonomy a good number of procreative activities and events that take place after the decision to reproduce has been made...[which] seems to discount the experience of reproduction from the woman's point of view' (n1: 33).

⁴² Nelson (n1) 41-42.

⁴³ Jackson E, *Regulating Reproduction: Law, Technology and Autonomy* (Hart Publishing 2001) 828; McLeod (n18) 2.

reproductive context, because ARTs involve ‘the cooperation of others’,⁴⁴ who might incur harm and have an interest in being protected; this may justify limitations on autonomy. More specifically, surrogacy involves both the decision about whether or not to reproduce, but also the decision to use another woman’s body for a very intimate purpose.

In 1990s, some feminists believed that autonomy is and should not be the only principle that matters in reproduction,⁴⁵ and some demanded a ban on ARTs, including surrogacy, based on concerns about harm to women’s bodily autonomy,⁴⁶ because assisted reproduction involves procedures that are intrusive, potentially dangerous for woman’s physical and emotional health and have limited success.⁴⁷ Others asserted ARTs forced ‘women...to negate their own bodies, [and] treat...their bodies as instruments for their own or someone else’s reproductive goals’.⁴⁸ Moreover, some claimed that ARTs reinforced gender norms depicting women as nurturers and caregivers, and defined motherhood as women’s ‘destiny’.⁴⁹ Others argued that ARTs strengthened the negative effects of medicalisation on women (since they are the main recipients of infertility treatments), and ultimately rendered women unable to control their own bodies and reproductive capacities, thus increasing male dominance.⁵⁰ Lastly, some claimed true consent to ARTs is impossible, because social oppression influenced women’s reproductive decisions rendering them non-autonomous.⁵¹

Whilst these feminist critiques are significant, they cannot and should not lead to a total prohibition of ARTs, including surrogacy, because this would be a denial of women’s autonomy. Rather, respect for reproductive autonomy means that ARTs are available to and accessible by all, and that we should ‘focus our attention on whether

⁴⁴ Dodds and Jones (n9) 3.

⁴⁵ Raymond JC, *Women as Wombs: Reproductive Technologies and the battle over Women’s freedom* (Spinifex Press, Australia 1995); Franklin S, *Embodied Progress: A Cultural Account of Assisted Conception* (Routledge, London 1997); Cherry A, ‘Choosing Substantive Justice: A Discussion of “Choice”, “Rights” and the New Reproductive Technologies’ (1997) 11 Wisconsin Women’s Law Journal; Rowland R, *Living Laboratories: Women and Reproductive Technologies* (Bloomington, Indiana University Press 1992).

⁴⁶ Raymond *ibid* 18.

⁴⁷ Franklin (n45); Corea G, *The Mother Machine: Reproductive Technologies from Assisted Insemination to Artificial Wombs* (Harper and Row 1985).

⁴⁸ Raymond (n45) 205; Radin M, ‘Market inalienability’ (1987) 100 Harvard Law Review.

⁴⁹ Callahan, C. and Roberts, D.E., ‘A Feminist Social Justice Approach to Reproduction-Assisting Technologies: A Case-Study on the Limits of Liberal Theory’, Kentucky Law Journal, 1995,1211.

⁵⁰ Corea (n47); Raymond (n45); Overall C, *Ethics and Human Reproduction: A Feminist Analysis* (Allen and Unwin, Boston, MA 1987) 124,167-170; Satz D, ‘Markets in Women’s Reproductive Labor’ (1992) 21(2) Philosophy and Public Affairs.

⁵¹ Corea (n47); Franklin (n45).

conditions exist that actually permit (or foster) the meaningful exercise of reproductive choice'.⁵² As such, the feminist concerns noted above should be treated as creating a rebuttable presumption about the potential negative effects of ARTs on women, requiring attention to the question of whether appropriate regulation serves to protect women's interests and to enable them to fully participate in society as autonomous members.⁵³ Moreover, any restriction on autonomy should be necessary and proportionate to the harm to be prevented. This means that the question of whether appropriate regulation is sufficient is an empirical one, requiring not just theoretical analysis but also a detailed, concrete consideration of how surrogacy operates in practice, and what role regulation can play in protecting the welfare of key participants.

Furthermore, I argue for a negative right to autonomy, meaning that the State should not erect any barriers to surrogacy, but once surrogacy is permitted, the State, has a general duty to protect the vulnerable from exploitation in access to reproduction, to ensure equality and ease of access, to eliminate (or, at least, so far as possible to limit) the risk of harm that might arise in this context, and to prevent discrimination against certain groups through specially designed, appropriate and effective law and regulation. I have thus far shown that autonomy grounds a *prima facie* right to women to decide whether to act as surrogates and to IPs to try to have a child through surrogacy, unless any of the objections considered below offers sufficiently strong reasons to prohibit them from doing so. If these reasons are deemed insufficient to prohibit surrogacy, the State has a duty to foster the conditions that support the exercise of autonomous choice, and to guarantee equal, fair and effective regulation regarding access, regulation during surrogacy and determination of legal parenthood, which, as will become apparent from the analysis below, essentially respond to the major concerns arising from surrogacy.

2.3 Objections to Surrogacy

This section discusses the most important arguments against surrogacy. To facilitate the analysis in this complex and large body of literature, I divide the objections into two distinct groups. I begin by considering the autonomy-based objections, in which it is claimed that surrogacy is immoral and should be illegal because autonomy (and

⁵² Nelson (n1) 50.

⁵³ *Ibid* 73.

thus valid consent) is impossible.⁵⁴ I then examine harm-based objections, according to which surrogacy causes harm to the surrogate, the children, and/or the IPs. The claim that surrogacy objectifies women and/or children is dealt with here as part of the claim that they are harmed in surrogacy. I conclude that, while these objections raise significant concerns, they would only justify a ban on surrogacy if it were impossible to address them through appropriate regulation.

2.3.1 Autonomy-based objections

The claim here is that those entering surrogacy arrangements do not act autonomously, and, therefore, it makes no sense to justify surrogacy in terms of respect for autonomy. This argument may take three forms. First, it might be suggested that autonomy is impossible in surrogacy because the surrogate cannot predict her emotional response to pregnancy and relinquishment of a child in advance. Second, it might be claimed that autonomy is impossible because certain conditions influence the surrogate in her decision, which might invalidate her consent. Third, it might be suggested that autonomy is impossible because the surrogate's consent cannot be fully informed.

- *Autonomy is impossible because no surrogate can truly know her own mind in advance*

The claim here is that the surrogate cannot provide valid advance consent to surrogacy, because she may come to bond with the child during pregnancy and may later find it hard, or even impossible, to relinquish her to the IPs.⁵⁵ As Oakley highlights, this claim, 'when conjoined with some moral principle about the justifiable limits on the ways others can be expected to exercise their autonomy on our behalf, is often taken to establish' that surrogacy is unethical.⁵⁶ However, the unpredictability of the surrogate's response to pregnancy and relinquishment does not necessarily render her consent invalid, her decision less autonomous, and, thus, surrogacy unethical. Consent does not require one to have complete knowledge of one's future emotional state.⁵⁷ This would require one to have first experienced a certain circumstance or to be able

⁵⁴ If a practice is immoral it does not follow that it should necessarily also be illegal (McLachlan HV, 'Defending commercial surrogate motherhood against Van Niekerk and Van Zyl' (1997) 23 JME 344-348).

⁵⁵ Dodds and Jones (n9) 9.

⁵⁶ Oakley J, 'Altruistic Surrogacy and Informed Consent' (1992) 6(4) Bioethics 269.

⁵⁷ *Ibid*

to foresee one's actual future psychological state for one's consent to be deemed valid, which arguably is just too demanding a standard.⁵⁸

Moreover, it is illogical to say that all surrogates are non-autonomous. As Dodds and Jones rightly note, each woman experiences pregnancy differently; even the same woman may have different experiences in each pregnancy, if she has more than one.⁵⁹ They further note that sadly there can be no guarantee that the surrogate will not get attached to the child and she will not be devastated by relinquishing her to the IPs.⁶⁰ Nevertheless, they suggest that this is not a strong reason to prohibit surrogacy if autonomy might be respected through alternative, less restrictive measures, such as the offer of counselling services and monitoring of surrogacy arrangements through an independent surrogacy board.⁶¹

Additionally, what is often stipulated in debates against surrogacy is that women cannot make an autonomous decision because 'emotions have a kind of *sui generis* unpredictability, which...entails that we lack information about them which is crucial to decisions involving emotional risks'.⁶² Purdy, however, emphasises that this type of unpredictability of emotions during and after pregnancy is not unique to surrogacy.⁶³ Rather, this might be the case for any pregnancy,⁶⁴ therefore, surrogacy cannot be prohibited based on this argument.

Oakley further argues that the unpredictability of the surrogates' emotions is not enough of a reason to ban the practice, because it is possible to predict one's future psychological state either by examining 'the pattern of [one's] past emotional responses to [similar] situations...[or by looking] for a pattern of response...via a certain emotion-type itself'.⁶⁵ If the potential surrogate has not had any experience of pregnancy and relinquishment (such as, previously having given up a child for

⁵⁸ Macklin R, 'Is there Anything Wrong with Surrogate Motherhood? An Ethical Analysis' (1988) 16 L Med & Health Care 61. If this were true, we would have to ban other practices, such as marriage or abortion, yet this is not the reason that any jurisdictions that ban abortion have done so. An alternative proposal is that surrogates must have experienced pregnancy and childbirth (Brief filed on behalf of Amici Curiae, The Foundation on Economic Trends *et al*, In *The Matter of Baby M*, NJ Supreme Court, Docket No. FM 25314-86E 30-31).

⁵⁹ Dodds and Jones (n9) 8-9.

⁶⁰ *Ibid*

⁶¹ *Ibid* 11.

⁶² Oakley (n56) 274.

⁶³ Purdy LM, 'A response to Dodds and Jones' (1989) 3(1) Bioethics 41-42.

⁶⁴ Moreover, this could be the case in other situations, such as an operation that one consents to without knowing whether any of the risks involved might be realised.

⁶⁵ Oakley (n56) 275. This argument arguably underpins the practice of some surrogacy organisations, as we will see in Chapter 5, to prevent women who already have a child to act as surrogates.

adoption or having had an abortion), she can try to remember how she had felt when she was in a state of major grief and regret before she consents to surrogacy. Her later consent would be valid and autonomous.

It could also be argued that the provision of professional counselling could help the surrogate reflect on any previous experiences of grief, and prepare herself to re-apply these coping mechanisms in the future if she experiences emotional pain due to relinquishment.⁶⁶ Tieu, however, argues that this constitutes a denial of surrogates' autonomy, because they are required to control their emotional responses by applying "cognitive dissonance" reduction strategies.⁶⁷

Beyond these theoretical concerns, there is also an important point to be made regarding the need for law and policy in this area to be evidence-based before any limitations are placed. In a study of 125 cases of surrogacy, Appleton reports that, despite the assumption that the surrogate might come to regret her initial decision, this is in fact rare.⁶⁸ Van den Akker also argues that the surrogates she interviewed knew their minds from the start of the surrogacy journey until post-relinquishment and that they retained their autonomy after the arrangement was completed, which indicates that they have made an autonomous choice.⁶⁹ Consequently, while this concern may suggest the need for further longitudinal empirical studies on the effects of surrogacy on surrogates' psychology, the argument that surrogacy should be banned due to the unpredictability of the surrogate's response to pregnancy and childbirth, appears to fail on empirical grounds. And, in any case, it is insufficient to support a total ban on surrogacy unless and until it has been established that the concern might be addressed

⁶⁶ By 'counselling' I mean the discussion with an experienced professional who, by asking the appropriate questions, can lead the client to explore a distressful situation and find a way to deal with it. '[It] may include the offer of information but...not giving advice or directing a client to take a particular course of action' (Crawshaw M, Hunt J, Monach J and Pike S, *British Infertility Counselling Association [BICA] - Guidelines for Good Practice in Infertility Counselling* (2012, 3rd edn) 75).

⁶⁷ Tieu MM, 'Altruistic Surrogacy: The Necessary Objectification of Surrogate Mothers' (2009) 35(3) *J Med Ethics*: 74. In support of Tieu's claim, there is proof, based on Baslington's study, that some surrogates 'learn' not to get attached with the child (Baslington H, 'The social organization of surrogacy: relinquishing a baby and the role of payment in the psychological detachment process' (2002) 7 *Journal of Health Psychology* 57-71). Note, though, that all surrogates in Baslington's study were genetically related to the child. The use of cognitive dissonance practices may not be necessary to surrogates with no genetic link to the child. This was also found by Teman in her anthropological study of gestational surrogates in Israel (Teman E, *Birthing a Mother. The Surrogate Body and the Pregnant Self* (University of California Press 2010).

⁶⁸ As evidenced by the lack of case law. Also, Appleton T, *Emotional Aspects: Effective Counselling and Support* (Cook R., Schlater S. and Kaganas F, eds, *Surrogate Motherhood: International Perspectives*, Hart Publishing 2003) 203.

⁶⁹ van den Akker O, 'Genetic and Gestational Surrogate Mothers' Experience of Surrogacy' (2003) 21 *Journal of Reproductive and Infant Psychology*.

through less restrictive means, for example through the offer of professional counselling to surrogates.⁷⁰

- *Autonomy is impossible in surrogacy because the surrogate may be influenced by certain conditions that might invalidate her consent*

Some claim that a woman cannot make an autonomous choice to act as a surrogate, because her consent might be vitiated, for example by her potentially dire financial situation. She might then find it difficult to refuse an offer to earn a living by acting as a surrogate.⁷¹ In such a case, consent to surrogacy could be thought to be a product of some form of coercion,⁷² which is a reason to regard it invalid. The assumption is that ‘no one would choose to...rent their wombs, if there were any other economic options’,⁷³ and, therefore, anyone who chooses to do so does not act voluntarily.

The above line of argument relates, first and foremost, to commercial surrogacy arrangements. It suggests that the availability of payment (over and above ‘reasonable’ expenses) may leave the door open to poor and uneducated women offering to become surrogates for the benefit of more well-off infertile individuals or couples who may take unfair advantage of her.⁷⁴ However, while, in principle, ‘to use someone’s desperation to leverage an outcome or behavior that that person would not otherwise offer is indeed exploitation’,⁷⁵ it is far from certain that the only motivation for surrogacy is the promise of payment.

⁷⁰ Cook questioned whether counselling for surrogacy is necessary, especially considering the rarity of cases where surrogates have changed their minds. However, she argues counselling should be offered to all people involved in the arrangement (Cook R, *Safety in the Multitude of Counsellors: Do we Need Counselling in Surrogacy?* (Cook *et al* (n68) 179). This is also endorsed by van den Akker (*ibid*: 153,159).

⁷¹ Macklin (n58) 62; Satz (n50); Anderson ES, 'Is women's labor a commodity?' (1990) 19(1) *Philosophy and Public Affairs*.

⁷² Wertheimer argues that ‘the short-term benefits contained in [the IP’s] offer may be so tempting or irresistible that they cause [the potential surrogate] to overlook the long-term harms’ and she might be in a way coerced to accept the offer, but he rebuts this claim. (Wertheimer A, 'Exploitation and Commercial Surrogacy' (1996) 74 *Denver University Law Review* 1222).

⁷³ Deonandan R, Green S and van Beinum A, 'Ethical concerns for maternal surrogacy and reproductive tourism' (2012) 38 *JME* 744; Tong R, 'The overdue death of a feminist chameleon: Taking a stand on surrogacy arrangements' (1990) 21(2-3) *Journal of Social Philosophy* 45; Field M, *Surrogate Motherhood. The Legal and Human Issues* (Harvard University Press, Cambridge, MA 1990).

⁷⁴ Wertheimer A, 'Two Questions about Surrogacy and Exploitation' (1992) 21(3) *Philosophy and Public Affairs* 213. ‘Unfair’ advantage here means the harm that the surrogate might incur outweighs the benefits. However, this is entirely subjective and hard to measure. Also, Ramskold LAH and Posner MP, 'Commercial surrogacy: how provisions of monetary remuneration and powers of international law can prevent exploitation of gestational surrogates' (2013) 39 *J Med Ethics* 399; Humbyrd C, 'Fair trade international surrogacy' (2009) 9 *Dev World Bioeth* 111-118. Also, citations in (n58). By compensation, I mean financial consideration over and above the reimbursement of the surrogate’s expenses.

⁷⁵ Deonandan *et al* (n73) 744.

Ragoné's studies show there is a variety of reasons behind women's decisions to form commercial surrogacy arrangements, and that money 'simply "isn't enough"'.⁷⁶ This was further demonstrated in Blyth's study,⁷⁷ and, more recently, in Baslington's,⁷⁸ and van den Akker's UK studies,⁷⁹ where it was found that it is difficult to classify surrogates' motives as purely financial or purely altruistic, as, in most cases, it was a combination of both. What these studies suggest is that, while payments might give a strong incentive to a woman to act as a surrogate, because, for example, the money will allow her to cover some of her financial needs or even enable her to do things she could not otherwise do,⁸⁰ it does not mean that it is the main motivation, and, therefore, her action is not coerced *per se*.⁸¹ A woman can make a free choice to earn money by becoming a surrogate notwithstanding all other existing alternative solutions. As Wilkinson points out, '*it would seem strange to say...that if someone were faced with an entirely free choice between X, which is extremely good, and Y, which is extremely bad, that that person could not validly consent to X because of the lack of acceptable alternatives*'.⁸²

With regards to coercion in cases of altruistic surrogacy arrangements, the argument is that the decision to become a surrogate is forced upon women by societal and sexist norms that reproduce and reinforce the pattern of pronatalism and gender stereotypes,⁸³ which promote the view of women as nurturers and care-givers.⁸⁴ Again, it is claimed that consent is coerced and invalid. However, I would argue, drawing on

⁷⁶ Ragoné H., *Surrogate Motherhood – Conception in the Heart* (Westview Press, Colorado, USA 1994) 57; Ragoné H., *The Gift of Life: Surrogate Motherhood, Gamete Donation and Constructions of Altruism* (Cook et al (n68) 212).

⁷⁷ Blyth E, "' I wanted to be interesting, I wanted to be able to say 'I've done something interesting with my life'": Interviews with Surrogate Mothers in Britain' (1994) 12 *Journal of Reproductive and Infant Psychology*.

⁷⁸ Baslington (n67).

⁷⁹ van den Akker OBA, 'A longitudinal pre-pregnancy to post-delivery comparison of genetic and gestational surrogate and intended mothers: Confidence and genealogy' (2005) 26 *Journal of Psychosomatic Obstetrics and Gynecology*.

⁸⁰ For example, to buy a house for her family, send her children to a good school, or gain financial independence, as showed by documentary on surrogacy in India. (BBC Four – House of Surrogates (1 October 2013). See also Horsey K, 'TV Review: House of Surrogates' (07/10/2013) <http://www.bionews.org.uk/page_350944.asp> accessed on 29/09/2014).

⁸¹ Macklin (n58) 62.

⁸² Wilkinson S, 'The Exploitation Argument against Commercial Surrogacy' (2003) 17(2) *Bioethics* 176.

⁸³ Satz (n50) 107; Sherwin S, 'Feminist Ethics and In Vitro Fertilization' (1987) 13 *Canadian Journal of Philosophy* 265-284; Annas G, *Fairy Tales Surrogate Mothers Tell* (Gostin L ed, Surrogate Motherhood: Politics and Privacy, Indiana University Press, Bloomington 1988) 43-55; Anderson (n71) 71-92; Tieu (n67) 171-175.

⁸⁴ Callahan and Roberts (n49) 1211; Cherry (n45) 439.

Andrews' work,⁸⁵ that this argument is weak, since one's choices and decisions are motivated by numerous influences, exactly because it would be impossible to separate the individual from the society she lives in.⁸⁶ The mere existence of socialisation does not necessarily mean that a woman is incapable of making autonomous decisions.⁸⁷ Instead of deeming surrogacy unethical and illegal on these grounds, we should press for the amelioration of oppression.⁸⁸

Another argument is that women are non-autonomous because they are influenced in their decision to act as surrogates by low self-esteem and feelings of guilt, if, for example, they had previously placed a child for adoption or had an abortion.⁸⁹ However, even if the initial motive was indeed influenced by these feelings, the woman may view surrogacy as a therapeutic process offering psychological benefits, and it would be counter-intuitive to deny her this option on autonomy grounds.⁹⁰ In any case, the problem with flawed autonomy resulting from feelings of guilt and regret might be addressed by less onerous means, for example, by the offer of counselling.⁹¹

- *Autonomy is impossible in surrogacy because consent can never be fully informed*

The claim here is that the surrogate can never provide fully informed consent, because she will never have all the necessary information and understanding of the risks involved. Drawing on Oakley,⁹² the authenticity and validity of an autonomous decision in surrogacy depends on three elements:

⁸⁵ Andrews LB, 'Surrogate Motherhood: The Challenge for Feminists' (1988) 16 Law, Medicine & Health Care 75.

⁸⁶ Jackson also notes that '*without socialisation...an individual's right to self-determination would be both meaningless and irrelevant*' (n43: 4).

⁸⁷ van Zyl L and Walker R, 'Beyond Altruistic and Commercial Contract Motherhood: The Professional Model' (2013) 27(7) Bioethics 373-381; Petchesky RP, *Beyond "a woman's right to choose". Feminist ideas about reproductive rights* (Ehrenreich, N. ed, The Reproductive Rights Reader. Law, Medicine and the construction of motherhood, New York University Press 2007); Lane M, *Ethical Issues in Surrogacy Arrangements* (Cook *et al.* (n68) 133; Baker B, 'A case for permitting altruistic surrogacy' (1996) 11(2) Hypatia 34-48. For a different view: Berkhout S, 'Buns in the Oven: Objectification, Surrogacy and Women's Autonomy' (2008) 34(1) Social Theory & Practice.

⁸⁸ *Ibid*

⁸⁹ n83.

⁹⁰ There are other instances where a woman might be provoked by allegedly "selfish" motivations or be "forced" by societal norms to provide her help/services for the benefit of others, namely in organ donation, foster-parenting, participation in experimental research. Yet, we do not view these circumstances as unethical and autonomy impossible (Macklin (n58) 60).

⁹¹ Damellio J and Sorensen K, 'Enhancing Autonomy in Paid Surrogacy' (2008) 22(5) Bioethics 269-277; Cook (n70); Appleton (n68).

⁹² Oakley (n56).

- lack of coercion, as discussed in the previous section;⁹³
- the provision of an adequate level of information that will help one make the decision;
- an understanding of the general risks that might occur (what Oakley calls objective risks), but also an effort to understand the risks that the specific potential surrogate might have based on her individual values, character, and past experiences (subjective risks).⁹⁴

Two questions, then, arise: first, what kind of information should be given to the surrogate; and second, how much information is ‘enough’. Before the surrogate embarks on the surrogacy journey, she should be informed about actual and potential risks involved in her undertaking.⁹⁵ This would include the biological risks linked to pregnancy and delivery, the emotional risks she is taking by becoming pregnant with a child she will then have to hand over to someone else, and other potential consequences associated with socio-cultural perceptions towards surrogacy.⁹⁶ With regards to the quantity of information that would be ‘enough’, Faden and Beauchamp suggest that ‘autonomy in decision-making is a matter of degree’,⁹⁷ and this degree will be different for every individual. ‘Enough’ information then means as much as the individual requires to have to come to a decision after having considered all possible consequences, which is in line with contemporary understandings of informed consent to medical treatment in the UK.⁹⁸ Therefore, the answer might be that a potential surrogate should be given the opportunity to be as informed as she wants and needs; then her consent to surrogacy can be valid and robust.

Also, it has been claimed that the surrogate’s informed consent is impossible because her emotional stability is affected by major hormonal changes during pregnancy and after delivery.⁹⁹ However, it seems odd and deeply offensive to assume that a woman’s capacity to control herself and her emotions is diminished due to her biology,¹⁰⁰ and

⁹³ *Ibid*; Wexler J, *Surrogate parenting. Some guiding principles for a legislative response*, vol 7 (in Rosner, J. R. and R. Weinstock eds, *Ethical practice in psychiatry and the law, Critical issues in American psychiatry and the law*, NY: Plenum Press 1990) 257-268.

⁹⁴ Oakley (n56) 281-282.

⁹⁵ Macklin (n58) 60.

⁹⁶ Deonandan *et al* (n73) 742-743; BICA guidelines for infertility counselling (n66) 77.

⁹⁷ Faden R and Beauchamp TL, *The concept of informed consent* (Beauchamp TL and Walters L eds, *Contemporary Issues in Bioethics*, 4th edn, Belmont, CA, Wadsworth 1994) 273.

⁹⁸ *Montgomery v Lanarkshire Health Board* [2015] SC 11 [2015] 1 AC 1430.

⁹⁹ *In re Surrogate Parenting*: Hearing on S.B. 1429 (April 10, 1987) (statement of Elaine Rosenfeld at 187)

¹⁰⁰ Andrews (n85) 75.

it 'is a step backwards' for women's rights to allege this.¹⁰¹ Moreover, this is an empirical claim demanding proof, and the surrogates who have described their experiences to previous researchers simply do not offer evidence to support it.

To conclude, I have so far shown that the autonomy-based objections to surrogacy are insufficient to justify its ban, but they do raise a case for regulation to ensure that consent is robust. This could be done by making information about the potential surrogacy-related risks readily available to and easily accessible by all interested parties, and by ensuring that appropriate support, advice, and counselling is offered to all surrogacy participants.

2.3.2 Harm-based objections

I now explore whether harm-based concerns might justify a total prohibition and/or whether they raise the need for appropriate further regulation. The discussion is structured around the three categories of individuals that might incur harm: (1) the surrogate, (2) the child, and (3) the intended parents (IPs).

Harm to the surrogate

The proponents of the view that surrogacy is harmful to surrogates have tended to characterise this harm in three ways: first, that surrogates unnecessarily expose themselves to numerous risks; second, that they might incur harm if the IPs decide to renege on the agreement; third, that surrogates are harmed by being exploited, commodified and objectified.

- *The surrogate is harmed because she is unnecessarily exposed to physical and emotional risks*

By agreeing to enter a surrogacy arrangement, the surrogate assumes certain physical risks which are associated with pregnancy, namely 'fatigue, nausea, weight gain, discomfort, skin stretching, insomnia, altered or suspended sexual activity, miscarriage, caesarean section, labour pains',¹⁰² and excessive bleeding. Additionally, there are other health risks associated with selective reduction in case of a multiple

¹⁰¹ Kerian CL, 'Surrogacy: A last resort alternative for infertile women or a commodification of women's bodies and children?' (1997) 12 Wisconsin Women's Law Journal; Blyth E, 'Not a Primrose Path: Commissioning Parents' Experience of Surrogacy Arrangements in Britain' (1995) 13 Journal of Reproductive and Infant Psychology 163.

¹⁰² Tong R, 'Feminist Approaches to Bioethics. Theoretical Reflections and Practical Applications' (Westview Press 1997) 191.

pregnancy, late abortion, amniocentesis, and more.¹⁰³ These might lead to short- or long-term health problems or even death. In addition, surrogates risk suffering from other physical and emotional risks related to fertility treatment, if pregnancy is accomplished through ARTs.¹⁰⁴ Lastly, they might face psychological issues, such as post-partum depression.¹⁰⁵

However, these health risks are not unique to surrogate pregnancies. Women experiencing pregnancy (natural or IVF) and childbirth might face the same issues, and surrogacy in no way aggravates these risks.¹⁰⁶ Moreover, it is unclear how the surrogate is harmed if she is aware of these risks in advance and consents to them. The argument against surrogacy might, then, be that she undertakes all these risks *unnecessarily*. While the woman who will raise the child herself can offset such risks and inconveniences against the joys of motherhood, the surrogate will not be able to do so, because the agreement requires her to surrender the child to the IP(s).

Yet, it is unclear how this is harmful. Rather, to assert harm here without evidence regarding the extent of harm to the surrogate's psychology is an entirely subjective and, thus, weak argument. Contrary to the assumptions made by the proponents of this argument, there is evidence that former surrogates were left with positive memories and increased sense of self-worth,¹⁰⁷ and a sense of empowerment.¹⁰⁸ Moreover, it has been noted that the surrogate may have certain financial and psychological gains from the arrangement; she gains from the IPs just as they gain from her,¹⁰⁹ thus, it could not be said that her act is without personal benefit.¹¹⁰ As Purdy also notes,

'there are often good reasons to consider transferring burden and risk from one individual to another...Some women love being pregnant, others hate it; pregnancy

¹⁰³ NHS information about pregnancy-related health risks: <http://www.nhs.uk/conditions/pregnancy-and-baby/pages/common-pregnancy-problems.aspx#close>.

¹⁰⁴ NHS, <https://www.nhs.uk/conditions/ivf/risks/>.

¹⁰⁵ *Ibid*

¹⁰⁶ Ramsey J, 'Paying for Reproduction: The Case Against Paid Surrogacy' (2006) 4 *Juridical Review* 343.

¹⁰⁷ Ragoné 1994 (n76); Blyth (n77); Snowdon C, 'What makes a mother? Interviews with women involved in egg donation and surrogacy' (1994) 21(2) *Birth* 77–84; van den Akker (n69) 154; Baslington (n67); Busby K and Vun D, 'Revisiting the Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers' (2010) 26 *Canadian Journal of Family Law*.

¹⁰⁸ Shalev C, *Birth Power: The Case for Surrogacy* (Yale University Press, New Haven, London 1989); Arneson RJ, 'Commodification and Commercial Surrogacy' (1992) 21(2) *Philosophy & Public Affairs* 132-164.

¹⁰⁹ Wertheimer (n74) 215.

¹¹⁰ Also, organ donors arguably assume serious physical risks, potentially leading to death (Fabre C, *Whose Body Is It Anyway? Justice and the Integrity of the Person* (OUP 2006) 194). However, organ donation is not considered unethical or illegal.

*interferes with work for some, not for others; pregnancy also poses much higher levels of risk to health (or even life) for some, not for others’.*¹¹¹

In absence of any empirical evidence proving that women are harmed by undertaking these risks specifically for the purposes of surrogacy, this claim cannot justify its prohibition, and it should also be empirically proven that restrictions on autonomy are necessary and proportionate to the harm to be prevented.

- *The surrogate might incur harm if the IPs renege on the arrangement*

Though this is considered very unlikely, the surrogate may be forced to raise a child she never intended to have if the IPs refuse to take the baby.¹¹² In commercial surrogacy, surrogates also risk not being paid at all, or being paid too little.¹¹³ While these concerns cannot be used as a basis to ban surrogacy, they do stress the need for proper and effective regulation, which might consider, for example, making surrogacy contracts enforceable or giving IP(s) legal parenthood from birth. Moreover, this risk could further be mitigated through the establishment of a good relationship based on feelings of mutual respect and trust between the IP(s) and the surrogate,¹¹⁴ and through the availability of support to both parties throughout the arrangement, and after its completion.¹¹⁵ However, it is important to consider whether such measures are necessary and proportionate, especially due to the lack of evidence of this happening in practice beyond very few high-profile cases.¹¹⁶

- *The surrogate is harmed because she is degraded by being exploited, commodified and objectified*

It is often claimed that surrogacy causes an objective emotional harm to surrogates for two reasons:

1. *‘a woman has an interest in not being [exploited,] commodified, degraded, or treated merely as means...[and/or,]*

¹¹¹ Purdy LM, 'Surrogate Mothering: Exploitation or Empowerment?' (1989) 3(1) Bioethics 21.

¹¹² Warnke G, *Legitimate Differences. Interpretation in the Abortion Controversy and other public debates* (University of California Press 1999); Tong (n102) 191.

¹¹³ Tong (n102) 191; Wertheimer (n74).

¹¹⁴ Beier K, 'Surrogate Motherhood: A Trust-Based Approach' (2015) 40(6) Journal of Medicine and Philosophy 640; Pettit P, 'The Cunning of Trust' (1995) 24 Philosophy & Public Affairs 202-222.

¹¹⁵ Van den Akker (n69,79); Cook (n70); Appleton (n68). This is also now endorsed by new guidance issued by the UK government: Department of Health and Social Care (DHSC), *Care in Surrogacy. Guidance for the care of surrogates and intended parents in surrogate births in England and Wales* (28/02/2018) 12; DHSC, *The Surrogacy Pathway. Surrogacy and the legal process for intended parents and surrogates in England and Wales* (28/02/2018) 14,17.

¹¹⁶ For example, 'Baby Gammy' in Thailand (Callaghan, S. and Newson, A. 'Surrogacy, Motherhood and Baby Gammy' (11/08/2014) http://www.bionews.org.uk/page_444683.asp accessed on 27/09/2014.

2. *a person can lose the respect of others or be degraded in their eyes, even if she does not lose self-respect or become degraded in her own eyes*'.¹¹⁷

The claim is that the surrogate is harmed because she has an interest in not being degraded, first, because she is exploited; second, because she is commodified, and, due to this, treated as means, a 'reproductive machine',¹¹⁸ namely as an object rather than a person. This implies that the surrogate is harmed because she feels that her personal value and dignity is undermined.

With regards to the second claim, that the surrogate is harmed because she might lose respect of others, it is hard to envisage what kind of harm that is, and whether it is serious enough to give a good reason to prohibit surrogacy. This concern ignores empirical evidence that many surrogates are, in fact, very proud of what they have done to help others have a child. If it is a question of stigma being harmful to the surrogate, that should not outweigh her consent, if she has autonomously chosen to act. Importantly, if we consider the expressive function of law,¹¹⁹ a law that allows and appropriately regulates surrogacy arguably sends out a moral message that might serve to combat stigma, whereas prohibition will clearly compound it.

- **Sub-objection 1: *The surrogate is degraded by being exploited***

This is an argument that is widely cited by several opponents of surrogacy.¹²⁰ In the words of Schwartz, 'to exploit something, in the most general sense, is simply to put it to use, not waste it, to take advantage of it[,]...to use it for a purpose'.¹²¹ From this definition it is not clear why exploitation is bad, and how the surrogate is harmed. Stephen Wilkinson asserts that 'exploitation' has a moral meaning, which relates to the idea of the 'wrongful use' of a person.¹²² Hence, the objectionable character of exploitation is founded on the unethical and improper use of the person to achieve someone else's (the exploiter's) aims. Namely, the person is not used as a means to her own ends, but *merely/solely* as means to someone else's ends. In this sense, the

¹¹⁷ Wertheimer (n74) 155.

¹¹⁸ Corea (n47); Raymond (n45).

¹¹⁹ Sustain CR, 'On the Expressive Function of Law' (1996) 144 University of Pennsylvania Law Review 2024.

¹²⁰ Field (n73) 25; Capron A and Radin MJ, *Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood* (Gostin, L. ed, Surrogate Motherhood: Politics and Privacy, Bloomington: Indiana University Press 1990) 62; Annas (n83) 43; Warnock M, *A Question of Life: The Warnock Report on Human Fertilisation and Embryology* (Oxford, Blackwell 1985) 46.

¹²¹ Schwartz J, 'What's wrong with exploitation?' (1995) 29 *Nous* 176.

¹²² Wilkinson S, *Bodies for Sale. Ethics and Exploitation in the Human Body Trade* (Routledge 2003) 12; Goodin RE, *Reasons for Welfare* (Princeton: Princeton University Press 1988) 147.

exploitative nature of surrogacy seems then to be circumstantial, and the claim is weak in the absence of empirical evidence of generalised harm.¹²³

Mary Shanley argues that surrogacy is a form of harmful exploitation because the surrogate lives under conditions that violate '[her] ongoing freedom...in a way that [they] restrict [her] future options'.¹²⁴ Others argue that surrogacy is a form of slavery, because the surrogate 'is never off-duty' and 'the contracting couple [IPs]...uses her womb and controls her life',¹²⁵ to the extent that they might also control her diet and any other activities, hiding their invasive conduct under the veil of the welfare of the child. According to this view, surrogacy should be illegal, because, by agreeing to be a surrogate, the woman consents to slavery, which cannot logically be an autonomous action, since 'it is not a freedom, [for one] to be allowed to alienate [one's own] freedom';¹²⁶ this would also be detrimental to the surrogate's dignity, 'her identity and self-understanding'.¹²⁷

However, the slavery analogy is flawed. A surrogacy agreement does not give any property rights to the IPs regarding the surrogate, and 'there is no indication of the "alienation of will", that is characteristic in slavery contracts'.¹²⁸ In slavery, the owners 'sell, use and dominate',¹²⁹ and the slave has no control over her own life, whereas the surrogate still has control over herself and her body. This comparison also assumes that slavery is inherently immoral, which is not universally agreed,¹³⁰ and, again, unjustifiably condemns surrogacy without support from empirical evidence of how and to what extent surrogates are being used as slaves by the IPs and whether they feel harmed because of it. On the contrary, as noted earlier, there is evidence that surrogates usually have positive experiences.

¹²³ Previous research does not suggest that surrogates, at least in the UK and US, felt exploited in any way (van den Akker (n69, n79); Blyth (n77); Snowdon (n107); Baslington (n67); Jadva V and others, 'Surrogacy: The Experience of Surrogate Mothers' (2003) 18 *Human Reproduction*).

¹²⁴ Shanley M, 'Surrogate Mothering and Women's Freedom: A Critique of Contracts for Human Reproduction' (1993) 18 *Signs* 618-639.

¹²⁵ Damellio and Sorensen (n91) 272.

¹²⁶ Mill (n10).

¹²⁷ Shanley (n124) 629.

¹²⁸ Hatzis A, *Just in the oven: A Law and Economics Approach to Gestational Surrogacy Contracts* (Boele-Welki, K. ed, Perspectives for the Unification and Harmonisation of Family Law in Europe, Intersentia 2003) 420; McElroy W, *Breeder Reactionaries: The "Feminist" War on New Reproductive Technologies* (McElroy W ed, *Liberty For Women: Freedom and Feminism in the Twenty-First Century*, Ivan R. Dee/ Independent Institute, Chicago 2002) 276; Allen AL, 'Surrogacy, Slavery, and the Ownership of Life' (1990) 13 *Harvard Journal of Law and Public Policy* 140.

¹²⁹ Allen (*ibid*) 140.

¹³⁰ *Ibid*

Perhaps, though, surrogates may be harmed not because they are being used as slaves by the IPs, but by other key actors in the surrogacy practice, in which case surrogacy could be banned. Anderson argues that the surrogate is harmed because she is obliged

*'to obey all doctor's orders made in the interests of the child's health. These orders could include forcing her to give up her job, travel plans, and recreational activities. The doctor could confine her to bed, regulate her diet rigidly, and order her to submit to surgery and to take drugs'.*¹³¹

Yet, there is no evidence that such onerous restrictions on a surrogate's freedom exist in practice, at least in the Greek and UK context, with which this is primarily concerned. Moreover, it seems impossible that the surrogate would have a legal obligation to obey these orders, and it is difficult to imagine how this would be policed. Even if she has a moral obligation to conform to these orders,¹³² it is not clear how she is harmed if she freely consents to them. Further, these restrictions are true for all pregnant women, not only surrogates.

Also, it could be argued that surrogacy is intrinsically bad and immoral, regardless of whether the woman does or does not feel harmed. However, provided that the surrogate is not treated *merely* as a means to an end, but also as an end in her own right (namely she is treated with respect), then surrogacy should not be banned.¹³³ Rather, we need evidence of what happens in practice to know whether this is a real problem, and this may vary from country to country. Lastly, there are other groups of individuals, for example actors, models, sportsmen, or doctors, who are never completely off-duty and are restricted in their day-to-day activities due to their professional status, but who are not deemed to be wrongfully exploited by their employers.¹³⁴ Surrogates are not harmed more so, if at all, than other individuals, and this condemnation is made without support from empirical evidence. Therefore, a ban on surrogacy would be unjustified. Nevertheless, exploitation concerns raise a case for

¹³¹ Anderson E, *Value in Ethics and Economics* (Harvard University Press 1995) 176.

¹³² Note that the phrase 'doctor's orders' is itself used idiomatically to mean conduct that the doctor has *advised*, with a patient not having a legal or moral obligation to obey.

¹³³ Mayer R, 'What's Wrong with Exploitation?' (2007) 24(2) *Journal of Applied Philosophy*.

¹³⁴ Damellio and Sorensen (n91) 272-274. Fabre (n110) argues surrogacy is not more demanding than other paid activities and uses compares surrogates to astronauts. They put a great strain on their bodies, are subjected to all kinds of medical experiments, and, when they are in space, they are monitored all day long and their activity usually lasts for several months. However, we do not regard their activity or the payment for it unethical.

proper and efficient regulation of surrogacy to ensure that exploitation does not, as a matter of fact, take place.¹³⁵

- **Sub-objection 2: *The surrogate is degraded by being commodified and objectified***

As in the case of exploitation, commodification, namely the payment of money to the surrogate for her reproductive labour, is not necessarily harmful to the surrogate. In its non-moral sense, ‘commodification’ refers to ‘a social practice for treating things as commodities..., as properties that can be bought, sold, or rented’.¹³⁶ Yet, it is not clear from this definition how commodification can harm the surrogate,¹³⁷ especially if she freely and validly consents to being paid for using her own body to benefit someone else’s (the IPs’/IP’s) interests.¹³⁸

Some argue that surrogacy is problematic, as it essentially distinguishes pregnancy from the act of mothering a child.¹³⁹ The argument is that these two are both so ‘integral to [the woman’s] identity...that [they] should not be treated as [a]...commodity’ that can be alienated.¹⁴⁰ This argument is primarily linked to commercial surrogacy arrangements, as it is thought that the monetary exchange leads to a fragmentation of the self. According to McLeod,

*‘in consenting to... commercial contract pregnancy, women might alienate from themselves more than just the physical act of reproductive labour. They might also lose some autonomy owing to manipulation, some integrity owing to regret, and some dignity owing to rejection’.*¹⁴¹

Radin further notes that a commercial surrogate sells certain attributes (her reproductive capacity or sexuality) that are non-detachable from herself, and is, therefore harmed because she loses the sense of herself.¹⁴²

¹³⁵ *Ibid.* van Zyl and Walker argue that the way to do this is if surrogacy became a profession governed by specific laws and monitored by professional organisations (n87).

¹³⁶ Resnik D, 'The commodification of human reproductive materials' (1998) 24 JME 388.

¹³⁷ Wertheimer (n74) 219.

¹³⁸ Wilkinson (n82) 175-178.

¹³⁹ Anderson (n71); van Niekerk A and van Zyl L, 'The Ethics of Surrogacy: Women’s Reproductive Labour' (1995) 21(6) JME; van Zyl L and van Niekerk A, 'Interpretations, perspectives and intentions in surrogate motherhood' (2000) 26 JME 404-409; Pateman C, *The sexual contract* (Polity Press, Cambridge 1988). For a different view: Arneson (n108).

¹⁴⁰ Van Niekerk and van Zyl (1995) *ibid* 347.

¹⁴¹ McLeod C, *For Dignity or Money: Feminists on the commodification of women’s reproductive labor* (Steinbock B ed, The Oxford Handbook of Bioethics, OUP 2009) 266.

¹⁴² Radin MJ, 'What, If Anything Is Wrong with Baby Selling?' (1995) 26 PAC LJ 143.

To provide support for their point, some compare surrogacy to prostitution, because the latter is usually considered harmful to women's identity.¹⁴³ However, this comparison is often made without arguing for or against the ethics of prostitution. By assuming that prostitution is immoral, and by trying to find similarities with surrogacy, they argue that surrogacy is also unethical.¹⁴⁴ Even if we accept this assumption for the sake of argument, it is possible to show that those taking this position are misguided. Some argue that surrogacy is a form of prostitution because it essentially requires the separation of the woman from her reproductive body parts/organs, hence, the woman is not whole.¹⁴⁵ Moreover, they argue, (commercial) surrogacy involves the sale of a woman's body to satisfy the reproductive needs of others.

Nevertheless, it is really the use of the surrogate's gestational services that are the object of sale in commercial surrogacy, not the use of her body, and we generally accept that services can be alienable.¹⁴⁶ Additionally, the prostitution argument is false, because the surrogate retains control over herself and her body before and throughout the pregnancy and during childbirth, as she must consent to all procedures, and can withdraw her consent in the same way as any other patient. In contrast, the prostitute might not be able to stop the sexual action until the client is satisfied.¹⁴⁷ Moreover, these practices 'have... different objectives';¹⁴⁸ prostitution aims to provide

¹⁴³ Stark C and Whisnant R eds. *Not for Sale: Feminists Resisting Prostitution and Pornography* (Spinifex Press Ltd 2004); Sera JM, 'Surrogacy and Prostitution: A Comparative Analysis' (1997) 5 *Journal of Gender and the Law*. Sera clarifies that, while this is quite often cited as the view of "most feminists", very few authors have in fact 'adopted [it] as their own' [317].

¹⁴⁴ Perhaps it would have been more accurate to compare commercial surrogates to paid porn-actors. Both activities can protect a woman's right to choose to enter into a contract to maximise her reproductive and sexual freedom (Raymond JG, 'The International Traffic in Women: Women Used in Systems of Surrogacy and Reproduction' (1989) 2(1) *Reproductive and Genetic Engineering* 51-57). Both porn-actors and commercial surrogates might often do something they would rather not do but have (unless there is actual coercion) chosen to do. Prostitutes, however, might not have chosen to have this occupation as they might have been forced by pimps and brokers to have this career, and, most importantly, they might not be able to get out of it. Importantly, surrogates and porn-actors are free to stop providing their services, whereas prostitutes may not be as able to do so.

¹⁴⁵ Dworkin A, *Right-Wing Women* (Perigee Books, G. P. Putnam's Sons 1983) 181-188; Corea (n47) 231-275; Corea G, *The reproductive brothel* (Corea, G. and others eds, *Man-Made Women: How New Reproductive Technologies Affect Women*, Hutchinson 1985); Field (n73) 28-30; Lieber KB, 'Selling the Womb: Can the Feminist Critique of Surrogacy Be Answered?' (1992) 68 *IND L J* 205,211 (stating that most feminists see surrogacy as a form of slavery or prostitution). For a different view: Radin (n142) 140-141 (explaining the feminist "market liberation argument", which would legalise abortion, prostitution, and surrogacy); Sera (n143) 315-342; Marneffe PD, *Liberalism and Prostitution* (OUP 2009).

¹⁴⁶ Malm HM, 'Commodification or Compensation: A Reply to Ketchum' (1989) 4(3) *Hypatia* 130.

¹⁴⁷ *Ibid.*

¹⁴⁸ Damellio and Sorensen (n91) 270.

sexual pleasure, whereas surrogacy to circumvent infertility and bring a child into the world.¹⁴⁹

More significantly, the analogy between surrogacy and prostitution is not only flawed, but also dangerous;¹⁵⁰ it generates and promotes negative connotations and stigmatising impressions in the absence of empirical evidence of harm. Arguably, it is odd for a so-called feminist position against surrogacy to have developed without first having asked women who have experienced it what they might think of it. Drawing vague comparisons with other practices that have different aims and effects and are usually harmful in a more intense way does not provide a good enough reason to prohibit surrogacy.

Perhaps, however, the claim is that the surrogate might be harmed because she is participating in something immoral.¹⁵¹ In the moral sense, 'commodification' describes the circumstance whereby someone is wrongfully treated as if one was an object of sale, which constitutes an immoral objectification of persons.¹⁵² By allowing (commercial) surrogacy, we fail to respect the individual's dignity, thereby breaching the second formulation of the Kantian categorical imperative that people should be treated as ends in themselves and not as means to someone else's end.¹⁵³ Consequently, surrogacy is harmful because it allows for women to be degraded to objects of use, "human incubators" and "reproductive machines", and serve as means to the IPs' end.¹⁵⁴ The question, then, is whether it is always bad to use someone as something; whether it is bad to objectify people.

Nussbaum defines 'objectification as the act of '[treating someone] as a (mere) object...something which [is not] really or (merely) an object'.¹⁵⁵ This, taken together with Kant's second formulation of the categorical imperative, creates 'tension between personal dignity and the commodification of women's bodies and their reproductive

¹⁴⁹ Ramsey (n106) 340.

¹⁵⁰ Sera (n143) 316.

¹⁵¹ Macklin (n58) 59. She states that this approach to ethics is known as 'formalism' and argues '*that certain actions are wrong because of the very type of action they are. It is the form the action takes that makes it wrong, not its consequences...[S]urrogacy is unethical because it is...a form of exploitation*'.

¹⁵² Wilkinson (n122) 46.

¹⁵³ Kant (n5) 30.

¹⁵⁴ Corea (n47); Raymond (n45); Ber R, 'Ethical issues in gestational surrogacy' (2000) 21 *Theoretical Medicine and Bioethics* 153-169.

¹⁵⁵ Nussbaum MC, 'Objectification' (1995) 24(4) *Philosophy and Public Affairs* 256

functions'.¹⁵⁶ However, 'the Kantian imperative requires that persons are not to be used *solely* as means' to an end,¹⁵⁷ and one is not treated *merely* as a means to an end provided that one is also treated as an end in her own right, namely treated with respect. Again, this means we need evidence of what happens in practice to know whether it is a real problem.

According to Raymond, objectification exists even in cases of altruistic surrogacy, where 'the women are not only the gift-givers, but the gift as well',¹⁵⁸ and women act under societal norms requiring them to provide their reproductive services to male dominance to achieve 'men's genetic continuity and "biological fulfilment"'.¹⁵⁹ In this way, surrogacy is an immoral practice that perpetuates gendered ideas of motherhood, and increases gender inequality.¹⁶⁰ Yet, the proponents of this view,¹⁶¹ tend to overlook the fact that in most cases of surrogacy it is a joint enterprise between a couple (IPs) and a surrogate, and the surrogate serves to attain a joint aim, not strictly a man's desire for a child.¹⁶²

More importantly, this claim does not take into account existent empirical evidence that surrogacy can sometimes help women gain self-confidence, pride and self-worth for doing something that is both personally and socially valuable,¹⁶³ and it 'presents women with a choice...[which] allows for a re-examination of motherhood and a reclaiming of procreative liberty'.¹⁶⁴ The claim, however, might be that surrogacy is intrinsically bad, regardless of whether the surrogate feels harmed or not. As above, the question about whether the surrogate is being treated *merely* as means to an end is entirely subjective and requires empirical substantiation. Lastly, if this risk could be mitigated through less restrictive means, then it should be preferred.

Up to this point, I have shown that, if surrogacy is mutually beneficial (to the surrogate and the IPs), if the surrogate freely and validly consents to it, and if she is not treated

¹⁵⁶ Blyth E and Potter C, *Paying for it? Surrogacy, Market Forces and Assisted Conception* (Cook *et al* (n68) 231).

¹⁵⁷ Ramsey (n106) 331.

¹⁵⁸ Raymond JG, 'Reproductive Gifts and Gift Giving: The Altruistic Woman' (1990) 20(6) *The Hastings Center Report* 7.

¹⁵⁹ *Ibid* 8.

¹⁶⁰ *Ibid*

¹⁶¹ n45,n47,n145.

¹⁶² Dodds S and Jones K, 'A response to Purdy' (1989) 1 *Bioethics* 38.

¹⁶³ Campbell A, *Sister Wives, Surrogates and Sex Workers: Outlaws by Choice?* (Ashgate, Surrey England 2013) 106. Moreover, empirical evidence supports this view: Ragoné 1994 (n76) 65.

¹⁶⁴ Munyon JH, 'Protectionism and Freedom of Contract; The Erosion of Female Autonomy in Surrogacy Decisions', 36 *Suffolk ULRev* (2002) 744.

as merely a means to an end, then surrogacy cannot be prohibited. Nevertheless, regulation is justified if necessary to ensure that such harm is prevented, but any restrictions must be appropriate and proportionate to that harm.

Harm to the Child

The proponents of the argument that surrogacy is harmful to surrogate-born children have tended to characterise this harm in three ways: first, that the child is harmed because there is uncertainty regarding legal parenthood; second, that the child incurs psychological harm when she finds out about the way she was created; and, third, that the child is harmed because she is degraded by being commodified.

- *The child is harmed due to the legal uncertainty regarding parenthood*

Perhaps the most troublesome issue relating to surrogacy is the legal parenthood status. Most countries in the world where surrogacy is not prohibited consider surrogacy agreements non-enforceable, and parenthood is decided after the child's birth. At the EU level, the exception is Greece, where surrogacy agreements are enforceable, and the IPs' parenthood is automatically acknowledged upon the child's birth. In the UK, surrogates are legal mothers at birth and until the IPs are granted a parental order (PO), a mechanism that confers parenthood to the IPs after the child's birth, and after the child has lived with the IPs for some time. However, the outcome of the PO application is uncertain, and surrogacy agreements are unenforceable.

If the IPs have surrogacy abroad, especially in parts of the world where surrogacy is wholly unregulated or less well-regulated, and the practice is illegal in the country of their origin, it is possible that the child may be rendered parentless and/or stateless.¹⁶⁵ In the meantime, the IPs are unable to register the child in their country(-ies) and issue a passport and other travel documents for the child.¹⁶⁶ Moreover, until legal

¹⁶⁵ Crawshaw M, Blyth E and van den Akker O, 'The changing profile of surrogacy in the UK – Implications for national and international policy and practice' (2012) 34(3) *Journal of Social Welfare & Family Law* 267–277; Batha E 'International surrogacy traps babies in legal limbo' (18/09/2014) <<http://mobile.reuters.com/article/idUSKBN0HD19T20140918?irpc=932>> accessed on 03/10/2014. See also the UK case *Re X & Y (Foreign Surrogacy)* [2008] EWHC 3030.

¹⁶⁶ The European Court of Human Rights recently recognised the need for children born after cross-border surrogacy arrangements to be registered as citizens of the IPs' countries of origin (*Menesson v. France* (application no. 65192/11), and *Labassee v. France* (no. 65941/11)). In the aftermath of these cases, the French State Council validated the "Taubira guideline", which gives children born abroad by a surrogate the right to become French citizens if they are genetically related to at least one of the IPs. In July 2015, the French Court of Cassation, considered two cases concerning two French males who sought to be acknowledged as the fathers of two children born in Russia, and for the children to be formally registered in the French birth registry. The Court ruled that children born to [surrogates](#) abroad will be recognised by the French state authorities (Court of Cassation, Plenary session, 3 July 2015, No

parenthood is granted to the IPs, they cannot make decisions about the child's life, her medical treatment and/or education,¹⁶⁷ and the child cannot inherit from the IPs in the event of their death.

While these concerns are real and serious, they cannot justify the legal prohibition of surrogacy if it is possible to address them through less restrictive means. Rather, they raise a case for proper regulation with clear and effective rules regarding the determination legal parenthood before or as soon as possible after the birth of the child, clear rules regarding dispute resolution during or following a surrogacy arrangement, and clear rules regarding the acknowledgment of citizenship rights to children born through a cross-border surrogacy arrangement.

- *The child incurs psychological harm when she finds out about the way she was created*

A claim often made against surrogacy is that the child might find it emotionally disturbing if, in the course of her life, she finds out that she was born through surrogacy (especially commercial arrangements),¹⁶⁸ namely that she has two mothers, and that she was 'created for the purpose of being given away to other parents'.¹⁶⁹ Turner and Coyle's study of donor-insemination children report a number of negative effects to the offspring's psychology when they found out how they were conceived: negative sense of distinctiveness, concern of genetic lineage and frustration in the search for their biological parents.¹⁷⁰ Some argue the same might apply to surrogate-born children as well, but this is wholly speculative.

Rather, we now have evidence that there are no issues with the emotional stability of the child who learns of her coming to the world through surrogacy.¹⁷¹ In addition, it

14-21.323, No 15-50.002; Oswald, K. 'France to recognise surrogate children' (BioNews 809, 6/07/2015) <http://www.bionews.org.uk/page.asp?obj_id=540529&PPID=542895&sid=697> accessed on 7/07/2015).

¹⁶⁷ Unless the IPs obtain parental responsibility (which is different from legal parenthood) by the court. Still, IPs will share parental responsibility with the surrogate until they get a PO.

¹⁶⁸ Andrews (n85) 77.

¹⁶⁹ Brazier M, Campbell A, Golombok S 'Surrogacy: Review for health ministers of current arrangements for payments and regulation - Report of the review team', 1 October 1998 [4.11].

¹⁷⁰ Turner A and Coyle A, 'What does it mean to be a donor offspring? The identity experiences of adults conceived by donor insemination and the implications for counselling and therapy' (2000) 15 Hum Reprod 2041-2051.

¹⁷¹ Golombok S and others, 'Families Created Through Surrogacy Arrangements: Parent-Child Relationships in the 1st Year of Life' (2004) 40(3) Developmental Psychology 400-411; Golombok S and others, 'Surrogacy families: parental functioning, parent-child relationships and children's psychological development at age 2' (2006) 47(2) Journal of Child Psychology and Psychiatry 213-222; Golombok S and others, 'Non-genetic and non-gestational parenthood: consequences for parent-child relationships and the psychological well-being of mothers, fathers and children at age 3' (2006) 21(7)

has been shown that openness and disclosure of surrogacy from an early age between parents and children is the key to the child's smooth psychological adjustment,¹⁷² and that IPs do disclose or intend to disclose the incidence of surrogacy to their children.¹⁷³ Furthermore, a recent study exploring whether parents disclose the incidence of donor conception, egg donation and surrogacy to their children proves that all IPs either have told or were planning on telling the child about surrogacy.¹⁷⁴ Additionally, Robertson suggests that any kind of psychological or social problems that may affect the surrogacy-born child can be overcome,¹⁷⁵ and, as surrogacy becomes more socially accepted and legally promulgated as a 'good practice',¹⁷⁶ surrogate-born children would have no problems dealing with this reality. Although this concern cannot justify banning surrogacy, especially in the absence of concrete evidence of generalised psychological harm to children, it does suggest the need for further longitudinal studies to supplement the limited research currently available.

- *The child is harmed in an existential way because she is degraded by being commodified*

This argument propounds that surrogacy should be illegal because it is a form of baby-selling. Anderson argues that, if we allow payments to be made for the creation of children, we allow children to be treated as commodities, which is disrespectful to the child, the same way as it is disrespectful to treat the surrogate as a commodity.¹⁷⁷

Hum Reprod 1918-1924; Golombok S and others, 'Families created through surrogacy: Mother-child relationships and children's psychological adjustment at age 7' (2011) 47(6) Dev Psychol 1579-88; Golombok S and others, 'Surrogacy families 10 years on: relationship with the surrogate, decisions over disclosure and children's understanding of their surrogacy origins' (2012) 27(10) Hum Reprod 3008-3014; Golombok S and others, 'Children born through reproductive donation: a longitudinal study of psychological adjustment' (2013) 54(6) J Child Psychol Psychiatry 653-660; Serafini P, 'Outcome and Follow-Up of Children Born After IVF-Surrogacy' (2000) 7(1) Human Reproduction Update 23-7; Blake L and others, 'Gay father surrogacy families: relationships with surrogates and egg donors and parental disclosure of children's origins' (2016) 106(6) Fertility and Sterility 1503.

¹⁷² *Ibid*; Freeman M, *Is surrogacy exploitative?* (McLean, S. ed, Legal Issues in Human Reproduction, Gower Publ., Aldershot 1989) 177.

¹⁷³ Readings J and others, 'Secrecy, disclosure and everything in-between: decisions of parents of children conceived by donor insemination, egg donation and surrogacy' (2011) 22(5) Reproductive BioMedicine Online 485-495; MacCallum F and others, 'Surrogacy: The Experience of Commissioning Couples' (2003) 18(6) Human Reproduction 1333-1342; van den Akker OBA, 'The importance of genetic link in mothers commissioning a surrogate baby in the UK' (2000) 15 HumReprod 1849-1855; Blyth (n77). Also, if the child has two gay dads, there is no getting away from the 'reality'.

¹⁷⁴ Readings and others (*ibid*) 488; Horsey K, Surrogacy in the UK: Myth busting and reform (Report of the Surrogacy UK Working Group on Surrogacy Law Reform, Surrogacy UK, 2015) 20.

¹⁷⁵ Robertson (n38).

¹⁷⁶ As evidenced by the new DHSC guidance (n115).

¹⁷⁷ Anderson (n71); Freeman (n172) 175; Blyth and Potter (n156) 233. This argument is applicable to other circumstances too. Infertile people often pay considerable sums of money to have a child through ARTs. It would, then, be difficult to show what distinguishes surrogacy from other technologies in order to justify a ban on surrogacy alone.

Moreover, Kavka argues that the child born through a commercial surrogacy arrangement would have a “bad start” in life; she would have a ‘restricted life, a life that is significantly deficient in one or more of the major respects that generally make human lives valuable and worth living’.¹⁷⁸ Lastly, Anderson suggests that any sentiments of love that the IP(s) show to the child do not change the immorality of surrogacy, since the IPs’ relationship with the child is based on market norms rather than norms of intimate relationships.¹⁷⁹ Anderson also argues that commercial surrogacy treats children as property and parental rights over children as trusts.¹⁸⁰

On the other hand, some note that the child cannot be harmed, because, were it not for this arrangement, she would not have been born at all,¹⁸¹ and existing is better than non-existing.¹⁸² Moreover, some claim that arguing that commercial surrogacy constitutes baby-selling is illogical, because a child is not property, and cannot be treated as such.¹⁸³ What is being agreed in surrogacy is the transfer of custodial rights from the woman who gestated and delivered the child to the IPs.¹⁸⁴ McLachlan and Swales explain that the object of a commercial surrogacy arrangement is not the transfer of parental rights; the contract merely sets out the mutual obligations of the parties, and exists as a “safety net” in case of a breach or a relationship breakdown between the IPs and the surrogate.¹⁸⁵

In a sale exchange, the commodified object can be used and eventually be re-sold and handed over to the highest bidder; this is not what occurs in commercial surrogacy.

¹⁷⁸ Kavka G, 'The Paradox of Future Individuals' (1981) 11 *Philosophy of Public Affairs* 105.

¹⁷⁹ Anderson E, 'Why Commercial Surrogate Motherhood Unethically Commodifies Women and Children: Reply to McLachlan and Swales' (2000) 8(1) *Health Care Analysis* 19-20.

¹⁸⁰ Anderson (*ibid*) 20.

¹⁸¹ Parfit D, *Reasons and Persons* (Clarendon Press, Oxford 1984); Harris J, 'The Welfare of the Child' (2000) 8(1) *Health Care Analysis* 27-34.

¹⁸² Posner R, 'The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood' (1989) 5 *The Journal of Contemporary Health Law and Policy* 21-23; Seidman LM, 'Baby M and the Problem of Unstable Preferences' (1989) 76 *Georgetown Law Journal* 1829,1832; Robertson (n35) 122; Harris (*ibid*); Tännsjö T, 'Our right to in vitro fertilisation – its scope and limits' (2008) 34 *Journal of Medical Ethics* 804; Savulescu J and others, 'Behavioural genetics: why eugenic selection is preferable to enhancement' (2006) 23(2) *J Appl Philos* 157.

¹⁸³ McLachlan HV and Swales JK, 'Babies, Child Bearers and Commodification: Anderson, Brazier et al and the Political Economy of Commercial Surrogate Motherhood' (2000) 8(1) *Health Care Analysis*.

¹⁸⁴ Posner R, 'The Regulation of the Market in Adoptions' (1987) 67 *Boston University Law Review* 59-72; Hanna JKM, 'Revisiting child-based objections in commercial surrogacy' (2010) 24(7) *Bioethics* 341–347; McLachlan and Swales (*ibid*) 11.

¹⁸⁵ McLachlan HV and Swales JK, 'Commercial Surrogate Motherhood and the Alleged Commodification of Children: A Defense of Legally Enforceable Contracts' (2009) 72 *Law and Contemporary Problems* 100-101. The perception of a surrogacy agreement as a “guide” or “reference point” is also promoted by the DHSC guidance to healthcare professionals (n115: 7) and to IPs and surrogates (n115: 9)

There is an agreement for a service which is performed for a financial benefit; the child is subsequently given to her parents, who cannot be regarded as owners, but rather as the child's trustees, since custody cannot be transferred by agreement.¹⁸⁶ Lastly, the child cannot be given away again;¹⁸⁷ her parents (or the state) are legally responsible for her care and well-being. Therefore, the 'baby-selling' analogy is inaccurate and flawed.

Moreover, there is no evidence that surrogates or IPs view or treat the child as a commodity, which could potentially be harmful, or that children experience any psychosocial harm. Instead, recent studies show that no harm is experienced by children.¹⁸⁸ Consequently, this claim is not strong enough to justify the prohibition of surrogacy, especially if there are other measures to mitigate these risks through appropriate and effective regulation that might consider, for example, requiring surrogacy arrangements be altruistic.

Harm to the IPs

Surrogacy has been described as a way to alleviate infertility,¹⁸⁹ which is a distressful and devastating experience for some individuals.¹⁹⁰ IPs' decision to have a child through surrogacy is usually made only after a long period of infertility, miscarriages, and/or failed efforts to have a child either through traditional or artificial means,¹⁹¹ and typically not done "for convenience".¹⁹²

IPs run the risk of being harmed in various ways and being exploited by either the surrogate and/or by surrogacy agencies.¹⁹³ The literature unjustifiably overlooks this issue, and generally only focuses on harm to the surrogate and/or the child. A notable exception is Rosemary Tong, who argues that IPs are in danger of 'falling prey to blackmailing surrogate mothers who threaten abortion unless their fee is substantially

¹⁸⁶ Purdy (n111) 28.

¹⁸⁷ They can be given up for adoption but not for money.

¹⁸⁸ n171.

¹⁸⁹ Kerian (n101); Blyth (n77) 188.

¹⁹⁰ Menning BE, 'The emotional needs of infertile couples' (1980) 34 *Fertil Steril* 313-9; Berger DM, 'Infertility: a psychiatrist's perspective' (1980) 25 *Can J Psychiatry*; Harrison RF and others, *Stress in infertile couples* (Bunnar, J. and W. Thomson eds, Fertility and Sterility, Lancaster: MTP Press 1984); Link PW and Darling CA, 'Couples undergoing treatment for infertility: Dimensions of life satisfaction' (1986) 12 *J Sex Marital Ther* 46-59; Pfeffer N and Woollet A, *The Experience of Infertility* (London: Virago Press 1983); Keye JWR, 'Psychosexual responses to infertility' (1984) 27 *Clin Obstet Gynaecol* 760-766.

¹⁹¹ MacCallum *et al* (n173).

¹⁹² Blyth (n77).

¹⁹³ Robertson J, 'Surrogate Mother: Not so novel after all' (1983) 13 *The Hastings Center Report* 28-34.

increased, or to renegeing surrogates who suddenly protest that they cannot go through with the “deal”¹⁹⁴ They might remain childless if the surrogate decides to keep the baby or choose to have an abortion.¹⁹⁵ Furthermore, surrogacy agencies might take advantage of IPs’ desperation, and ask for a high price.

Moreover, IPs have to deal with labyrinthine laws and regulations, and rarely receive any guidance by public authorities to help them in their surrogacy journey.¹⁹⁶ Additionally, the lack of effective regulation in IPs’ countries of origin may force them to consider alternative overseas destinations where commercial surrogacy is available but not always well-regulated and where there are concerns about how surrogates are treated. Moreover, undertaking surrogacy overseas can be very expensive, thus putting extreme strain on IPs’ finances.¹⁹⁷ IPs might also experience difficulties in acquiring all the paperwork necessary to gain legal parenthood of the child, and/or to bring the child back to their country of origin.¹⁹⁸

Nevertheless, even though surrogacy might raise multiple problems for IPs, empirical evidence indicates that IPs have positive experiences.¹⁹⁹ Some IPs also wanted to continue their relationship with the surrogate, and were open to talking about their experience of surrogacy to their friends, family, and the child.²⁰⁰ It should, though, be noted that there may be many IPs who have tried and failed to have a child through surrogacy, and we have almost no knowledge of what their experiences were. The evidence we have available does not support a prohibition of surrogacy. Further, restrictions must be proportionate and necessary to the harm to be prevented, and

¹⁹⁴ Tong (n102) 191. In the UK, surrogate Louise Pollard was jailed for fraud for pretending to be pregnant to several infertile couples simultaneously and extracting large sums of money from them (*R v Pollard*, Bristol Crown Court (June 2014); The Huffington Post online, 'Louise Pollard, woman who faked surrogate pregnancies, jailed for fraud' (17/06/2014) <http://www.huffingtonpost.co.uk/2014/06/17/louise-pollard-fake-surrogate-pregnancy_n_5502500.html> accessed on 27/09/2014).

¹⁹⁵ Ramsey (n106) 332.

¹⁹⁶ Blyth (n77). A recent exception comes from the UK government (DHSC guidance, n115).

¹⁹⁷ For example: Ottolenghi, Y. 'Childless UK couples forced abroad to find surrogates' (20/02/2016) <https://www.theguardian.com/lifeandstyle/2016/feb/20/childless-uk-couples-forced-abroad-surrogates> accessed on 20/02/2018.

¹⁹⁸ Culley L and others, "What are you going to do, confiscate their passports?" Professional perspectives on cross-border reproductive travel' (2013) 31(1) *Journal of Reproductive and Infant Psychology* 46-57; Jackson E, 'UK Law and International Commercial Surrogacy: 'the very antithesis of sensible'' (2016) 4(3) *JMLE* 199; Kirby J, 'Transnational Gestational Surrogacy: Does It Have to Be Exploitative?' (2014) 14(5) *American Journal of Bioethics* 24-32; Gamble N, 'Crossing the Line: The Legal and Ethical Problems of Foreign Surrogacy' (2009) 19(2) *Reproductive BioMedicine Online* 151-152.

¹⁹⁹ MacCallum *et al* (n173) 1333-1342; Blyth (n77) 185-196.

²⁰⁰ *Ibid*

regulation should strive to address these concerns through less restrictive means, for example through the availability of proper advice, support, and counselling to IPs throughout the arrangement and after its completion.

2.4 Justice concerns

Other than autonomy and harm, equality is an important principle in surrogacy. First, equality concerns might be a reason to ban surrogacy because surrogacy risks fuelling inequality (allowing rich people to exploit poorer women by having them carry their babies); second, if we think surrogacy should be permitted, we should be concerned with how it is made available, and this should reflect a concern for social justice.

The first of these concerns has been discussed earlier, where I concluded that this claim is weak in the absence of empirical evidence proving that, even in commercial surrogacy arrangements, surrogates are not treated *solely* or *merely* as means and are not respected. Moreover, given the very substantial liberty interests at stake, and the enormous potential benefits to IPs and surrogates, restrictions must be proportionate and necessary to the harm to be prevented, and previous research does not support a prohibition.

The second claim requires us to consider regulating surrogacy arrangements in ways that ensure equal, fair, and affordable access to treatment. This may relate to ensuring that all social groups would be eligible to access surrogacy, and that some public funding will be available to cover at least some relevant costs.²⁰¹ As Nelson explains, ‘even if eligibility criteria permit (or mandate) access for all who might wish to use ART treatment, financial constraints may effectively prevent it’,²⁰² and we know that ARTs (including surrogacy) are an expensive undertaking.²⁰³ Nevertheless, it should be remembered that public funding is finite, and there are multiple criteria linked to its allocation.²⁰⁴ Social justice concerns, though, require that funding, however limited, is allocated fairly and equitably.

²⁰¹ Riley L, 'Equality of access to NHS-funded IVF treatment in England and Wales' in Horsey, K. and H. Biggs (eds), *Human Fertilisation and Embryology: Reproducing Regulation* (Routledge-Cavendish 2007).

²⁰² Nelson (n1) 272.

²⁰³ Chambers GM and others, 'The Economic Impact of Assisted Reproductive Technology: A Review of Selected Developed Countries' (2009) 91 *Fertility and Sterility* 2288.

²⁰⁴ The most important of which are medical need and cost-effectiveness. Read further in Riley (n201); Mladovsky P and Sorenson C, 'Public Financing of IVF: A Review of Policy Rationales' (2008) 18 *Health Care Analysis*; Neofytou A, 'Is Childlessness an Illness so as to Justify Treatment Funded Through Public Resources?' (LLM thesis, Kent Law School 2012).

Further, nowadays, due to the existence and wide use of the Internet, and the relatively low cost and easiness of travel services,²⁰⁵ difficulties in accessing treatment within one's home jurisdiction may lead one to seek treatment abroad, where access is easier,²⁰⁶ but where treatment may be less regulated or totally unregulated. Respect for equality means that regulation should provide for equal and fair access within one's jurisdiction. Additionally, respect for equality means that we need to pay close attention to who is able to achieve parenthood through surrogacy. This requires close scrutiny of formal legal provisions or eligibility criteria for access to any form of (in)fertility treatment, including surrogacy, as well as the parenthood rules.

2.5 CONCLUSION AND THE CRITERIA FOR 'GOOD' SURROGACY REGULATION

This chapter provided an overview of the main ethico-legal objections to surrogacy and explored the challenges for regulation in this area. I argued that autonomy grounds a strong presumption that individuals should be free to enter surrogacy arrangements unless there are good reasons for preventing them from so doing. The bulk of this chapter then explored a range of objections to surrogacy that purport to offer such good reasons: first, that true autonomy is impossible; second, that surrogacy may cause harm to the surrogate, the child, and the IPs. While much of the literature is critical of surrogacy on a theoretical level, claims are often made without support from empirical evidence, or despite such evidence as exists. I argued that while none of these objections offers a convincing reason to prohibit surrogacy, they do raise a range of concerns which highlight the need for robust regulation.

To echo Kerian, this thesis will seek to demonstrate that, 'when precautions are taken, surrogacy is a positive alternative with the potential to benefit the needs of each involved party'.²⁰⁷ Specifically, a 'good' law would allow surrogacy, within certain parameters, and be supported by appropriate guidelines. It should be informed by empirical evidence about the 'real' experience of surrogacy and should go some way to protecting all parties from potential harms. It should also ensure equal, fair and affordable access to surrogacy, within the constraints of current health budgets, and

²⁰⁵ Jackson E, 'The law and DIY assisted conception' in Horsey, K. (ed), *Revisiting the Regulation of Human Fertilisation and Embryology* (Routledge 2015) 31.

²⁰⁶ Shenfield F et al, 'Cross Border Reproductive Care in Six European Countries' (2010) 25 *Human Reproduction* 1365; Jackson (n198).

²⁰⁷ Kerian (n101) 166.

provide effective guidelines about how to ensure fully informed and voluntary consent from all parties. Additionally, a ‘good’ surrogacy regulation should provide clear rules regarding legal parenthood following surrogacy, as well as rules for dispute-resolution. Lastly, appropriate measures should be taken to mitigate or alleviate other conditions that might pose risks to reproductive autonomy, for example supporting research on the causes and effective treatment of infertility, limiting poverty, and raising awareness about why people might use and/or need ARTs and/or surrogacy.

This set of criteria will assist in my critical evaluation of the legal regimes of Greece and the UK, which will also be informed by evidence of my own empirical work in these countries. The concerns raised about surrogacy fall broadly into three categories: problems with accessing surrogacy; problems during a surrogacy arrangement, and problems regarding legal parenthood, which is reflected in the structure of the work to follow. In the next chapter, I explore how Greek regulation addresses these concerns within the three broad categories noted above, and then proceed to do the same for the UK regime. Later, I evaluate in more detail how well these regimes respond to concerns regarding access, regulation, and parenthood in Chapters 5, 6, and 7, respectively, drawing on my interview data and evidence from the literature.

CHAPTER 3

The Greek regulatory framework for surrogacy

3.1 INTRODUCTION

As identified in the previous chapter, surrogacy raises various ethico-legal concerns, but none strong enough to justify prohibiting the practice for fears of threats to autonomy, harm, and justice. Instead, these concerns imply the need for proper and effective regulation. Nevertheless, any restrictions should be necessary and appropriate to the harm to be prevented, and it should be ensured that the way surrogacy is practised does not fuel inequality.

This chapter explores the Greek surrogacy regime, which has been described by Greek scholars as comprehensive and possibly the most progressive regime in the EU.¹ Greece is one of the few jurisdictions worldwide, and the only European one,² where gestational surrogacy agreements are legal and enforceable after the child's birth, provided they have been authorised by the court at the preconception stage, and where parenthood is based heavily on intention. Further, since Greek law allows only gestational surrogacy, pregnancy can only be achieved through IVF in a clinic, thus formal legal surrogacy is fully medicalised.³ Lastly, there is a regulator, namely the National Authority of Medically Assisted Reproduction (NAMAR), which monitors the clinical practice of ARTs, including surrogacy, and issues strictures with legal

¹ Kounougeri-Manoledaki E, *Assisted reproduction and family law. The Greek legislation: Laws 3089/2002 and 3305/2005* (Sakkoulas 2005) 6; Panagos K, *Surrogate motherhood. The Greek regulatory framework - criminal law perspectives* (Sakkoulas 2011) 9; Hatzis A, 'From soft to hard paternalism and back: the regulation of surrogate motherhood in Greece' (2009) 49(3) Portuguese Economic Journal 207; Trokanas T., *Human Reproduction – Personal autonomy and its limits* (vol 13 (Kaiafa-Gbandi, M., E. Kounougeri-Manoledaki and E. Symeonidou-Kastanidou eds, Publications on Medical Law and Bioethics, Sakkoulas 2011) 407. It should be noted that the Greek literature on surrogacy mentioned in this thesis is almost exclusively in Greek and I have translated the citations to make them more accessible to international readers.

² McCandless J. *et al*, *A Comparative Study on the Regime of Surrogacy in EU Member States* (European Parliament, 2013) 277
[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOL-JURI_ET\(2013\)474403_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf).

³ Article 1458 Greek Civil Code (GCC). Presumably, there are informal surrogacy arrangements flying under the legal radar, which we know almost nothing about. It should also be noted that surrogacy outside clinics is not illegal, but, in such a case, the legal presumption of motherhood at birth will not be applicable, and the general rules of parenthood shall apply.

force.⁴ I begin my analysis by providing an historical account of how Greek surrogacy law has developed, and then set out how the law has sought to address the concerns laid out in Chapter 2.

3.2 BACKGROUND AND HISTORICAL DEVELOPMENT OF GREEK ART AND SURROGACY LAWS

Generally, Greek society places great importance on the institution of the family,⁵ and, in many instances, which will become evident from the analysis below, law emphasises traditional theories of ‘the family’ reflecting and reinforcing the nuclear ‘sexual’ family model.⁶ Leon *et al* note that the ‘traditional’ Greek family presents three characteristics: first, young adults leave the parental household late and indeed after they get married; second, co-habiting unmarried couples with children are very rare, and divorce rates are relatively low; third, having a child ‘is delayed...[and] always connected with creating a nuclear family’.⁷

Greece is a relatively small country, with a population of 11 million.⁸ Low birth rates,⁹ together with high rates of infertility affecting almost 15-20 per cent of the adult

⁴ For example, the NAMAR Code of Practice for ARTs (Government’s Gazette B’ 293/07.02.2017), hereafter Greek CoP.

⁵ The protection of the ‘the family’ is guaranteed by article 21(1) Greek Constitution (hereafter GC). See analysis by Chrysogonos K, ‘The Greek Constitution and the Family’ (1997) 38 Greek Justice 738. Article 9(1) GC declares the state’s duty not to interfere with one’s family life). The right to personal autonomy guaranteed by article 5(1) GC is thought to include the right to have a child through ‘natural’ or medically assisted reproduction (Leon G, Papetta A and Spiliopoulou C, ‘Overview of the Greek legislation regarding assisted reproduction and comparison with the EU legal framework’ (2011) 23 Reproductive BioMedicine Online 823; Paxson H, ‘Reproduction as spiritual kin work: Orthodoxy, IVF, and the moral economy of motherhood in Greece’ (2006) 30 Culture, Medicine and Psychiatry 481-483; Kokota V, The influence of religion on the legal framework concerning medically assisted reproduction (V. Kantsa, G. Zanini and L. Papadopoulou eds, (In)Fertile Citizens: Anthropological and Legal Challenges of Assisted Reproduction Technologies, (In)FERCIT, University of the Aegean 2015) 68,73).

⁶ Fineman M, *The Neutered Mother, The Sexual Family and other Twentieth Century Tragedies* (Routledge 1995) 143.

⁷ Leon *et al* (n5) 823.

⁸ According to the latest census (2011). Official results by the Greek Statistical Authority (ELSTAT), available at http://www.statistics.gr/portal/page/portal/ESYE/BUCKET/General/A1602_SAM01_DT_DC_00_20_11_02_F_GR.pdf, accessed on 23/02/2015.

⁹ During the parliamentary proceedings leading to the 2002 Law, MP Lintzeris said the total fertility rate (TFR) in Greece in 1980 was 2.2 children per woman (cpw), which decreased to 1.30 in 1999 (Parliamentary proceedings on 26/11/2002, <http://www.parliament.gr/ERGASIES>). Eurostat reports that, in 2003, the Greek TFR was 1.30 live births per woman, with the average EU TFR at 1.60. The Greek TFR has been decreasing since 2009 (1.47), the year when the financial crisis started, and is now at 2.1 (Eurostat <http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tps00199&plugin=1>, accessed on 04/01/2018). More in G. Lanzieri, *Towards a ‘baby-recession’ in Europe? Differential fertility trends during the economic crisis* (Eurostat, EU 13/2013), <http://ec.europa.eu/eurostat/statistics->

population in Greece,¹⁰ have caused a demographic problem, and a serious birth and death imbalance. For this reason, reproduction within marriage, even through IVF, is endorsed by the Christian Orthodox tradition,¹¹ the dominant religion in the country, and is also reflected in Greek law and policy.

As discussed in Chapter 1, most international jurisdictions do not recognise an express right to reproduce, but they do recognise a right not to reproduce. Although no Greek scholar disputes the existence of a constitutional right to have a child, they disagree on which specific provision of the Greek Constitution (GC) grounds such a right.¹² Some argue that it is based on the right to personal freedom,¹³ some on the principle regarding the protection of private and family life,¹⁴ and others on the social right for the protection of 'the family'.¹⁵ The majority of commentators, though, believe that reproductive autonomy is grounded on freedom of expression.¹⁶

According to many Greek scholars, reproductive autonomy engrains one's ability and freedom to define oneself, as well as the freedom to plan and form one's life in line

[explained/index.php/Fertility_statistics_in_relation_to_economy_parity_education_and_migration](#), accessed on 04/01/2018.

¹⁰ Ravdas P, *Surrogate Motherhood: The legislator's expectations tested by statistical data* (Papachristou, T. K. and others eds, 21st Century Family Law: Coincidental and Fundamental Reforms - Law and Society in 21st century, Sakkoulas 2012) 69.

¹¹ The Greek Orthodox Church considers that procreation expresses a man's and a woman's wishes to partake in God's creative work, but it rejects reproduction through gamete donation. Katsimigkas G., 'Regulation 135/1999. IVF under the Orthodox religious perspective', http://www.ecclesia.gr/greek/holysynod/committees/pastoral/katsimigas_exosomatiki.html accessed on 23/02/2015; Dr Metropolitan Nikolaos, 'Symposium: Religion in assisted reproduction. The Greek Orthodox position on the ethics of assisted reproduction' (2008) 17(3) *Reproductive BioMedicine Online* 25-33; Paxson (n5); Kokota (n5).

¹² n5 and Milapidou M, *Bodily integrity and assisted reproduction*, vol 14 (Kaiafa-Gbandi, M., E. Kounougeri-Manoledaki and E. Symeonidou-Kastanidou eds, Publications on Medical Law and Bioethics, Sakkoulas 2011) 11-18.

¹³ Article 5(3) GC. Manitakis A, *The legal abolishment of cloning and the right to reproduce* (Artificial reproduction and genetic technology, Sakkoulas 2003) 33-84. He believes that the right to have a child is founded on personal freedom, and human cloning is founded on the freedom of expression. Mitrosyli argues that article 5(3) GC contains the freedom of the ARTs participants to choose the method that is more appropriate for them, and not their right to have a child (Mitrosyli M, 'Medically Assisted Reproduction' Application of medically assisted reproduction' Act (3305/2005, Greece): Presentation and Comments' (2007) 24(6) *Archives of Hellenic Medicine* 614).

¹⁴ Article 9(1) GC. Vidalis T, 'Family project: the constitutionality of the law on 'medical assistance in human reproduction'' (2003) *Legal Library* 834-840; Vidalis T, *Life without the person - The Constitution and the use of human genetic material* (Sakkoulas 2003) 101.

¹⁵ Article 21(1) GC. Chrysogonos (n5) 729-740.

¹⁶ Article 5(1) GC. This interpretation is also accepted by the Memorandum-3089/2002, I(4). For academic commentary see citations in n5 and Varka-Adami A, 'Law 3089/2002 on 'medical assistance to human reproduction'-first approach' (2003)(44) *Greek Justice* 1510-1518; Kriari-Katrani I, *Biomedical developments and Constitutional Law - Constitutional [law] issues about the methods of assisted reproduction and the applications of genetics* (Sakkoulas 1994) 68; Marinos A, 'Genetic engineering and the law' (1998) 39 *Greek Justice* 1231; Manesis A, *Constitutional rights, individual freedoms* (Sakkoulas 1981) 68, 127; Fountedaki K, *Human Reproduction and doctor liability*, vol 4 (Publications of Medical Law and Bioethics, Sakkoulas 2007) 158.

with one's physical and emotional abilities and views in such a way that one develops and shapes one's personality through having a child.¹⁷ However, this freedom is not absolute. Firstly, reproductive autonomy should not be exercised in a way that infringes any rights of others. Secondly, it cannot and should not override any fundamental rights and freedoms declared by the Constitution and any other laws. Thirdly, the exercise of individual autonomy should be in line with the social morals.¹⁸ These limitations exist for any form of reproduction ('traditional' or artificial), but only ARTs are subject to regulation, because 'traditional' reproduction is impossible to police.¹⁹

Since the early 1990s, the use of ARTs was quite widespread in Greece,²⁰ though ARTs were unregulated until 2002. Other European jurisdictions have regulated ARTs since the mid-1980s and early 1990s.²¹ In 1999 and 2000, three cases reached the Greek courts,²² highlighting the need for regulation of ARTs.²³ The first concerned an application for Greek citizenship of an unmarried Indian woman who had acted as a gestational surrogate for a Greek man.²⁴ Following the child's birth, the woman

¹⁷ Kounougeri-Manoledaki (n1). Reproductive autonomy also includes the right not to reproduce (right to contraception, lawful abortion, selective sterilisation): Mitrosyli (n13) 613. Based on this definition for reproductive autonomy, Greece could rightfully be called a pro-natalist society. A 2014 Regulation established partial funding for ARTs, thereby encouraging individuals to use ARTs to have a child (Explanatory Memorandum of Law 3305/2005 (hereafter 'Memorandum-3305/2005') 9). Part of the cost may be covered through public funding, subject to a long bureaucratic process through an IVF Committee (Regulation of 6/06/2014, <http://www.eopyy.gov.gr/>).

¹⁸ Article 5(2) GC.

¹⁹ Mitrosyli (n13) 613; Kounougeri-Manoledaki (n1: 16) notes that 'natural' reproduction belongs in the private sphere but ARTs in the public sphere, because they necessarily involve the interference of other people, and the use of medical technology. This may justify the introduction of certain restrictions. Papachristou argues that even in 'natural'/'traditional' reproduction, law intervenes for the determination of parenthood (Papachristou T, 'Articles 1455-1460' in Georgiadis, A. and M. Stathopoulos (eds), *Civil Code* (Sakkoulas, Athens 2003) 22,26. Considering the low birth rates in Greece, the state arguably has strong interest to interfere in ARTs (Minutes of the parliamentary debates in 2002 in Agallopoulou P and Koutsouradis A (eds), *Medical Assistance in Human Reproduction. Law 3089/2002. Preparatory reports - Parliamentary debates* (Sakkoulas 2004) 235,249,252,286; Minutes of the 2005 parliamentary debate: 526,535,541,547,549,572,582,593,600,606,659,665,667). On the public-private debate in reproduction, read Williams S, 'Comment: Autonomy and the Public-Private Distinction in Bioethics and Law' (2005) 12 *Indiana Journal of Global Legal Studies* 483-94; Eijkholt M, 'The Right to Found a Family as a Stillborn Right to Procreate' (2010) 18 *Med Law Rev* 127-151.

²⁰ Memorandum-3089/2002, I(2). Papazisi T, 'Borderline issues regarding adoption and assisted reproduction' (1995) *Greek Justice* 1000. Pazi mentions that, at the time, surrogates were considered legal mothers by birth, and IPs acquired parenthood through adoption.

²¹ Memorandum-3089/2002, I(3).

²² Out of the three cases mentioned here, only the last two were cited in the Memorandum-Law 389/2002 Law (I(2)). The first case was not part of this consideration because it involved a question of citizenship and fell under the jurisdiction of the Administrative Court rather than the Civil Court (family division), which deals with surrogacy cases. However, the reasoning adopted by the Administrative court judges alluded to legal parenthood following surrogacy, which is why I cite it here.

²³ Memorandum, *ibid*; Minister of Justice Decision no.15795/22.11.2000.

²⁴ Supreme Administrative Court no.157/1999.

requested Greek authorities cancel the deportation order against her, arguing that she was the mother of a Greek citizen,²⁵ and, therefore, she should be registered as Greek.²⁶ The administrative authority rejected her application, and ruled she was not to be regarded as the child's mother, but rather as a gestational carrier. Later, the Supreme Administrative Court recognised her as the child's legal mother by birth,²⁷ and granted her Greek citizenship.

In another case, a heterosexual married couple sought to adopt twins who were genetically related to them and born by a surrogate.²⁸ Under the then applicable law, motherhood was based on gestation and birth,²⁹ hence the surrogate was the legal mother and IPs could only establish parenthood through adoption. However, the judiciary questioned the appropriateness of adoption law in this case,³⁰ since adoption law requires the lack of a genetic link between the adopters and the adoptee(s).³¹ The judges decided to allow the adoption in this particular case but urged the legislature to regulate parenthood following surrogacy.³² This case caused lively academic controversy and debate about how parenthood should be determined in surrogacy cases.³³

The third case concerned the acknowledgement of paternity to children born through donor-IVF outside marriage.³⁴ This case established intention as the basis for parenthood, with this principle later entrenched in Law 3089/2002 (2002 Law). An infertile married woman who had visited a clinic to have IVF formed an extra-marital relationship with her doctor. The treatment was successful, and twins were born as a result. Subsequently, the woman's estranged husband successfully disputed his

²⁵ The child had been awarded Greek citizenship at birth based on the father's citizenship (Article 5A Greek Citizenship Code).

²⁶ Subject to the provisions of article 1(1) Greek Citizenship Code.

²⁷ Following the ancient *mater semper certa est* rule ("the mother is always certain"), according to which motherhood is based exclusively on birth (former article 1463(2) GCC). Also, Vidalis T, 'Supreme Administrative Court no.157/1999' (2000) 48 Legal Library 553-557.

²⁸ Multi-Member District court of Heracleion no.31/5803/176/1999.

²⁹ Former Article 1463 GCC.

³⁰ Multi-Member District court of Heracleion no.31/5803/176/1999.

³¹ Skorini-Paparrigopoulou F and Papachristou T, 'Multi-Member Court of Heracleion case no.31/5803/176/1999' (2000) 1 Critical Review 236.

³² *Ibid.*

³³ Papachristou has argued the ruling was in line with the child's best interests (Papachristou T, 'Critical observations on the Multi-Member Court of Heracleion case no.31/5803/176/1999' (2000) 48 Legal Library 57). Others found it incorrect, because it constituted wrong application of adoption law (Evangelidou-Tsikrika F, 'Issues arising by the biological fragmentation of motherhood' (2002) 43 Greek Justice 43; Skorini-Paparrigopoulou F, 'Observations on the Multi-Member Court of Heracleion case no.31/5803/176/1999' (2000) 48 Legal Library 498).

³⁴ Multi-Member Court of Athens no.6779/2000.

parenthood, which had been established automatically by virtue of his marriage to the mother, arguing that he had neither consented to the IVF nor was he genetically related to the children.³⁵ The woman asked the court to legally oblige the doctor, who had consented to her IVF, to accept paternity.³⁶ DNA tests proved that neither the woman nor the doctor were genetically related to the twins, because the pregnancy was a result of double gamete donation. The judges ruled that parenthood should be based on intention, which is proven by consent to ARTs.³⁷ Hence, the doctor was recognised as the legal father of the twins based on his consent. Nevertheless, this ruling was overturned by the Appeal Court in 2002,³⁸ with that decision subsequently confirmed by the Supreme Court in 2004.³⁹ The Supreme Court judges deemed the doctor's consent to IVF invalid as "against good morals", because it was based on an immoral (extra-marital) relationship.⁴⁰ This decision was criticised as anachronistic and mistaken, because the judges failed to apply the intention-based parenthood rule, which had by then become law.⁴¹

In light of these cases, the 2000 Minister of Justice, Mihail Stathopoulos, appointed a Committee, led by law Professor Koumantos, 'to study the effects of biotechnology and genetics on civil, and particularly family, law'.⁴² The Committee proposed the new parenthood rules be incorporated into the Greek Civil Code (GCC) instead of introducing separate legislation for ARTs.⁴³ In this way, the Committee hoped to achieve a systematic handling of all parenthood issues and to modernise the GCC.⁴⁴ Surrogacy was to be considered a form of ARTs, aiming to cure or alleviate female infertility, and an alternative way to create 'natural' family relationships.⁴⁵

³⁵ Former article 1465 GCC.

³⁶ n33.

³⁷ *Ibid.*

³⁸ Appeal Court of Athens no.2171/2002.

³⁹ Greek Supreme Civil and Criminal Court (Areios Pagos) no.14/2004.

⁴⁰ *Ibid.*

⁴¹ Kounougeri-Manoledaki E, 'Observations on the High Court case no.14/2004' (2004) 4 Private Law Chronicles 609. Arguably, though, the decision was correct, since the law was not in place when the facts of the case took place.

⁴² Minister of Justice Decision no.15795/22.11.2000.

⁴³ The Committee members were divided, but they agreed that it should be part of GCC (see Committee Meeting Minutes 22/11/2001, 23/01/2002, 14/02/2002 in Agallopoulou and Koutsouradis (n19)).

⁴⁴ Memorandum-3089/2002, I(6).

⁴⁵ As opposed to an 'artificial' family relationship, which results from adoption (Document No.10 – Minutes of 24/05/2001 (Agallopoulou and Koutsouradis, (n19) 66). Also, Kounougeri-Manoledaki E, *Surrogate motherhood and adoption: seeking a "fair" interpretational solution* (Justice in Particular, Sakkoulas 2007) 161-172. The author was a member of the 2002 draft law committee.

Additionally, the Committee suggested surrogacy agreements be enforceable; that they be authorised by the court at the preconception stage,⁴⁶ and that both gestational and traditional surrogacy be allowed.⁴⁷ However, there was intense disagreement about payments for surrogacy.⁴⁸ The Committee proposed that law should leave this unregulated, but the Memorandum should mention that, based on the social morals at the time, courts would probably have to deem such payments immoral and invalid.⁴⁹ This would, then, leave room for manoeuvre in the future, if social norms changed, to allow for commercial surrogacy agreements, without needing to change the law.⁵⁰

After public consultation,⁵¹ the Minister of Justice, Filippos Petsalnikos, submitted the draft law to Parliament. During the parliamentary debate, several MPs expressed concerns about surrogacy,⁵² and, in response, some provisions were amended: only altruistic gestational surrogacy would be allowed, and both parties would need to be permanent residents of Greece. Some MPs also argued that the proposed law was incomplete, because it did not regulate the clinical practice of ARTs.⁵³ The Minister of Justice, though, noted that these issues would be covered by a different law to be introduced the Ministry of Health.⁵⁴ Amid mild controversy, the 2002 Law was passed with a substantial majority, it being accepted that it would help address the problem

⁴⁶ Draft 2002 ART Law.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ Committee Meeting Minutes, 5/10/2001 (Agallopoulou and Koutsouradis (n19) 103).

⁵⁰ *Ibid.*

⁵¹ Spokesmen of the Greek Orthodox Church, medical professionals, biologists, and geneticists part in the consultation process (Petsalnikos F (Minister of Justice), Parliamentary proceedings–21/11/2002). The Greek Orthodox Church strongly opposed many of the provisions in the draft 2002 Law, and called the withdrawal of the surrogacy provisions, arguing that surrogacy disrupts the structure of the traditional family, and that the judicial process needed clarification (Church of Greece Synod, Comments and Proposals on the Draft Law on Assisted Reproduction (06/11/2002), http://www.bioethics.org.gr/03_b.html#3).

⁵² For example, MP Kosionis (communist party) and MP Kouvelis (leftist/environmentalist coalition) questioned whether modern law should create ideas about ‘appropriate motherhood and womanhood’ and referred to exploitation and commodification arguments. MP Tsiplakis (conservative party) and MP Ioannidis (socialist party) referred to prostitution and baby-selling arguments (<http://www.parliament.gr/ERGASIES>).

⁵³ Konstantopoulos and Koulouris, MPs (*ibid* 26/11/2002).

⁵⁴ Closing statement by Filippos Petsalnikos (Minister of Justice), *ibid.*

of infertility in Greece.⁵⁵ The 2002 Law was subsequently enacted,⁵⁶ and the GCC was amended accordingly.⁵⁷

Three years later, the then Minister of Health introduced the second, promised law, which sought to regulate ART practice in clinics.⁵⁸ Law 3305/2005 (2005 Law) also established the ‘reasonable expenses’ rule for surrogacy, founded NAMAR, a regulatory body for ARTs, and set criminal and disciplinary sanctions for those who failed to abide by the statutory provisions or NAMAR’s strictures.⁵⁹ In 2008, NAMAR introduced regulation pertaining to the ‘reasonable expenses’ rule for payments in surrogacy, setting a maximum limit for those expenses.⁶⁰

The most recent amendment in ART law occurred in July 2014,⁶¹ aiming to modernise and improve ART regulation by clarifying and simplifying some legal provisions.⁶² Only one amendment related to surrogacy: the new law lifted the domicile requirement.⁶³ Most recently, in 2017, NAMAR issued a legally binding Code of Practice, further regulating specific aspects of ART practice in clinics. I now move to discuss the main provisions of Greek ART law in detail, exploring them in the context of three themes: access, regulation during surrogacy arrangements, and determination of parenthood.

⁵⁵ Rethymniotaki E, *A comparative gendered reading of the changes in Family Law after the regulation of biomedical technology of reproduction* (Vosniadou, S. and V. Dendrinou eds, Gender, Body and the gendered difference: encounters of legal and social problematisation, National and Kapodistrian University of Athens, 2008) 59, http://thefyliscentre.uoa.gr/fileadmin/thefyliscentre.uoa.gr/uploads/thefylis_tomos_2.pdf.

⁵⁶ Government’s Gazette A’ 327/23.12.2002.

⁵⁷ Article 1 Law 3089/2002: ‘Article 1458 GCC will be amended as follows: *The transfer of fertilized ova to another woman (the ova should not be hers) and pregnancy by her is allowed by a court authorization issued before the transfer, given that there is a written and, without any financial benefit, agreement between the involved parties, meaning 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 intends to have a child, provided that evidence is adduced not only in regard [to] the fact that she is medically unable to conceive but also [with regard to] the fact that the surrogate is in good health and able to conceive*’ (the underlined parts were added by Parliament). English translation of the 2002 Law available at <http://www.bioethics.gr/index.php/en/dikaio/nomothesia/138-medically-assisted-human-reproduction>.

⁵⁸ Memorandum-3305/2005, Annex A. The 2005 Law was enacted on 27/01/2005 (Government’s Gazette A’ 17/27.01.2005).

⁵⁹ *Ibid.*

⁶⁰ NAMAR Decree 36/2008–Government’s Gazette 670/B’/16.4.2008.

⁶¹ Law 4272/2014 (hereafter ‘the 2014 Law’).

⁶² Explanatory Memorandum of Law 4272/2014, Annex C (hereafter Memorandum-4272/2014).

⁶³ Article 17, 2014 Law. The domicile rule had been established by article 8, 2002 Law.

3.3 GREEK LEGAL PROVISIONS FOR SURROGACY

3.3.1 ACCESS

Access to ARTs in Greece is limited to those who: can demonstrate a medical need for treatment; fall within certain age limits; have a particular relationship status; provide valid, informed consent; have been tested for certain health conditions; and meet the residence requirement.

- ***Medical Need for assisted reproduction***

Though the Constitution provides a *prima facie* right to have a child, Greek law limits access to those who can demonstrate a need for ARTs. Treatment is only available to individuals unable to have a child by ‘traditional’ means,⁶⁴ or those suffering from a severe genetic disease which might be transmitted to the child.⁶⁵ Under Greek law, ARTs have a therapeutic role,⁶⁶ and are not intended to be available as a choice over ‘traditional’ reproduction.⁶⁷ Therefore, it is not possible for a single fertile woman,⁶⁸ or a lesbian fertile woman who does not have a male partner,⁶⁹ to access ARTs. Yet, some Greek scholars accept that ‘infertility’ includes cases of both biological/physical inability to reproduce ‘traditionally’ and of ‘unexplained infertility’.⁷⁰

To access surrogacy, the intended mother (IM) must prove to the court dealing with her application that she is medically unable to gestate a child.⁷¹ It has also been argued

⁶⁴ This relates to ‘human infertility’ (Memorandum-3089/2002(II) comments on article 1455 GCC).

⁶⁵ Article 1455(1) GCC.

⁶⁶ Papachristou T, *The right to have a child and its limits* (Tsinorema, S. and K. Louis eds, Issues of Bioethics - Life, Society and Nature before the biomedical challenges, Cretan University Press 2013); Koumantos G, 'Bioethics and Biolaw' (2003) Bioethical Issues, Polis Publications 92; Rethymniotaki E, *Regulation or self-regulation? The example of medically assisted reproduction*, vol 20 (Institutions of the Greek Society, 2003) 122; Skorini-Paparrigopoulou F, *Greek Civil Code, Articles 1455-1456*, vol 8 (Georgiadis, A. and M. Stathopoulos eds, Law and Economy, 2nd edn, Sakkoulas 2003) 16; Kounougeri-Manoledaki (n1); Fountedaki (n16) 178. However, Vidalis argues that ARTs could, in the future, be a matter of choice without it being unlawful (Vidalis T, *Biolaw*, vol 10 (The person, Publications of Medical Law and Bioethics, Sakkoulas 2007) 208).

⁶⁷ Marinos (n16) 1231.

⁶⁸ Kounougeri-Manoledaki (n1) 10; Fountedaki (n16) 178.

⁶⁹ Fountedaki argues that homosexuality should be regarded as a condition that restricts individuals to have a child through traditional means (n16: 177); Papazisi T, 'Same-sex family: depravity or equal treatment?' (2007) Private Law Chronicles 761-767; Trokanas (n1) 217-218; Kipouridou K and Milapidou M, 'The homosexuals' right to procreation in Greece' (2015) 1(1) Bioethica 39; Papadopoulou L, *Restrictions in medically assisted reproduction in Greece* (Kantsa, V. ed, Kinship and medical technology. Assisted reproduction in Greece, Aleksandreia Publications 2015) 13.

⁷⁰ Papazisi T, 'Surrogate mother or mater semper certa est' in Kaiafa-Gbandi, M., E. Kounougeri-Manoledaki and E. Symeonidou-Kastanidou (eds), *Medical Assistance in Human Reproduction. 10 years of the application of Law 3089/2002* (Sakkoulas 2013) 78.

⁷¹ Article 1458 GCC.

that the medical need for surrogacy legal requirement is different than that for other ARTs.⁷² More specifically, an IM needs to prove either her inability to conceive,⁷³ or her inability to bring a pregnancy to term.⁷⁴ According to an academic commentary and the explanatory memorandum of the 2002 Law, the reason for this further limitation is that surrogacy is an extreme and unusual method of reproduction that should only be an option if it is absolutely necessary.⁷⁵ In other words, this rule serves to prevent surrogacy ‘for convenience’, and is said to protect the potential surrogate from exploitation.⁷⁶ For example, a woman cannot resort to surrogacy because she would like to continue her professional career without interruption, or because she prefers not to undergo pregnancy and childbirth for cosmetic reasons.⁷⁷

Some indicative conditions for which surrogacy is allowed are uterine absence, for instance due to a hereditary condition (e.g. Mayer-Rokitansky syndrome)⁷⁸ or uterine cancer.⁷⁹ Surrogacy is also available to women suffering from any illness that is known to affect fertility and render pregnancy dangerous, for example: diabetes, kidney failure, congenital heart disease,⁸⁰ multiple miscarriages,⁸¹ and multiple IVF failures.⁸²

- *Age limits*

Greek law requires ART participants to be at an age when ‘natural’ reproduction is still possible.⁸³ The 2005 legislature set the age limit at 50 for women, because ‘this is usually the age when many women reach menopause’.⁸⁴ In this way, the legislature

⁷² Karasis M, 'The new draft legislation on the application of methods of medical assistance to human reproduction (Issues of constitutionality and suggestions)' (2006) Armenopoulos 844; Kyriakaki E, 'Comments on the Multi-member Court of Heracleion no.678/2755/671/2003 ruling' (2004) 52 Legal Library 280-281.

⁷³ Multi-member Court of Heracleion no.678/2755/671/2003. The court allowed a woman suffering from blocked fallopian tubes syndrome to have surrogacy.

⁷⁴ Kotzampasi A, 'The right to reproduce. Between the freedom of physical reproduction and the regulated right to artificial reproduction' (2006) Opinions and Ideas on interpretative issues of Civil Law, City Publish 253.

⁷⁵ Trokanas (n1) 173; Memorandum-3089/2002 II, article 1455 GCC.

⁷⁶ Memorandum *ibid*, and Panagos (n1) 13-37.

⁷⁷ Memorandum *ibid*; Kounougeri-Manoledaki (n1) 10; Skorini-Paparrigopoulou (n66) 16.

⁷⁸ Single-member court of Korinthos no.224/2006.

⁷⁹ Papazisi (n70).

⁸⁰ *Ibid*

⁸¹ Single-member court of Heracleion no.678/2003.

⁸² Single-member court of Athens no.1320/2004.

⁸³ Article 1455(1) GCC. The Committee suggested the age limit to be set at 60 (Agallopoulou and Koutsouradis (n19) 210) but Parliament rejected it.

⁸⁴ Article 4(1) 2005 Law. Also, Memorandum-3305/2005, B, comments on article 4.

aimed to discourage cases of postponed motherhood, which could endanger the pregnant woman's and the child's health.⁸⁵

Nevertheless, there is an exceptional case of a woman who was allowed to access ARTs despite having exceeded the legal age limit.⁸⁶ She had cryopreserved her eggs before the enactment of the 2005 Law, and after the law's enactment, asked NAMAR to grant her permission to have IVF using the cryopreserved eggs and her partner's sperm. Her application was successful, because she could not have known that the law would change when she preserved her eggs.⁸⁷ More recently, a 52-year-old infertile woman, who had cryopreserved her eggs at 42, succeeded in her surrogacy application, and it was deemed that her constitutional right to have a child superseded the age limitation set by ART law.⁸⁸

Greek ART law does not set an age limit for men. Arguably, such a limit would ensure that the child had a good chance of having two young parents.⁸⁹ According to the majority of Greek scholars, the statutory age limit for women also applies to men when they seek ART together.⁹⁰ In fact, one commentator argues that any diverse interpretation would constitute an unjustifiable gender discrimination.⁹¹ However, the law is unclear on this point, and it could be contended that as women grow older, they naturally completely lose their ability to reproduce, whereas the same does not apply to all men, so there is no case of bias *per se*. While men's fertility declines with age, it is not completely lost. In this case, if the age limitation towards women alone remains, it could be taken to ensure that law seeks to promote the 'traditional' sexual family norm.

⁸⁵ *Ibid*; Papazisi T, *Legal and ethical issues regarding assisted reproduction after menopause* (Medical Assistance in Human Reproduction - Critical Review Library, 1st edn, Sakkoulas 2002) 77. Moreover, Greek ART law sets an upper age limit for donors (40 years of age for sperm donors and 35 for egg donors. These limits may be increased to 50 years for men and 40 for women in "exceptional circumstances", e.g. due to shortage in donated genetic material, with NAMAR's permission (article 8(7), 2005 Law).

⁸⁶ Recommendation of NAMAR no.2/29.11.2006, NAMAR's 2006 Annual Report.

⁸⁷ *Ibid*

⁸⁸ Multi-member court of Patras no.248/2016. Moreover, the judges ruled that the age limitation was due to a concern on (the pregnant) women's health, but here the IM would not gestate the child herself, rendering this concern irrelevant.

⁸⁹ Memorandum-3305/2005, article 4(1). However, it does not follow that younger parents will necessarily be better than older ones (Pennings G, 'Measuring the welfare of the child: in search of the appropriate evaluation principle' (1999) 14(5) *Human Reproduction* 1149)

⁹⁰ Fountedaki (n16) 169; Skorini-Paparrigopoulou (n66) 27; Spyridakis I, *Family Law* (Sakkoulas 2006) 404.

⁹¹ Article 4(2) GC. See Fountedaki (n16) 170. However, Kounougeri-Manoledaki argues that the differential treatment towards women only is justifiable because a man's reproductive capacity is not affected by his age, or at least not in the same way as the woman's (n1: 13).

Until recently, Greek law set no upper age limit for surrogates.⁹² NAMAR changed this in 2017. While this is speculative, the previous lack of an age limit for surrogates could have been an oversight rather than design, or it could have suggested that age limits were justified by a concern to prevent older parents rather than by a concern for women's health. In practice, the courts adopted a case-by-case approach with regards to the surrogate's age, if she could demonstrate clinical evidence that she was sufficiently physically healthy to gestate and deliver a child.⁹³

In 2006, a Greek court gave permission to a 52-year-old woman to carry her grandchild on behalf of her daughter.⁹⁴ This happened again in 2016, with a 67-year-old woman who reportedly became the world's oldest surrogate.⁹⁵ In the aftermath of the latter case, NAMAR issued a stricture (with legal force) that surrogates should be between 25 and 45 years old.⁹⁶ Although this is unconfirmed, this new rule is likely to change Greek surrogacy practice. Subsequently, NAMAR issued a statement explaining that the newly-introduced criteria for the surrogate are in line with evidence and guidance produced by the European Society of Human Reproduction and Embryology and the American Society for Reproductive Medicine; namely that older women run more risks of experiencing complications during pregnancy and delivery, which could be fatal for the woman and the child.⁹⁷ Therefore, the new age restriction is guided by concerns for both women's health and the best interests of the child-to-be.

- ***Relationship status***

Since the enactment of the 2002 Law, ARTs, including surrogacy, are available to (heterosexual) married couples, (heterosexual) couples in legally recognised

⁹² Agallopoulou, a member of the 2002 Committee, had suggested that surrogates should be younger than 35 years old, but it was rejected (Agallopoulou and Koutsouradis (n19) 69).

⁹³ Skorini-Paparrigopoulou (n66) 29.

⁹⁴ Single-Member Court of First Instance of Korinthos no.224/2006. Trokanas criticised this decision and suggested that the age limit should apply to surrogates and IMs, because the case-by-case scrutiny of applications for surrogacy may lead to the limitation of reproductive autonomy (Trokanas (n1) 203).

⁹⁵ Sawyer, P. 'Greek grandmother becomes world's oldest surrogate mother' (23/12/2016) <<http://www.telegraph.co.uk/news/2016/12/23/greek-grandmother-becomes-worlds-oldest-surrogate-mother/>> accessed on 04/01/2017.

⁹⁶ Article 9(1) Greek Code of Practice (CoP) 2017. Also, the surrogate should have a child of her own, and must have had no more than two caesarean sections.

⁹⁷ NAMAR's statement regarding the Greek CoP's criteria for surrogacy – Age limit for the surrogate at 45 (14/09/2017) <http://eaiya.gov.gr/deltio-typou-19-04-2017/> accessed on 10/01/2018.

relationships,⁹⁸ and single women.⁹⁹ As the law currently stands, ARTs are not available to same-sex couples, and it is doubtful whether surrogacy can be accessed by single infertile men. The surrogacy provision refers to a woman (the IM) who sets the process in motion.¹⁰⁰ Surrogacy is expressly available to single women,¹⁰¹ and all other permutations (married, in a legally recognised civil partnership (only available to opposite sex couples till recently), or in an enduring relationship), and the surrogate may also be married, in a civil partnership (legally recognised or not), or single.

As regards the rights of individuals who identify themselves as lesbians, gays, bisexuals and transsexuals (LGBTs), Greece cannot generally be described as progressive,¹⁰² which has a direct impact on their rights to access ARTs. Until recently, civil partnerships were not legally recognised as an option for same-sex couples,¹⁰³ which served indirectly to restrict their access to ARTs.¹⁰⁴ In 2013, Greece was condemned by the European Court of Human Rights for discriminating against same-sex couples on the basis of sexual orientation, because they could not form legal civil partnerships.¹⁰⁵ This judgment pushed the legislature to reform the law. In December

⁹⁸ ARTs were available to heterosexual partners in an enduring relationship even before the adoption of the civil partnerships regime (Law 3719/2008-Government Gazette 241/A/26.11.2008), and while the public debate about whether to regulate these partnerships was on-going. This makes the 2002 Law a very forward-thinking legislation.

⁹⁹ Memorandum-3089/2002, I(5).

¹⁰⁰ Article 1458 GCC.

¹⁰¹ Memorandum-3089/2002, I(5). The legislature did not oppose to single infertile women's right to access ARTs, because 'single-parent families were already a reality' (Trokanas (n1) 172; Agalopoulou and Koutsouradis (n19) 281-282; Pantelidou K, 'Observations on the draft legislation on Medically Assistance to Human Reproduction' (2002) B Private Law Chronicles 588; Kounougeri-Manoledaki (n1) 63; Skorini-Paparrigopoulou (n66) 77).

¹⁰² Homosexuality has been legal in Greece since 1951, and the rights of same-sex individuals are guaranteed by the GC: articles 4(1) (equality), 5(1) (freedom of expression), and 9(1) GC (protection of the private and family life). However, certain forms of bias against LGBT+ still exist in criminal and employment law (Papazisi T, 'European framework regarding homosexuality and the legal framework in Greece' (2000) Scientific Yearbook Armenopoulos 69-81; M. Pavlou, *Homophobia in Greece. Love for Equality* (Greek Institute for Rights- Equality and Diversity (i-red), 2009 http://www.i-red.eu/resources/publications-files/i-red_homophobia_in_greece2009--6.pdf, accessed on 25/05/2015).

¹⁰³ Papachristou T, 'Critical observations on the Law 3719/2008' (10/11/2008) Applications of Civil Law 1018; Kounougeri-Manoledaki E, 'The new Law 3719/2008: primary evaluation' (10/11/2008) Applications of Civil Law 1018; Papadopoulou (n69); Kantsa V, 'The price of marriage: same-sex sexualities and citizenship in Greece' (2014) 17(7) Sexualities 818-836; Kipouridou and Milapidou (n69) 37-41.

¹⁰⁴ Skorini-Paparrigopoulou (n66) 58; Fountedaki (n16) 178. Others argue that same-sex have a right to access ARTs under the conditions for heterosexual infertile couples and single infertile women: Vellis G, 'Issues from Law 3089/2002 on medical assistance to human reproduction (artificial reproduction)' (2003) C Private Law Chronicles 496; Papachristou (n66) 35; Rethymniotaki E, *Same-sex couples and medically assisted reproduction: sexual freedom, family life and/or parental relationship*, vol 18 (Kaiafa-Gbandi, M., E. Kounougeri-Manoledaki and E. Symeonidou-Kastanidou eds, Assisted Reproduction and Alternative Family Schemas-Publications of Medical Law and Bioethics, Sakkoulas 2014) 147-180).

¹⁰⁵ Vallianatos and Others v Greece, ECtHR Application no.29381/09 and 32684/09, 7.11.2013.

2015, a new Civil Partnerships' Law was enacted, under which same-sex couples gain the same tax and inheritance rights as married or registered civilly-partnered heterosexual couples.¹⁰⁶ However, this law made no reference to whether same-sex couples who register as civil partners have an express right to access ARTs and/or adoption services, which has been characterised as a missed opportunity.¹⁰⁷ In 2016, the Ministry of Justice announced that the government plans to reform Greek family law and provide such rights to same-sex couples.¹⁰⁸

Another possible statutory limitation to access concerns a single infertile man's right to have a child through surrogacy. The only express right for a man to have a child through ARTs is if he consents to his female partner's fertilisation.¹⁰⁹ Therefore, a single man's access to surrogacy is currently unregulated. Only one commentator argues for the extension of this right to single men, reasoning by analogy either based on his constitutional right to reproductive autonomy, or on the constitutional right for gender equality.¹¹⁰

The opponents of this view argue that there is no case of gender discrimination, as there are important differences between men and women with regards to infertility.¹¹¹ Specifically, a man's inability to reproduce does not fulfil the criterion of infertility because a man is not physically made to be able to carry a pregnancy and give birth.¹¹² Rather, his infertility is due to a physical inability typical for his gender, hence there is no gender bias. On the other hand, he may still face the same difficulty as an infertile

¹⁰⁶ Law 4356/2015. Proposals for legislation regarding same-sex couples' right to form civil partnerships had been completed since 2010 but had not been put to a vote until 2015.

¹⁰⁷ Hatzis A, *Gay Adoption in Greece* (Baros, V. and others eds, Childhood and Migration: Challenges for the Pedagogy of Diversity, Diadrasi: Athens 2016).

¹⁰⁸ --'Ministry of Justice: We are considering the matter of adoption by same-sex couples' (09/03/2016) <<http://www2.iefimerida.gr/news/255515/ypoyrgeio-dikaiosynis-exetazoyme-zitima-tis-yiothesias-paidion-apo-omofyla-zeygaria>> accessed on 20/02/2017. In mid-April 2018, a draft law was submitted to Parliament that, if approved, will provide rights to same-sex couples to foster a child, but no mention is made about their rights to adoption and/or to access ARTs (Kougiannou, A. 'Same-sex couples' right to foster children. What it means and how easily-achievable it is going to be.' (18/04/2018) https://www.huffingtonpost.gr/entry/ti-semainei-to-dikaioma-anadoches-paidion-kai-se-omofela-zeygaria-kai-poso-eekolo-tha-einai-gr_5ad73d84e4b029ebe01fca22 accessed on 20/04/2018).

¹⁰⁹ Article 1475(1) GCC. Also, Rethymniotaki (n104); Kipouridou and Milapidou (n69) 41.

¹¹⁰ Spyridakis I, *The new regulation of assisted reproduction and kinship* (Sakkoulas 2003) 33; Spyridakis (n90) 32.

¹¹¹ Kotzampasi (n74) 270; Papadopoulou-Klamari D, *Kinship. Establishment - Registration - Protection* (Sakkoulas 2010) 223-224.

¹¹² Articles 1455 GCC and 13 of 2005 Law (inability to carry and bring a pregnancy to term).

woman. Arguably, as the infertile single woman compensates her inability to reproduce through sperm donation and surrogacy, so would an infertile single man.¹¹³

Moreover, surrogacy for single men is available in the case of *post-mortem* reproduction, if the deceased woman (and former wife/registered partner of the man) had previously preserved her eggs and given consent.¹¹⁴ Presumably, then, the dead wife renders the man's request to be a single parent more acceptable.¹¹⁵ Therefore, by not providing an express right to single infertile men to access ARTs, Greek law seemingly shows its concern to protect the 'traditional' sexual family ideal, rather than a rejection and/or disapproval towards a single man's parenting abilities.

Greek judicial practice has dealt with two cases of single infertile men requesting permission for surrogacy. In 2008, a 43-year-old single man suffering from obstructive azoospermia was successful in his surrogacy application.¹¹⁶ The man and the surrogate proceeded to double donation IVF, and twins were born as a result. The following year, a different court authorised another single infertile man's application for surrogacy.¹¹⁷ In both cases, the judges grounded the permission on the men's constitutional rights to reproductive autonomy and gender equality.¹¹⁸

However, the Attorney General of the Appeal Court of Athens appealed against the first of the above cases, succeeding in reversing the first-instance decision.¹¹⁹ The reason given for the appeal was that there was no gender discrimination, because men are physically unable to carry a pregnancy, and the right to surrogacy is legally granted only to single infertile women.¹²⁰ Moreover, based on Greek law, judicial scrutiny in

¹¹³ Koumoutzis M, 'Greek Civil Code, Articles 1457-1458' in Georgiadis, A. and M. Stathopoulos (eds), *Greek Civil Code* (Law and Economy, 2nd edn, Sakkoulas 2003) 79; Trokanas (n1) 222.

¹¹⁴ Memorandum-3089/2002, II, article 1457. Kounougeri-Manoledaki disagrees with the argument that surrogacy should be available to single men by analogy to a man's right to post-mortem reproduction, because, in the latter case, we are still treating the deceased woman's inability to carry and bring a pregnancy to term, as the law requires. In the single man's surrogacy case, we are lacking the female infertility requirement ('Single-Member Court of Athens no.2827/2008' (2010) 9 Medical Law and Bioethics).

¹¹⁵ There is an interesting parallel here with a famous UK case (*R v HFEA (ex parte Blood)* [1997] 2 WLR 806), involving a widow's right to be artificially inseminated with her late husband's sperm, which she had preserved before his death, but the man had not consented to *post-mortem* reproduction. Ms Blood won her long legal battle in 2002. It was contended that a dead husband made the request for treatment 'respectable', even though the husband would not be able to share parenting. A more recent case is *L v HFEA & Secretary of State for Health* [2008] EWHC 2149 (Fam).

¹¹⁶ Single-Member court of Athens case no.2827/2008. For comments: Papachristou T, 'Single-Member Court of Athens no.2827/2008' (2009) *Private Law Chronicles* 817-819.

¹¹⁷ Single-Member Court of Thessaloniki no.13707/2009.

¹¹⁸ Opposite view by Papachristou (n66) 29.

¹¹⁹ Appeal Court of Athens case no.3357/2010.

¹²⁰ *Ibid.*

surrogacy establishes the IM's parenthood rights following the child's birth, and extinguishes the birth mother's (the surrogate's) rights. If the legal presumption of motherhood is, by analogy, applied to fatherhood, then the child would be denied the right to ever have a mother, not even through adoption, since there would be no legal mother to consent to the adoption.¹²¹

During the appeal, the man stated that between the time of the first instance decision and the birth of the twins, he had married a woman, and asked she be recognised as legal mother. However, the Appeal Court ruled this impossible; the woman did not participate in the surrogacy application and, therefore, she could only attain parenthood by adoption.¹²² As a result of the successful appeal, the surrogate was named the legal mother of the twins by gestation and birth,¹²³ and the man was instructed to seek parenthood through adoption.¹²⁴ The ruling was criticised by some commentators,¹²⁵ and the media.¹²⁶ While the 2008 decision of the Court of Athens was reversed, the 2009 decision of the Court of Thessaloniki, above, remains in place, meaning the law is still unclear regarding single infertile men's right to access formal legal surrogacy.

In summary then, under Greek law, surrogacy is available to women, whatever their relationship status, but it is debatable whether same-sex couples or single infertile men can access ARTs, including surrogacy.¹²⁷

- ***Welfare of the Child (WoC)***

Greek ART law lays down the protection of the 'best interests' of the child as its primary aim.¹²⁸ This principle is important in the context of ART regulation, as it

¹²¹ *Ibid.* Also Lekkas GK, *Medically assisted reproduction and parenthood under Greek law. Establishment of the 'socio-emotional' parenthood or the procreation without parenthood?* (Papachristou, T. K. and others eds, 21st Century Family Law: Coincidental and Fundamental Reforms - Law and Society in 21st century, Sakkoulas 2012) 41-42.

¹²² Appeal Court of Athens case no.3357/2010.

¹²³ *Ibid.*, based on article 1463 GCC.

¹²⁴ *Ibid.*

¹²⁵ Spyridakis (n110) 32; Spyridakis I, Assisted reproduction (Sakkoulas 2009); Vidalis (n66) 220. The majority of the theory follows a 'black letter law' approach (that surrogacy is only available to infertile women: Agallopoulou P, 'Surrogate Motherhood' (2004) *Digesta* 6; Kotzampasi (n74) 270; Papadopoulou-Klamari (n111); Lekkas (n121), and others).

¹²⁶ Tsimpoukis, P. 'The law denies twins from father who used a surrogate mother' (22/03/2014) <http://www.protothema.gr/greece/article/363934/o-nomos-sterei-apo-patera-ta-diduma-pou-apektise-me-parentheti-mitera/> accessed on 10/07/2017.

¹²⁷ It is also unclear whether transgender women can access ARTs in Greece.

¹²⁸ Article 1(2) 2005 Law. See also Kounougeri-Manoledaki E, 'The law as a tool of social monitoring of the medically assisted reproduction' (2001) 14 *Indictus* 149; Memorandum-3089/2002, II, article 1.

responds to the concern of avoiding causing harm to others.¹²⁹ As such, WoC may justify limitations to reproductive autonomy, in terms of access to ARTs and legal parenthood.

Notably, the 2002 Law made no reference to a WoC provision.¹³⁰ According to academic commentaries and the 2002 Law explanatory memorandum, Greek family law's approach, in general, is entirely child-centred;¹³¹ ARTs are considered to benefit the child, who would not have been born otherwise,¹³² so an express reference to WoC was considered redundant. However, the 2005 legislature introduced WoC to show that reproductive autonomy is subject to certain limits.¹³³ Under the current framework, WoC is assessed by judges, who authorise surrogacy agreements, and clinics, where the parties in a surrogacy arrangement undergo IVF.

Nevertheless, law does not specify any criteria for evaluating WoC,¹³⁴ and makes no reference to the weight that WoC should be given relative to the interests of others.¹³⁵ According to Trokanas, WoC may give unlimited discretion, first, to judges and, secondly, to ART professionals, to act as gatekeepers of access to ARTs.¹³⁶ Others suggest that WoC is to be considered merely as a declaration, rather than a tool to control people's suitability to parent a child.¹³⁷ Therefore, they argue, the principle

¹²⁹ Article 5(2) GC.

¹³⁰ Some members of the 2005 draft law Committee objected to including WoC in ARTs law, because there is no certainty that a child will be born as a result (Koumoutzis (n113) 76).

¹³¹ Trokanas T, *The application of medically assisted reproductive methods and the welfare of the child to be born* (Papachristou, T. K. and others eds, 21st Century Family Law: Coincidental and Fundamental Reforms - Law and Society in 21st century, Sakkoulas 2012) 121. Also, statement by Minister of Justice during the parliamentary debates for the 2002 legislation (26/11/2002), and Memorandum-3089/2002, I(4): '*a ban on the various forms of ARTs would not be the best measure, since it would victimise the most vulnerable party of all, the child born through a prohibited and unregulated practice.*'

¹³² Fountedaki (n16) 154; Papadopoulou-Klamari (n111) 228. However, Karasis argues that ARTs do not serve WoC (n72: 834).

¹³³ Article 1(2) 2005 Law. Also, Agallopoulou and Koutsouradis (n19) 45, 68, 74); Koutsouradis A, 'Issues of Surrogate Motherhood after the Law 3305/2005' (2006) 54 Legal Library 355.

¹³⁴ The existence of a stable and supporting environment is a crucial factor, as well as the IPs' ages, their medical history, and their ability to fulfil the child's needs (Athens Bar Association, 'Explanatory Report on Law 3305/2005' (2005) 53 Code of Legal Tribune 24; Koutsouradis (n133) 335).

¹³⁵ Memorandum-3305/2005 (II, article 1) cites the 2003 Code of Practice of the British HFEA as the point of reference for the criteria regarding the child's 'best interests' [3.12]. Also, Agallopoulou and Koutsouradis (n19) 45,68,74; Koutsouradis (n133) 355.

¹³⁶ Trokanas (n131) 123.

¹³⁷ *Ibid* 124; Karasis M, 'The crisis in Family Law after Law 3089/2002' (2004) Armenopoulos 1237; Koumoutzis (n113) 1237; Papadopoulou-Klamari (n111) 29; Papachristou T, *Assisted reproduction in the Civil Code* (Sakkoulas 2003) 213.

should be used only by the judiciary, and sparingly, namely only in instances where law expressly allows it, as for example in surrogacy cases.¹³⁸

With the exception of few court decisions placing importance on WoC, Greek judicial practice concerning surrogacy shows that WoC is an important principle but not the most important one. Hence, the child's interests are weighed against the IPs' interests.¹³⁹ However, in some cases, WoC has been used as a tool to deem the IPs unsuitable to become parents,¹⁴⁰ and, in some, it was linked to the IPs' ability to provide 'a real stable and supportive environment' for the child-to-be, and was a decisive criterion for providing access to surrogacy.¹⁴¹

- ***Consent to ART***

As I argued in Chapter 2, free and fully informed consent is central to reproductive autonomy, and, perhaps even more so, in the surrogacy context. According to two Greek scholars, the legal requirement for consent to ART shows that law recognises the reproductive autonomy of ART participants',¹⁴² and externalises the individual's will to form an agreement with the ART professional, and/or the clinic.¹⁴³ Most importantly, consent to ART establishes parenthood.¹⁴⁴ As will be seen in the following chapter, Greek law differs considerably from that of the UK on this point: UK law provides both for gestational and traditional surrogacy (in clinics, and at home). If the surrogate's fertilisation takes place at home, consent is unregulated.

Greek law requires ARTs participants to provide written consent before the start of clinical treatment.¹⁴⁵ If the couple is married, the consent form is an informal written document. Single infertile women and unmarried (heterosexual) couples, however, must provide consent through a notarised document,¹⁴⁶ which arguably makes it harder

¹³⁸ Trokanas (n131); Koutsouradis (n133) 357.

¹³⁹ Trokanas (*ibid*).

¹⁴⁰ Single-member court of Thessaloniki nos.40820/2007; 16574/2009; 10350/2010; 10351/2010.

¹⁴¹ Single-member court of Katerini no.408/2006; Single-member court of Rodopi no.400/2007; Single-member court of Thessaloniki no.838/2010 and 14946/2010. In Single-member court of Thessaloniki no.395/2009 the judge mentioned that the IPs are '*honest, they have a harmonious relationship, while their financial status is good, which will secure a comfortable life to the child-to-be*'. Additionally, in Single-member court of Thessaloniki no.14946/2010 and 16574/2009 the judiciary took into account '*the exhausting and costly attempts of the [IP's] to have a child through ARTs, which prove their innate desire to have a child and provide a loving and caring environment to the child-to-be*'.

¹⁴² Fountedaki (n16) 234.

¹⁴³ Trokanas (n1) 243.

¹⁴⁴ *Ibid* 244.

¹⁴⁵ Article 1456(1) GCC, and article 6 Greek CoP.

¹⁴⁶ *Ibid*.

for them access ARTs. The legislature explained that this extra formality is required because the man's consent will lead to an irrefutable legal presumption of his paternity,¹⁴⁷ hence he must be certain he wants to undertake this commitment. The unmarried woman's notarised consent also establishes her intention and commitment to becoming a mother.¹⁴⁸ Although potentially an inconvenience, it is doubtful it offers a significant obstacle in practice, since notaries are easily accessible across Greece, and the cost of this service is minimal.¹⁴⁹

Further, Greek law requires that consent is fully informed,¹⁵⁰ and establishes a duty for medical professionals to provide information about a wide range of issues, including the medical process of the chosen treatment, the actual and potential health risks, and an account of the main social, legal, and financial implications of the decision to have ART.¹⁵¹ Additionally, regulation recognises the value of professional counselling in the context of ARTs. The recent Code of Practice establishes a duty on clinics to offer professional counselling to all ARTs participants, especially to those using surrogacy and/or donated gametes, and those having multiple embryos implanted.¹⁵² Lastly, as in any other case of ARTs, all parties in a surrogacy arrangement can freely withdraw their consent before the embryo is transferred into the surrogate's body.¹⁵³

- ***Required health checks***

Under Greek law, before treatment starts, all ARTs participants must be tested for any condition that might affect a healthy pregnancy and delivery, and for any other serious illness, such as HIV/AIDS, Hepatitis B and C, and/or syphilis, that might be transmitted to the child.¹⁵⁴ In surrogacy, all parties (including the surrogate's partner,

¹⁴⁷ Memorandum-3089/2002, II, article 1456. This is based on the 'treatment together' rule that creates an irrefutable presumption of paternity (article 1475(2) GCC), which existed even before the enactment of the 2002 Law (Papadopoulou-Klamari D, 'Presumed father's consent to artificial fertilisation' (1994) 2 Critical Review).

¹⁴⁸ Kounougeri-Manoledaki (n1) 18.

¹⁴⁹ Nine notary associations, with more than 3,000 members, are located across Greece. The cost is approximately 50€ (<http://www.notarius.gr/info/1011>).

¹⁵⁰ Article 5(2) 2005 Law.

¹⁵¹ *Ibid*, and article 6 Greek CoP. See also Kounougeri-Manoledaki (n1) 28. Moreover, medical professionals treating patients without their consent are liable to pay damages (articles 330 GCC and 8 Law 2251/1994).

¹⁵² Article 22 Greek CoP.

¹⁵³ Article 1456(2) GCC.

¹⁵⁴ Article 4(2) 2005 Law.

if she has one),¹⁵⁵ must undergo these tests.¹⁵⁶ Additionally, they must undergo detailed psychiatric evaluation to ensure their emotional stability and determination to complete the surrogacy arrangement.¹⁵⁷ If the parties fail to prove this, they will be restricted from accessing surrogacy. This limitation is said to be guided by a concern for the welfare of the parties and of the child-to-be.¹⁵⁸

- ***Residence requirement for surrogacy***

Until recently, surrogacy was only allowed when both the IM and the surrogate were domiciled in Greece.¹⁵⁹ It is noteworthy that the 2002 draft Law did not include a residence rule; it was added by the Minister of Justice during the parliamentary proceedings to reduce welfare concerns about exploitation, and potential “trafficking” of poor foreign women to act as surrogates in Greece.¹⁶⁰ Later legislative amendments introduced criminal sanctions for violations of this provision.¹⁶¹ However, even if the domicile rule were violated, parenthood would remain unchanged.¹⁶²

The statutory limitation was not based on any empirical evidence of harm, and we have almost no knowledge of how the residence rule worked in practice. The Bioethics Commission reported in 2013 that ‘Greece is one of the most popular countries within Europe where “reproductive tourism” takes place’, and that cases of trafficking for egg donation and surrogacy had been brought to the Committee’s attention.¹⁶³ Yet, due to the paucity of empirical evidence, these claims remain unconfirmed.

According to Ravdas’ 2012 study, more than half of the women who have acted as surrogates in Greece were foreigners, with most of them having come from Eastern

¹⁵⁵ Memorandum-3305/2005, B, article 4; article 13(3) 2005 Law.

¹⁵⁶ Article 13(2), (3) 2005 Law redirects to the medical checks of article 4.

¹⁵⁷ *Ibid.* Article 1458 GCC also refers to the surrogate’s ‘suitability’, which includes her good psychological health (Kounougeri-Manoledaki (n1) 61).

¹⁵⁸ Memorandum-3305/2005, B.

¹⁵⁹ Article 8, 2002 Law. The domicile rule still applies under UK law.

¹⁶⁰ Minutes of parliamentary proceedings on 27/11/2002 and 3/12/2002. Also, Papazisi (n70) 81.

¹⁶¹ Article 26(8) 2005 Law.

¹⁶² Kounougeri-Manoledaki (n1) 65. Also Single-Member Court of Chania no.122/2008, between Greek IPs and an Albanian surrogate who was not a permanent resident of Greece. The judge was ready to grant permission, but the surrogate’s husband’s consent was missing. A further hearing was scheduled, but the parties broke off the arrangement and withdrew the application.

¹⁶³ Hellenic National Bioethics Commission Annual Report (10/06/2013), available at http://www.bioethics.gr/images/pdf/ETHSIES/Annual_2012-2013.pdf accessed on 03/03/2015 (hereafter *Bioethics Commission 2012-2013 Report*). This report also stressed the need for more stringent regulation for surrogacy through NAMAR, which had formally ceased operations in 2010, and was finally re-instated in March 2014 (Ministerial decision no.21142/Government’s Gazette 124/11.03.2014).

European countries and the Balkans.¹⁶⁴ Nevertheless, there is no evidence that women have been trafficked to act as surrogates, and, despite the limited sample, there is also no clear evidence of intentional exploitation.¹⁶⁵ Ravdas argues that, based on the judicial transcripts, judges considered the domicile requirement less important than other statutory requirements for surrogacy, and, in some cases, they were content with a vague statement that both women lived in Greece without requesting further proof.¹⁶⁶

In 2014, the legislature lifted the residence requirement, noting that the rule was not in line with the modern realities of surrogacy, and especially the phenomenon of cross-country medical care.¹⁶⁷ The new rule requires that one of the women, either the IM or the surrogate, reside in Greece at least temporarily.¹⁶⁸ This makes formal legal surrogacy in Greece available to foreign couples, but also enables the state to monitor and regulate the practice.¹⁶⁹

However, some have expressed fears that Greece could become yet another popular destination for cross-border surrogacy,¹⁷⁰ and that the risk of exploitation would increase without careful and efficient monitoring.¹⁷¹ For this reason, the legislature also re-established NAMAR, which, as will be discussed below, had only partly functioned for a limited time.¹⁷² A few months after the abolition of the residence rule, an Australian couple succeeded in accessing formal legal surrogacy in Greece.¹⁷³ More

¹⁶⁴ Ravdas (n10) conducted a study of 136 judicial decisions regarding surrogacy, which had been published by Greek courts during November 2009 and December 2011. He found that 91% of IMs were Greek, while only 54% of the surrogates were Greek and 38% foreigners. Also, 35% of the surrogates came from Eastern Europe and the Former Soviet Union and 21% of them came from the Balkans (Bulgaria, Albania, Romania, Moldova). Indicative examples of the surrogates' employment: housekeeper, hairdresser, beautician. More updated results (based on 256 decisions issued between 2010 and 2016) are expected to be published soon (Ravidas, 'Surrogate Motherhood', working paper).

¹⁶⁵ *Ibid.* Though some of the foreign surrogates in Ravdas' study (n10) were in low-paid employment, there is no evidence that they were exploited by the IPs.

¹⁶⁶ *Ibid.*

¹⁶⁷ Memorandum-4272/2014, Chapter 3.

¹⁶⁸ Article 17 Law 4272/2014, Government's Gazette A' 145/11.07.2014.

¹⁶⁹ Memorandum-4272/2014, Chapter 3.

¹⁷⁰ Kovacs, Stéphane. 'Greece, The Eldorado of surrogacy', *Le Figaro* (3/10/2014), available in French at <http://www.lefigaro.fr/mon-figaro/2014/10/03/10001-20141003ARTFIG00288-en-grece-l-eldorado-de-la-gpa.php>, accessed on 23/05/2015.

¹⁷¹ Memorandum-4272/2014, Chapter 3(3). Papachristou argued that the change in the residence rule is against the law's core objectives: the discouragement of reproductive tourism and the safeguarding against the risk of human trafficking (Papachristou TK, 'An unfortunate choice by the lawmaker' (2014) 8 Private Law Chronicles).

¹⁷² Article 21 Law 4272/2014.

¹⁷³ Norris-Ongso, P. 'Surrogacy in Greece. First Australian IPs Obtain Court Approval' (5/11/2015) <https://www.globalsurrogacy.world/news/greece/surrogacy-in-greece-first-australian-ips-obtain-court-approval/> accessed on 6/11/2015

recently still, Ravdas' ongoing research identified surrogacy applications involving foreign IPs, especially from France and Italy.¹⁷⁴

3.3.2 REGULATION OF SURROGACY ARRANGEMENTS

In this section, I consider how Greek law regulates surrogacy arrangements once access has been agreed. The Greek legal model provides for intense state-monitoring at the preconception stage, and almost no monitoring after the child's birth, whereas, as we will see in the next chapter, in the UK, some surrogacy arrangements are completely unregulated, and others very little regulated at the start, but there is intense state-monitoring after the child's birth, if the IPs seek for their parenthood to be legally recognised.

- ***Monitoring of Greek surrogacy practice***

Under Greek law, surrogacy practice is regulated and monitored by the judiciary at the preconception stage, and by NAMAR. The IM requests the court' to approve the surrogacy agreement that the parties drafted and signed.¹⁷⁵ A judge must ensure that all legal requirements are met, that there are no clauses in the agreement that excessively restrict the surrogate's freedom (such as her right to a lawful abortion,¹⁷⁶ or her right to consent to medical interventions), and to authorise access to formal legal surrogacy. There is no requirement for a formal legal document for the agreement, although, in practice, it is often signed off by a notary,¹⁷⁷ which offers greater legal protection to the contracting parties. The IM must also submit a medical affidavit proving her medical need for surrogacy and the surrogate's good physical and emotional health.¹⁷⁸

However, the judge's power is very restricted: he/she can only check that all legal requirements are met and affirm that consent is valid. He/she cannot and will not

¹⁷⁴ Ravdas P, 'Surrogate Motherhood' (working paper).

¹⁷⁵ Article 1458 GCC. According to Single-Member Court of Thessaloniki no.27035/2003 only the IM can apply for the court's authorisation, and not her husband/partner. The court responsible for the review of surrogacy arrangements is the civil Single-Member Court of First Instance of the place of residence of either the IM or of the surrogate (articles 740 and 499(1) Code of Civil Procedure, as amended).

¹⁷⁶ Under the conditions of article 304 Criminal Code. However, a non-medically necessary abortion on the part of the surrogate may constitute a breach of contract, and the surrogate may be liable for damages to the IPs (Trokanas (n1) 358). Also, Vidalis (n14) 118; Papachristou (n66) 55).

¹⁷⁷ Papachristou (n66) 51; Kounougeri-Manoledaki (n1) 51; Koumoutzis (n113) 55; Vastaroucha, M. 'A practical guide to fertility legislation in Greece' (21/03/2016) <http://www.nomos.gr/en/fertility-law/> accessed on 10/09/2016; Single-member court of Thessaloniki no.13707/2009.

¹⁷⁸ Article 13, 2005 Law.

investigate the reasons for choosing surrogacy (other than to ensure that it is medically necessary), and will not look for evidence of a close relationship between the contracting parties, or a truly altruistic motivation.¹⁷⁹ Consequently, the judicial scrutiny process can be depicted as more of a procedural requirement, a ‘rubber stamp’, rather than a detailed review of surrogacy cases. One commentator notes that the reason for this could be that the judiciary considers it a “good deed” to facilitate infertile women becoming mothers.¹⁸⁰

The 2005 Law established NAMAR as an organisation with powers to monitor ARTs in clinics and issue regulation. Surrogacy falls inside NAMAR’s remit; because there can be no genetic link between the surrogate and the child, the ova must come from the IM or a donor,¹⁸¹ and pregnancy can only be attained through IVF in a clinic licensed by NAMAR.¹⁸² Nevertheless, NAMAR never functioned fully, and all its members resigned in 2010. According to a statement by a former member, since its establishment, NAMAR lacked administrative and financial support, which made its operation very difficult.¹⁸³ Hence, the practice of approximately 67 Greek fertility clinics, which were reportedly in operation, was unmonitored for many years, until recently.¹⁸⁴

However, before their resignation, the earlier members of NAMAR produced important work. In 2008, NAMAR issued two decrees; one stipulating what payments are legally acceptable in gamete donation and surrogacy, and another specifying the terms and conditions regarding the operation and monitoring of fertility clinics. The

¹⁷⁹ Hatzis (n1).

¹⁸⁰ Papazisi (n70) 85.

¹⁸¹ Kounougeri-Manoledaki E, 'Comments on the Single-Member Court of Heracleion no.678/2003' (2003) 57 *Armenopoulos* 1604; Agallopoulou P, 'Granting of permission for surrogacy' (2003) 2 *Critical Review* 242.

¹⁸² Article 16(1) 2005 Law.

¹⁸³ Skorini-Paparrigopoulou F, 'National Authority of Medically Assisted Reproduction: Experiences and future perspectives' in Kaiafa-Gbandi, M., E. Kounougeri-Manoledaki and E. Symeonidou-Kastanidou (eds), *Medical Assistance in Human Reproduction. 10 years of the application of Law 3089/2002* (Sakkoulas 2013) 125. NAMAR seems to have fallen victim of political turbulence and expense cuts in the public sector due to the financial crisis since 2009.

¹⁸⁴ Karlatira P. '67 fertility centres [operating] without licence in our country [Greece]' (ProtoThema, 15/10/2014) <http://www.protothema.gr/ugeia/article/418527/horis-adeia-oi-67-monades-upovoithoumenis-anaparagogis-sti-hora-mas/>, accessed on 19/11/2014. This will hopefully change for the better now that NAMAR has been re-established and is now fully operating. Also: Paraskou A and Babu GP, 'The market for reproductive tourism: analysis with special reference to Greece' (2017) 2(16) *Global Health Research and Policy*.

latter required approval by the Minister of Health,¹⁸⁵ which, after much delay, came in 2015,¹⁸⁶ and gained legal force. The licensing process was completed in November 2017 by the newly reformed NAMAR,¹⁸⁷ which also issued a long-awaited Code of Practice introducing regulation with legal force.

- *Payments in surrogacy*

Surrogacy in Greece is allowed for altruistic reasons only.¹⁸⁸ Initially, the 2002 legislature deemed all payments for surrogacy illegal to avoid potential harm due to commodification,¹⁸⁹ but the 2005 Law took a more practical approach: payments are still illegal and constitute a criminal offence,¹⁹⁰ but there is an exception regarding payments for the surrogate's 'reasonable' expenses.¹⁹¹ These cover the costs for the surrogate's pregnancy, childbirth and childbed,¹⁹² as well as compensation for lost wages.¹⁹³ In 2008, NAMAR further specified the legally acceptable amount of 'reasonable expenses' at no more than €10,000 (approximately £8,865).¹⁹⁴ However, Hatzis reports that, in reality, payments to surrogates frequently exceed €12,000 (approximately £10,600) and refers to the possibility of payments "under the table" that go unmonitored.¹⁹⁵ More importantly, Greek law contains no specific mechanism

¹⁸⁵ Tarlatzis V, *The effect of law on the clinical practice of medically assisted reproduction* (Kaiafa-Gbandi, M., E. Kounougeri-Manoledaki and E. Symeonidou-Kastanidou eds, Medical assistance in Human Reproduction 10 years of the application of Law 3089/2002, Sakkoulas 2013) 8.

¹⁸⁶ Presidential decree of 31/07/2015 for the licensing and regulation of ART units.

¹⁸⁷ NAMAR's Chairman, Dr Arntsaklis, reported that there are currently 44 fertility clinics in operation, and they have all received licenses from NAMAR (Kougiannou, A. 'Huffington Post's big study on IVF in Greece' (05/12/2017) http://www.huffingtonpost.gr/entry/e-meyale-ereena-tes-huffpost-yia-tis-exosomatikes-sten-ellada_gr_5a25615de4b0a02abe928cf3 accessed on 10/12/2017).

¹⁸⁸ Articles 1458 GCC, 13 and 26(8) 2005 Law.

¹⁸⁹ Minister of Justice, parliamentary proceedings-21/11/2002.

¹⁹⁰ Article 26(8) 2005 Law declares sanctions of at least two years' imprisonment and liability for damages of at least 1,500€. Moreover, excess payments arguably invalidate the surrogacy agreement (Koutsouradis (n133) 348).

¹⁹¹ Article 13(4) 2005 Law.

¹⁹² Pregnancy costs include payments for IVF, legal expenses, pregnancy clothing, costs of healthy nutrition and medical care during pregnancy, counselling costs, costs of life and health insurance, travel costs, and expenses for phone contact with the IPs. The costs of childbirth include payments for the surrogate's postnatal care. (NAMAR Decree 36/2008, article 4; Trokanas (n1) 375).

¹⁹³ Article 13(4) 2005 Law. If the surrogate is unemployed, she can receive compensation for the equivalent of the basic pay (NAMAR Decree, *ibid*).

¹⁹⁴ NAMAR Decree *ibid*.

¹⁹⁵ Hatzis (n1) 13. This was confirmed by Ravdas (n10), who reported that, in 24% of surrogacy cases he studied, the surrogacy relationship could be described as 'purely altruistic' (the surrogate was the IM's mother, sister, aunt, sister-in-law), and 30% of the cases made a vague statement about the surrogate being 'a close friend'. In 20% of cases the surrogate was employed by the IM or her family but there were mentions of a friendship between the parties, and in 26% of the cases there was no reference to the social/professional relationship between. Two Greek clinics that participated in a small-scale quantitative study in McCandless *et al* (n2) reported payments of more than €14,000 to surrogates (for expenses).

to control excessive payments to surrogates other than NAMAR's duty to monitor ARTs in clinics and to report illegal activities to the courts.¹⁹⁶

The 2005 Law also bans the operation of commercial surrogacy agencies, and the advertisement of surrogacy services, but again makes no mention on how to monitor these practices.¹⁹⁷ Rather, sanctions for payments in surrogacy practice are arguably intended to have a 'chilling effect' to prevent commercial surrogacy. The Bioethics Commission recently reported that commercial surrogacy takes place in Greece,¹⁹⁸ and urged the state to control surrogacy practice more efficiently. Despite the lack of effective oversight, no cases involving harm due to illegal payments for surrogacy have ever reached Greek courts or been reported in the media.

3.3.3 Determination of parenthood following surrogacy

- ***Enforceability and intention-based parenthood***

Greek law introduces a particularly interesting process for the determination of parenthood that is starkly different to that in the UK and, indeed, most other countries. Greece is one of the few regimes worldwide that recognises intention as the basis of parenthood.¹⁹⁹ According to this principle, the meaning of biological truth is diminished, and intention is more important.²⁰⁰

Greek family law establishes the general presumption of motherhood based on the event of birth.²⁰¹ However, in surrogacy, the preconception judicial decision creates a legal presumption that the child's mother is not the one who gave birth to her, but rather the one who has obtained the court's permission, namely the IM.²⁰² This, in turn, leads to the surrogacy agreement becoming fully enforceable upon the child's birth, which is an extension of the intention-based parenthood model. Parenthood is immediate, certain, and in favour of the IM. There is no process to be followed other than the event of birth itself, and the registration of the child in the National Registry

¹⁹⁶ Article 20(1) 2005 Law.

¹⁹⁷ Article 26(8) *ibid.*

¹⁹⁸ [Bioethics Commission 2012-2013 Report \(n163\)](#).

¹⁹⁹ Horsey K, 'Challenging presumptions: legal parenthood and surrogacy arrangements' (2011) 22(4) *Child and Family Law Quarterly*, where she argues for the benefits of adopting an intention-based approach to parenthood following surrogacy arrangements in the UK.

²⁰⁰ Memorandum-3089/2002, II(1).

²⁰¹ Article 1463 GCC.

²⁰² Article 1464(1) GCC.

under the IM's name simply by submitting the court decision that authorised surrogacy.

Due to the enforceability rule, there is no right to a 'change of heart' except if it is a 'mutual change of heart',²⁰³ whereby the presumed legal mother can consent to the child being adopted by the surrogate. This does not affect the principle that the IM is the legal mother; it merely provides a legal avenue for reversing those effects. As noted above, the surrogate retains her autonomy during the surrogacy arrangement, since she must consent to all interventions. Consequently, enforceability only influences parenthood issues after the birth.

In practical terms, enforceability means that the event of birth creates a legal mandate for the surrogate to hand the child over to the IM, and for the IM (and now presumed legal mother) to receive the child. If the surrogate refuses to hand over the child, the IM can request the civil court to order the surrogate to do so, and the surrogate may face criminal charges for child abduction.²⁰⁴ On the other hand, the surrogate can request the court to force the IM to take the child up if she refuses to do so. The IM may also face criminal charges for desertion.²⁰⁵ However, no case has reached the national courts, either civil or criminal, requesting the enforcement of a surrogacy agreement, meaning that the rule possibly works well.

Nevertheless, the presumption of motherhood can be rebutted in court within six months after the child's birth if the surrogate or the IM present sufficient proof that the child is genetically related to the surrogate.²⁰⁶ If the application is successful, the surrogate will be considered the child's legal mother retrospectively, based on the general criterion of gestation and birth.²⁰⁷ Therefore, Greek law adopts the intention-based model of parenthood, but sets a significant limitation upon it: the surrogate is not to be genetically related to the child,²⁰⁸ because then she would fulfil all criteria of motherhood (genetics, gestation and birth), and it would be considered extremely unfair to force her to give away a child that she is related to.²⁰⁹ Yet, this provision

²⁰³ Kounougeri-Manoledaki (n45) 161-172; Kounougeri-Manoledaki (n1) 112.

²⁰⁴ Article 324 Criminal Code.

²⁰⁵ Article 306 *ibid*

²⁰⁶ Articles 1464(2) GCC, 614 and 615 Code of Civil Procedure.

²⁰⁷ Article 1463 GCC.

²⁰⁸ Article 1458 GCC and the Memorandum-3089/2002 do not expressly prohibit traditional surrogacy, but they certainly discourage it by making the presumption of maternity rebuttable (Koumoutzis (n113) 41. Spyridakis argues that traditional surrogacy is not prohibited but not advisable (n110: 31).

²⁰⁹ Minister of Justice, parliamentary proceedings 26/11/2002. It would also be illegal based on article 179 GCC.

creates an antithesis. Greek law takes intention very seriously, but places a lot of weight on genetics, too. This provision could be taken to show the law's concern to ensure that the 'gestational-only' rule must be respected.

According to the draft 2002 Law Committee, enforceability shows that the law trusts the sincerity of the parties' intentions and respects their autonomy to make their own choices.²¹⁰ Namely, the IPs are free to exercise their full reproductive autonomy and become parents, although they may not fulfil the criteria that traditionally establish kinship (genetic, coital and gestational components),²¹¹ and donors or surrogates also exercise their reproductive autonomy by offering their services without having to accept legal parenthood for a child they did not intend to raise.²¹² Moreover, it is considered that intention-based parenthood benefits the child, because it is in the child's 'best interests' to be raised by the parents who wanted her.²¹³ Secondly, enforceability is thought to protect the parties and the child from harm that could arise if one party decided to renege on the agreement.²¹⁴ Lastly, enforceability is considered to serve WoC, as the child knows with certainty who her legal parents are at birth, and the legal reality reflects the social reality of parenthood.²¹⁵ Arguably, it is also a way to decrease, or eliminate, the possibility of legal disputes over parenthood, which could be lengthy and stressful. On the other hand, altruism, which is also part of the Greek surrogacy regime, possibly does not bond well with enforceability. Perhaps the imbalance is owed to bad design; the draft 2002 Law did not exclude the practice of commercial surrogacy, but Parliament rejected it, thereby rendering the Greek regime a legal hybrid containing both altruistic and commercial elements.

- ***Determination of fatherhood following surrogacy***

Under Greek law, fatherhood is based on two criteria: relationship status with the legal mother and consent. The man who is married to or in a legally recognised civil partnership with the legal mother is presumed to be the legal father upon the child's birth.²¹⁶ In surrogacy, the IM's husband or registered (male) civil partner who had

²¹⁰ Agallopoulou and Koutsouradis (n19).

²¹¹ Johnson A, 'A biomedical perspective on parenthood' in Bainham, A., S. Slater and M. Richards (eds), *What is a parent? A socio-legal analysis* (Hart Publishing 1999) 47-49.

²¹² *Ibid.*

²¹³ Memorandum-3089/2002, II(1).

²¹⁴ Committee Meeting Minutes, 5/10/2002; Trokanas (n1) 373; Hatzis A, *Just in the oven: A Law and Economics Approach to Gestational Surrogacy Contracts* (Boele-Welki, K. ed, Perspectives for the Unification and Harmonisation of Family Law in Europe, Intersentia 2003) 417.

²¹⁵ Memorandum-3089/2002, II(1).

²¹⁶ Article 1465 GCC.

signed the surrogacy agreement will be considered the child's legal father immediately after birth by virtue of both his relationship with the legal mother and his consent.²¹⁷ It could, then, be argued that Greek law provides some weight to intention, but also a lot of weight to wanting to ensure that the 'traditional' sexual family ideal is preserved.

In the case of a *de facto* (non-legally) recognised relationship, fatherhood is purely based on consent; hence, the IM's (male) partner who consented to the surrogacy agreement and the surrogate's IVF, will be regarded the child's legal father,²¹⁸ even if he is not genetically related to her. Greek law does not regulate parenthood in cases of same-sex couples who have had a child through ARTs, including surrogacy.²¹⁹ Consequently, a lesbian IM can gain legal parenthood, but her partner cannot.²²⁰

In case of a successful rebuttal of the IM's presumption of motherhood, the surrogate's husband/registered (male) civil partner who had consented to surrogacy will automatically be considered the child's legal father.²²¹ If the surrogate (and now the child's legal mother) was in a non-legally recognised relationship, her partner who consented to her IVF is automatically the child's father by virtue of his consent.²²² Interestingly, in such a case, fatherhood is irrefutable.²²³ If the surrogate (and now legal mother) was single, the child will have no father at birth. The above provisions reflect the importance of robust advance consent to surrogacy, but also the law's concern to protect the 'traditional' family ideal, and the child's presumed interest to have parents who want her. Lastly, by virtue of the intention-based model of parenthood stipulated by Greek law, gamete donation is anonymous.²²⁴ Therefore, donors' reproductive autonomy receives full protection. Yet, donor anonymity could arguably violate the child's right to know her genetic origins.²²⁵

²¹⁷ Article 1471(2) GCC.

²¹⁸ Article 1475(2) GCC.

²¹⁹ Provided they gained access in the first place, since it is unregulated.

²²⁰ Not even through adoption, since same-sex couples right to adoption is unregulated.

²²¹ Memorandum-3089/2002, II(2), and article 1465(1) GCC.

²²² Articles 1456(1) and 1475(2) GCC.

²²³ Article 1478(2) GCC.

²²⁴ Article 1460 GCC. Also, Memorandum-3089/2002, II(2), article 1460.

²²⁵ Turkmendag I, 'The Donor-Conceived Child's 'Right to Personal Identity': The Public Debate on Donor Anonymity in the United Kingdom' (2012) 39(1) *Journal of Law and Society* 58-75; Blyth E and Farrand A, 'Anonymity in donor-assisted conception and the UN Convention on the Rights of the Child' (2004) 12 *International Journal of Children's Rights*. Due to lack of space, I will not discuss the ethics of donor anonymity. In the UK, donor anonymity was abolished in 2005 (HFEA (Disclosure of Donor Anonymity Information) Regulations 2004).

3.4 CONCLUSION

This chapter presented several interesting and distinctive factors of Greek law pertaining to surrogacy. Greek law recognises an express right to have a child through ‘traditional’ or artificial means, including surrogacy, and places great importance on the principle of WoC. Unlike in the UK, WoC is not paramount in Greece, but is rather weighed in the balance with the IPs’ and the surrogate’s rights to autonomy and welfare. Access to surrogacy is restricted to women with a medical need for treatment, who are under 50 years old, and who are married or in a legally recognised civil partnership (which was only available to opposite sex couples only until recently). Surrogacy is only allowed for altruistic reasons, but compensation for ‘reasonable expenses’ up to €10,000 is permissible. Additionally, only gestational surrogacy is available in Greece, and it is only practised in clinics.

The most distinctive features of Greek regulation concern the determination of parenthood following surrogacy: unlike the UK and most other jurisdictions in the world, in Greece, intention is the basis of parenthood and surrogacy agreements are enforceable after the child’s birth. Greek law introduces a legal presumption of motherhood based on the preconception judicial authorisation for surrogacy, again placing weight on intention. For this reason, donor anonymity is strictly protected. Nevertheless, by giving a limited right to surrogates to rebut the legal presumption of motherhood, Greek law still partly promotes the ‘traditional’ sexual family ideal, while also partly moving away from it.

In the following chapter, we will see that UK law has reached a starkly different position on many of these issues.

CHAPTER 4

The UK regulatory framework for surrogacy

4.1 INTRODUCTION

This chapter describes how surrogacy is regulated in the UK. As opposed to Greece, where law only accommodates gestational surrogacy (in clinics), UK regulation allows traditional and gestational altruistic surrogacy, and pregnancy can be achieved in a clinic, where the practice is regulated, or informally at home, which is unregulated. Greek surrogacy agreements are enforceable, and the IPs' parenthood is automatically acknowledged upon the child's birth. UK regulation provides for non-enforceable surrogacy agreements, and a post-birth judicial scrutiny leading to the transfer of legal parenthood from the surrogate (and any partner she may have) to the IPs through a PO, if the legal requirements are met.

The UK's first recommendation towards formal recognition and regulation of ARTs was made by the government-appointed Committee on Human Fertilisation and Embryology, chaired by the then Dame (now Baroness) Mary Warnock in 1984 (Warnock Report).¹ This led to legislation that criminalised commercial surrogacy,² and later to legislation regulating ARTs practice in clinics and parenthood following the use of regulated technologies.³ These Acts, along with subsequent legislative amendments, professional guidance (with no legal force) issued by the Human Fertilisation and Embryology Authority (HFEA), and common law principles (for example for the determination of parenthood in cases not involving ARTs), form the UK legal framework for surrogacy.

While my analysis focuses primarily on regulated aspects of surrogacy, some reference is made to UK informal surrogacy arrangements,⁴ which are largely

¹ Department of Health & Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd 9314, July 1984).

² Surrogacy Arrangements Act (SAA) 1985.

³ Human Fertilisation and Embryology Act 1990 (1990 Act).

⁴ Namely where the surrogate pregnancy is achieved at home and the parties do not go through a UK non-profit surrogacy organisation. Although surrogacy organisations are not formally licensed or regulated by the state, they have introduced self-regulation (sometimes strict rules, as we will see in the next chapters), which is why I do not regard surrogacy arrangements that go through an organisation as completely 'informal'.

unregulated and potentially dangerous.⁵ As in the previous chapter, I begin with an historical account of how UK surrogacy law has developed and proceed to set out how regulation has addressed the concerns laid out in Chapter 2 in the context of three broad themes: access, regulation of surrogacy arrangements, and parenthood. Throughout, I emphasise the major differences from the approach followed in Greece.

4.2 BACKGROUND AND HISTORICAL DEVELOPMENT OF UK SURROGACY LAW

As discussed earlier, Greek birth rates are among the lowest in Europe, and the infertility rate is quite high, while ARTs, including surrogacy, are considered acceptable ways to create a family. Moreover, the protection of ‘the family’ is a very important concern reflected in ART law and policy, and various legal provisions of ART support the supremacy of the ‘traditional family’.⁶

According to demographic data, the UK population was 64.6 million in 2014.⁷ A downward trend in births started in mid-2012,⁸ although the population has increased quite considerably in recent years due to immigration.⁹ Around one in seven UK couples suffer from infertility.¹⁰ Unlike Greek law,¹¹ UK law does not expressly recognise a right to have a child. As Riley notes, the rights conferred by the ECHR¹²

⁵ As proven by surrogacy cases involving deception: *Re N (A Child)* [2007] EWCA Civ 1053; *H v S (Surrogacy Agreement)* [2015] EWHC 36; *Re TT (Surrogacy)* [2011] EWHC 33, [2011] 2FLR 392; *JP v LP & Others (Surrogacy Arrangement: Wardship)* EWHC 595 (Fam), [2015] 1 FLR 307; *Re X (A Child)* [2016] EWFC 54, [2016] EWFC 55; *Re M (Child)* [2017] EWCA Civ 228. Horsey K and Sheldon S, 'Still Hazy After All These Years: The Law Regulating Surrogacy' (2012) 20 Med Law Rev 73; Jackson E, 'The law and DIY assisted conception' in Horsey, K. (ed), *Revisiting the Regulation of Human Fertilisation and Embryology* (Routledge 2015).

⁶ Chapter 3 'Background and historical development of Greek ART law'; J. Grant and S. Hoorens, *The new pronatalism? The policy consequences of population ageing* (RAND Europe 2006).

⁷ Office for National Statistics (ONS), <http://ons.gov.uk/ons/taxonomy/index.html?nscl=Population>

⁸ The total fertility rate (TFR) in 2013 was 1.85 children per woman (c.p.w.) with a TFR of 2.1c.p.w. to reach the replacement level (ONS, <http://www.ons.gov.uk/ons/rel/vsob1/birth-summary-tables--england-and-wales/2013/info-births-2013.html>, accessed on 14/10/2015). The UK's TFR was at its lowest in 2000 (1.64), but it has been stable since 2010 (1.92) till it fell in 2013 (Eurostat, <http://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do>, accessed on 14/10/2015). G. Lanzieri, *Towards a 'baby-recession' in Europe? Differential fertility trends during the economic crisis* (Eurostat, European Union 13/2013, 2013). See also, Jessica Brown's study on pro-natalism in British printed media between 2000 and 2003 ('In Praise of Good Breeding: Pro-Natalism and Race in the British Print Media' (2003) 15(3) Journal of Women's History 161-165).

⁹ BBC, 'UK population increases by 500,000 official figures show' (25/06/2015) <<http://www.bbc.co.uk/news/uk-33266792>> accessed on 14/10/2015.

¹⁰ NHS, <https://www.nhs.uk/conditions/infertility/>, accessed on 16/04/2018.

¹¹ The Greek Constitution recognises a right to have a child through 'traditional' and artificial means as an extension to the freedom of expression (Chapter 3, p.89-90).

¹² Articles 8,12,14 ECHR. Certain articles of the ECHR were incorporated into the Human Rights Act (HRA) 1998.

only provide fertile people with a negative right of non-interference,¹³ and do not create ‘a duty [on the state] to assist in the founding of families for those who cannot do so naturally’.¹⁴

Since the late 1970s and the birth of the first ‘tube-baby’,¹⁵ the UK has led the way in the practice and regulation of ARTs. In 1982, the UK government appointed the Warnock Committee to consider how recent and potential developments in assisted reproduction should be regulated.¹⁶ One of the issues to be explored was surrogacy, which was identified as a practice that ‘can cause public concern’.¹⁷ The Committee was primarily interested in the possibility of exploitation in commercial surrogacy arrangements.¹⁸

The majority agreed that commercial surrogacy is ‘contrary to public policy’,¹⁹ ‘a risky undertaking for those involved’,²⁰ ‘totally ethically unacceptable’,²¹ because it distorts ‘the relationship between mother and child’,²² and ‘is the wrong way to approach pregnancy’.²³ The Committee advised commercial surrogacy be made a criminal offence,²⁴ and all surrogacy agreements be unenforceable.²⁵ An acceptable remedy to infertility would be adoption (rather than ARTs).²⁶

However, the Committee’s dissenters were more sympathetic towards the pressures that might lead one to resort to commercial surrogacy. They believed the risk of exploitation in commercial surrogacy was not ‘clear-cut’,²⁷ and the exchange of

¹³ Concerning the availability of free contraception and access to abortion services (under the conditions of the Abortion Act 1967). Stone J, ‘Infertility treatment: a selective right to reproduce?’ in Byrne, P. (ed), *Ethics and Law in Health Care and Research* (John Wiley and Sons 1990) 66.

¹⁴ Riley L ‘Equality of access to NHS-funded IVF treatment in England and Wales’ in Horsey, K. and H. Biggs (eds), *Human Fertilisation and Embryology: Reproducing Regulation* (Routledge-Cavendish 2007) 101-103. In *North West Lancashire H.A. v A, D and G* [2000] 1 WLR 977: ‘article 8 imposes no positive obligation to provide treatment’. The right to found a family through adoption (based on article 12 ECHR) was refused in *X & Y v United Kingdom* [1978] 12 DR 32. *Mellor (The Queen on the Application of Mellor v Secretary of State for the Home Department* [2001] 3 WLR 533) ruled that art.12 could not establish a prisoner’s right to have a child. Art.14 (non-discrimination) does not ground a right to have a child, because it can only be engaged if there are ‘rights and freedoms set forth in [the ECHR]’, and no such right is expressly provided.

¹⁵ Louise Brown, born in England in July 1978.

¹⁶ Warnock Report, Terms of reference.

¹⁷ *Ibid* [1.3].

¹⁸ *Ibid* [8.12],[8.17].

¹⁹ *Ibid* [8.5].

²⁰ *Ibid* [8.6].

²¹ *Ibid* [8.17].

²² *Ibid* [8.11].

²³ *Ibid*

²⁴ *Ibid* [8.18].

²⁵ *Ibid* [8.19].

²⁶ *Ibid* [8.20].

²⁷ *Ibid*, Expression of Dissent, A[3].

money should not prevent the IPs from adopting the child.²⁸ They also maintained that surrogacy should be run by a state-licensed non-profit surrogacy agency and operate like an adoption agency.²⁹ Although Baroness Warnock agreed with the majority's opinion at the time, she later stated that 'probably this minority was right',³⁰ and that she now feels 'ashamed' of her earlier stance towards surrogacy.³¹

After the Warnock Report was published, news emerged about '*Baby Cotton*', a baby born to a UK surrogate, Kim Cotton, in exchange for money.³² This was at a time when UK surrogacy was completely unregulated. Mrs Cotton was commissioned by a US surrogacy agency to be artificially inseminated with the sperm of the male partner of a childless Swedish couple. She gave birth to a baby-girl in a London hospital on 4 January 1985 and received a payment of £6,500.³³ She was subsequently forced to leave the hospital without the baby, after the Social Services Department obtained a place of safety order in respect of the child,³⁴ and was prevented from handing the child over to the intended father. The father applied to the High Court requesting that he and his wife be recognised as the child's caretakers, and be granted permission to take the child back to the US.³⁵ The judge found that Ms Cotton had consented to relinquishing her parental rights, and that it was in the child's best interests to be with her biological father and his wife, because they were able to provide for the child's material and emotional needs and offer a suitable home. Also in 1985, a UK court ruled on another 'alarming' surrogacy case. In *A v C*,³⁶ the surrogate was paid £3,000 and decided to keep the child, while the intended father was awarded limited access, but not custody. On appeal, the surrogate succeeded in keeping the child, who was deemed to be the product of a 'sordid commercial bargain'.³⁷

²⁸ *Ibid* [7].

²⁹ *Ibid* [5], [6].

³⁰ Warnock M, *Making Babies. Is there a right to have children?* (OUP 2002) 88, 93; Horsey, K. and S. Avery. 'Meeting Mary Warnock' <http://www.bionews.org.uk/page.asp?obj_id=611935&PPID=611933&sid=452> accessed on 1/02/2016. Parts of the interview can be found at https://www.youtube.com/watch?v=1_Rf5ujW_vg.

³¹ Horsey and Avery (*ibid*), at 8:50'.

³² *Re C (A Minor) (Wardship: Surrogacy)* [1985] FLR 846; Cotton K, 'The UK's antiquated laws on surrogacy: a personal and professional perspective' (2016) 4(3) JMLE 229-235.

³³ *Ibid*

³⁴ Under the Children and Young Persons Act 1969.

³⁵ *Re C* [1985] (n32).

³⁶ *A v C* [1985] FLR 445. It was heard in 1978, but judgment was made in 1985.

³⁷ *Ibid* at 455.

Amid panic that commercial surrogacy would become common in the UK, as in some parts of the US,³⁸ and due to a concern to protect and preserve ‘the family’,³⁹ a Bill ‘was rushed through Parliament’ to prevent commercial agencies from being established in the UK,⁴⁰ with the Surrogacy Arrangements Act (SAA) enacted in 1985.⁴¹ While the SAA aimed at regulating surrogacy practice,⁴² it merely defined the term ‘surrogate mother’,⁴³ and criminalised commercial surrogacy activities by prohibiting: surrogacy brokering;⁴⁴ payments for negotiations for surrogacy;⁴⁵ and advertisement of surrogacy services.⁴⁶ The SAA did not go as far as the Warnock Committee recommended; it only targeted surrogacy agencies and brokers, not persons.⁴⁷ Later in 1985, a draft bill proposed the criminalisation of all forms of surrogacy,⁴⁸ but it fell.⁴⁹

Due to the SAA’s name and the ambitious aims laid down in its long title, there is, arguably, a misconception that UK law provides a comprehensive regulatory response to surrogacy. In fact, the SAA does not regulate altruistic surrogacy, or the activity of non-profit surrogacy organisations or legal parenthood following surrogacy. It merely ensured that surrogacy ‘could survive without thriving’.⁵⁰ Mainly due to the haste with which the SAA was adopted, it has been described ‘an ill-considered and largely irrelevant panic measure’,⁵¹ which created a perception that surrogacy was immoral and against public policy.⁵²

In 1989, UK Parliament considered how to regulate ARTs in clinics, and legal parenthood following such treatments.⁵³ Initially, surrogacy was not part of this action.

³⁸ Warnock (n30) 89; Harry Greenaway MP, *Hansard* vol.77, col.45.

³⁹ Peter Bruinvels MP, *ibid*, col.43.

⁴⁰ Warnock (n30) 89.

⁴¹ SAA 1985 (16/07/1985).

⁴² *Ibid*, in the SAA’s long title.

⁴³ s.1(2) *ibid*.

⁴⁴ s.2 *ibid*.

⁴⁵ s.1(4) *ibid*.

⁴⁶ s.3(3)(4) *ibid*.

⁴⁷ The reasoning behind this was to ‘avoid the birth of a child whose mother or family are subject to the taint of criminality’ (Warnock Report [8.19]). In *Re An Adoption Application (Surrogacy)* [1987] 2 All ER 826, Latey J held that payments to a surrogate were a compensation for her time and inconvenience, and there was no breach of s.57(3) Adoption Act 1976 (rendering payments or reward in consideration of the adoption of a child unlawful).

⁴⁸ Surrogacy Arrangements (Amendment) Bill 1985.

⁴⁹ *Hansard*, HL Deb 08 April 1986, vol.473, cc.60-186.

⁵⁰ Lee RG and Morgan D, *Human Fertilisation and Embryology. Regulating the Reproductive Revolution* (OUP 2001) 6.

⁵¹ Freeman M, ‘Is surrogacy exploitative?’ in McLean, S. (ed), *Legal Issues in Human Reproduction* (Gower Publ., Aldershot 1989) 165.

⁵² *Re P (Minors) (Wardship: Surrogacy)* [1987] FLR 421.

⁵³ Later leading to the enactment of the HFE Act 1990 (1990 Act).

Johnson argues that surrogacy was only included in the 1990 Act because it may involve the use of donated genetic material, which must take place in a licensed clinic, as the Act prescribes.⁵⁴ Before the 1990 Act, IPs' established their parenthood through adoption, and compensation to surrogates was unregulated.

While the HFE Bill was being considered by Parliament, Michael Jopling MP received a complaint by a couple in his constituency that they had to foster and adopt twins they had through surrogacy and who were biologically related to the couple, while the surrogate had relinquished custody. The couple had also initiated legal proceedings in the High Court to decide on the twin's parenthood.⁵⁵ Jopling proposed an amendment to the Bill regarding a legal mechanism to transfer parenthood to IPs that would act as a fast-track adoption process.⁵⁶ This was subsequently included in the 1990 Act.⁵⁷ The 1990 Act also inserted a section in the SAA stipulating the non-enforceability of all surrogacy agreements,⁵⁸ and established the HFEA, a government-appointed organisation with licensing, advisory, and monitoring roles for ARTs (including surrogacy in clinics).⁵⁹

The 1980's perception that surrogacy was immoral initially influenced professional engagement with surrogacy. In the 1980s, the British Medical Association (BMA) considered the practice 'unethical' and advised against it,⁶⁰ but, in 1996, it recognised surrogacy as a last resort solution to alleviate female infertility.⁶¹ A year later, another problematic surrogacy case made headlines in the UK. Karen Roche, a British woman, acted as a surrogate for a Dutch couple, and received a payment of £12,000 as

⁵⁴ Johnson MH, 'Surrogacy and the HFE Act' in Cook, R., S. Sclater and F. Kaganas (eds), *Surrogate Motherhood: International Perspectives* (Hart Publishing 2003) 93; Blyth E, 'Parental Orders and Identity Registration: One Country Three Systems' (2010) 32(4) *Journal of Social Welfare & Family Law* 346.

⁵⁵ *Re W (Minors) (Surrogacy)* [1991] 1 FLR 385.

⁵⁶ HFE Bill, Explanatory Notes, HL 5 February 2008 [Bill 70] 33.

⁵⁷ s.30 1990 Act. The PO provisions came into effect on 1/11/1994, a lot later than other provisions of the 1990 Act (effective since August 1991), because the issues arising from this were 'considerably more complex than they first appeared' (Tom Sackville MP, *Official Report*, House of Commons (26/10/1994), col.974). Parents who had had a child through surrogacy until April 1995 could ask a retrospective recognition of their parenthood through a PO.

⁵⁸ s.1A SAA 1985, inserted by s.36(1) 1990 Act.

⁵⁹ s.5 1990 Act.

⁶⁰ BMA, *Annual report of council, 1989-90, Appendix V: surrogacy report* (British medical journal 300 (6728), 1990) 39-48. The HFEA's first CoP did not include surrogacy-related guidance. Its 1993 amendment advised clinics to perform IVF-surrogacy 'only where it [was] physically impossible or highly undesirable for medical reasons for the commissioning mother to carry the child' (CoP, 2nd edn, 1993 [3.19]).

⁶¹ BMA, *Changing Perceptions of Motherhood. The Practice of Surrogacy in Britain* (Wiley-Blackwell 1996), hereafter '1996 BMA report'.

‘expenses’.⁶² The parties were put in touch through a non-profit surrogacy organisation founded by Kim Cotton in 1988.⁶³ Mrs Roche initially claimed a miscarriage, but then announced to the media that she and her husband would keep the child.⁶⁴ Various media reports at the time presented the UK ‘as the surrogacy capital of western Europe’.⁶⁵

In response, the then Health Minister, Tessa Jowell, ordered a Committee, chaired by Professor Margaret Brazier, to consider ‘*whether payments, including expenses, should continue to be made to surrogate mothers; whether a recognised body or bodies should regulate such arrangements; and if changes are required as a result to the [SAA 1985] and/or the [HFE Act 1990]*’.⁶⁶ The Brazier Report was published in 1998, and marks the point where ‘surrogacy becomes an “acceptable alternative” to other fertility treatments’.⁶⁷ The Committee made a number of recommendations for tighter regulation of altruistic surrogacy through a new Surrogacy Act and a new Code of Practice (CoP),⁶⁸ but advised that agreements should remain unenforceable.⁶⁹ Commercial surrogacy should continue to be illegal, although surrogates should still receive payments for expenses related to pregnancy and actual loss of earning.⁷⁰ The PO scheme for the transfer of parenthood should be preserved with some modifications,⁷¹ but surrogacy would be perceived as more akin to adoption than other forms of ARTs.⁷²

In 2005, the Department of Health announced a review of the HFE Act,⁷³ and an amending statute was enacted in 2008.⁷⁴ However, ‘not one of the Brazier Review’s

⁶² BBC News 'Biological Father to Fight for Custody of Surrogate Baby' (3/11/1997) <http://news.bbc.co.uk/2/hi/uk_news/21009.stm> accessed on 14/09/2015.

⁶³ Childlessness Overcome Through Surrogacy (COTS), <http://www.surrogacy.org.uk/>

⁶⁴ BBC News (n62).

⁶⁵ Lee and Morgan (n50) 204.

⁶⁶ M. Brazier, A. Campbell and S. Golombok, *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation* (HMSO, London Cm 4068, 1998), Executive Summary [1] ('Brazier Report').

⁶⁷ Freeman M, 'Does Surrogacy Have a Future after Brazier?' (1999) 7 *Med Law Rev* 3.

⁶⁸ Brazier Report [6.6],[7.19].

⁶⁹ *Ibid* [6.25],[8.14].

⁷⁰ *Ibid* [7.11].

⁷¹ *Ibid* [7.9],[7.22].

⁷² *Ibid* [6.13].

⁷³ DoH, *Review of the Human Fertilisation and Embryology Act: A public consultation* (London: DoH, 2005). Later, the DoH published a White paper containing ART-related policy recommendations (DoH, *Review of the Human Fertilisation and Embryology Act. Proposals for revised legislation including establishment of the Regulatory Authority for Tissue and Embryos*) (London: DoH, Cm 6989, 2006).

⁷⁴ HFE Act 2008 (2008 Act).

recommendations [was] formally implemented'.⁷⁵ The only legislative change relating directly to surrogacy was the extension of PO eligibility to same-sex couples and those in 'enduring family relationships'.⁷⁶ Single people have no statutory access to POs, which has been criticised as 'anachronistic and discriminatory',⁷⁷ especially since they have adoption rights.⁷⁸ Nevertheless, this change and that to the WoC criterion for access to ARTs, which will be discussed, legitimised alternative families, and promoted equality and reproductive autonomy.⁷⁹

However, the 2008 reform was not a wholesale review of UK surrogacy, as had been hoped,⁸⁰ and little progress has been made since then. The only recent changes in surrogacy regulation were the acknowledgement of the IPs' right to paid parental leave,⁸¹ and the provision of limited funding for ARTs.⁸² But things might change. In a Parliamentary debate in 2014, Jessica Lee MP described UK surrogacy law as 'outdated and ill-equipped'.⁸³ Following this, the then Minister for Public Health stated that the government might consider potential future reform of UK surrogacy

⁷⁵ Horsey and Sheldon (n5) 68.

⁷⁶ s.54, 2008 Act. Further guidance is offered by the HFEA (Parental Order) Regulations 2010 ('PO Regulations 2010'), the Family Procedure Rules 2010, the Home Office Border Agency for Inter-country surrogacy arrangements, and the HFEA *CoP* (8th edition, 2009).

⁷⁷ Fenton R, Heenan S and Reece J, 'Finally fit for purpose? The Human Fertilisation and Embryology Act 2008' (2010) 32(3) *Journal of Social Welfare & Family Law* 281.

⁷⁸ Under the ACA 2002.

⁷⁹ Fenton *et al* (n77) 278. Sheldon S, Lee E and Macvarish J, 'Supportive Parenting'. Responsibility and Regulation: The Welfare Assessment under the Reformed Human Fertilisation and Embryology Act (1990)' (2015) 78(3) *MLR* 487-489; Lee E, Macvarish J and Sheldon S, 'Assessing Child Welfare Under the Human Fertilisation and Embryology Act 2008: a case study in medicalisation?' (2014) 36(4) *Sociology of Health and Illness* 500-515.

⁸⁰ Fenton *et al* (n77); Horsey K and Neofytou K, 'The fertility treatment time forgot: What should be done about surrogacy in the UK?' in Horsey, K. (ed), *Revisiting the Regulation on Human Fertilisation and Embryology* (Routledge 2015) 117.

⁸¹ Children and Families Act 2014. This change came after a UK intended mother (IM) challenged the rule denying her maternity leave because she had not given birth (*RKA v Secretary of State for Work and Pensions* (2012)). The case was referred to the European Court of Justice, which ruled the woman had been discriminated against (*CD v ST (Surrogacy)* Case C-167/12).

⁸² Limited funding is available through the NHS Clinical Commissioning Groups (CCGs), subject to eligibility criteria set by the CCG of their place of residence (<http://www.nhs.uk/Conditions/Infertility/Pages/Treatment.aspx>). See also National Institute for Health and Care Excellence (NICE) guidance, (*Assessment and Treatment for People with Fertility Problems* CG11 (2013)). In June 2011, an all-party Parliamentary group commissioned a report into NHS IVF services. It was found that NHS does not always implement NICE guidelines for IVF funding (Gareth Johnson M, 'Holding Back the British IVF Revolution? A Report into NHS IVF Provision in the UK Today' (13/06/2011) http://www.bionews.org.uk/page_96927.asp). There is also an active campaign for fertility fairness, which found that 'just 12 per cent [of CCGs in England] now follow national guidance, down from 24 per cent in 2013' (Fertility Fairness, NHS IVF Provision Report (2017) http://www.fertilityfairness.co.uk/wp-content/uploads/2017/10/FertilityFairness_2017_PBRapor.pdf). On 18/04/2018, MP McCabe introduced a bill, which, if approved, will end postcode lottery in IVF in the UK (Pritchard, S. 'MP Steve McCabe calls for end to postcode lottery in Ten Minute Rule Bill' (23/04/2018) https://www.bionews.org.uk/page_135469 accessed on 23/04/2018).

⁸³ Hansard, 14/10/2014, col.1WH.

law.⁸⁴ In December 2016, the House of Lords held a surrogacy debate supporting legal reform,⁸⁵ and, in late 2017, the government laid a draft remedial order that, if approved, will extend PO eligibility to single IPs.⁸⁶ Moreover, in December 2017, the Law Commission confirmed that surrogacy would form part of its 13th Programme of Law Reform.⁸⁷

Despite the difficulty in estimating the prevalence of surrogacy,⁸⁸ there is evidence that UK surrogacy is increasing in recent years.⁸⁹ Crawshaw *et al* note various developments which ‘indicated a potential for [the numbers of PO applications] to rise’;⁹⁰ for example, the growing social acceptance of surrogacy,⁹¹ its gradual acceptance by medical professionals,⁹² its regular appearance in media stories,⁹³ the operation of surrogacy agencies in the UK and overseas, and the extension of the PO eligibility criteria. Crawshaw *et al* found that 887 POs were registered in England and Wales between 1995 and 2011, 133 of which were made in 2011 alone.⁹⁴ The Children and Family Court Advisory and Support Service (Cafcass), a non-departmental public body that represents children in family court cases, suggests surrogacy arrangements

⁸⁴ Jane Ellison *ibid*. She subsequently said ‘the Government has no current plans to change the legislation in respect of surrogacy arrangements’ (Hansard (3/03/2016) Written Answer to question–28369).

⁸⁵ HL Deb 14 December 2016, vol.777.

⁸⁶ Hansard (29/11/2017) Written statement-HLWS282.

⁸⁷ Law Com No.377, 2017.

⁸⁸ Lee and Morgan (n50) 194; Teman E, ‘The Social Construction of Surrogacy Research: An Anthropological Critique of the Psychosocial Scholarship on Surrogate Motherhood’ (2008) 67 *Social Science and Medicine* 1104; Horsey and Sheldon (n5) 74; Horsey K, *Surrogacy in the UK: Myth busting and reform*, Report of the Surrogacy UK Working Group on Surrogacy Law Reform (Surrogacy UK, November 2015) 13.

⁸⁹ HFEA, *Fertility treatment 2014–2016. Trends and figures* (HFEA, 2018); Law Com No.377, 2017 [2.41].

⁹⁰ Crawshaw M, Blyth E and van den Akker O, ‘The changing profile of surrogacy in the UK – Implications for national and international policy and practice’ (2012) 34(3) *Journal of Social Welfare & Family Law* 268-270.

⁹¹ A 2014 YouGov study shows 59% of British adults approve of gestational surrogacy, and only 21% reject it (http://cdn.yougov.com/cumulus_uploads/document/ubj8or4iat/InternalResults_140805_Surrogate_Mother.pdf accessed on 27/09/2014).

⁹² 1996 BMA report (n61); *CoP*. The HFEA identified 50 clinics that performed surrogacy in the UK in 2010-2012 (HFEA, *Freedom of Information Disclosure Log F-2013-00151-Surrogacy treatments and information between 2007 and 2012* (2013) <<http://www.hfea.gov.uk/8133.html>>. Norton *et al* found that 23 (42.6%) of the 54 UK clinics that responded to their study offered surrogacy, and 31 (57.4%) did not (Norton W and others, ‘A survey of UK clinics’ approach to surrogacy arrangements’ (2015) 21 *Reproductive BioMedicine Online* 329).

⁹³ For example, in popular TV shows (‘Coronation Street’; ‘Victoria Derbyshire’), and in newspapers (Foster, J. ‘I don’t care what people think. My baby’s loved, I’m happy and nothing else matters: Single gay man and his mum who gave birth to his surrogate son insist they’ve done nothing wrong’ (8/03/2015) <http://www.dailymail.co.uk/news/article-2985590/I-don-t-care-people-think-baby-s-loved-m-happy-matters-extraordinary-story-divided-Britain-single-gay-man-mother-gave-birth-surrogate-baby.html#ixzz43xHA6rs0> accessed on 25/03/2016).

⁹⁴ Crawshaw *et al* (n90) 267,269.

are increasing: ‘there were 138 applications for parental orders in April 2011-March 2012 rising to 241 applications in April 2014-March 2015’.⁹⁵ More importantly, overseas surrogacy, which brings about different and even more complex problems,⁹⁶ is reportedly increasing.⁹⁷ Nevertheless, with traditionally conceived ‘commercial surrogacy hubs’, such as India, slowly but steadily restricting or complicating access to non-natives,⁹⁸ IPs have fewer destinations to choose for overseas surrogacy. The upward trajectory is also evidenced by the ever-growing number of PO applications involving an international element.⁹⁹ However, the PO applications may not accurately reflect how many surrogacy arrangements occur; some IPs never apply for a PO, which essentially means that some children are being cared for by individuals who do not have legal parenthood.¹⁰⁰ Lastly, some IPs ‘illegally register themselves as the child’s parents (sometimes on the explicit advice of lawyers)’.¹⁰¹

4.3 UK LEGAL PROVISIONS FOR SURROGACY

4.3.1 ACCESS

Under UK law, access to surrogacy in clinics is limited to those who satisfy the welfare criteria, and who provide valid and informed consent. Accordingly, the statutory

⁹⁵ Holly Rodger (Cafcass), *Cafcass Study of Parental Order Applications made in 2013/14* (July 2015) 3.

⁹⁶ Elsworth M and Gamble N, 'Are Contracts and Pre-Birth Orders the Way Forward for UK Surrogacy?' (2015) IF 159; Crawshaw *et al* (n90). Fenton *et al* (n77) 282; Jackson E, 'UK Law and International Commercial Surrogacy: 'the very antithesis of sensible'" (2016) 4(3) JMLE 197-214; Doward, J. 'Childless UK couples forced abroad to find surrogates' (20/02/2016) <http://www.theguardian.com/lifeandstyle/2016/feb/20/childless-uk-couples-forced-abroad-surrogates> accessed on 25/03/2016. Also, *Re X & Y (Foreign Surrogacy)* [2008] EWHC 3030.

⁹⁷ Crawshaw *et al* (n90); Stuhmcke A, 'New wine in old bottles and old wine in new bottles: The judicial response to international commercial surrogacy in the UK and Australia' in Horsey, K. (ed), *Revisiting the Regulation of Human Fertilisation and Embryology* (Routledge 2015); Horsey's study (n88).

⁹⁸ Oswald, K. 'India moves to curb commercial surrogacy' (19/10/2015) http://www.bionews.org.uk/page_576944.asp accessed on 20/10/2015; Hoe Low, Chee. 'Thailand moves to ban commercial surrogacy' (18/08/2014) http://www.bionews.org.uk/page_446318.asp accessed on 27/09/2014; Nepal's Supreme Court also suspended the provision of such services to foreigners (Ilic, A. 'Nepalese court suspends commercial surrogacy' (1/09/2015) http://www.bionews.org.uk/page_561682.asp accessed on 14/10/2015). Commercial surrogacy was also banned in Cambodia (Sidhu, T. 'Cambodia moves to permanently ban commercial surrogacy' (29/08/2017) http://www.bionews.org.uk/page_878304.asp accessed on 06/01/2018). However, new 'hubs' are constantly popping up, with Mexico being very popular now (Richardson J, 'TV Review: Unreported World-Mexico's Baby Business' (30/11/2015) http://www.bionews.org.uk/page_576767.asp accessed on 25/03/2016).

⁹⁹ *Re X & Y* [2008] (n96); *Re L (a minor)* [2010] EWHC 3146 (Fam); *Re W* [2013] EWHC 3570 (Fam); *Re C (A Child) (Parental Order)* [2013] EWHC 2408 (Fam); *AB v DE* [2013] EWHC 2413 (Fam); *Re G, M* [2014] EWHC 1561 (Fam); *Re Z (Foreign Surrogacy: Allocation of Work) (Guidance on Parental Order Reports)* [2015] EWFC 90; *Re A (Foreign Surrogacy: South Africa)* [2015] EWHC 1756 (Fam), and many more.

¹⁰⁰ Crawshaw *et al* (n90) 270.

¹⁰¹ Blyth (n54) 345.

criteria for access to ARTs in the UK essentially rest upon ‘two pillars’: welfare, and consent.¹⁰² This is different in Greece, where law allows only gestational surrogacy that must take place in clinics, and establishes various eligibility criteria (medical need, age, WoC, relationship status, and, until recently, permanent residence). Also, the Greek regime provides for intense state-monitoring on the outset through judicial scrutiny and an assessment in the clinic.

UK law does not, in principle, exclude anyone from accessing ARTs, including surrogacy.¹⁰³ However, depending on the type of the surrogacy arrangement (traditional or gestational), and the place where the insemination takes place (in a clinic or at home), there are certain statutory limitations. If using traditional surrogacy, the parties can achieve pregnancy either in a clinic or at home. In the latter case, the parties enter into an informal surrogacy agreement, which is practically impossible to regulate. If the parties choose a clinical setting, either for insemination (traditional) or IVF (gestational) surrogacy, the statutory conditions for access to ARTs apply.¹⁰⁴

- *WoC assessments in clinics*

As in Greece, the UK regime prioritises the welfare of the child (WoC) when considering access to ARTs. The welfare clause was heavily contested during the draft 1990 Act debates,¹⁰⁵ but was later included in the Act.¹⁰⁶ Initially, it required clinics to consider ‘the child’s need for a father’ when deciding whether to provide access to ART. This provision was considered unfair and discriminatory, specifically against same-sex couples and single women,¹⁰⁷ and a ‘tax on the infertile who must prove their ability to parent’.¹⁰⁸ Further, it was criticised as ‘disingenuous and

¹⁰² Fox M, 'The Human Fertilisation and Embryology Act 2008: Tinkering At the Margins' (2009) 17 *Feminist Legal Studies* 333-334; Sheldon S, '*Evans v Amicus Health Care; Hadley v Midland Fertility Services*. Revealing Cracks in the "Twin Pillars"?' (2012) 16 *Child and Family Law Quarterly* 437.

¹⁰³ As discussed earlier, single men’s and same-sex couples’ right to access ARTs in Greek clinics is unregulated.

¹⁰⁴ s.3(1)(2) 1990 Act, as amended.

¹⁰⁵ HL Deb 6 February 1990, vol.515, cc.788-804.

¹⁰⁶ s.13(5) 1990 Act.

¹⁰⁷ Douglas G, 'Assisted Reproduction and the Welfare of the Child' (1993) 46 *CLP*.

¹⁰⁸ Fenton *et al* (n77) 277. Also, Fenton R and Dabell F, 'Treatment provisions: Proposals for reform of the Human Fertilisation and Embryology Act 1990' (2007) 29(3) *Journal of Social Welfare & Family Law* 293-305; Jackson E, *Regulating Reproduction: Law, Technology and Autonomy* (Oxford Hart Publishing 2001); House of Commons (Science and Technology Committee), *Human Reproductive Technologies and the Law* (Fifth Report of Session 2004-5. HC 7-I, 2005) at [91-101] ('HCSTC Report'); Pennings G, 'Measuring the welfare of the child: in search of the appropriate evaluation principle' (1999) 14(5) *Human Reproduction*; Thomson M, 'Legislating for the Monstrous: Access to Reproductive Services and the Monstrous Feminine' (1997) 6 *Social and Legal Studies* 401.

illegitimate',¹⁰⁹ 'incoherent and essentially meaningless',¹¹⁰ and an unjustifiable intrusion to individual reproductive autonomy.¹¹¹

These criticisms and a few other legislative developments, such as the prohibition of discrimination based on sexual orientation,¹¹² and the formal recognition of same-sex couples as partners,¹¹³ and as parents,¹¹⁴ motivated the legislature to re-consider the WoC criterion. In 2008, the statutory limitation regarding the child's 'need for a father' was replaced by 'the child's need for supportive parenting'.¹¹⁵ The Act left it to the HFEA to decide what this would include. The child's 'need for supportive parenting' was defined as

*'a commitment to the health, well-being and development of the child. (...)Where [ART] centres have concern as to whether this commitment exists, they may wish to take account of wider family and social networks within which the child will be raised'.*¹¹⁶

Moreover, the CoP required the clinic to take into account the IPs' medical history,¹¹⁷ and various other factors to evaluate how the child-to-be would enjoy 'supportive parenting',¹¹⁸ and 'decide whether there is a risk of significant harm or neglect' to the child-to-be 'or any other child who may be affected by the birth'.¹¹⁹ Additionally, in surrogacy cases, the CoP advised clinics to consider 'the possibility of breakdown' in the arrangement, and its potential effect on the child-to-be and on any other existent child (the surrogate's child, if she has one).¹²⁰

Though the reform to the WoC criterion meant the two-parent sexual family norm became less important, some problems remained; WoC can still influence some people's access to ARTs, and surrogacy in clinics, which makes medical professionals 'the gatekeepers' of ARTs.¹²¹ On the other hand, surrogacy arrangements that occur outside clinics escape the welfare assessment completely. Further, some argue that the

¹⁰⁹ Jackson E, 'Conception and the Irrelevance of the Welfare Principle' (2002) 65 MLR 177.

¹¹⁰ *Ibid* 178. For a different opinion: Laing JA and Oderberg DS, 'Artificial Reproduction, the 'Welfare Principle' and the Common Good' (2005) 13 MLR 328.

¹¹¹ HCSTC Report (n108) 6.

¹¹² Equality Act 2006.

¹¹³ Civil Partnerships Act 2004 and Marriage (Same Sex Couples) Act 2013.

¹¹⁴ ACA 2002.

¹¹⁵ s.13(5) 1990 Act, as amended.

¹¹⁶ *CoP* (2009) [8.11].

¹¹⁷ *Ibid* [8.9].

¹¹⁸ *Ibid* [8.11].

¹¹⁹ *Ibid* [8.2],[8.3],[8.10].

¹²⁰ *Ibid* [8.12].

¹²¹ Fox (n102) 337; Fenton *et al* (n77) 278; Gamble N, 'Considering the Need for a Father: The Role of Clinicians in Safeguarding Family Values in UK Fertility Treatment' (2009) 19 Reproductive BioMedicine Online. But, see Sheldon *et al*'s and Lee *et al*'s studies (n79) about how WoC assessments work in clinical practice.

welfare of a not-yet conceived and possibly never-to-be conceived child should not be prioritised over the IPs' autonomy,¹²² especially since there is no certainty whether the WoC provision does indeed protect the child's best interests.¹²³

Despite the criticisms of the WoC assessment, empirical studies performed in the early 1990s reported that it made little difference in clinical practice, and single women and lesbian couples were not excluded from ARTs merely based on welfare concerns,¹²⁴ but primarily on ideas about the 'appropriate' family.¹²⁵ A recent study confirmed that the legislative reforms 'represented a case of the law changing to reflect clinical practice rather than vice versa'.¹²⁶ It also showed that usually clinics base their decisions on a presumption to treat, and there are very few cases of refusal of access based on WoC, though couples still have more preferential treatment than singles.¹²⁷ Nevertheless, the study highlights that ineligibility for public funding for ARTs may sometimes prevent access,¹²⁸ although it is not a statutory access requirement. Also, clinics impose their own access requirements, for things which may impact their success rates,¹²⁹ and possibly prevent some people from accessing ARTs.

- **Consent**

As discussed in Chapter 2, the provision of unconditional, free, and fully informed consent is very important in ARTs. Unsurprisingly, consent was and remains at the heart of UK law on ARTs.¹³⁰ As in Greece, UK law requires all ART participants to provide clinics with written consent prior to treatment.¹³¹ The use of gametes or

¹²² Cohen G, 'Beyond Best Interests' (2012) 96 *Minnesota Law Review* 1187; Jackson (n109) 177.

¹²³ Thorpe *et al* explain that WoC assessments in Victorian ART practice are used to reassure 'the wider community that ART is strongly regulated' rather than to ensure that children's interests are protected ('New Assisted Reproductive Technology Laws in Victoria: A Genuine Overhaul or Just Cut and Paste?' (2011) 18 *Journal of Law and Medicine* 835).

¹²⁴ G. Douglas, *Access to Assisted Reproduction: Legal and other criteria for eligibility. Report of a survey funded by the Nuffield Foundation* (1992); Douglas (n107); Blyth E, 'The United Kingdom's Human Fertilisation and Embryology Act 1990 and the Welfare of the Child: A Critique' (1995) 3 *The International Journal of Children's Rights*; Lieberman BA, Matson P and Hamer F, 'The Human Fertilisation and Embryology Act: How Well is it Functioning?' (1994) 9 *Human Reproduction*; Patel JC and Johnson MH, 'A Survey of the Effectiveness of the Assessment of the Welfare of the Child in UK In-Vitro Fertilization Units' (1998) 13 *Human Reproduction*.

¹²⁵ Douglas *ibid*; Douglas (n107).

¹²⁶ Sheldon *et al* (n79) 468.

¹²⁷ *Ibid*. However, prospective patients (often single women) may be 'counselled out' of the treatment process in ART clinics (*ibid* 486).

¹²⁸ Sheldon *et al* (n79).

¹²⁹ For example, age, weight, smoking, previous pregnancy history etc. (Fertility Fairness, NHS IVF Provision Report (n82); NICE Guidelines (n82) 13). In a sense, in terms of success rates, surrogacy could be an attractive treatment option for clinics, because surrogates are unlikely to have fertility issues, which could mean that the chance of conception and a successful pregnancy are high.

¹³⁰ Fenton *et al* (n77) 282; Sch 3, s.7, 1990 Act, as amended.

¹³¹ Sch 3, ss.1(1)-(3), 2(1)-(3), 6, 8 *ibid*.

embryos without consent ‘may breach the licence issued by the HFEA to the ‘person responsible’ for the clinic where the treatment services are offered;¹³² it may amount to a criminal offence; and it may affect the status of any child born of those treatment services’.¹³³

Additionally, UK law requires consent to be informed, which can be achieved through the offer of information and counselling.¹³⁴ This should include a discussion directed at enabling participants to understand the implications of the treatment.¹³⁵ Counselling is not mandatory, but it should be offered,¹³⁶ and it should be aligned with professional guidance on good practice in infertility counselling.¹³⁷ Moreover, the clinic should offer information about the financial cost of treatment,¹³⁸ and legal parenthood,¹³⁹ and discuss its implications for the future parents and the child-to-be.¹⁴⁰ In cases of surrogacy, clinics should offer specific information about the effect of POs,¹⁴¹ advise the parties that surrogacy agreements are unenforceable, and prompt them to seek legal advice.¹⁴² Additionally, the CoP clearly states that IPs and surrogates who provide their own gametes when a surrogate pregnancy is attained in a clinic are considered donors.¹⁴³

¹³² The ‘person responsible’ ensures that the clinic adheres to the statutory rules and the HFEA guidance (s.17(1) 1990 Act; *CoP*, 1B), and is different from the clinic manager.

¹³³ Lee and Morgan (n50) 177. A number of recent court decisions involve bad practice on the part of the clinic regarding the patients’ consent, which later affected their parental rights: *Re G (Human Fertilisation and Embryology Act 2008)* [2016] EWHC 729 (Fam); *In re A and others (Human Fertilisation and Embryology) (Legal Parenthood: Written consent)* [2015] EWHC 2602 (Fam), [2016] 1 All ER273, [2015] WLR (D) 387; *Re the Human Fertilisation and Embryology Act 2008 (Case J)* [2016] EWHC 791 (Fam); *Re the Human Fertilisation and Embryology Act 2008 (Case J)* [2016] EWHC 1330 (Fam); *Re the Human Fertilisation and Embryology Act 2008 (Case N)* [2016] EWHC 1329 (Fam); *Re M* [2016] EWHC 1572 (Fam); *Case O (Human Fertilisation and Embryology Act 2008)* [2016] EWHC 2273; *A v R and Another (Declaration of Parentage)* [2017] EWHC 396 (Fam); *B v B (Fertility Treatment - Paperwork Error)* [2017] EWHC 599 (Fam); *Re Cases Y, Z, AA, AB & AC (Human Fertilisation and Embryology Act 2008)* [2017] EWHC 784 (Fam); *Re AD & Others Human Fertilisation and Embryology Act 2008* [2017] EWHC 1026 (Fam), and more. Sir James Munby in *Re M* (above) states: ‘the HFEA has identified no fewer than 90 cases where there are “anomalies”’ [2].

¹³⁴ s.13(6) 1990 Act; Sch.3 1990 Act; Sch 3ZA, Parts 1 and 2 HFE Act 2008. Lee and Morgan suggest that counselling provides the opportunity ‘for discussion, reflection and judgment’ (n50: 175).

¹³⁵ Sch.3, s.3(1)(a) 1990 Act; *CoP* (2009) [3.3]-[3.5],[4.2].

¹³⁶ *CoP* (2009) [3.2].

¹³⁷ *Ibid* [3.8]. For example: M. Crawshaw, J. Hunt, J. Monach and S. Pike, *British Infertility Association - Guidelines for Good Practice in Infertility Counselling* (3rd edn, 2012). For the importance of surrogacy counselling: Appleton T, *Emotional Aspects: Effective Counselling and Support* (Cook, R., S. Sclater and F. Kaganas eds, *Surrogate Motherhood: International Perspectives*, Hart Publishing 2003); Cook R, *Safety in the Multitude of Counsellors: Do we Need Counselling in Surrogacy?* (*ibid* Cook *et al* 2003).

¹³⁸ *CoP* (2009) [4.3].

¹³⁹ *Ibid* [6.1].

¹⁴⁰ *Ibid* [6.2]-[6.6].

¹⁴¹ *Ibid* [14.1].

¹⁴² *Ibid* [14.2].

¹⁴³ *Ibid*, 14A.

As becomes apparent, UK law shows great respect for fully informed, free and unconditional consent prior to treatment in a clinic. However, consent to (traditional) at-home surrogacy is wholly unregulated, and it is unlikely that parties receive counselling, medical, and/or legal advice, especially if they do not go through a surrogacy organisation.¹⁴⁴ This may endanger the rights and the interests of the parties and the child.¹⁴⁵ In Greece, where only gestational surrogacy is allowed, all users of formal legal surrogacy must go through a clinic, where they are offered information, advice, and counselling.

4.3.2 REGULATION OF SURROGACY ARRANGEMENTS

As mentioned above, there is a common misconception that UK surrogacy is regulated by the SAA 1985. The 1990 Act, as amended in 2008, and the establishment of the HFEA possibly further promoted the view that UK surrogacy is closely monitored and strictly regulated, but this is perhaps true only in cases where the treatment takes place in UK clinics. Also, the current framework focuses less on the regulation of surrogacy arrangements, and more on parenthood after the child's birth, which will be discussed in the next section. This is different from Greece, where the law is more concerned with the regulation of surrogacy arrangements from the outset, and there is no state-involvement after the child's birth. My analysis here focuses on the UK statutory provisions regarding payments in surrogacy, the role of surrogacy organisations, and the role of the HFEA in regulating surrogacy.

- ***Payments in surrogacy***

As in Greece, UK law only allows altruistic surrogacy.¹⁴⁶ Arguably, the SAA made it difficult for surrogacy to exist. However, as Jackson notes, 'largely due to the result of the internet, the picture is now rather different'.¹⁴⁷ Indeed, potential surrogates, gamete providers, and IPs can now 'meet' on-line through 'introduction' websites or social media,¹⁴⁸ or through 'consumer'-style conferences, and have traditional surrogacy at home, where everything occurs 'in a regulatory vacuum'.¹⁴⁹ Lastly, IPs can also search on-line for commercial agencies operating outside the UK, travel

¹⁴⁴ UK non-profit surrogacy organisations offer these services, as discussed below.

¹⁴⁵ Elsworth and Gamble (n96) 159; *JP v LP & Others* [2014] (n5); *Re W* [2013] (n99); *Re TT* [2011] (n5); *Re X* [2016] (n5).

¹⁴⁶ s.1(4) SAA 1985.

¹⁴⁷ Jackson (n5) 31.

¹⁴⁸ As in *Re X* [2016] (n5).

¹⁴⁹ Jackson (n5) 31.

overseas, and return a few months later with a child. This is admittedly very difficult to police,¹⁵⁰ and, again, falls outside the remits of UK law and the HFEA's monitoring responsibilities.

Furthermore, the SAA does not prohibit payments to surrogates,¹⁵¹ and the 1990 Act stipulates that surrogates can only incur payments for 'reasonable expenses', which would be under judicial review following the child's birth.¹⁵² However, this will become relevant only if the IPs apply for a PO.¹⁵³ Moreover, the law did not specify what these expenses may include, and what the acceptable amount is or should be. Lastly, it permitted discretion to the court to retrospectively authorise excess payments.¹⁵⁴ Therefore, the provision against payments is arguably more of a disincentive than a ban.¹⁵⁵

The Brazier Committee considered whether payments for surrogacy in general should continue to be illegal,¹⁵⁶ and heard evidence that surrogates had been paid for their services.¹⁵⁷ A UK surrogacy organisation reported that between 1988 and 1999 there were payments of up to £11,520 over and above 'reasonable expenses'.¹⁵⁸ Moreover, COTS admitted to having a policy that around £10,000 should be paid to the surrogate as 'compensation' for the risk to her and for placing her life and her family's life 'on hold'.¹⁵⁹ Most surrogates who responded to Horsey's recent survey said they received less than £15,000, and no-one received more than £20,000 as expenses.¹⁶⁰ This confirms evidence produced by Cafcass that surrogates' expenses 'rang[e] from

¹⁵⁰ Culley L and others, "What are you going to do, confiscate their passports?" Professional perspectives on cross-border reproductive travel (2013) 31(1) *Journal of Reproductive and Infant Psychology*.

¹⁵¹ s.2(2) SAA 1985.

¹⁵² s.30(7) 1990 Act.

¹⁵³ Blyth notes that many IPs do not apply for POs (n54), which is also stipulated by Crawshaw *et al* (n90: 270). However, Horsey's study found these claims to be largely unfounded (n88: 18).

¹⁵⁴ s.30(7) 1990 Act. In *Re Q (Parental Order)* [1996] 1 FLR 369, the judge retrospectively authorised a payment of £8,000 to the surrogate. This ruling mirrored the decision in *Re An Adoption Application* [1987] (n47) and was adopted in almost all PO decisions ever since.

¹⁵⁵ Horsey and Sheldon (n5).

¹⁵⁶ Brazier Report, Executive Summary.

¹⁵⁷ *Ibid* [5.3].

¹⁵⁸ COTS, *Surrogacy - A Workable Solution. In response to the [Brazier] Review Team's Report* (COTS, undated), Appendix B. Evidence from 188 surrogacy arrangements.

¹⁵⁹ *Ibid* [3.34],[4.41(1)],[5.25],[4.36].

¹⁶⁰ Horsey's report (n88) 20.

nothing to £12,000',¹⁶¹ and there is no other substantive evidence to claim that UK surrogacy operates on a commercial basis.

However, the ambiguity and confusion regarding 'reasonable expenses' remains. According to a recent study, many Cafcass PO Reporters, who meet with IPs and surrogates before the court's consideration of a PO application, expressed "unease" about determining whether payments incurred by surrogates were 'reasonable', and were unsure about whether to seek relevant guidance from the court.¹⁶² Furthermore, recent PO decisions have established and reinforced the view that judges will indeed retrospectively authorise excess payments, unless there is a clear abuse of public policy, which sets a very high threshold.¹⁶³ This is because WoC is the court's paramount consideration when making a PO, Stuhmcke, thus, rightly argues that UK judicial practice diminishes the weight of the prohibition on payments, and, to an extent, public policy, compared to the WoC.¹⁶⁴ Further, due to lack of guidance on what constitutes 'commercial' surrogacy, the courts 'input[e] layers of altruism into the commerciality of the arrangement'.¹⁶⁵

Moreover, Scott suggests that judicial practice is inconsistent regarding payments in surrogacy: the magistrate's courts, which decide the outcome of POs for most intra-UK surrogacy arrangements, show little concern about the amount and purpose of the payments, but the High Court,¹⁶⁶ which decides POs following international surrogacy arrangements, scrutinises payments.¹⁶⁷ Importantly, there is evidence that, despite the

¹⁶¹ Freeman (n67) 9; Crawshaw M, Purewal S and van den Akker O, 'Working at the Margins: The Views and Experiences of Court Social Workers on Parental Orders in Surrogacy Arrangements' (2012) *British Journal of Social Work* 9.

¹⁶² Crawshaw *et al* (*ibid*) 8.

¹⁶³ *Re X & Y* [2008] (n96) [24]: '*it is almost impossible to imagine a set of circumstances in which (...)the welfare of the child (...)would not be gravely compromised at the very least by a refusal to make an order*'. Hedley J further stated that an order may not be refused on this ground, unless there was the clearest case of the abuse of public policy. Also, *Re S* [2009] EWHC 2977 (Fam); *Re L* [2010] (n99); *Re X (Children)* [2011] EWHC 3147; *G v G* [2012] All ER (D) 138; *Re A & B (Parental Order Domicile)* [2013] EWHC 426 (Fam); *Re P-M* [2013] EWHC 2328 (Fam); *Re C* [2013] (n99); *Re W* [2013] (n99); *J v G* [2013] EWHC 1432 (Fam); *R & S v T* [2015] EWFC 22, and others.

¹⁶⁴ Stuhmcke (n97) 207.

¹⁶⁵ Stuhmcke concludes that it would be more logical for UK law to 'explicitly recognise that a surrogate mother does and should profit from her surrogacy' (*ibid*: 211).

¹⁶⁶ By virtue of The Family Court (Composition and Distribution of Business) Rules 2014/840 ('Family Court Rules').

¹⁶⁷ Scott, N. 'Surrogacy in the UK vs Surrogacy Abroad—entirely different, or one and the same?' (4/08/2015) <http://www.familylawweek.co.uk/site.aspx?i=ed146132> accessed on 25/03/2016. Also, by examining the magistrate's PO rulings, it is clear the payments authorisation is based on what the IPs said they paid.

statutory ban, payments for the negotiation and drafting of a surrogacy agreement have taken place in the UK, but no charges have been brought against the offenders.¹⁶⁸

Perhaps in an effort to address these concerns, the government issued guidance in February 2018 stipulating an indicative list of costs that have been accepted as 'reasonable expenses': the surrogate's (and her partner's/spouse's) loss of earnings, additional childcare to support the surrogate pregnancy and the clinic and antenatal visits, help with additional cleaning, additional food and other supplements, travel and accommodation, maternity clothes, a modest recovery break for the surrogate and her family, and other incidental expenses relating to the treatment and the pregnancy.¹⁶⁹

- ***The role of non-profit surrogacy organisations***

UK law prohibits surrogacy brokering, but there is nothing to prevent UK non-profit surrogacy organisations from operating. Three years after the implementation of the SAA, Kim Cotton launched COTS.¹⁷⁰ Since then, two more reputable surrogacy organisations have emerged: Surrogacy UK,¹⁷¹ and, more recently, Brilliant Beginnings.¹⁷² Also, in 2011, a branch of a Californian surrogacy organisation was founded in the UK to help mainly same-sex couples have surrogacy, but it has a bad reputation.¹⁷³

As noted in *Re P*,¹⁷⁴ surrogacy organisations cannot charge for their operational costs and services, but may advertise that they hold lists of potential surrogates and IPs, introduce one to another, and run background checks.¹⁷⁵ In reality, these organisations

¹⁶⁸ In *JP v LP & Others* [2014] (n5), Mrs Justice King found that the solicitors who drew up a surrogacy agreement for a fee committed a criminal offence under s.2 SAA 1985, but no criminal charges were brought against the solicitors. This case may deter people from seeking legal advice for surrogacy.

¹⁶⁹ Department of Health and Social Care (DHSC), *Care in Surrogacy. Guidance for the care of surrogates and intended parents in surrogate births in England and Wales* (28/02/2018).

¹⁷⁰ n63.

¹⁷¹ Surrogacy UK (SUK), http://www.surrogacyuk.org/about_us

¹⁷² Brilliant Beginnings (BB), <http://www.brilliantbeginnings.co.uk/about>

¹⁷³ British Surrogacy Centre (BSC), <http://www.britishtsurrogacycentre.com/>. It operates from an Essex address, and was set up by Barrie and Tony Drewitt-Barlow, the first gay male UK couple who had children through surrogacy (Kendrick, K. 'Britain's First Gay Dads Set Up Surrogacy Clinic For Same-Sex Couples' (22/05/2015) <http://www.huffingtonpost.co.uk/2012/03/14/britain-s-first-gay-dads-set-up-surrogacy-clinic-for-same-sex-couples_n_7379676.html> accessed on 20/04/2016). Former BSC users have described its practices 'abusive and aggressive' (Graham, C. 'Surrogate fathers tore my life apart: Used, abused and called trailer trash. How UK poster boys for gay fatherhood turned on woman hired for her womb' (04/01/2015) <<http://www.dailymail.co.uk/femail/article-2895772/Surrogate-fathers-tore-life-apart-Used-abused-called-trailer-trash-UK-poster-boys-gay-fatherhood-turned-woman-hired-womb.html>> accessed on 20/04/2016).

¹⁷⁴ *Re P (A Child)* [2007] EWCA Civ 105.

¹⁷⁵ *Ibid*

are self-regulated, staffed by people who are usually not professionals in surrogacy,¹⁷⁶ and charge a registration fee, which falls out of the statutory ban on surrogacy brokering. Since they are not public bodies, they cannot order a full criminal record check, as can some fostering and adoption organisations.¹⁷⁷

In *Re G*, McFarlane J said, referring to COTS, that ‘it is questionable whether the role of facilitating surrogacy arrangements should be left to groups of well-meaning amateurs’,¹⁷⁸ though he recognised the value of the advice and support offered by reputable UK surrogacy organisations. *Re P* is a sad example of how a surrogacy arrangement which had been “checked” and facilitated by such an organisation can go wrong.¹⁷⁹ Nevertheless, the important (and positive) role of UK surrogacy organisations recently gained formal state recognition.¹⁸⁰

- ***Licensing and monitoring of fertility clinics***

The 1990 Act established the HFEA to regulate ARTs. It licenses and monitors ART clinics,¹⁸¹ it formally documents and publishes, where appropriate, ART-related information,¹⁸² and issues guidance about ‘good practice’ in ARTs.¹⁸³ However, ‘there is clear evidence that inspections were inconsistent from the inception of the HFEA’.¹⁸⁴ In 2008, the amending statute introduced new rules about the HFEA’s operation to allow for more effective monitoring of ART centres.¹⁸⁵ However, recent

¹⁷⁶ The only exception to this is Brilliant Beginnings (BB), which has a sister organisation, [Natalie Gamble Associates](http://www.nataliegamble.co.uk) (fertility law firm) (<http://www.brilliantbeginnings.co.uk/about/our-founders>).

¹⁷⁷ Nye, C. and S. Patel. ‘The Fraught World of UK Surrogacy’ (21/08/2014) <http://www.bbc.co.uk/news/magazine-28864973> accessed on 20/09/2015

¹⁷⁸ In *Re G* [2007] EWHC 2814 (Fam) [29]. Also, more recently, Mrs Justice Theis in *J v G* [2013] (n163) questioned the quality of support offered by UK surrogacy organisations ([6]) and referred the BSC to the DoH.

¹⁷⁹ *Re P* [2007] (n174). Mrs P had severe psychological problems (identified as an addiction to procreate), lived on state-benefits and was an ex-prostitute. She registered with COTS and agreed to be the surrogate for two couples (Mr and Mrs P, and Mr and Mrs J). P lied to both couples about having miscarried. Her 19-year-old daughter from a previous relationship blew the whistle as retaliation, which led Mr R to discover the existence of his 4-year-old daughter, and Mr J to discover that P was due to give birth to his son. Both couples requested the court to issue residence and parental responsibility orders for their respective children. Coleridge J found that Mrs P had embarked on a deliberate, cruel and inhumane plan to trick two men into parting with their sperm, and two women into believing they would become mothers, although she knew she intended to keep the children.

¹⁸⁰ DHSC, ‘*The Surrogacy Pathway. Surrogacy and the legal process for intended parents and surrogates in England and Wales*’ (28/02/2018). In the list of agencies formally recognised, the BSC is omitted.

¹⁸¹ s.9-22, 1990 Act.

¹⁸² ss.8,31-35 *ibid*. The HFEA publishes Annual Reports and Accounts which are publicly available (<http://www.hfea.gov.uk/>).

¹⁸³ s.25, 1990 Act. Through its *CoP*.

¹⁸⁴ Winston R, *The IVF Revolution: The Definitive Guide to Assisted Reproductive Techniques* (London, Vermillion 1999) 148.

¹⁸⁵ Sch.3B 1990 Act, as amended.

court cases show that the legislative reform has not fully addressed the problems; the complexity of some of the guidelines led some clinics to make mistakes, which have negatively affected some individuals' parenthood rights.¹⁸⁶

The Brazier Committee examined whether regulation of all forms of surrogacy should come under the HFEA,¹⁸⁷ but advised against it, because surrogacy arrangements should not be viewed 'as merely another treatment for infertile people'.¹⁸⁸ In Greece, surrogacy is considered a form of ARTs. This perhaps explains why all state-involvement in Greek surrogacy takes place at the preconception stage, as in all other cases of ARTs.

4.3.3 DETERMINATION OF PARENTHOOD FOLLOWING SURROGACY

As discussed earlier, Greek law provides for an intention-based model of parenthood, including cases where the child has no genetic link to the IP(s), and for enforceable gestational surrogacy agreements. In the UK, surrogacy agreements are unenforceable, motherhood depends almost exclusively on gestation and birth, and fatherhood depends importantly on relationship status. However, UK law provides for the possibility of a review after the child has been born, if the IPs seek a PO. Moreover, to establish parenthood, the UK model requires at least a partial biological relationship between at least one of the IPs and the child.

- ***Non-enforceability of surrogacy agreements and determination of motherhood***

In Greece, the IM is the child's legal mother at birth, based on a legal presumption specifically designed for surrogacy recognising intention as the basis of parenthood.¹⁸⁹ This also leads to surrogacy agreements being enforceable after the child's birth.¹⁹⁰ Under UK law, surrogacy agreements are non-enforceable.¹⁹¹ The woman who

¹⁸⁶ Because clinics used the wrong consent forms. Case citations in n133.

¹⁸⁷ Brazier Report [6.10],[6.13],[7.9].

¹⁸⁸ *Ibid* [6.13].

¹⁸⁹ The presumption is rebuttable within six months if there is evidence that the surrogate is genetically related to the child.

¹⁹⁰ But not during the surrogacy arrangement. The surrogate must consent to all medical interventions and can terminate the surrogate pregnancy (if the legal criteria are met).

¹⁹¹ s.36(1) 1990 Act inserted s.1A into SAA 1985. Cases where there is 'a change of heart' are rare: In *Re P* [2007] (n174) a genetic father was successful in his application for a residence order, but the surrogate continued to be considered the legal mother. In *Re N* [2007] (n5), a surrogate's appeal against orders requiring the surrogate-born child's residence be transferred to the biological father was dismissed, as she was found to have deceived the IPs. In *H v S* [2015] (n5), two gay men (H and B) were granted a residence order, and it was found that S (surrogate) made a deliberate attempt to discredit H and B in a homophobic and offensive manner. S claimed she had agreed on a donor-conception agreement, not surrogacy, and clearly intended to keep the child. The judge ruled that the child should live with the IPs, because S was unable to help the child understand her birth story. The case was

gestated and gave birth to the child (here, the surrogate) is always considered to be the legal mother at birth.¹⁹² Moreover, she has an absolute right to change her mind at any time during the arrangement or after its completion (but before the IPs obtain a PO or an adoption order),¹⁹³ and to keep the child.¹⁹⁴ On the other hand, the IM will never be the child's legal mother at birth, whether she is genetically related to her or not:¹⁹⁵ she must acquire legal parenthood through a PO or adoption. Furthermore, the UK non-enforceability rule means also that the IPs cannot be compelled to take the surrogate-born child and will not (usually) be considered the child's parents at birth.¹⁹⁶ These rules apply even if the birth takes place outside the UK following an overseas surrogacy arrangement.¹⁹⁷

Horsey has argued that the UK legal parenthood schema 'creates a less than ideal situation which must stem from an overarching distaste for surrogacy', and, further, that it does not reflect the realities of surrogacy.¹⁹⁸ Others suggest the non-enforceability rule does not take into consideration the preconception intentions of either of the parties,¹⁹⁹ and does not reflect the true story of the child's birth.²⁰⁰

- ***Determination of fatherhood/second parenthood following surrogacy***

As seen earlier, in Greece, fatherhood is based on intention and consent; the intended father is the legal father at birth, if he was married to or had been in an enduring relationship with the IM and had consented to the surrogacy arrangement and the

misrepresented by the media as a judicial enforcement of a surrogacy agreement, when it was actually a welfare decision. Reid, S. 'Revealed: The Chilling Details Of A Judgement which Ordered a Mother to Hand Over Her Baby To A Gay Couple And The Gagging Order That Prevented Her From Telling Her Story' (13/11/2015) <http://www.dailymail.co.uk/news/article-3317909/The-chilling-details-judgment-ordered-mother-hand-baby-gay-couple-gagging-order-prevented-telling-story.html#ixzz3rb5R80qb> accessed on 14/11/2015.

¹⁹² s.27(1) 1990 Act.

¹⁹³ Her consent to the PO is required under s.54(6) HFE Act 2008 ('Eligibility Criteria' below).

¹⁹⁴ s.1A SAA 1985.

¹⁹⁵ s.47 HFE Act 2008; *CoP*, 6G.

¹⁹⁶ Except if, as will be discussed below, the surrogate is unmarried, in which case, the intended (genetic) father is the child's legal father at birth, if the surrogate consents to it.

¹⁹⁷ s.27(3) 1990 Act. In case of an overseas arrangement, even if the IPs are recognised as parents of the surrogate-born child by another jurisdiction, they must obtain a PO to have their parenthood recognised in the UK.

¹⁹⁸ Horsey K, 'Unconsidered Inconsistencies. Parenthood and Assisted Conception' in Horsey, K. and H. Biggs (eds), *Human Fertilisation and Embryology: Reproducing Regulation* (Routledge-Cavendish 2007) 159.

¹⁹⁹ McCandless J and Sheldon S, 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family' (2010) 73(2) *Modern Law Review* 183; Gamble, N. 'Time For A Regulated Process for Surrogate Parents?' (12/05/2016) <http://www.familylawweek.co.uk/site.aspx?i=ed144719> accessed on 16/05/2015.

²⁰⁰ Elsworth and Gamble (n96) 157; Blyth (n54); *Re A & B (Children: POs: Time Limits)* [2015] EWHC 911 (Fam) [41].

surrogate's IVF. In the UK, the rules about fatherhood and/or second parenthood (in case of a female couple) following surrogacy are not as clear-cut as those for motherhood and are based on general family law rules.²⁰¹ Hence, parenthood is based on relationship status, consent, and, in some cases, on a genetic relationship with the child.

If the surrogate is married or in a legally recognised civil partnership at the time of treatment, her husband, wife or civil partner is the child's other parent at birth,²⁰² unless evidence exists that he/she had not consented to it.²⁰³ This rule applies whether the treatment took place in the UK or abroad,²⁰⁴ and whether the sperm belongs to the intended father or a donor. If the surrogate is unmarried but has a partner, the latter will be the child's legal parent at birth, if he/she has provided prior consent to the treatment.²⁰⁵ For this rule to apply, the treatment must have taken place in an HFEA licensed UK fertility centre.²⁰⁶ Lastly, if the surrogate is single and pregnancy has been attained in a clinic, it is possible for the intended father (or second IM) to be registered as the child's second parent (together with the surrogate) at birth, if the surrogate consents to it.²⁰⁷

If the child was born following an informal surrogacy arrangement (where pregnancy was attained through artificial insemination at home), the surrogate's husband, wife, or partner, if she has one, is the second legal parent by virtue of their relationship.²⁰⁸ If the surrogate is single, or has a non-consenting partner, the biological (intended) father can be registered as the child's father on the birth certificate, with the surrogate's consent.²⁰⁹ If the surrogate does not consent to this, he can acquire parental responsibility,²¹⁰ which enables him to make decisions about the child's life until he acquires legal parenthood through a PO or adoption.

²⁰¹ Probert R, *Family Law in England and Wales* (7th edn, Walters Kluwer 2011) 224.

²⁰² s.35(1)(a) and 42, 2008 Act.

²⁰³ s.35(1)(b) *ibid*. Note that s.35 does not influence the presumption under s.38(2)(3) *ibid* that 'any child born within marriage is those parties' legitimate child'. There is no similar provision for civil partners. See Explanatory Notes, HFE Act 2008 [175].

²⁰⁴ s.35(2) 2008 Act.

²⁰⁵ ss.35-37, 42 *ibid*.

²⁰⁶ s.36(a) *ibid*. If the treatment took place abroad, the child will have no father at birth.

²⁰⁷ HFEA, 'Commencement arrangements for the parenthood provisions in Part 2 of the Human Fertilisation and Embryology Act 2008' (2009) http://www.hfea.gov.uk/docs/parenthood_commencement_guidance.pdf accessed on 21/10/2015.

²⁰⁸ Based on the common law presumption of fatherhood (Probert (n201)).

²⁰⁹ Until a PO or adoption order transfers parenthood to the man's partner/wife/husband, the man will share legal parenthood with the surrogate.

²¹⁰ Under ss.2(2),4(1)(a) Children's Act 1989.

If the IPs are in a female same-sex relationship, none of the IMs will have legal parenthood at birth. However, the woman (one of the IMs) whose egg was used for the surrogate's IVF can register her name on the child's birth certificate, if the surrogate is single or has a non-consenting partner, and if the consent requirements have been met.²¹¹ The situation is similar in the case of a male same-sex couple. If the surrogate is single or has a non-consenting partner, the biological intended father can register as a legal parent and share parenthood with the surrogate, if she consents to it. The non-biological parent can only acquire parenthood through a PO or adoption.²¹² According to McCandless and Sheldon, the fatherhood and same-sex parenthood conditions were modelled around the parenthood provisions for heterosexual couples,²¹³ which reflects UK law's concern to promote the 'traditional' heteronormative two-parent family ideal.²¹⁴

- ***Legal process for the transfer of parenthood to the IPs***

In the first years of the SAA's implementation, parenthood could only be achieved through adoption. However, after a much-publicised case,²¹⁵ the legal provisions regarding POs were inserted in the 1990 Act and came into effect in 1994.²¹⁶ The PO is unique to surrogacy, but, arguably, it is not a very innovative construct. POs are described in the Explanatory Notes of the HFE Bill as a 'fast-track adoption' process.²¹⁷ The 2008 amendments extended eligibility for a PO to same-sex couples

²¹¹ The second female parent will be the child's parent (but not "mother") together with the surrogate (HFEA guidance,n207). This exception was put forward as an analogy to the situation where the surrogate is single, and the intended biological father is the child's legal father at birth (if the surrogate consents).

²¹² *Ibid*

²¹³ McCandless J and Sheldon S, 'No father required'? The Welfare Assessment in the Human Fertilisation and Embryology Act 2008' (2010) *Feminist Legal Studies* 201-225.

²¹⁴ *Ibid*; Fenton *et al* (n77) 279. This is also evidenced by the non-recognition of a right to apply for a PO to single IPs. However, things may change. *Re Z (A Child: Human Fertilisation and Embryology Act: Parental Order)* [2015] EWFC 73 concerned a single man's application for a PO in respect of his child (Z), born following a gestational surrogacy arrangement in USA. Munby P dismissed the application having considered the adoption legislation and the legislative developments in parenthood following surrogacy. Moreover, he ruled that UK law does not include an express right to have a child, therefore, the single man's argument based on Article 12 ECHR failed, as did the argument based on articles 8 and 14 ECHR. However, the man can still succeed on appeal through a declaration based on article 4 ECHR (per Munby P at [24]). In *Re Z (A Child) (No 2)* [2016] EWHC 1191 (Fam), the President of the Family Division made a declaration that s.54(1)(2) HFEA 2008 was incompatible with Art.8 and Art.14 ECHR, and the government conceded. In November 2017, the government submitted a remedial order, which, if passed, will extend PO eligibility to single IPs (n86). Recently, a judge noted that, until the law regarding single IPs' right to apply for a PO changes, single IPs cannot be granted POs (*M v F & SM (Human Fertilisation and Embryology Act 2008)* [2017] EWHC 2176 (Fam)).

²¹⁵ *Re W* [1991] (n55).

²¹⁶ s.30 1990 Act.

²¹⁷ n56.

and to partners in non-legally recognised partnerships, but otherwise the parenthood regime remained unchanged.

The effect of a successful PO is similar to that of an adoption order: it extinguishes the surrogate's (and her husband's/partner's) original parenthood towards the child, and acknowledges the IPs as that child's legal parents.²¹⁸ Further, the child, if not already one, becomes a British citizen.²¹⁹ Importantly, not all IPs will be able to get a PO, as POs are subject to eligibility criteria and judicial scrutiny after the child has been born, and lived with the social parents (IPs) for some time.²²⁰

- ***Eligibility criteria***

The after-birth transfer of parenthood to the IPs is subject to several eligibility criteria, which must be satisfied whether the child was born within or outside the UK,²²¹ and judicial scrutiny. Consequently, while UK parenthood provisions provide certainty as to who the parent is at birth (the surrogate and her husband/wife/consenting partner), it is uncertain who the child's legal parents will ultimately be. This is different in Greece, where legal motherhood is recognised at birth, and there is very little room to change the parenthood status.

Under UK law, the applicants must be a couple (heterosexual or same-sex),²²² who are married, in a civil partnership or in an enduring (non-legally recognised) family relationship.²²³ Single IPs are currently ineligible for a PO.²²⁴ In Greece, single infertile women, and possibly single infertile men,²²⁵ can become the surrogate-born child's parent, but (shared) same-sex parenthood following surrogacy is unregulated. Moreover, in the UK, at least one of the IPs must be genetically related to the child,²²⁶ which is different from Greece, where parenthood is based purely on intention, and the child may or may not be genetically related to the IP(s).

Hence, UK law imputes a genetic view of parenthood in surrogacy without justifying why the surrogate-born child's welfare requires two parents when an adopted child's

²¹⁸ s.54(1) 2008 Act.

²¹⁹ PO Regulations 2010, Sch.4 [7].

²²⁰ Elsworth and Gamble (n96) 158.

²²¹ s.54(10) 2008 Act.

²²² s.54(1) *ibid*

²²³ s.54(2)(a)-(c) *ibid*

²²⁴ But single people can have a child through gamete donation and adoption.

²²⁵ There are contradicting court decisions about this (see Chapter 3, 'Relationship status').

²²⁶ s.54(1)(b) 2008 Act.

welfare is satisfied by one parent,²²⁷ or why genetic ties play such an important role. Presumably, the rule about the genetic relationship between the IPs and the child is aimed at preventing pure ‘social families’ from being created through surrogacy, because this can be done through adoption, and, arguably, shows ‘a desire to discourage surrogacy’.²²⁸ However, if surrogacy is a substitute for adoption, then arguably the same rules should apply to both situations, rendering the requirement for a genetic link unnecessary. If surrogacy is an infertility treatment, on the other hand, the rules for gamete donation and IVF should apply (whereby double donation is possible and does not affect parenthood).

Furthermore, applicants must be at least 18 years old,²²⁹ but there is no upper age limit. This is also different from the provisions described for Greece, where the IM must be younger than 50 years old, and the surrogate, under a new rule, should be younger than 45 (and older than 25). Additionally, in the UK, at least one of the IPs must be domiciled in the UK when the application is lodged.²³⁰ Notably, mere residence in the UK will not suffice for a PO.²³¹ As we saw, in Greece, the residence requirement for surrogacy was lifted in 2014, and currently only one of the parties must have at least temporary residence in the country. Another PO eligibility criterion is that the surrogate pregnancy has been achieved through artificial insemination (at home or in a clinic),²³² and not through sexual intercourse between the surrogate and the intended father.²³³ Again, there is a difference between the Greek and UK models: under Greek law, the egg must not belong to the surrogate, and surrogacy must take place in a clinic. Additionally, the PO application must be lodged between six weeks and six months after the child’s birth.²³⁴ However, the six-months’ deadline has been successfully challenged in courts recently, and deemed ‘nonsensical’.²³⁵ Accordingly, time-limits

²²⁷ Fenton et al (n77) 281. Recently, the government stated that the rationale behind the legal requirement for a couple to apply for a PO was that ‘a fuller [adoption-like] assessment (...) was more likely to ensure that a person on their own was able to cope with the demands of bringing up a child’ (DHSC, The Government’s Response to an incompatibility in the Human Fertilisation & Embryology Act 2008: A remedial order to allow a single person to obtain a parental order following a surrogacy arrangement, Cm 9525, November 2017[2.6]).

²²⁸ Johnson (n54) 94; DHSC report 2017, *ibid*.

²²⁹ s.54(5) 2008 Act.

²³⁰ s.54(2) *ibid*

²³¹ *Re G* [2007] (n178); *Re A* [2015] (n99). The Brazier Committee had recommended that habitual residence ‘is more straightforward’ (Brazier Report [7.24]), but the proposal was rejected.

²³² s.54(1) 2008 Act.

²³³ However, it is practically impossible to check that this legal requirement has been met.

²³⁴ s.54(3) 2008 Act.

²³⁵ *In Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam) [2015] 1 FLR 349, Munby P granted the PO although the child was already 2,5 years old. The same rule was applied by Ms Justice

no longer affect PO applications. The court must also be satisfied that no payments have taken place other than ‘reasonable expenses’,²³⁶ though as discussed earlier, an exception is that excess payments can be authorised by the court, and do not prevent IPs from obtaining a PO.

Further, a PO is subject to the surrogate’s and, where relevant, the other legal parent’s consent.²³⁷ For consent to be effective, it must be ‘free and unconditional’ and given specifically for the making of a PO;²³⁸ it must be in writing;²³⁹ and it must have been given six weeks after the child’s birth.²⁴⁰ This time-limit operates as a ‘cooling-off’ period, during which the surrogate can decide whether to consent to the PO. If the surrogate cannot be found or is incapable of giving her consent for other reasons, the court can dispense with the consent requirement.²⁴¹ Lastly, the child must be living with the applicants when the application and the PO is made.²⁴² This offers another way for the parties to show their true intentions. However, it is arguably impractical, since the child ‘is required by law to live for some time with persons’ who are not legally recognised as the child’s parents,²⁴³ which may cause various problems.

The eligibility criteria are checked by a judge, who must also consider the child’s best interests, namely the welfare checklist, when deciding whether to grant a PO.²⁴⁴ Nonetheless, even with the help of this checklist, it is difficult to define the true meaning of WoC. Importantly, since the introduction of the 2010 PO Regulations, WoC is to be the court’s paramount consideration when making POs, whereas before it was merely one of the important factors that the court considered. Therefore, for a

Russell in *Re A and B* [2015] (n200), and POs were made for two children aged 5 and 8 years old. Also, Theis J in *Re A and B (No 2 - Parental Order)* [2015] EWHC 2080 (Fam), granted a PO for 3-year-old twins.

²³⁶ s.54(8) 2008 Act.

²³⁷ s.54(6) *ibid.*

²³⁸ *Ibid*

²³⁹ Family Procedure Rules 2010, Practice Direction 5A, 3.1, Table 2. Form A101A is available on the website of the Ministry of Justice. Where consent is given outside of the UK, rule 13.11(4) Part 13 Family Procedure Rules 2010 applies.

²⁴⁰ s.54(7) HFE Act 2008.

²⁴¹ *Ibid.* See *R & S v T* [2015] (n163), and *Re D & L (minors) (surrogacy)* [2012] EWHC 2631; *A & B* [2016] EWFC 34.

²⁴² s.54(4)(a) HFE Act 2008. This was challenged in *Y v Z & Ors* [2017] EWFC 60 and *X (A Child: foreign surrogacy)* [2018] EWFC 15.

²⁴³ McCandless J, ‘Reproducing the Sexual Family: Law, Gender and Parenthood in Assisted Reproduction’ (thesis for the degree of Doctor in Philosophy, Keele University 2010) 334.

²⁴⁴ PO Regulations 2010 [7.4].

PO to be made, the child's interests must take absolute priority in the balance with everyone else's (the IPs' and the surrogate's) interests, as Hedley J noted in *Re L*.²⁴⁵

This leads judges to grant POs even where the statutory criteria are not met (except where the applicant is single). For example, we saw that judges may have no other choice but to retrospectively authorise payments to the surrogate or a surrogacy agency that were obviously above and beyond the legally allowed 'reasonable expenses', or to dispense with the requirement for the surrogate's consent if she cannot be found, if the PO serves the child's interests. Admittedly, it is very difficult to imagine a situation where a judge will refuse to grant a PO.

Nevertheless, under this interpretation, WoC may sit in tension with other important principles, such as the IPs' reproductive autonomy, and may lead to inconsistencies in the law's application.²⁴⁶ Conversely, the Greek interpretation of WoC as one of the factors to be considered during the preconception judicial scrutiny shows more regard to reproductive autonomy. Perhaps the reason for this difference is the timing of the judicial assessment of WoC; in Greece, this happens when the child is not yet in existence, whereas in the UK it occurs when the child already exists and lives with the IPs, thus WoC gains more importance.

- ***Procedural matters***

After a PO application has been submitted to a Family Procedures Court, a PO Reporter, who is a Cafcass social worker, is appointed to check whether the PO eligibility criteria are satisfied.²⁴⁷ The PO Reporters make an initial assessment and submit a report to the court.²⁴⁸ Following this, there is a court hearing, during which the judge decides whether to grant the PO.

A recent study showed that PO Reporters are not provided with a structured framework about how they should produce their reports. Rather, they are 'left to develop their

²⁴⁵ *Re L* [2010] (n99). The House of Lords had since the 1970s defined 'paramount' as constituting the sole factor in decision-making, as trumping every other concern: *J v C* [1970] AC 668.

²⁴⁶ Reece H, 'The Paramountcy Principle. Consensus or Construct?' (1996) 49(1) Oxford Journals, Current Legal Problems.

²⁴⁷ Family Court Rules (n166).

²⁴⁸ Cafcass Adoption and Surrogacy Handbook, Guidance for Parental Order Reporters, https://www.cafcass.gov.uk/media/198312/adoption_and_surrogacy_handbook_final_for_launch_08_01_14.pdf

own processes’,²⁴⁹ and there is lack of consistency in their practices.²⁵⁰ Many Reporters also worry about the lateness of their involvement, notably after all transactions and other arrangements have taken place, and the child has lived with the IPs for some time.²⁵¹

After a PO has been granted to the IPs, it is registered in a confidential PO Register, and the child’s birth registration is amended (and a new birth certificate is issued) to capture the new parenthood situation.²⁵² Upon reaching adulthood, the child can access his/her long certificate including all the information about his/her birth history.²⁵³ This process is similar to that followed in UK adoption cases. In Greece, no such process is necessary; the IPs are the legal parents at birth.

4.4 CONCLUSION

This chapter provided an overview of the background and historical development of UK surrogacy regulation, and highlighted the key elements that are interesting, significant, potentially problematic, and different from those in Greece. Under UK law, access to surrogacy is available to all individuals, subject to a WoC assessment performed in clinics, and consent. Additionally, UK surrogacy is altruistic. Payments to surrogates are not illegal but if they are above ‘reasonable expenses’, they must be authorised by the judiciary at the PO stage. Surrogacy practice in clinics falls under the responsibility of the HFEA, which monitors ARTs and issues regulation with no legal force. Informal surrogacy arrangements that take place outside a clinic are unregulated. Likewise, UK non-profit surrogacy organisations are unregulated.

The most significant differences between the two regimes relates to the way in which parenthood is determined. In Greece, surrogacy is perceived as a form of ARTs, parenthood following surrogacy is based on intention, and surrogacy agreements are enforceable after the child’s birth. In the UK, parenthood is based on gestation and birth, and the surrogate and her husband, wife, or partner, are the child’s legal parents at birth. Surrogacy agreements are non-enforceable, and parenthood is transferred to the IPs post-birth through a PO, which is subject to numerous eligibility criteria and a

²⁴⁹ Crawshaw *et al* (n161) 5. Horsey’s survey had similar results: PO Reporters reported ‘feel[ing] poorly treated by medical and other professionals’, and that ‘the DoH should produce guidance for professionals in the field’ (n88: 36).

²⁵⁰ Crawshaw *et al* (n161) 6.

²⁵¹ *Ibid* 7,15,16.

²⁵² s.10(1) Births and Deaths Registration Act 1953, as amended.

²⁵³ PO Regulations 2010, Schedule 1[1(a)].

judicial scrutiny. The PO process is essentially a fast-track adoption process, which does not work for all surrogacy arrangements. However, because the WoC is the court's paramount consideration when deciding on a PO, judges have been forced to 'read down' the statute and grant the PO even without all legal requirements being met, except in a case where the IP was single.

Having set out the law in Greece and the UK, I will now evaluate how access to surrogacy in Greece and the UK operates in practice, drawing on my empirical work, other studies, and the literature.

CHAPTER 5

Access to Surrogacy in Greece and the UK

5.1 INTRODUCTION

In Chapter 2, I laid down some ethical standards against which any surrogacy regime should be measured. I argued that, in principle, and in the absence of harm, autonomy grounds a strong presumption that individuals should be free to form surrogacy arrangements. Moreover, I suggested that a ‘good’ surrogacy regime should ensure equal, fair and affordable access to all interested parties, and that the welfare of everyone involved in surrogacy, including the child-to-be, is, as far as possible, protected.

In Chapters 3 and 4, I considered how Greece and the UK regulate surrogacy. I now evaluate the extent to which the law set out there is working to achieve the ethical goals regarding access to surrogacy laid out in Chapter 2, drawing on my own empirical data and on existing literature and other studies. I begin by discussing the factors which influence access to surrogacy in these countries. I focus on two categories of restrictions: those set by regulation (Section 5.2), and those not set by law but nevertheless limiting access in certain ways (Section 5.3). While my research investigated formal legal and informal barriers to surrogacy, it makes its major contribution regarding the latter, which is much less researched.

5.2 Regulatory restrictions on access to surrogacy

Greek law guarantees a *prima facie* individual right to have a child and makes ARTs and surrogacy expressly available to heterosexual couples and single women. However, it remains unclear whether surrogacy in Greece is legally available, as of right, to single men and same-sex couples. Additionally, ARTs, including surrogacy, are restricted to individuals with a medical need for treatment and to women who are under 50 years old. Furthermore, only gestational surrogacy (in clinics) is legal, and access depends on a preconception judicial scrutiny of the surrogacy agreement and a WoC assessment in clinics.

On the contrary, UK law does not explicitly recognise a right to have a child, but it allows both gestational and traditional surrogacy, provided that pregnancy is achieved in clinics, leaving at-home (traditional) surrogacy completely unregulated. UK non-profit surrogacy organisations are likewise unregulated. Access to formal legal surrogacy depends on consent and WoC. The welfare criterion is subject to an assessment by clinics, and access is not restricted to any groups and/or individuals, but parenthood following surrogacy is still only available to couples (heterosexual and same-sex).¹ This potentially deters some people (fearing they do not fulfil the parenthood criteria) from accessing formal regulated surrogacy in the UK.

Based on the theory, regulation, and my own evidence, the following statutory factors clearly influence access to surrogacy in Greece and the UK: medical need, age, relationship status, WoC, residence, and the judicial scrutiny of surrogacy agreements.

5.2.1 Medical need

Under Greek law, ARTs, including surrogacy, are allowed only if their use is justified by a medical need, namely infertility. The IM must prove she is medically unable to attain a pregnancy and/or bring it to term.² This presumably aims at ensuring ARTs are not used ‘for convenience’, and at limiting the risk of exploitation in surrogacy.³ One Greek academic has argued that ‘infertility’ must be understood more broadly to include ‘unexplained’ infertility.⁴ However, little is known about how the medical need restriction works in practice.

My evidence suggests that Greek clinicians involved in surrogacy consider this requirement very important and will recommend surrogacy only if it is absolutely necessary for medical reasons. Importantly, my interviewees gave a narrow interpretation to ‘medical need’, which links strictly to physical infertility. For example, Dr Pantos (Greek clinician) said:

¹ This was challenged in *Re Z (A Child: Human Fertilisation and Embryology Act: Parental Order)* [2015] EWFC 73, and *Re Z (A Child) (No 2)* [2016] EWHC 1191 (Fam). The government recently laid a remedial order, which, if passed, will make POs available to single IPs (Written statement-HLWS282).

² Chapter 3, ‘Medical need’.

³ Memorandum-3089/2002 II, art.1455 GCC; Trokanas T, *The application of medically assisted reproductive methods and the welfare of the child to be born* (Papachristou, T. K. and others eds, 21st Century Family Law: Coincidental and Fundamental Reforms - Law and Society in 21st century, Sakkoulas 2012) 173.

⁴ Papazisi T, ‘Surrogate mother or mater semper certa est’ in Kaiafa-Gbandi, M., E. Kounougeri-Manoledaki and E. Symeonidou-Kastanidou (eds), *Medical Assistance in Human Reproduction. 10 years of the application of Law 3089/2002* (Sakkoulas 2013) 78.

If it's a case of unexplained infertility, we can do other things, not surrogacy. (...)There must be a medical reason for surrogacy. (...)I get this question from a lot of couples. They've had many failed IVFs and they think they need surrogacy. No. If the uterus and the endometrium are in perfect condition, they don't need surrogacy. The cause of infertility is elsewhere.

Two other clinicians confirmed the view that surrogacy is only permissible if the woman is physically unable to carry a child, citing variously the case where a woman lacks a uterus, where chronic illnesses make pregnancy difficult or dangerous,⁵ or the case of a previous liver transplant, cancer or blood problems.⁶

However, within my sample, there was evidence that a Greek lesbian couple, who did not fulfil the 'medical need' criterion, accessed "surrogacy" in Greece (albeit in an unusual form). This suggests that exceptions may be made, and doctors may help some individuals bend the rules. Aria and Katerina had a child using Aria's egg, donor sperm, and Katerina's uterus. In the UK, this couple would be able to legally access ARTs in a clinic, and they would both be considered legal parents, if they met all other statutory criteria. In Greece, the only option available to the couple was surrogacy,⁷ but the clinic would not treat them unless they acquired the court's permission. For this to happen, there had to be misrepresentations in court: the clinician gave Aria a false affidavit declaring her medical need for surrogacy, and Katerina was presented as Aria's friend, who would act as her surrogate. Although one Greek clinician interpreted 'medical need' for surrogacy broadly and did a lot to accommodate the desires of a lesbian couple, it is uncertain whether other clinicians would do the same.

Furthermore, surrogacy is an important option for gay male couples, who are not physically infertile but are unable to have a child without a surrogate. Greek law does not expressly provide a right for gay male couples to access ARTs (and formal legal surrogacy), which reflects a clear tension between the overarching principle of the right to have a child and the non-recognition of gay male couples' right to access formal legal surrogacy. Nevertheless, it is possible that gay male couples are involved in informal surrogacy arrangements in Greece, which were unlikely to be captured by my sample.⁸ Although my sample is small and partly self-selected, it suggests that

⁵ Dr Tarlatzis. List of all interviewees with short biographies included in Appendix C.

⁶ Ms Chatziparasidou.

⁷ Access to ARTs for same-sex couples (and same-sex parenthood) is unregulated.

⁸ My focus was on formal legal surrogacy arrangements, and my sample was recruited based on their experience with primarily regulated aspects of surrogacy. As we will see below, one Greek clinician said he would allow foreign gay male couples to access surrogacy in his clinic.

medical need for surrogacy is broadly accepted amongst Greek clinicians and presents a significant limitation on access to surrogacy.

In the UK, medical need is not legally required, and no evidence exists in the literature about surrogacy being tied to a medical need. Dr Sue Avery, a leading UK clinician, considered medical need to be quite significant for surrogacy, but not in the same way as Greek clinicians. She stated that surrogacy is usually chosen in cases where pregnancy would be very risky for the woman and/or the child; therefore, medical need would be a significant factor for ensuring the support of a clinic, because surrogacy eliminates those risks. Additionally, she interpreted gay male couples' inability to have a child as a form of 'medical need'.

Other UK interviewees suggested that medical need neither operates as a restriction nor a justification for access to surrogacy in UK clinics. I also found that, nowadays, UK doctors are aware and supportive of surrogacy, which suggests that the 1996 BMA guidance to medical professionals to be more accepting and supportive of surrogacy has filtered into medical practice,⁹ as was also confirmed by a recent UK study.¹⁰ For instance, Sarah (SUK surrogate and SUK Chair) said:

Medical professionals are passing on more information now. [Surrogacy is] more recognised as [an] improved method to have a child. (...) [D]efinitely the medical professionals have helped to grow the number of couples that are looking into surrogacy now, which is great. (...) IPs, loads of them, come to us [SUK], especially heterosexual couples, by recommendation by a medical professional(...).

Additionally, some interviewees remarked that women suffering from serious medical conditions that render them unable to carry healthy pregnancies (or carry a pregnancy at all) are being presented with the option of surrogacy and can access UK clinics without any problem, but this approach is new.¹¹ Natalie stated:

[Women are] being spoken to about surrogacy much earlier on in their diagnosis, especially cancer patients (...). Five years ago, [surrogacy] was hardly spoken about with cancer patients as part of their own options if their fertility was affected, whereas now I think there's more awareness.

In summary, Greek law does not specify whether medical need only refers to physical/biological inability to have a child, but clinicians interpreted 'medical need'

⁹ BMA, *Changing Perceptions of Motherhood. The Practice of Surrogacy in Britain* (Wiley-Blackwell 1996) 59.

¹⁰ Lee E, Macvarish J and Sheldon S, 'Assessing Child Welfare Under the Human Fertilisation and Embryology Act 2008: a case study in medicalisation?' (2014) 36(4) *Sociology of Health and Illness*.

¹¹ Sarah, Natalie (SUK mother and SUK Trustee), and Marina (COTS surrogate and COTS Trustee).

strictly. Although there was evidence that exceptions may be made, social infertility was not enough, hence a lesbian couple and the clinician pretended that the IM was physically infertile to get the court's support. My Greek data imply that the medical need criterion may prevent some individuals from accessing formal regulated surrogacy. As one would expect from the law and the existing literature, my UK evidence showed that medical need plays no role in access to surrogacy in clinics. Based on my data, UK clinicians' awareness of surrogacy, especially in cases of physical infertility, has increased, and surrogacy is presented as an option now more so now than in the past.

5.2.2 Age

Under Greek law, access to ARTs is restricted to women who are under 50 years old. According to the literature, this requirement was guided not just by a concern for women's and children's welfare,¹² but also by a rejection of motherhood in old age.¹³ Nonetheless, my interviewees tended to suggest that the upper age limit shows concern for the future child's welfare (not being raised by older parents) rather than for women's health.¹⁴ For example, Mr Cazlaris said:

(...)It's not in the child's best interests to have a mother who's 65 years old; a line should be drawn there. There should be an age limit. (...) [W]e didn't want to leave gaps in ART law. We wanted the law to be clear.

Nevertheless, many Greek interviewees were against the statutory age limit for women. For instance, Dr Pantos considered it 'foolish', because it prevents some women from accessing ARTs, which intensifies the low birth rate problem. Lena was one of the few that considered this restriction a strength of the law. In her view, the child should be raised by a younger mother, which shows she perceives the age restriction as a tool to protect the child's (presumed) welfare. However, this concern is not supported by any evidence of harm;¹⁵ hence, the age restriction sits in tension with the express right to have a child enshrined in the Constitution.

¹² Papazisi T, *Legal and ethical issues regarding assisted reproduction after menopause* (Medical Assistance in Human Reproduction - Critical Review Library, Sakkoulas 2002) 77.

¹³ *Ibid*

¹⁴ Haris Cazlaris (embryologist, policy-maker and former NAMAR member), Lena (surrogate and clients' manager in a large Greek clinic), Professor Aristides Hatzis (legal academic), Takis Vidalis (legal academic and advisor at the Hellenic National Bioethics Commission).

¹⁵ There are no Greek studies about the effects of ARTs and surrogacy on children, but arguments can be drawn from the UK literature. Many UK studies reveal that children are not harmed by ARTs, and surrogacy (Chapter 2, n171; Pennings G, 'Measuring the welfare of the child: in search of the appropriate evaluation principle' (1999) 14(5) Human Reproduction).

A few interviewees noted that the lack of effective monitoring of Greek clinics by NAMAR while it was not fully operating has left scope for differences in practices, with some clinics refusing to treat older women, and other clinics offering them treatment.¹⁶ They also thought this ambiguity makes it impossible for an environment of trust to be created, which they believed is important in ARTs. Dr Pantos thought trust is particularly important in the context of reproductive tourism. Generally, all Greek clinicians talked very openly and positively about developing ‘reproductive tourism’ in Greece, as they thought it would increase reproductive autonomy.¹⁷ This finding is surprising, especially considering the controversy that surrounds ‘reproductive tourism’ and the negative connotations regarding the commercialisation of ARTs.¹⁸ Greek clinicians identified various possible reasons for the positive stance towards ‘reproductive tourism’: the high-quality ART services provided in Greece, their low-cost (compared to other countries), and the innovative, liberal and protective legal regime.

As regards the surrogate, the only legal requirement was (until recently) that she is physically and emotionally able to carry a pregnancy. Both the literature and my data show the upper age limit entrenched in the 2005 Law concerns the IM, not the surrogate.¹⁹ This, however, changed in 2017. The Greek Authority for ARTs (NAMAR) issued new rules (with legal force) that surrogates should be between 25 and 45 years old, should have at least one child of their own, and should have had no more than two caesarean sections.²⁰ NAMAR justified this decision by a concern for women’s health.²¹ Since my interviews were completed before this change, I was unable to explore how this rule operates in practice. In any case, clinics could refuse

¹⁶ Ms Chatziparasidou (clinician), Dr Pantos.

¹⁷ Ms Chatziparasidou, Dr Tarlatzis.

¹⁸ Jackson E, ‘UK Law and International Commercial Surrogacy: ‘the very antithesis of sensible’’ (2016) 4(3) *JMLE* 197-214; Spar D, *The baby business: How money, science, and politics drive the commerce of conception* (Harvard Business School Press 2006); Whittaker A and Speier A, ‘Cycling overseas’: Care, commodification and stratification in cross-border reproductive travel’ (2010) 29 *Medical Anthropology* 363–383; Culley L and others, ‘“What are you going to do, confiscate their passports?” Professional perspectives on cross-border reproductive travel’ (2013) 31(1) *Journal of Reproductive and Infant Psychology*. Greek doctors’ openness is probably owed to recent moves and expressed desire of the state to develop medical tourism in Greece (Varvara, F. ‘Greece [to become] the ‘Mecca’ of medical tourism’ (4/12/2014) <http://www.karfitsa.gr/2014/12/04/mekka-toy-iatrikoy-toyris moy-i-ellad/> accessed on 18/04/2017). Additionally, a 2012 official report considered future and advantages of developing medical tourism in Greece (A. Doksiadis, A. Katsapi and K. Souliotis, *Development of Medical Tourism in Greece* (Hellenic Institute of Social and Preventive Medicine, 2012).

¹⁹ Skorini-Paparrigopoulou F, *Greek Civil Code, Articles 1455-1456*, vol.8 (Georgiadis, A. and M. Stathopoulos eds, *Law and Economy*, 2nd edn, Sakkoulas 2003) 29.

²⁰ Article 9, Decision 73/24-1-2017 (NAMAR Code of Practice for ARTs professionals).

²¹ NAMAR press release (19/04/2017) <http://eaiya.gov.gr/deltio-typou-19-04-2017/>

a surrogate for medical reasons, which renders the surrogate's age limitation legally irrelevant. This was also suggested by Mr Cazlaris to justify why the 2005 Law included no criteria for the surrogate.

Unlike Greece, UK regulation does not set an age requirement for access to ARTs and surrogacy, and none of my UK interviewees mentioned it as an issue. However, that may be because it does not arise often as an issue rather than because of any approval or disapproval of postponed motherhood. Also, it is possible that age could be an informal barrier to access, because it could impact clinics' success rates.²²

5.2.3 Relationship status

Under Greek law, ARTs and surrogacy are available to single women and heterosexual couples, married or in civil partnerships (a status only available to opposite-sex couples until recently). Same-sex couples have no express right to access ARTs, but it could be a future possibility since the 2015 change in the civil partnership regime,²³ as well as the recent change in the child adoption and fostering law.²⁴ Moreover, the literature and judicial practice are unclear about whether single men can have surrogacy in Greece. As noted in Chapter 3,²⁵ there have been two cases of infertile single men having been successful in formal legal surrogacy, but one of them was later overturned by the Supreme Court, meaning it remains unclear whether single men can have formal legal surrogacy in Greece.

There is no published research on how the relationship status criterion operates in practice. My evidence suggests it does not always exclude people from accessing ARTs, and surrogacy, in clinics. As mentioned above, lesbian partners Aria and Katerina were successful in accessing IVF 'surrogacy' and sperm donation in a Greek clinic. Aria said the doctor was disinterested in their relationship status and wanted to help them achieve their aim, although there were various obstacles.

Aria: Katerina wanted to carry my own child. We both thought this was a brilliant idea, because each could have a certain link to the child. We went to a fertility centre and told the doctor about our desire to have a child this way.

²² Various CCGs around the country have upper age limits for the provision of IVF funding (Chapter 4, n129).

²³ Law 4356/2015. Hatzis A, *Gay Adoption in Greece* (Baros, V. and others eds, Childhood and Migration: Challenges for the Pedagogy of Diversity, Diadrasi 2016).

²⁴ Since May 2018, same-sex couples have formally been allowed to adopt and foster children (Law 4538/2018).

²⁵ Section 3.3.1, 'Relationship Status'.

Interviewer: *Did you go to the doctor as a couple?*

Aria: *He never asked, and we never explained. They [doctors] rarely ask. They're not interested in it. At the time, I was 42 years old. The doctor told us that I couldn't be an egg donor, because, under Greek law, egg donors must be younger than 35, so we couldn't use my egg. (...)Then, he suggested we do surrogacy.*

Since formal legal surrogacy cannot happen without the court's permission, the couple had to follow the formal legal process, because the clinic would not treat them otherwise. I found that some clinicians will find ways to offer ARTs to same-sex couples, even though this is not formally provided for in law and even if it involves deceiving the authorities. Additionally, there was evidence that same-sex couples may attempt to deceive clinicians to achieve access. An anonymous Greek lawyer reported that she drafted a surrogacy agreement between a gay male couple and their surrogate. The parties signed the agreement, and then the surrogate and one of the men appeared to the clinic as a couple seeking ARTs and accessed treatment.

Some Greek interviewees suggested the current law reveals a tension between the overarching principle of the right to have a child and the non-recognition of same-sex couples' right to access ARTs, including surrogacy.²⁶ Takis Vidalis argued that this imbalance could easily be remedied if the interpretation of the term 'partnership' was broadened to include partners in a same-sex relationship.

The right to reproduce is everyone's right. (...)I think the current law could be interpreted to extend access to ART to same-sex couples. The law talks about 'intended parents'; there is no differentiation based on gender and relationship status(...). If we interpret the word "partners" as "partners in civil partnership"(...), there wouldn't be a problem.

Furthermore, my data imply that the legal ambiguity regarding same-sex couples' right to access ARTs leaves scope for differences in clinical practices across Greece, with some doctors saying they would treat same-sex couples under certain conditions, and others saying they would not. For example, Dr Pantos said he would treat gay male couples if they were foreigners who were legally married or in a legally recognised civil partnership in their jurisdiction, and that now that the Greek civil partnership law has changed, he would consider treating Greek same-sex couples. In contrast, Ms Chatziparasidou said her clinic has a strict policy against treating same-sex couples, which would only change when ARTs law changed accordingly.

²⁶ Dr Pantos, Dr Tarlatzis, Professor Hatzis, Vidalis, Cazlaris, anonymous lawyer, Lena.

In the UK, access to ARTs does not rest on a relationship criterion. As originally drafted, the 1990 Act, included a requirement for clinicians to take account of ‘the child’s need for a father’ before providing access to ARTs, which could arguably exclude lesbian couples and single women.²⁷ However, in 2008, this was changed to the child’s ‘need for supportive parenting’, making it clear that there was no requirement for a woman to be in a relationship in order to receive treatment. Moreover, clinics were regularly treating single women and lesbian couples, as some UK studies performed in the 1990s suggest.²⁸ Recent studies show that UK clinics operate under a presumption to treat, and same-sex couples can access ARTs, although there is still some suspicion of single women.²⁹

Dr Avery stated that no social groups are barred from treatment, and same-sex couples and single people have no problems accessing ARTs nowadays. However, she indicated this is due to fears of accusations of discrimination and bad publicity.

I think if you do have censorship or you do have individuals who would like to restrict access to particular groups, it is very much harder for them to do so than it was. Not from a legal point of view, but from a profile point of view. Now it’s not at all uncommon [to treat singles and same-sex couples]. (...) [I]f you were to attempt to make an exception on the basis of surrogacy, it would be very hard to do it very obviously, and, being cynical about it, the other thing that worries people is people going to the press and saying “they wouldn’t let me have treatment because...”. (...) You can’t refuse anybody.

Some UK interviewees referred to unverified anecdotal evidence of gay male couples having been refused access in UK clinics after the 2008 legal reform.³⁰ Steven and Simon said these stories caused them a lot of anxiety, so much so that they initially wanted to avoid going through a clinic for surrogacy. Nevertheless, when they did so at the request of their surrogate, they met no legal restrictions and had a positive experience. Two other UK surrogates who were treated in UK clinics together with same-sex IPs, said their access was legally unproblematic. This reveals that it can take

²⁷ Chapter 4, ‘WoC assessments in clinics’.

²⁸ G. Douglas, *Access to Assisted Reproduction: Legal and other criteria for eligibility. Report of a survey funded by the Nuffield Foundation* (1992); Blyth E, 'The United Kingdom’s Human Fertilisation and Embryology Act 1990 and the Welfare of the Child: A Critique' (1995) 3 *The International Journal of Children’s Rights*; Lieberman BA, Matson P and Hamer F, 'The Human Fertilisation and Embryology Act: How Well is it Functioning?' (1994) 9 *Human Reproduction*; Patel JC and Johnson MH, 'A Survey of the Effectiveness of the Assessment of the Welfare of the Child in UK In-Vitro Fertilization Units' (1998) 13 *Human Reproduction*.

²⁹ Lee, Macvarish and Sheldon (n10); Sheldon S, Lee E and Macvarish J, 'Supportive Parenting'. Responsibility and Regulation: The Welfare Assessment under the Reformed Human Fertilisation and Embryology Act (1990)' (2015) 78(3) *MLR* 461-492.

³⁰ Sarah, Lauren, Simon and Steve (SUK gay fathers).

time for legislative changes to filter into public consciousness and clinical practice, and it confirms findings of recent UK studies that same-sex couples no longer face legal restrictions in accessing ARTs in UK clinics.³¹

5.2.4 Welfare of the child (WoC)

As discussed earlier, UK law requires clinics to perform a WoC assessment before providing access to ARTs. Some UK commentators have noted the WoC criterion regarding the child's 'need for supportive parenting' (and previously the child's 'need for a father') could have operated as a limitation on access to ARTs.³² In fact, recent studies have shown that WoC assessments nowadays are very light-touch, and clinicians promote access.³³ The latter was confirmed through my sample. For example, Dr Sue Avery said:

I do think it is much harder for people to decide not to offer treatment on the basis of some general prejudice these days. (...)Possibly, if we have a problem, it goes the other way, and that's not to do with surrogacy. It's where people are worried about not providing treatment even when you have serious WoC concerns, because they don't want to say no, and they're worried about appearing to be discriminatory.

She also considered assessing WoC was difficult, but noted there are processes in place to ensure wide agreement in case of possible concern during the assessment.³⁴ Furthermore, she stated that access will be refused in very specific circumstances, such as domestic violence or an unstable relationship, which are not to do with surrogacy specifically, or due to concerns about possible exploitation of the surrogate by the IPs:

I think we've had one surrogacy case where, due to concerns, we didn't go ahead, but that was where the proposed surrogate was the niece of the IM, quite young, living in their house, and it became clear that this wasn't something she was consenting to quite as freely as we would've liked her to.

Moreover, I found that access does not depend merely only on clinics' WoC assessments, but also on assessments done by surrogacy organisations. This theme is largely overlooked in the UK literature and emerged strongly in my data. Notably, such assessments do not affect legal access to surrogacy, but they may set practical barriers. Marina from COTS said:

³¹ Lee, Macvarish and Sheldon (n10); Sheldon, Lee, and Macvarish (n29).

³² Chapter 4, n107-111,124 and accompanying text in the main body.

³³ Lee, Macvarish and Sheldon (n10); Sheldon, Lee, and Macvarish (n29).

³⁴ The clinic holds multidisciplinary meetings to discuss concerns.

We do a police-check. (...)We ask them [IPs] if they have any involvement in social services. (...)At the end of the day we think of the safety of the child. (...)We have stringent rules.

Similar processes were noted by other interviewees, with Helen Prosser from Brilliant Beginnings (BB) describing a rigorous process for background checks that can take up to four months, and Sarah from SUK mentioning that prospective SUK members must provide background clearance to be accepted. Additionally, Lauren (SUK surrogate) underwent an interview with an experienced SUK surrogate to gain an approval of registration, which is another form of assessment.

Notwithstanding the way in which independent surrogacy is sometimes characterised,³⁵ I found that rigorous processes and checks to ensure WoC are common in that sector, too. Jamie (UK independent surrogate) and her IPs shared the results of their police-checks but, for them, trust was more important than any ‘formal’ check. In fact, Jamie found background checks ‘silly’, because, in her opinion, ‘*it just means you haven’t been caught on paper*’.

In Greece, WoC is assessed by the court at the preconception stage and later by the clinic. Greek literature considers WoC very important in ARTs,³⁶ but, according to some, it can restrict autonomy because it offers unlimited discretion, first, to judges and, secondly, to clinicians to assess peoples’ suitability to become parents.³⁷ There is no published evidence about how WoC assessments are conducted in Greek clinics and whether they are onerous or not. However, Greek judicial practice suggests that WoC concerns do not limit access to surrogacy.³⁸ This is confirmed by my evidence.

Takis Vidalis explained that WoC does not act as a significant limitation, because the court cannot do a full review of surrogacy arrangements. Moreover, clinics cannot refuse access if a judicial permission for gestational surrogacy has been obtained. Therefore, the clinical WoC assessment, if it happens, is light-touch.

³⁵ Many UK judges described it as ‘dangerous’: *Re N* [2007] EWCA Civ 1053; *Re TT* [2011] EWHC 33, [2011] 2FLR 392; *Re X* [2016] EWFC 54, [2016] EWFC 55; *Re M* [2017] EWCA Civ 228; *JP v LP & Others (Surrogacy Arrangement: Wardship)* EWHC 595 (Fam), [2015] 1 FLR 307, and others. By ‘independent’ I mean surrogacy arrangements where the parties do not go through a surrogacy organisation.

³⁶ Koutsouradis A, ‘Issues of Surrogate Motherhood after the Law 3305/2005’ (2006) 54 Legal Library; Fountedaki K, *Human Reproduction and doctor liability*, vol.4 (Publications of Medical Law and Bioethics, Sakkoulas 2007).

³⁷ Trokanas (n3) 123; Koutsouradis (*ibid*) 357.

³⁸ Generally, in Greece, WoC is weighed equally to the interests of the IPs and the surrogate during the judicial scrutiny of surrogacy arrangements. In some cases (Chapter 3, n140-141), WoC operated as a tool to assess the IPs’ parenting abilities but access was granted.

Vidalis: *There is nothing that can be done [by the court] regarding [WoC]. The court only checks the surrogacy agreement, and there's no child at that point. (...)The judge will check whether the circumstances guarantee a relatively safe pregnancy and delivery, nothing more.*

Interviewer: *How about the next stage? At the clinic. Can a doctor assess [WoC]?*

Vidalis: *Since the court's permission is in existence, there is no other check, as we have for example in adoption, about the suitability of the parents-to-be. There is no check specifically for surrogacy.*

Generally, there was clear agreement across my Greek sample that judges and clinics very rarely refuse access on WoC grounds, with some saying that this would only happen in very specific circumstances; for example, if there is history of violence, or if the IPs' relationship appears to be unstable (also cited by Dr Avery in the UK).³⁹ Moreover, there was agreement between the UK and Greek clinicians about the difficulty associated with assessing WoC.⁴⁰ Lastly, Greek clinicians considered counselling very significant in assessing WoC and revealed that they make it mandatory in their clinics,⁴¹ although it is not a statutory access requirement. This also happens in the UK, as noted by previous studies⁴² and as confirmed by many of my interviewees.⁴³

In summary, my data showed that both Greek and UK clinics, and UK surrogacy organisations, consider WoC assessments very important. Although very rare, WoC may be used to justify refusals of access to surrogacy. It is, though, possible that refusals are so rare because cases raising serious WoC concerns do not reach clinics (or surrogacy organisations) at all, since people may be screening themselves out, which was unlikely to be captured by my sample.

5.2.5 Residence

Residence was never a statutory access requirement in the UK. In Greece, until July 2014, permanent residence was an absolute legal requirement for access to surrogacy and was monitored by the court at the preconception stage. As noted in Chapter 3, there were concerns that the residence rule was not working effectively,⁴⁴ and one

³⁹ Dr Pantos, Dr Tarlatzis, and Ms Chatziparasidou. Moreover, some said access would be refused if the medical need criterion is not fulfilled (Dr Pantos, Ms Chatziparasidou, Professor Hatzis, anonymous Greek lawyer).

⁴⁰ Ms Chatziparasidou, Dr Pantos, and Dr Avery from the UK.

⁴¹ *Ibid*

⁴² Lee, Macvarish and Sheldon (n10); Sheldon Lee, and Macvarish (n29).

⁴³ Dr Avery said surrogacy counselling is mandatory in her clinic. Lauren, Sarah, Simon and Steve, and Natalie received counselling in UK clinics, which was presented to them as mandatory.

⁴⁴ Chapter 3, n163-164,166 and accompanying text in the main body.

commentator described it as ‘nonsensical’.⁴⁵ In 2014, the law was amended to require merely that either the IM or the surrogate has at least temporary residence in Greece. The change was explained as an effort to modernise the law and facilitate state-monitoring of ART practice,⁴⁶ but the literature and the media saw it as aiming to increase ‘reproductive tourism’ for surrogacy.⁴⁷

Greek interviewees confirmed that the residence requirement never worked well, because its enforcement was patchy,⁴⁸ and effective monitoring by judges was virtually impossible because there was no mechanism in place to help them do so. This meant that judges had to rely on the statements of the parties and one witness.⁴⁹ Furthermore, some suggested that one could find ways to work around the requirement if one tried hard enough,⁵⁰ and that there have been misrepresentations in court to overcome the residence rule.⁵¹

Lena: It used to be more time-consuming and harder to [have surrogacy in Greece]. Now we don't have to prove residence. We used to submit an electricity bill, and a witness statement, someone who would say they were the IPs' neighbour. In most cases the IPs would stay in Greece during the surrogate's pregnancy anyway, so they would rent a house, etc.

Moreover, in line with the commentators mentioned above, many of my interviewees believed the legislative change was politically-driven, aiming at increasing reproductive tourism,⁵² which would be unsurprising considering the state's interest in accepting and promoting such a development.⁵³ Some interviewees viewed the change as potentially dangerous, fearing it could increase the risk of exploitation,⁵⁴ and others noted that it does not sit comfortably with the principle of altruism

⁴⁵ Kounougeri-Manoledaki E, *Assisted reproduction and family law. The Greek legislation: Laws 3089/2002 and 3305/2005* (Sakkoulas 2005) 65.

⁴⁶ Memorandum-Law 4272/2014.

⁴⁷ Papachristou TK, 'An unfortunate choice by the lawmaker' (2014) 8 *Private Law Chronicles*; Kovacs, Stéphane. 'Greece, The Eldorado of surrogacy', *Le Figaro* (3/10/2014) <http://www.lefigaro.fr/mon-figaro/2014/10/03/10001-20141003ARTFIG00288-en-grece-l-eldorado-de-la-gpa.php>, accessed on 23/05/2015 (in French).

⁴⁸ Anonymous lawyer, Takis Vidalis.

⁴⁹ *Ibid*, and Professor Hatzis.

⁵⁰ Lena, anonymous lawyer, Professor Hatzis, Takis Vidalis.

⁵¹ *Ibid*

⁵² Dr Tarlatzis, Dr Pantos, Takis Vidalis, Professor Hatzis, anonymous lawyer, Haris Cazlaris.

⁵³ n18.

⁵⁴ Mr Vidalis thought that, due to the refugee crisis Greece is dealing with, there are now many vulnerable women of no or low income who could be tempted to become surrogates for money. Also, an anonymous Greek lawyer worried that new regime facilitates trafficking for surrogates.

underpinning Greek surrogacy law. However, some thought these dangers could be minimised, if not eliminated, through tighter monitoring by NAMAR.⁵⁵

5.2.6 Judicial scrutiny of surrogacy agreements

Greek law requires that the court approves the surrogacy agreement at the preconception stage; therefore, judges could be viewed as the main gatekeepers of surrogacy. In the UK, there is no equivalent to the judicial pre-approval process. Again, there is little evidence about how the judicial scrutiny operates in Greece. One commentator noted that judges do not examine surrogacy cases in detail, and regularly provide access if the medical need requirement is met,⁵⁶ and another described it a 'rubber-stamping' service.⁵⁷

Although I was unable to gather evidence directly from Greek judges, I found relevant information through my other interviewees. Greek clinicians emphasised the significance of the judicial scrutiny requirement, noting that they do not proceed to treatment in the absence of the court's authorisation, which was also confirmed by Greek surrogates and IPs.⁵⁸ Many interviewees also suggested that the judicial scrutiny acts as a 'safety valve' against exploitation.⁵⁹ For example, Takis Vidalis said:

[L]aw has provided tools to detect and prevent exploitation. (...) [It] requires provision of clear and unconditional informed consent, and there is a judicial process. (...) [T]here are certain rights, especially on the part of the surrogate, that are irrefutable whatever the agreement says. (...) No one can make her do anything she doesn't want to do, and the court process is there to make sure the parties know about it.

However, a few others emphasised that, in practice, the detection and prevention of exploitation is problematic, because judges lack the necessary training and knowledge.⁶⁰ Additionally, my findings confirm assumptions in the literature that the judicial scrutiny does not involve a full review of the surrogacy arrangement. Takis Vidalis said that *'there is no effective judicial monitoring(...). It's a conventional check of the evidence [and documents] that should be there (...) because the law says*

⁵⁵ Takis Vidalis, Haris Cazlaris, Professor Hatzis.

⁵⁶ Papazisi (n4) 85.

⁵⁷ Hatzis A, 'From soft to hard paternalism and back: the regulation of surrogate motherhood in Greece' (2009) 49(3) Portuguese Economic Journal. As will be seen in Chapter 7, UK judges will rarely refuse PO applications, which renders the post-birth judicial scrutiny of surrogacy a rubber-stamping service.

⁵⁸ Dr Pantos, Ms Chatziparasidou, Dr Tarlatzis, Elina (surrogate), Aria (lesbian IM).

⁵⁹ Takis Vidalis, Professor Hatzis, Dr Tarlatzis, Dr Pantos, anonymous lawyer, Giota (IM), Lena, Elina, Areti (mother of twins through surrogacy).

⁶⁰ Professor Hatzis, Vidalis.

so'.⁶¹ He later stated that judges rarely ask questions about the parties' true relationship, and about the existence of altruism, and, if they do, they only rely on the parties' statements.

Usually, if this examination takes place, parties just say they're friends. (...) [T]he judge cannot dispute this. In many cases, it is clear they're not 'friends', but the judges cannot do anything.

Further, an anonymous Greek lawyer said the judicial scrutiny for surrogacy is far less rigorous than other family law processes, such as that for adoption, and that '*the court merely ratifies the parties' agreement*'. Also, some interviewees stated that Greek judges very rarely refuse surrogacy applications, especially if the medical need requirement is fulfilled.⁶² Greek surrogates and IPs said the judicial process was a quick, positive, and relatively straightforward experience.⁶³ For example, Aria, Greek lesbian mother through 'surrogacy', said:

[T]he whole process went by smoothly. (...) The judge asked if Katerina is my friend, and I said yes. Then [the judge] asked if Katerina was going to be paid at all, and I said no. Nothing more. (...) I think the hearing was less than 15 minutes long. (...) We got the court's written permission a few days later, [and] went back to the clinic.

Likewise, Elina, a Greek surrogate for IPs living in Germany,⁶⁴ said that the judge did not ask any questions to affirm the parties' residence in Greece, although the hearing took place before the legislative change to the residence rule. Also, the judge only examined the IM's father, who appeared as a witness. However, Lena described a far more rigorous process than this. She was asked a series of questions, including her opinion about the IPs' suitability to become parents.

I attended the [surrogacy court] hearing. The judge asked me if I know the couple, if we'd agreed on a payment more than my expenses, if I consent to becoming a surrogate for them, if we work and what it is that we do, if I know what surrogacy involves, and if I think they will be good parents.

My data confirmed the existing literature: the preconception judicial scrutiny of surrogacy agreements does not pose important limitations on access, but it does not help detect exploitation either, because judges lack proper knowledge and training. It is, though, possible that the prospect of needing to undergo a judicial process, the

⁶¹ The evidence consists of a medical affidavit certifying the IM's medical need for surrogacy, the results of the surrogate's physical and psychiatric evaluation, and the signed surrogacy agreement.

⁶² Professor Hatzis, anonymous lawyer, Ms Chatziparasidou. Interestingly, as noted above psychological, 'unexplained', and social infertility do not meet the medical need requirement.

⁶³ Aria, Areti, Elina.

⁶⁴ The IM was a Greek national, whose parents lived permanently in Greece.

additional expense of potentially needing a lawyer, and the length of time till approval is obtained,⁶⁵ deters some people from accessing formal legal surrogacy in Greece. In fact, Professor Hatzis believed that the legal cost is the reason that illegal surrogacy possibly occurs in Greece. Given the nature of my sample, and the paucity of research in Greece, it was impossible to find a response to this claim.

5.3 Practical (non-regulatory) restrictions

Up to this point, I have explored how regulatory restrictions influence access to surrogacy in Greece and the UK. As Nelson explains, it is important to explore not only whether law promotes reproductive autonomy, but also ‘whether conditions exist that *actually* permit (or foster) the meaningful exercise of reproductive choice’.⁶⁶ Moreover, it is important to examine how legal provisions impact in practice to see if any forms of discrimination (not expressed in the formal rules) still exist.

I will now discuss other (non-regulatory) factors posing difficulties and/or barriers to access to surrogacy in Greece and the UK. This issue is severely under-researched, and thus my evidence makes a significant contribution to the existing literature. Based on my interviews, potential barriers here include the availability and quality of information, the difficulty in finding surrogates, the surrogates’ preferences, and cost and lack of public funding.

5.3.1 Availability and quality of information and support in accessing surrogacy

Access to accurate and easily understood information enables decision-making and supports the exercise of reproductive autonomy.⁶⁷ It is important to explore how people interested in surrogacy in Greece and the UK find relevant information, because this has strong implications for who can access the information, what quality the information is likely to possess, and for how independently the parties in such an arrangement are able to operate (if access is controlled by formal gatekeepers). Hence, this investigation allows us to see how easy, fair, and equitable access is. I focus on

⁶⁵ This ranged from 24 days (in smaller courts outside the capital) to 6 months (in the capital) with most interviewees mentioning 2-4 months (Ms Chatziparasidou, anonymous lawyer, Lena, Elina, Giota, Aria).

⁶⁶ Nelson E, *Law, Policy and Reproductive Autonomy* (Hart Publishing 2013) 50.

⁶⁷ Beckman LJ and Harvey SM, ‘Current Reproductive Technologies: Increased Access and Choice?’ (2005) 61(1) *Journal of Social Issues* 7-9.

the role of the Internet and the media, and of other key actors of surrogacy, namely surrogacy organisations and medical and legal professionals.

- **The role of the media and the Internet**

Jackson argues that nowadays the Internet plays an important role in surrogacy practice,⁶⁸ but there is little evidence on how parties interested in surrogacy in the UK find relevant information. Horsey's study included evidence about how IPs and surrogates found each other (for example, through surrogacy organisations, online forums, and friends or relatives),⁶⁹ but not about how they found information about surrogacy in the first place. Recent UK court cases revealed that the Internet offers new possibilities regarding information, support, and matching for surrogacy, but it can be dangerous.⁷⁰ As to Greece, my research has not uncovered any studies exploring this topic. As such, while my study sample was small, it offers unique evidence.

My data suggest that people use different sources to find information about surrogacy in each country, including the Internet, mainly Google and social media (Facebook groups, and parenthood and/or (in)fertility online forums) and the media (for example TV shows and editorials in magazines and newspapers). The Internet and the media appeared to be much more important in the UK than in Greece. All UK participants identified them as the main source of information about surrogacy, whereas, as we will see below, Greek participants referred to medical professionals, and less so to lawyers, to gather relevant information. This shows that people interested in UK surrogacy choose independent sources to find information, while Greeks depend on information that formal gatekeepers decide to share with them.

Steven and Simon, gay fathers, used 'Google' to find information about surrogacy. This led them to the websites of two UK surrogacy organisations, and they later registered with SUK. Lauren also gathered information about UK surrogacy law and the work of surrogacy organisations through Google and registered with SUK. Others emphasised that the use of the Internet for information about surrogacy is a new

⁶⁸ Jackson E, 'The law and DIY assisted conception' in Horsey, K. (ed), *Revisiting the Regulation of Human Fertilisation and Embryology* (Routledge 2015) 31.

⁶⁹ Horsey K, *Surrogacy in the UK: Myth busting and reform*, Report of the Surrogacy UK Working Group on Surrogacy Law Reform (Surrogacy UK, November 2015) 22.

⁷⁰ n35.

phenomenon,⁷¹ but some noted the difficulty of distinguishing accurate and good quality from misleading information,⁷² and believed practising surrogacy over the Internet is dangerous.⁷³

H.Prosser: *I think the biggest source is the internet(...). Google, and Facebook, and also friends and family. (...)I'd say three years ago people were cluttered with information. Now I think people have done quite a lot of research, and information is improving almost daily, so they've got a rough idea. But what they're needing testing is the validity of that information. That's when they come to us [lawyers and other surrogacy professionals].*

N.Gamble: *[P]eople access information from each other as well. A lot of people go on online forums and share the experiences of other people that have done surrogacy in different ways. (...) [I]t's changed very radically very recently. (...)It can be very dangerous.*

On the other hand, I found that the Internet, and more specifically social media, can provide certain advantages to some users of surrogacy. Jamie explained that online forums offer new (and quite possibly improved) ways of making contact for the purposes of surrogacy,⁷⁴ finding out how to go about surrogacy, and receiving support. Facebook offered Jamie a sense of empowerment, and she proceeded to create her own Facebook group of surrogates and IPs. Notably, these opportunities might be lost with tighter regulation.⁷⁵

Jamie: *Since I was about 17 I've wanted to be a surrogate(...). [Years later], I saw an advert on Facebook about egg donation. I started talking to (...)a girl, who is a surrogate herself, on Facebook. (...) [S]he introduced me to the group, and that kind of re-sparked everything. I wanted to be a surrogate. (...)We [Jamie and her IPs] did everything by ourselves. (...)I felt like the decisions were ours. (...)I had a support network, my [Facebook] group. (...)I created my own support network based on what I needed rather than having a support network that was 'one size fits all'.*

Furthermore, although many UK interviewees noted that surrogacy often receives bad publicity,⁷⁶ some identified the media as a valuable source of information about

⁷¹ Kirsty Horsey (legal academic), Natalie Gamble (solicitor and BB co-founder) and Helen Prosser (BB co-founder).

⁷² Helen Prosser, Natalie Gamble, Vasanti Jadvā (psychology academic).

⁷³ Also purported by legal precedent (n34).

⁷⁴ 'Improved' because information is easily and widely accessible and communications more immediate.

⁷⁵ This has been noted by a recent study exploring the work of Cafcass PO Reporters: Crawshaw M, Purewal S and van den Akker O, 'Working at the Margins: The Views and Experiences of Court Social Workers on Parental Orders in Surrogacy Arrangements' (2012) *British Journal of Social Work* 1238-1240. Moreover, tighter regulation or prohibition could drive the practice underground, thus worsen any problems with it (Freeman M, 'Does Surrogacy Have a Future after Brazier?' (1999) 7 *Med Law Rev* 20).

⁷⁶ Lately there have been many positive surrogacy stories in the press, which could indicate a change in perceptions: Fishwick, S. 'A new frontier for fertility: why surrogate pregnancies are on the rise' (28/09/2017) <https://www.standard.co.uk/lifestyle/london-life/a-new-frontier-for-fertility-why->

surrogacy. Marina decided that she wanted to become a surrogate at an early age, after she watched a TV interview with Kim Cotton, the UK's first surrogate and founder of COTS. Sarah said that many IPs and prospective surrogates find information through the media. She also suggested that media stories help women decide to become surrogates, whereas IPs use other sources.

[Most people find out through] *the media*. (...) *The moment we have a media story out, we see an increase in surrogate enquiries. (...) [I]t isn't something that you would normally think yourself. I think you need that push so you can see that surrogacy is a viable option. (...) IPs find out elsewhere.*

Unlike in the UK, Greek interviewees did not mention the Internet as a significant source of information. Areti was the only exception. Just like Natalie in the UK, Areti was informed by her doctor at a young age that she was physically unable to carry a pregnancy, with surrogacy being her only route to biological parenthood. Years later, she used an online parenthood forum to work out how to have surrogacy in Greece.

My doctor told me around 2004 that surrogacy was an option for me to have a biological family. (...) A few years later, and with my family's encouragement, I started looking into surrogacy, and I posted a comment on a parenthood forum. Two months later a girl replied saying that a lawyer can find a surrogate for me and gave me his contact details.

Another interviewee said the Internet and the TV are important in finding out about clinics dealing with surrogacy but emphasised that Greek IPs usually get initial information from clinicians.⁷⁷ This will be discussed in the next section.

One of my most interesting and important findings is that surrogacy is still a taboo issue in Greece, although, according to my interviewees, the secrecy around it has started to decrease.⁷⁸ Lena noted that Greeks have only recently started sharing surrogacy stories on online forums, and there is very limited information available online and the media, which may hinder some people's access to surrogacy.

[surrogate-pregnancies-are-on-the-rise-a3646061.html](http://www.vogue.co.uk/article/surrogacy-in-the-uk) accessed on 04/01/2018; Mowbray, N. 'To Have and To Hold: The Rise of Surrogacy In Britain' (27/09/2017) <http://www.vogue.co.uk/article/surrogacy-in-the-uk> accessed on 04/01/2018. Also, many celebrities have used surrogacy, and help raise awareness: Clemmons, R. V. '28 Celebrities that have used gestational surrogates' (6/12/2017) <https://www.metro.us/entertainment/celebrities/28-celebrities-have-used-gestational-surrogates#.WiiBjMuJ-Qg.facebook> accessed on 5/01/2018; Dailymail.com Reporter. 'We are so in love!' Kim Kardashian and Kanye West welcome a 'healthy' baby girl and thank surrogate for making their 'dreams come true' (16/01/2018) <http://www.dailymail.co.uk/tvshowbiz/article-5275785/Kim-Kardashian-Kanye-West-welcome-girl-surrogate.html#ixzz54Wu9j57Q> accessed on 17/01/2018.

⁷⁷ Lena first heard about surrogacy through a popular Greek TV show.

⁷⁸ Lena, Elina, Professor Hatzis, Mr Cazlaris, Ms Chatziparasidou, anonymous lawyer.

Surrogacy is still very much a taboo issue, much more than any other ART. Greeks are not open to discuss IVF, so you can imagine how much more difficult it is to talk about surrogacy. (...) Only recently people have started opening up about surrogacy, mostly on Facebook groups, but you won't find much information about it online and on TV.

Although there is no data from other studies to support these claims, the frequent appearance of surrogacy in popular culture could possibly indicate a change in perceptions.⁷⁹

- **The role of medical professionals**

In the UK, only surrogacy that takes place in clinics is regulated and, if the parties do not go through one, it is likely that medical professionals will be involved only after pregnancy has been achieved. Two UK interviewees said only a few people get initial information from medical professionals, whereas the majority primarily use the Internet, the media, and/or surrogacy organisations.⁸⁰ However, as discussed above, UK doctors present surrogacy as an alternative to infertile heterosexual couples, and doctors' awareness about surrogacy has increased over the years.⁸¹

For gay male couples, medical professionals may not be a source of information about surrogacy, because they already know that this is their only way to (partial) biological parenthood, as Sarah explained. She also said these couples gather relevant information 'in various ways: by recommendation, or a social event' (organised by surrogacy organisations), through consumer conferences,⁸² and/or the Internet and the media.

Although there is no evidence in the literature about this, most Greek interviewees suggested that doctors are usually the first point of call for couples interested in surrogacy. However, doctors will only suggest surrogacy if there is a medical need for it and only as a last resort solution.⁸³ Moreover, my Greek data revealed a strong presence, at least amongst my interviewees, of medical paternalism.⁸⁴ Takis Vidalis said:

⁷⁹ For example, the popular Greek TV story of a surrogacy arrangement between two childhood friends: 'Under the Moonlight', *Sto Fos tou Feggariou* (Mega TV 2004). Also, surrogacy is the central topic in a current TV series titled 'Virgin Life', *Parthena Zoi* (ANT1 TV 2017).

⁸⁰ Dr Avery, Vasanti Jadva.

⁸¹ This chapter, 5.2.1.

⁸² Such as the annual Families Through Surrogacy conferences and The Fertility Show.

⁸³ Ms Chatziparasidou, Dr Pantos, Dr Tarlatzis.

⁸⁴ Mr Vidalis, Ms Chatziparasidou, Dr Pantos, Professor Hatzis, Mr Cazlaris, Elina, Lena, Aria.

Generally, the doctor's advice is very important in Greece. Someone with problems conceiving a child will seek advice from an obstetrician-fertility specialist. (...)There is a high degree of trust from the patient towards the doctor, and sometimes it is unjustified. (...)Medical paternalism (...)remains very strong in Greece, although Greek laws are not paternalistic any more at any level and in any area of medicine.

Professor Hatzis also thought paternalism exists in Greek medical practice, adding that *'the doctor is the absolute decision-maker, and doesn't share the knowledge with the patient'*, and this level of control could prove dangerous. For instance, he believed that the parties *'may do things they wouldn't have been willing to do in any other case, only because the doctor said so. They won't doubt the doctor's advice; they will follow it till the end'*, even if this means that they have little, or no, freedom to make their own decisions during their arrangement. He also noted that Greek doctors are probably involved in matching for surrogacy, although it is illegal. While all clinicians I interviewed in Greece denied being involved in surrogacy matching, evidence from other interviewees suggested that at least some clinics provide matching services, as we will see later.

Trust in doctors and clinics was also deemed important in the UK, but not in the same way as in Greece. Two surrogates said they would follow their doctors' advice, and they trusted the doctors' knowledge and expertise for all matters regarding the medical aspects of surrogacy,⁸⁵ but did not indicate that the doctor was an important decision-maker. Moreover, Dr Avery said there is no involvement of UK clinics in surrogacy matching.⁸⁶ However, this role, as we will see below, is largely undertaken by UK surrogacy organisations, which do not exist in Greece.

Regarding the content of information, my data revealed that UK medical professionals may provide information about surrogacy organisations and other helpful sources of information. This usually consists of a list with websites of reputable surrogacy organisations, according to Dr Avery. This is in line with government guidance recently published in the UK.⁸⁷ In Greece, medical professionals have a more active role; they offer information which covers a wider context: the medical and the legal process for surrogacy. Also, Greek clinicians disclosed that they routinely refer interested parties to experienced lawyers specialised in surrogacy.⁸⁸

⁸⁵ Lauren, Sarah.

⁸⁶ Dr Sue Avery.

⁸⁷ Department of Health and Social Care (DHSC), *Care in Surrogacy. Guidance for the care of surrogates and intended parents in surrogate births in England and Wales* (28/02/2018) 8.

⁸⁸ Dr Tarlatzis, Ms Chatziparasidou, and Dr Pantos, and confirmed by Lena, Areti.

In summary, the role of medical professionals in providing information about surrogacy is pivotal in Greece but less important in the UK, where my interviewees indicated the main sources of information are the Internet, the media, and surrogacy organisations. This has implications for who can access surrogacy, since medical professionals in Greece will only suggest surrogacy if there is a medical need, which is a legal requirement that does not exist in the UK. On the other hand, the quality of information provided by medical professionals, is most likely better compared to that on the Internet and the media.⁸⁹

- **The role of UK surrogacy organisations**

An issue that is mostly overlooked by the UK literature is the role of non-profit organisations in providing information and support for surrogacy.⁹⁰ Although they are currently unregulated, their important role in UK surrogacy practice has received formal recognition from the DHSC recently.⁹¹ In Greece, there is no evidence that any such organisations are operating.

My evidence revealed that UK surrogacy organisations raise awareness about surrogacy, and provide information and support through their websites, their accounts on social media, social events, conference attendances, and media stories. Almost all UK interviewees noted the important function of those organisations, with all mentioning the moral and emotional support and information offered, as well as noting the space, both physical and online, to raise and think through issues in a supportive environment, and to help new members understand the practical and legal aspects of UK surrogacy.⁹² If necessary, surrogacy organisations may provide legal support.

Marina: *I always felt that COTS was giving me the back-up if (...)something went wrong. I needed COTS at one stage, because social services planned to take one of the children(...), after my first arrangement. The couple were from Holland, and it was illegal there.*

⁸⁹ van den Akker has noted that gestational surrogates 'are potentially better informed 'because of their greater level of contact with health professionals' (van den Akker OBA, 'Genetic and Gestational Surrogate Mothers' Experience of Surrogacy' (2003) 21(2) Journal of Reproductive and Infant Psychology 147).

⁹⁰ Except for Horsey's study (n69). There are four main surrogacy organisations in the UK: Surrogacy UK (<https://www.surrogacyuk.org/>), COTS (<https://www.surrogacy.org.uk/>), Brilliant Beginnings [BB] (<http://www.brilliantbeginnings.co.uk/>), and the British Surrogacy Centre [BSC] (<http://www.britishtsurrogacycentre.com/>). However, the BSC has a bad reputation (Chapter 4, n173).

⁹¹ DHSC guidance for medical professionals (n87); DHSC, 'The Surrogacy Pathway. Surrogacy and the legal process for intended parents and surrogates in England and Wales' (28/02/2018).

⁹² Natalie, Sarah, Lauren, Steven and Simon (all from SUK), Marina (COTS), Natalie Gamble and Helen Prosser (BB).

As I discuss below, UK surrogacy organisations support their members by also putting them in touch. However, the processes and costs involved in accessing information and support through these organisations (although it is a one-off cost) may deter some people, as Jamie said. More specifically, she thought that the membership fee charged by those organisations sits in tension with the principle of altruism underpinning the law. No other IPs and surrogates mentioned any feelings of discontent with the processes and costs of UK surrogacy organisations, but it was unlikely they would since they have used those services.

- ***The role of lawyers***

Due to the legal requirement for the preconception judicial scrutiny of surrogacy agreements, the involvement of lawyers in surrogacy is presumably common in Greece, although no evidence exists about it. I found that Greek lawyers provide information about the legal process, help parties draft their agreements, and handle surrogacy applications in court.⁹³ There was no evidence within my sample that Greek lawyers are involved in negotiations about surrogacy (which would be illegal); this was rather presented as a matter the parties decide between them.⁹⁴ Although only one Greek lawyer agreed to be interviewed (on condition of full anonymity), the evidence gathered is illuminating.

The parties negotiate the financial side of their surrogacy agreement on their own. We don't get involved in this. We do advise them to account for reasonable expenses for the surrogate's dietary, clothing, and medical needs, as well as other living expenses. (...)I couldn't have known if they agreed on a further payment.

In addition, some noted that lawyers often collaborate with clinics to help with surrogacy cases.⁹⁵

In the UK, surrogacy at the early stages is largely unregulated, hence I did not expect to find evidence of lawyers' involvement regarding access to surrogacy, and this was confirmed by some UK surrogacy professionals.⁹⁶ A few also noted that lawyers may provide initial legal advice to people seeking to confirm the information found on the

⁹³ Anonymous Greek lawyer, Dr Pantos, and Lena.

⁹⁴ Anonymous lawyer, Giota, Elina.

⁹⁵ Dr Pantos said his clinic has in-house lawyers, who explain the legal process to the couples and handle the application to the court. Lena said the clinic she works at collaborates with lawyers, who are outsourced and specialised in ART law. Lastly, Giota said her doctor referred her to a lawyer with experience in surrogacy cases.

⁹⁶ UK barrister Andrew Powell said lawyers only get involved when a case is problematic, usually concerning international or informal surrogacy arrangements, and/or cases that challenge the legal rules. Natalie Gamble and Helen Prosser agreed with the above.

Internet.⁹⁷ It is possible for the UK to see an increased involvement of lawyers in surrogacy, because the DHSC now advises IPs and surrogates to seek legal advice on the outset and draft a written surrogacy agreement, though it will have no direct legal force.⁹⁸ Nevertheless, this could be problematic if lawyers are not specialised in surrogacy cases, as recent cases show.⁹⁹

Moreover, the UK recently saw the emergence of a lawyer-run surrogacy organisation (BB), which, as discussed in the previous section, provides a range of services to its clients, including information, advice, and support.¹⁰⁰ Although there are some differences in the processes and the way of operation between the reputable UK surrogacy organisations, the advice they offer can at least help those involved navigate various legal risks.

5.3.2 Difficulty in finding surrogates and matching services

A lack of available surrogates is likely to be one of the most important practical limitations on access to surrogacy, especially if there are no systems to support interested parties find each other. Although this is speculative, it is perhaps owed to the fact that advertisement and (paid) mediation for surrogacy are illegal in both countries.

Several interviewees identified the difficulty in finding surrogates as an important practical barrier to surrogacy in Greece,¹⁰¹ and one believed it is the main reason why surrogacy is still relatively rare.¹⁰² The anonymous lawyer I interviewed confirmed the lack of formal systems through which IPs can find surrogates and remarked that *'it's a matter of the IPs' social networks and personal contacts'*. According to Giota, advertising for surrogacy online is the only way to find a surrogate, although this is probably illegal,¹⁰³ and even then, the search can be long.¹⁰⁴

⁹⁷ Natalie Gamble, Helen Prosser.

⁹⁸ DHSC guidance to surrogates and IPs (n91) 9,11,15.

⁹⁹ In *JP v LP & Others* [2014] (n35), Mrs Justice King found that the solicitors who drew up a surrogacy agreement for a fee committed a criminal offence, but this was because they were unaware it was illegal.

¹⁰⁰ Alghrani, A. and D. Griffiths. 'What is so brilliant about 'Brilliant Beginnings'?' (30/09/2013) <http://www.bionews.org.uk/page_348102.asp> accessed on 04/01/2018.

¹⁰¹ Anonymous Greek lawyer, Giota, Lena, Mr Cazlaris, Dr Pantos, Dr Tarlatzis, Ms Chatziparasidou.
¹⁰² Dr Tarlatzis.

¹⁰³ Under Article 26(8) Law 3305/2005, anyone who publicly, or privately, through documents, pictures or performances, announces or advertises the need for or provision of surrogacy services or provides paid mediation services for surrogacy will be imprisoned for at least two years and pay a €1,500 fine. It is, though, uncertain whether online posting for surrogacy falls under this prohibition.

¹⁰⁴ Giota's search took a little over than two years.

In the UK, some interviewees believed the demand for surrogates is greater than the number of surrogates available, which obliges surrogacy organisations to regularly close their lists and stop accepting new IPs.¹⁰⁵ Marina thought the scarcity of surrogates is due to negative perceptions against surrogacy, but others noted a positive change towards surrogacy both by medical professionals and the media. Others said the lack of surrogates in the UK leads some IPs to go abroad for surrogacy, which could prove dangerous or raise ethical considerations, if surrogacy is done in countries with less regulation.¹⁰⁶ Lastly, I found that some IPs may change their criteria for their ‘ideal’ surrogate because they fear they will not find one.

Steven: *[T]he application forms [to become a member in SUK] have those big questions: how far away do you want your surrogate [to be]?*

Simon: *[S]o we put 400 miles because we didn't know. At that point you don't know how many surrogates there are. You think if there's only one available and she lives in Scotland, you don't want to say "it's too far for me". (...)It said "would you consider a surrogate who smokes?". We put 'yes' because we thought, if there's only one surrogate available, then.... But we'd prefer it if she didn't smoke. (...)We would travel a long way and accept many things, because we wanted to meet someone.*

Nevertheless, in the UK, there are at least better systems for finding surrogates than in Greece. Surrogacy organisations put surrogates and IPs in touch, although each of them has different processes and practices for doing so. BB matches one-to-one,¹⁰⁷ whereas COTS and SUK have lists of IPs and surrogates. In SUK, new members gain access to the lists which contain online profiles of all the members, and surrogates choose the IPs.¹⁰⁸ In COTS, experienced members narrow down a few profiles of IPs for the surrogate, who then chooses the IPs.¹⁰⁹ Representatives of SUK and COTS, said there is a fee paid by new members, so that they can access the lists and other services.¹¹⁰

Although UK surrogacy organisations generally facilitate access, they do so within limits. Again, this issue is previously unstudied. My evidence suggests that organisations may set certain requirements, which are additional to those set by law.

¹⁰⁵ Marina, Sarah, Kirsty Horsey.

¹⁰⁶ Helen Prosser, Vasanti Jadv.

¹⁰⁷ Helen Prosser, Natalie Gamble.

¹⁰⁸ Natalie.

¹⁰⁹ Marina.

¹¹⁰ Marina (COTS), and Natalie (SUK). Jamie said the IPs' registration fee in UK surrogacy organisations is around £750. The membership fee for new IPs in SUK is £800 (as mentioned in the application form available at <https://www.surrogacyuk.org/wp-content/uploads/2011/03/Application-IP-Heterosexual-20092012.pdf>, 21), and £850 for COTS (in the application form available at https://media.wix.com/ugd/8eac99_900ecb0a81f9485b9a4744cee3d90aec.pdf, 14).

Lauren, SUK surrogate, said that SUK has a minimum age limit for surrogates, although there is no such legal requirement.

I saw that they wouldn't take people on as surrogates unless they were 23, and I was 22 at the time, so, I thought, OK, I'll wait.

Other criteria mentioned by UK interviewees for the approval of new members were the surrogates' good health,¹¹¹ and a clear background check.¹¹² Additionally, I found that SUK has a policy of rejecting memberships if the IPs do not fulfil the PO criteria.¹¹³ However, due to the already high and ever-increasing demand for surrogacy in the UK,¹¹⁴ surrogacy organisations do not turn any applicants away,¹¹⁵ but the imbalance in IP and surrogate numbers in their books means that the search for a surrogate may be long.

Moreover, I found that online communities, such as Facebook,¹¹⁶ play an important role in matching for surrogacy both in Greece and the UK. According to Jamie, UK independent surrogate, Facebook is the main tool for matching if the parties do not wish or are unable to register with a surrogacy organisation, for example, because they cannot afford it, or because the lists are closed. In Greece, I found that there are matching websites where Greek IPs and surrogates can find each other,¹¹⁷ but it is still difficult to do so due to the scarcity of surrogates. Furthermore, as noted above, the use of the Internet for surrogacy is not as prevalent in Greece as in the UK.

Nevertheless, these communities (surrogacy organisations and online groups and forums) are currently unregulated in both countries and operate informally. Although the regulation of these communities could facilitate surrogacy, it could also mean that the practice of surrogacy will become less independent, which would be perceived by some as a negative development, as Jamie explained.

¹¹¹ Lauren.

¹¹² Natalie, Sarah (SUK), Marina (COTS), Helen Prosser (BB), as well as the literature (Crawshaw M, Blyth E and van den Akker O, 'The changing profile of surrogacy in the UK—Implications for national and international policy and practice' (2012) 34(3) *Journal of Social Welfare & Family Law* 267; Horsey (n69)).

¹¹³ See: https://www.surrogacyuk.org/intended_parents/joining-surrogacy-uk and [evidence from Sarah](#).

¹¹⁴ Based on all UK interviewees, and evidence from the literature (Chapter 4, p.124-125).

¹¹⁵ Natalie, Marina, Helen Prosser.

¹¹⁶ These Facebook groups are 'closed', meaning that an interested party has to request to join, and wait for the administrator's approval. Based on my experience, before the approval, the administrator of the group messages the interested person and asks a few questions about the reasons for the request.

¹¹⁷ Dr Pantos mentioned the website www.surrogatefinder.com, a global database of agencies, surrogates and IPs, some of whom are Greek.

As opposed to the claims often made about the dangers of online surrogacy matching,¹¹⁸ Jamie thought that meeting IPs through Facebook is better than meeting through surrogacy organisations:¹¹⁹ through informal chats on Facebook groups, she could observe how prospective IPs communicate with others online, which provided her a deeper knowledge of who they ‘really are’. She also suggested that the Facebook group offered her and her IPs a sense of liberation and empowerment which, according to Jamie, they would have lost by going through an organisation.

Jamie: There was nothing that we ourselves couldn't do that [the surrogacy organisation] did as the middle man. We had that trust which we just built ourselves just by spending time together without anybody else having to interfere. That was a big thing for us. (...)I felt like the decisions were ours. We made the decision about what tests we wanted, what paperwork we wanted, about what scans we wanted, about the money, about how everything was going down. We didn't have anybody breathing down our necks.

On the other hand, representatives from all three UK surrogacy organisations were in favour of regulation. Interviewees from SUK and COTS emphasised the need for the state to offer better support to those organisations, for example by providing funding or by recognising their work and licensing them,¹²⁰ and a few suggested that advertisement for altruistic surrogacy be made legal to make it easier for IPs to find a surrogate.¹²¹ Representatives from BB said that there is no urgent need for regulation, but it would be good to find a system of good practice and regulation in the long-run.¹²²

My evidence from Greece did not provide a clear answer as to how IPs find surrogates, but there were indications that matching services are undertaken by key actors in surrogacy practice. Arete said that her lawyer found a surrogate for her, but the Greek lawyer I interviewed denied offering matching services. This response was not surprising, since a positive answer would most likely have involved an admission of criminal activity (if there was payment for it),¹²³ and other interviewees noted that lawyers were often unwilling to help in this way.¹²⁴

¹¹⁸ As recent court decisions note (n35), and as Natalie Gamble said in her interview.

¹¹⁹ Jamie had initially contacted a surrogacy organisation, but did not like their approach in matching, and decided to operate independently.

¹²⁰ Marina, Natalie, and Sarah.

¹²¹ Marina, Sarah.

¹²² Natalie Gamble, Helen Prosser.

¹²³ Article 26(8) Law 3305/2005.

¹²⁴ Giota, Lena.

Additionally, some said clinicians may provide matching services for surrogacy in Greece.¹²⁵ Lena stated that a large Greek clinic is indeed involved in matching IPs and surrogates.¹²⁶ Giota disclosed that a Greek clinician offered to find her a surrogate when they spoke on the phone and through emails, but later told her there were no available surrogates at the time, and prompted her to advertise her interest in a newspaper.¹²⁷ Again, unsurprisingly, all clinicians I interviewed denied being involved in matching, and two of them, referred to a common misconception that clinics can find a surrogate for IPs, the same way as they can find a gamete donor.¹²⁸ This, according to Dr Pantos, reveals the law's hypocritical stance towards surrogacy because, on one hand, it allows it and, on the other hand, it makes it difficult to happen and thrive. If this is right, there is no evidence in the literature to suggest that this is intentional, as has been argued with regard to the UK.¹²⁹

In summary, my evidence shows that there is a lack of available surrogates both in Greece and the UK, which limits some IPs' access to surrogacy. In the UK, this problem is mitigated through non-profit surrogacy organisations which provide matching services. Some of my interviewees suggested that, if these systems received better state support and were properly regulated, access might be enhanced.¹³⁰ In Greece, IPs can find surrogates only informally (through personal contacts and online communities), and possibly through medical and legal practitioners, who may, however, be accused of acting as mediators, which is illegal (if paid).

5.3.3 Surrogates' preferences

Based on my sample, another important factor potentially limiting access to surrogacy is the criteria that surrogates set for their 'ideal' IPs, which is also unstudied. For example, Lauren wanted to match with gay male IPs because, first, she feels more compatible with men than with women; secondly, she thought there would be no antagonism between them; and, thirdly, she presumed access to surrogacy would be more difficult for same-sex IPs. In contrast, Elina, a Greek surrogate, said she would

¹²⁵ Giota, Lena, Takis Vidalis, Professor Hatzis.

¹²⁶ Lena works at this clinic. Representatives from this clinic regularly attend international consumer conferences advertising their surrogacy programme.

¹²⁷ Giota.

¹²⁸ Ms Chatziparasidou, Dr Pantos. However, since our interview, Ms Chatziparasidou's clinic has stopped taking on surrogacy cases (evidence from personal communication).

¹²⁹ Freeman (n75) 3; Horsey K, 'Not withered on the vine: The need for surrogacy law reform' (2016) 4(3) JMLE 181-196.

¹³⁰ However, Jamie disagreed.

never work with same-sex couples because she believed a child should have both a female and male role model. Other surrogates mentioned different factors that would prevent them from forming an arrangement with certain groups of IPs. For instance, Sarah stated:

My first deal-breaker is that I don't work with anyone who has cancer. (...)My first couple (...Inaudible...) the lady had got breast cancer, and while we were trying for a baby(...)[,] she unfortunately died. It really upset me, and I thought I can't try to get pregnant again. (...)For me the choice of who to work with is about who I get on with, so actually their story about why they're infertile doesn't matter to me. (...)Age doesn't matter to me. Whether that friendship will be real after surrogacy, that's important to me.

Lastly, Lauren would only work with IPs who accepted her chosen surrogacy type.¹³¹

Lauren had chosen gestational surrogacy for personal reasons. Although her IPs (Simon and Steve) initially wanted to do traditional surrogacy, they accepted Lauren's choice.

Lauren: Simon and Steve said in their diary in SUK blackboard, "we feel that it would have been easier if we used straight surrogacy"(...). When I offered, they knew I was going to do [gestational surrogacy], and they [said] "it's fine". (...)I didn't know that [traditional] surrogacy really existed. (...)But, also, because I hadn't had any children of my own, I kind of didn't want anybody else to have a child that was linked to me, and, [from] speaking to my mum,[I realised] she would've seen that as her grandchild, and, even though you stay in contact, she said that wouldn't be enough.

Though these criteria are merely indicative, and will probably be different in different cultural contexts, they should be taken into consideration, because they may pose informal barriers to some people's access to surrogacy in these countries.

5.3.4 Cost and lack of public funding for surrogacy

Cost

In Chapter 2, I argued that respect for autonomy and justice require a 'good' surrogacy regime to ensure that access to surrogacy is fair and affordable, because cost can significantly limit reproductive autonomy and cause (or increase) social disparity.¹³²

In Greece, where only gestational surrogacy is allowed, the IPs must bear the cost of

¹³¹ This option exists only in the UK, since Greek law does not allow traditional surrogacy. This was a deliberate choice, aiming to protect the surrogate from possibly forming a bond with the foetus, which the legislature thought was more likely to happen if there was a genetic link (Parliamentary debates 2002). Nevertheless, the 'gestational only' rule arguably limits reproductive autonomy, as well as the pool of available surrogates.

¹³² Riley L, 'Equality of access to NHS-funded IVF treatment in England and Wales' in Horsey, K. and H. Biggs (eds), *Human Fertilisation and Embryology: Reproducing Regulation* (Routledge-Cavendish 2007) 84; Nelson (n67) 280.

the IVF, the legal cost associated with the judicial scrutiny of the surrogacy agreement, and the surrogate's expenses. In the UK, surrogacy can happen privately at home (where the cost can be minimal), or in a clinic. The IPs will also have to account for the surrogate's expenses.

According to estimates, IVF in Greece costs around €3,500-4,500 (approximately £2,500-3,500),¹³³ and £3,000-6,000 in the UK.¹³⁴ My Greek evidence suggests that IVF surrogacy costs around €3,000 (approximately £2,640),¹³⁵ whereas in UK clinics it ranged between £3,500 and 10,000,¹³⁶ which is higher than the amounts typically cited in the literature. Within my sample, cost was cited as a very (if not the most) important factor influencing access to surrogacy both in Greece and the UK. Some UK interviewees mentioned that cost may entirely deter some people, or force them to choose independent surrogacy, because they cannot afford or do not wish to pay a service fee to UK surrogacy organisations.¹³⁷ Moreover, some UK surrogates expressed their annoyance that surrogacy in clinics costs IPs so much money,¹³⁸ and one considered the financial cost to conflict with the altruistic principle underpinning UK surrogacy law.

Jamie: The biggest reason [why she did not go through an organisation] was the expense. (...)I've got a massive issue with the fact that it costs IPs so much money. (...)The last time my couple looked into it, it was £750 simply to get on the list [of surrogacy organisations]. It's gone up again. But there's also other fees: the costs for counselling, CRB checks, psychiatric evaluations, administration fees. I think it would come around £1,200 or maybe £1,500. And you have a matching fee. (...)The cost of [UK] surrogates [for their expenses], on average, is £12-15,000. If you're then adding up £7,000 per time for an IVF treatment, it becomes expensive, and that goes against the whole basis of surrogacy. It's supposed to be altruistic. (...)It's just too expensive for some people.

In the UK, cost also influences people's decisions about whether to go through a clinic and about which type of surrogacy to choose. Traditional surrogacy at home is much cheaper, and it could be a preferable option for some IPs who cannot afford the clinic

¹³³ Paraskou A and Babu GP, 'The market for reproductive tourism: analysis with special reference to Greece' (2017) 2(16) Global Health Research and Policy, table 1.

¹³⁴ Chambers GM and others, 'The Economic Impact of Assisted Reproductive Technology: A Review of Selected Developed Countries' (2009) 91 Fertility and Sterility 2281,2288; Riley (n132: 84). Respondents in Horsey's study mentioned £6,774 as medical costs for surrogacy (n69: 23)

¹³⁵ Elina, Katerina, Areti, Dr Pantos. Other sources mention that the cost of IVF (not only for surrogacy) ranges between €2,500-4,000 (Kalou, K. 'Questions and Answers about IVF [in Greece]' (12/02/2014) <<http://www.tovima.gr/vimagazino/interviews/article/?aid=566568>> accessed on 25/05/2017).

¹³⁶ Simon and Steve, Sarah, Jamie, and Natalie.

¹³⁷ Jamie, Marina. See n109 for membership fees to UK surrogacy organisations.

¹³⁸ Sarah, Marina, Jamie.

costs.¹³⁹ Jamie revealed she had an honest and open discussion with her IPs about cost, which helped them build a strong relationship and gave them a sense of empowerment.

We did obviously all the sexual health checks [in] a clinic, but everything else was basically done at home ourselves. There was no clinic, no IVF costs or anything like that. (...) [We] set [our] expenses based on what they [IPs] could afford. (...) Nothing was off boundaries; we literally discussed everything. (...) I don't think I'd have gotten that relationship by going through an agency or a clinic.

Furthermore, some interviewees noted that some IPs may even get into debt to try surrogacy, if this is their only chance to attain biological parenthood.¹⁴⁰ For example, Marina said:

My IM (...) knew that surrogacy was the only way that she could have a child other than adoption. (...) She had to borrow money (...) from her mother, and her family rallied around to make sure she could have her dream. (...) [T]o get there it cost her probably around £20,000-30,000. (...) They were just a standard couple. A hairdresser and a builder. (...) People will do whatever they can. And they are so vulnerable.

Nevertheless, not everyone within my UK sample found the cost of surrogacy restrictive. Simon and Steve maintained surrogacy requires certain financial sacrifices on the IPs' part, but the cost 'is not out of reach'. They also believed that having a limited budget for the surrogate's expenses does not necessarily prevent IPs from accessing surrogacy, because surrogates will have different needs and expenses, and it is a matter of negotiation and good will from both parties. However, they showed some level of annoyance and aggravation when they said surrogacy costs are 'a charge for being gay', since it is their only option to (biological) parenthood.

In Greece, Katerina, a lesbian mother who acted as a 'surrogate' for her female partner, said that the medical cost for surrogacy was 'quite considerable'.¹⁴¹ Moreover, three interviewees (Katerina, Elina, and Giota) cited the legal costs of formal legal surrogacy in Greece as an additional expense,¹⁴² which was around €1,000-3,000 (approximately £880-2,640). Also, the cost for the surrogates' expenses is borne by the IPs. This, based on my evidence, ranged from nothing to €20,000 (approximately £17,600) in Greece, and £5,000-12,000 in the UK, which is line with findings of a

¹³⁹ Jamie, Lauren.

¹⁴⁰ Marina, Simon and Steven, Sarah, Jamie. This possibility was also noted by Elina and Areti in Greece.

¹⁴¹ Katerina offered a breakdown of medical costs: 'An IVF cycle cost around €3,000. The hormonal drugs cost around €1,500, and I think every egg collection was €500.'

¹⁴² For submitting the application to the court, and for legal representation by a lawyer.

recent UK study.¹⁴³ Lastly, as UK surrogates, Elina, a Greek surrogate, found it upsetting that surrogacy is so expensive for IPs, adding that law leaves scope for some doctors to take advantage of IPs' desperation.¹⁴⁴

Since my sample was recruited because of their experience of surrogacy, and everyone was able to cover all costs involved, it was unlikely to find that cost was an important limitation. However, these sums will be very significant for some IPs. To explore whether surrogacy laws and policies in these countries have achieved fair and equal access, it is important to consider the issue of public funding, which will be discussed next.

Public funding

In Greece, there is a policy for the provision of limited funding for ARTs. The 2012 Greek government founded the National Organisation for the Provision of Health Services (NOPHS), an organisation which allocates health funding. Under this regime, if ARTs take place in a public hospital, the cost is fully covered by NOPHS. If ARTs take place in a private clinic, then NOPHS covers the total cost of IVF medication, and successful applicants receive €352 (approximately £310) per IVF attempt for up to four attempts.¹⁴⁵ However, this depends on the decision of an IVF funding Committee.¹⁴⁶

All non-expert interviewees who had completed their surrogacy arrangements in Greece went through private clinics, and all costs were paid privately by the IPs. Only Katerina received partial reimbursement for certain medical costs from her work insurance.¹⁴⁷ Two expert interviewees mentioned that the cost covered by NOPHS is minor compared to the total costs for IVF.¹⁴⁸ According to Dr Pantos, the cost of IVF medication (which may be partly funded by NOPHS) amounts to €1,500-2,000 (approximately £1,300-1,757), while each IVF cycle costs between 2,000 and 3,000€

¹⁴³ Horsey's study noted a mean average of £10,000-£15,000 for the surrogates' expenses (n69: 23). No Greek studies explore this issue.

¹⁴⁴ Elina described her IPs as 'a normal working couple' and the IVF doctor as a 'businessman' who 'will try to get as much as they can from the couple'. This will be discussed further in Chapter 6.

¹⁴⁵ Information and documentation for the application to IVF Committees are available at www.eopyy.gov.gr. Regulation of 6/06/2014; Greek Infertility Society 'Magna Mater', The extreme difficulties of IVF <<http://www.magnamater.gr/show/el/media/article05.aspx>> accessed 20/05/2017. The article mentions that many ART users do not consider going through the funding application process worthwhile, since the amount of funding is that low.

¹⁴⁶ *Ibid.* There are eight IVF funding Committees across Greece.

¹⁴⁷ She considered herself 'lucky' for having received funding for the IVF drugs, the labour, and the antenatal care, and said she paid approximately 20% of the total medical costs out of her own pocket.

¹⁴⁸ Dr Pantos, Mr Cazlaris.

(approximately £1,757-2,640). Moreover, the process to secure public funding for ARTs (through the IVF funding Committee) is long, bureaucratic and complicated, and many applications are rejected, according to Mr Cazlaris.

In the UK, there is, in principle, public funding for ARTs, but it is very limited, and its provision is mostly a matter of a 'postcode lottery', with a tendency to reduce, or even eliminate, IVF funding in many areas within the UK.¹⁴⁹ Generally, the cost of surrogacy in clinics is paid privately by the IPs, who also have to account for the surrogate's expenses,¹⁵⁰ and, possibly, the registration fees in surrogacy organisations. The literature notes that public funding may restrict access to ARTs, and the lines between WoC and NHS funding eligibility criteria often get blurred.¹⁵¹ This was confirmed by Dr Avery, who stated that standards vary from clinic to clinic, but eligibility for public funding influences access in many UK private clinics. It was also obvious that the public sector has WoC criteria and additional eligibility criteria for public funding, which are far more rigorous than WoC.¹⁵² This confirms findings of Lee *et al*'s study.¹⁵³

In summary, my evidence revealed that surrogacy is costly both in Greece and the UK, especially when all costs involved are combined, such as for treatment in the clinic, for legal costs (mainly in Greece), for registration with surrogacy organisations (in the UK), and the surrogate's expenses. The scarcity of public resources means that any decision regarding public funding must be weighed against other public interests and needs. However, both jurisdictions fail to provide the conditions for fair and equal access to surrogacy, because they only offer very limited funding for surrogacy, meaning that it is an option more readily available to the wealthy.¹⁵⁴ Lastly, a question is raised about whether access to public funding for ARTs in Greece and the UK depends on criteria other than wealth, such as relationship status, which we currently have no knowledge of.

¹⁴⁹ Chapter 4, n82; Fertility Fairness, NHS IVF Provision Report (2017) http://www.fertilityfairness.co.uk/wp-content/uploads/2017/10/FertilityFairness_2017_PBRapor.pdf

¹⁵⁰ Muffitt, E. 'How to have a baby by surrogate in the UK' (07/05/2015) <<http://www.telegraph.co.uk/women/mother-tongue/11583545/How-to-have-a-baby-by-surrogate-in-the-UK.html>> accessed on 23/02/2017.

¹⁵¹ Sheldon Lee, and Macvarish (n29) 468.

¹⁵² For example, Fertility Fairness reports that age and childlessness are set as criteria for NHS funding in many CCGs across the UK (n149).

¹⁵³ Lee, Macvarish and Sheldon (n10) 504.

¹⁵⁴ Mladovsky P and Sorenson C, 'Public Financing of IVF: A Review of Policy Rationales' (2008) 18 Health Care Analysis 113; Quigley M, 'A Right to Reproduce?' (2010) 24(8) Bioethics 410.

5.4 CONCLUSION

In Chapter 2, I argued that there is a duty to respect reproductive autonomy unless there are good harm-based reasons for limiting it, and that the principle of justice dictates that equality of access is important. This chapter has focused on statutory and practical limitations on access to surrogacy in Greece and the UK, drawing both on existing literature, academic studies, and my interview data. Due to the paucity of research on the legal experience of surrogacy in these countries, Greece especially, my evidence offers valuable insights.

The literature and the findings of my own research suggest that WoC is the only formal legal restriction to affect access to UK surrogacy, whereas in Greece there are various statutory restrictions, such as age, medical need, relationship status, WoC and, until recently, permanent residence. Based on my Greek evidence, only medical need and age appeared to pose important limitations. Moreover, the statutory upper age limit demonstrates concern for the future child's welfare (not being raised by older parents) rather than for women's health, as the literature suggests.

Unlike UK law, which makes access available to all social groups, Greek law sets a relationship status criterion, thereby reflecting a clear tension between the overarching principle (the right to have a child) and the non-recognition of same-sex couples' right to access surrogacy. I found that some Greek clinicians may restrict same-sex couples from accessing surrogacy, though one lesbian couple within my sample was able to have surrogacy (albeit in an unusual form) with the clinician's permission and help. Additionally, WoC does not generally act as a barrier to surrogacy in Greece and the UK, because such assessments are very light-touch, which confirms evidence from previous UK studies. However, clinics in both countries may make counselling mandatory and essential in establishing WoC, although it is legally required in neither.

Furthermore, I examined a range of informal barriers to access, which have been largely unstudied. Though they will probably be different in different cultural contexts, they should be considered, because they may significantly limit some people's access to surrogacy. I found that the availability and quality of information about surrogacy has increased in recent years. The Internet was identified as the main source of information in the UK, whereas in Greece interested parties appeared to gather information through medical practitioners, who are formal gatekeepers of surrogacy. The stark difference between Greece and the UK on this could be an

extension to the law's perception that surrogacy is a medically supervised form of ARTs in Greece, whereas UK surrogacy is not to be viewed 'as merely another treatment for infertile people'.¹⁵⁵

Also, my data suggested that, at least on occasion, online matching can be positive and empowering, and greater regulation may have a negative impact. UK surrogacy organisations, which are unregulated, also play an important role in providing information and support. These organisations have developed their own processes and checks, and seem to be working effectively, yet they appear to want more regulation. This issue will be discussed further in the following chapter.

Importantly, there is a serious lack of available surrogates in both countries, but the UK at least has better systems to put interested parties in touch (through surrogacy organisations and other communities), although they are unregulated. Moreover, I found that surrogates have their own preferences and deal-breakers, which may limit access even more. Lastly, based on my evidence, the most important limitation on access to surrogacy in both countries is cost and neither of them provides adequate public funding. Hence, both regimes fail to effectively address fair and equitable access to surrogacy to all.

The next chapter discusses how regulation during a surrogacy arrangement operates in Greece and the UK.

¹⁵⁵ Brazier Report [6.13].

CHAPTER 6

Regulation during a surrogacy arrangement in Greece and the UK

6.1 INTRODUCTION

This chapter discusses how the Greek and UK regimes regulate issues that arise (or may arise) *during* surrogacy arrangements, and how well they respond to the concerns laid out in Chapter 2. There I argued that one has a *prima facie* right to enter into surrogacy arrangements, unless there is a reason, based on harm concerns, to impose limitations. Having focused on access to surrogacy in Chapter 5, I now consider first how specific measures and requirements serve to protect and promote autonomy during surrogacy arrangements (section 6.2), and, secondly, how far regulatory limitations on autonomy can be justified as a legitimate response to welfare concerns (section 6.3). Justice concerns are important primarily in the context of access to surrogacy and to parenthood following it, hence, they do not form a central part of the analysis of this chapter, but they do emerge occasionally.

6.2 Respect for and promotion of autonomy

Three themes emerged from my interviews in Greece and the UK relating to autonomy during a surrogacy arrangement. The vast majority of my interviewees in both countries attached importance to consent (6.2.1); Greek interviewees talked about the significance of the preconception agreement in ensuring respect for autonomy during the arrangement (6.2.2); and, lastly, interviewees in both countries talked about the role of counselling in ensuring valid consent (6.2.3).

6.2.1 Importance of consent and the role of regulation in ensuring its validity

Greek law mandates that consent should be monitored by the judge during the preconception scrutiny of the surrogacy agreement. After the court's permission has been secured, the parties can seek IVF-surrogacy in a clinic,¹ but the treatment must not begin until they have provided written consent; and received information about

¹ Since only gestational surrogacy is allowed, they must go through a clinic.

health risks and the social, legal, and financial implications of the treatment. Furthermore, medical professionals are required to have a thorough discussion with all ART participants prior to the treatment to ensure that their decision is serious, conscious, and well-informed.² Therefore, consent is also monitored by clinics. Although this is unstudied, there may be some traditional arrangements in Greece which go under the radar and are therefore unmonitored. UK law requires written consent from all participants in ART, including surrogacy, when it takes place in clinics.³ However, some UK surrogacy arrangements occur privately at home. Hence, in some arrangements, consent is completely unmonitored, and some recent cases demonstrate how problematic this can be.⁴

Interviewees in both countries showed overwhelming support for the principle of informed and uncoerced consent. Greek interviewees believed regulation provides sufficient tools and processes to guarantee that consent to surrogacy is, as far as possible, valid and robust. For example, several Greek interviewees considered the requirement for the surrogate to undergo physical and psychological evaluation at the preconception stage a good measure, because it helps assess the validity of her consent.⁵

Dr Tarlatzis: [The doctors] *examine the surrogate to ensure she is [physically] healthy; (...)then we [doctors] will refer her to a psychologist, who will evaluate her emotional state. The psychologist will determine whether she fully understands the consequences of her decision and whether she has thought it thoroughly. If all goes well, we will provide an affidavit confirming that she can indeed carry a child and she is mentally healthy. This is then submitted to court along with the surrogacy application. (...)It's good that law provides for all these. Consent is very important.*

Additionally, most Greek interviewees remarked that clinics generally follow the legal mandate to offer thorough information before asking ART participants to sign any consent forms. All IPs and surrogates in Greece said they had received adequate information from medical and legal professionals and were able to provide valid consent.

²Article 5 Law 3305/2005; Article 5 Greek Code of Practice (GCoP) 2017. The GCoP was introduced after I completed my empirical work.

³ Sch.3 HFE Act 1990 (the 1990 Act), as amended.

⁴ For example: *H v S (Surrogacy Agreement)* [2015] EWHC 36; *Re N (A Child)* [2007] EWCA Civ 1053; *Re TT (Surrogacy)* [2011] EWHC 33, [2011] 2FLR 392; *JP v LP & Others (Surrogacy Arrangement: Wardship)* [2015] EWHC 595 (Fam), 1 FLR 307; *Re X (A Child)* [2016] EWFC 54, [2016] EWFC 55; *Re M (Child)* [2017] EWCA Civ 228.

⁵ Dr Tarlatzis (clinician and policy-maker), Ms Chatziparasidou (clinician), Lena (surrogate and clients' manager in a large fertility centre in Greece). Complete list of interviewees and short biographies in Appendix C.

Furthermore, some Greek interviewees believed that the preconception judicial scrutiny process is important in ensuring valid consent, noting that it adds formality to the private agreement between the parties and affirms that consent is valid and well-considered.⁶ Others believed the waiting period between the submission of the surrogacy application and the surrogacy hearing offers ample time for the parties to gather all necessary information, and to reflect upon their decision to participate in surrogacy.⁷ Further, some emphasised that Greek judges do ask the parties to show they have made a conscious and informed decision to participate in surrogacy by asking them if they understand exactly what this arrangement means and by repeating the rules set by law,⁸ but, as we will see below, this possibly depends on the judge and it is not followed by all judges. Moreover, several said that women acting as surrogates in Greece generally choose to do so freely,⁹ and, based on my limited evidence, there was clear contentment with the status quo.

However, some interviewees referred to cases that raised concerns about whether the surrogates were truly making a free and fully informed choice due to the existence of certain socio-economic conditions that may be influencing their decisions.¹⁰ These concerns were, though, nuanced by the recognition that surrogacy most likely offered these women a chance to improve their lives; that even in such cases valid consent is possible; and that it is important that surrogates know that they retain their autonomy rights and can withdraw consent any time before or during the arrangement. For example, Ms Chatziparasidou said:

In the cases we've seen so far, the women offering to be surrogates are foreigners living in Greece, of a lower socio-economic status, and in dire need of money. (...) We live in a state of financial crisis, and there may be a woman who has a child and she has no other income. State benefits are not a given anymore. This woman has little choice. (...) Surrogacy can provide her with some income, and she can be with her child and take care of her. (...) It doesn't mean that she can't consent. She goes through psychiatric evaluation and the court, and she can withdraw her consent. We had a case of a surrogate who changed her mind and didn't go through the IVF, even though

⁶ Takis Vidalis (lawyer and advisor at the Hellenic National Bioethics Commission), Professor Aristides Hatzis (legal academic), anonymous lawyer, Dr Tarlatzis.

⁷ According to my interviewees, this can take 'several months', especially if the application is submitted in a large court, such as that of Athens and Thessaloniki (anonymous lawyer, Lena, Areti (mother through surrogacy), Vidalis, and Professor Hatzis). Added to that is the waiting period between the surrogacy hearing and the judge's final decision, which can range from 24 days to 4 months (Chapter 5, n64).

⁸ Lena, Elina (surrogate), Areti. Also, see Lena's statement in Chapter 5, p.159.

⁹ Lena, Elina, Giota (IM), Areti, Professor Hatzis, Vidalis.

¹⁰ Elina, Giota, Vidalis, Professor Hatzis, anonymous lawyer, Ms Chatziparasidou.

she had gone through the judicial process. There was another surrogate who didn't consent to the embryo transfer and the treatment stopped.

According to Ravdas' study, which is the only other source of evidence about Greek surrogacy, more than half of the women who have acted as surrogates in Greece are foreigners, with most of them having come from Eastern European countries and the Balkans.¹¹ However, there is no evidence that these women did not consent validly. This also emerged from my data. For instance, Elina disclosed that her bad financial situation at the time she made her decision to act as a surrogate did not impede her ability to consent.

[I]t all started with my divorce. I had to leave my husband to make a better life for my two kids. (...)That period I had nothing, I had no money at all, so that money [from surrogacy] was important. (...)I wanted a small apartment for me and my kids (...)and I wanted to help my mum out financially(...). I was determined to do this for a specific reason. (...)I knew what it entailed. I'm glad I had that choice. (...)I never reconsidered or wavered.

As discussed in Chapter 2, the mere existence of socio-economic pressures does not necessarily invalidate the surrogate's consent,¹² but it does raise concerns that should be addressed and mitigated through proper regulation.¹³ While my sample is relatively small and partly self-selected, it suggests that the processes employed by the Greek model are sufficient to ensure, as far as possible, that consent is robust and that it remains so during the arrangement. This view was supported by Greek IPs, surrogates and by professionals who between them have experience of many surrogacy cases.¹⁴

As in Greece, the vast majority of my UK interviewees recognised consent as an important part of a surrogacy arrangement. Nevertheless, some noted that the system and processes set by regulation for ensuring valid consent are weak and do not fully achieve their aims,¹⁵ with many adding that some tools that UK clinics routinely use to assess consent are ineffective. For instance, some remarked that consent forms

¹¹ Ravdas P, *Surrogate Motherhood: The legislator's expectations tested by statistical data* (Papachristou, T. K. and others eds, 21st Century Family Law: Coincidental and Fundamental Reforms. Law and Society in 21st century, Sakkoulas 2012).

¹² Chapter 2, p.64-68.

¹³ *Ibid* and Andrews LB, 'Surrogate Motherhood: The Challenge for Feminists' (1988) 16 Law, Medicine & Health Care 75; Petchesky RP, Beyond "a woman's right to choose". Feminist ideas about reproductive rights (Ehrenreich, N. ed, The Reproductive Rights Reader- Law, Medicine and the construction of motherhood, NY University Press 2007); Lane M, Ethical Issues in Surrogacy Arrangements (Cook R., Schlater S.and Kaganas F.eds, Surrogate Motherhood: International Perspectives, Hart Publishing 2003) 133 and more.

¹⁴ All Greek surrogates and IPs, all clinicians, anonymous lawyer, Vidalis.

¹⁵ Dr Sue Avery (UK clinician), Andrew Powell (UK family law barrister), Helen Prosser (co-founder of Brilliant Beginnings, hereafter BB), Sarah (experienced SUK surrogate and SUK Chair).

provided to clinics by the HFEA are confusing and completely out-dated.¹⁶ Sarah recounted her experience with having to sign two contradictory consent forms at the clinic:

[My] first three surrogacy pregnancies came about without a clinic, but the last time we tried at-home insemination I didn't get pregnant and found out I had blocked fallopian tubes. (...)So, I had to go through IVF in a clinic. (...) [W]e decided to use my eggs again. But that meant that practically, (...)I had to be my own egg donor. (...)I had to sign one piece of paper for one thing [waiving parental rights as a donor], and another piece of paper for the opposite [acknowledging legal parenthood as a surrogate]. (...)I told them "I can't sign both, because they're saying the opposite thing. You have to choose which piece of paper you want me to sign".

Others highlighted that UK courts have recently dealt with numerous cases involving the use of 'the wrong paperwork', which subsequently affected some people's parenthood.¹⁷ Dr Avery explained that these errors are due to lack of proper training of the people who take the patients' consent in clinics. She added that proper consent requires the provision of information about a range of issues including legal issues, especially regarding legal parenthood, but 'clinics are not particularly engaged with legal issues', and medical professionals may not have the knowledge and ability to provide all the necessary information. Both Dr Avery and Marina (experienced COTS surrogate) identified a need for specific training for medical professionals about consent and, more specifically, consent to surrogacy, which, according to Dr Avery, is 'an even more complex issue'. Lastly, she suggested that lack of understanding of consent issues sometimes means that medical professionals are confused about the timing of consent, with consent taken after treatment has started. This, she believed, is not only against the rules but also renders consent-provision meaningless.

Despite the complaints about the weaknesses of the current systems followed by UK clinics, all interviewees who went through formal legal surrogacy in clinics reported feeling secure and well-supported before and during the treatment.¹⁸ They also remarked that, as in Greece, UK clinics generally follow the guidance regarding the provision of information and support prior to ARTs,¹⁹ and continue to offer that support throughout the treatment. This suggests that things work well despite the faults in regulation. For example, Lauren (SUK surrogate) said:

¹⁶ Dr Avery, Helen Prosser, Sarah.

¹⁷ Kirsty Horsey, Andrew Powell. Also, case citations concerning mistakes made by UK clinics regarding consent-provision in Chapter 4, n133.

¹⁸ Lauren, Sarah, Marina, Simon and Steve, Natalie (SUK mother and SUK Trustee).

¹⁹ HFEA CoP (2009) [4],[6].

I was always thinking, we're using the clinic; they know what they're doing there. (...)I never felt pressured. (...)I felt very supported in terms of understanding what was going on, they [the clinic] explained everything. (...) [T]hey sent a timetable of what to take and when, and I always felt that, if I had any problems or questions, I could ring or email them, and they would get back to me pretty much on the same day(...).

Moreover, my interviewees suggested that, apart from clinics, UK surrogacy organisations have a significant, although informal, role in ensuring valid consent to surrogacy, but one that is currently overlooked in the literature. Interviewees with an active role in three reputable UK surrogacy organisations (SUK, COTS, BB) reported the use of information sessions, where the parties learn about surrogacy; and agreement sessions, where the parties discuss possible eventualities and draft their agreement in the presence of another member of the organisation.²⁰ More specifically, my interviewees noted that SUK has a strict policy regarding a three-month 'getting-to-know' period, which allows the parties time to develop a trusting relationship,²¹ and to give valid consent.²² Marina from COTS and Helen Prosser from BB, also referred to a 'getting-to-know' period.

Other interviewees emphasised that, while the information, advice and support offered by UK surrogacy organisations is vital, there should be more professional resources available to help the parties make a fully informed choice.²³ Natalie and Marina, however, noted that, although UK surrogacy organisations are mostly run by volunteers, they are fully professional in their operation.

Natalie: Even though we [SUK] are volunteer-led, we offer 24/7 support for our members. (...) [A]s an organisation we're 100% professional. (...) We have links with lawyers, we have them on the Board, we have a GP [general practitioner] on the Board. (...) [T]he processes that we have in place as an organisation are very robust. (...) We are a proper organisation that has been functioning for 12 years, and functioning well, and we have hands-on experience, so I think that makes us professional.

²⁰ Sarah, Lauren, Simon, Steve, Natalie, Marina, Natalie Gamble (solicitor and co-founder of BB), Helen Prosser.

²¹ Which, due to the UK non-enforceability rule, is very important, as will be discussed in Chapter 7. Also, Beier K, 'Surrogate Motherhood: A Trust-Based Approach' (2015) 40(6) *Journal of Medicine and Philosophy* 633-652.

²² Sarah, Lauren, Simon and Steve, Natalie.

²³ Vasanti Jadva (psychology academic), Kirsty Horsey (legal academic), Helen Prosser, Natalie Gamble, Andrew Powell.

All UK interviewees commended the work of the three major UK surrogacy organisations and believed that their role should be formally recognised in regulation, which has recently been done by the Department of Health and Social Care (DHSC).²⁴

Conversely, Jamie (UK independent surrogate) emphasised that not going through an organisation can be both liberating and empowering, adding that there are important advantages in allowing the parties to decide the terms of their arrangement and discuss the issues that matter to them.

I felt like the decisions were ours. We made the decision about what tests we wanted, what paperwork we wanted, about what scans we wanted, about the money, about how everything was going down. We didn't have anybody breathing down our necks. We wouldn't agree on anything that I wasn't happy with, and it was all down to us, nobody else.

Jamie further rejected the assumption frequently made in the literature and by the judiciary that valid consent is less likely in independent surrogacy arrangements.²⁵ However, other UK interviewees, who have dealt with many surrogacy cases, remarked that information-sharing outside clinics and surrogacy organisations can be misleading and dangerous,²⁶ and may influence the validity of the parties' consent and lead to legal disputes,²⁷ while also noting that these cases are exceptional. Although the positive perception of independent surrogacy is a result of only one interviewee's account, and while there is evidence about the negative aspects of that practice, my data shows that the practice provides certain advantages and that risks could be mitigated through appropriate regulation.

Lastly, all UK interviewees believed that most UK surrogates know their minds and can provide valid consent with or without advice and support through a clinic, which challenges the assumption sometimes made in the literature and which underpins the UK surrogacy law.²⁸ Nonetheless, several believed this is mainly due to the good

²⁴ DHSC, *Care in Surrogacy. Guidance for the care of surrogates and intended parents in surrogate births in England and Wales* (DHSC guidance for medical practitioners); DHSC, *The Surrogacy Pathway. Surrogacy and the legal process for intended parents and surrogates in England and Wales* (28/02/2018), [DHSC guidance for IPs and surrogates. Both guidance notes list these three organisations and recommend that IPs and surrogates should consider joining them.](#)

²⁵ Case citations in n4; Jackson E, 'The law and DIY assisted conception' in Horsey, K. (ed), *Revisiting the Regulation of Human Fertilisation and Embryology* (Routledge 2015); Horsey K and Sheldon S, 'Still Hazy After All These Years: The Law Regulating Surrogacy' (2012) 20 Med Law Rev.

²⁶ Natalie Gamble and Helen Prosser, Marina, Sarah.

²⁷ This possibility is noted in the literature (e.g.: Jackson (n25); Elsworth M and Gamble N, 'Are Contracts and Pre-Birth Orders the Way Forward for UK Surrogacy?' (2015) IFL 159) and recent case law (n4).

²⁸ Chapter 2, section 2.3.1 'Autonomy-based objections'. Nevertheless, some interviewees also believed it is good that regulation provides for the surrogates who do not or cannot consent validly.

intentions and sense of responsibility shown by the parties in UK surrogacy arrangements: in other words, surrogacy works despite, rather than because of, the law.²⁹

Professor Brazier: [Where the parties have] *adequate information, and allowed adequate time for consultation and agreement, and the whole of the surrogacy arrangement is located within the UK, the current system seems to work reasonably well, (...)but partly, I think, that's because surrogates and IPs themselves (...)have done so much work on how to make it work in practice.*

6.2.2 The role of the preconception agreement in ensuring valid consent

In Greece, written surrogacy agreements are legally mandated and have force,³⁰ which was explained by the legislature and in the literature as aiming to show the law's respect for the parties' autonomy during a surrogacy arrangement.³¹ Contrastingly, in the UK, written surrogacy agreements are neither legally required nor have direct legal force. Nevertheless, their significance was formally recognised through governmental guidance issued recently.³² Although regulation in these countries clearly places different weight on written surrogacy agreements, based on my evidence, many of those involved in the practice consider the agreements significant and useful in ensuring valid consent and promoting reproductive autonomy.

Several Greek interviewees emphasised the importance of the legal mandate for a written surrogacy agreement and the legal force given to it. More specifically, they suggested it helps the parties have a thorough discussion about the many issues that may arise during the arrangement, and ensures, as far as possible, that they make a conscious and well-thought-out decision to enter a surrogacy arrangement.³³

Although some scholars have claimed that a surrogacy agreement infringes the surrogate's autonomy to make decisions about her pregnancy (such as for medical interventions, her diet, her life activities, and the delivery, among other issues),³⁴ many

²⁹ Vasanti Jadva, Professor Brazier, Helen Prosser, Natalie Gamble, Dr Avery, Jamie.

³⁰ The IPs automatically attain legal parenthood after the child's birth (Article 1464GCC). This will be discussed further in Chapter 7.

³¹ 2002 Committee Meeting Minutes, 5/10/2002. Trokanas T., *Human Reproduction. Personal autonomy and its limits* (Kaiafa-Gbandi, M., E. Kounougeri-Manoledaki and E. Symeonidou-Kastanidou eds, Publications on Medical Law and Bioethics, Sakkoulas 2011) 373; Hatzis A, *Just in the oven: A Law and Economics Approach to Gestational Surrogacy Contracts* (Boele-Welki, K. ed, Perspectives for the Unification and Harmonisation of Family Law in Europe, Intersentia 2003) 417.

³² DHSC guidance for medical practitioners (n24) 7; DHSC guidance for IPs and surrogates (n24) 9.

³³ Vidalis, Professor Hatzis, anonymous lawyer, Areti, Giota, Elina, Lena.

³⁴ Chapter 2, p.71-73.

Greek interviewees explicitly said this was untrue, because the surrogate retains control throughout the pregnancy through her right to consent to medical interventions.³⁵ Additionally, Greek commentators note that surrogates have an undisputed right to terminate the pregnancy,³⁶ which is usually expressly stated in the agreement.³⁷ While there is no evidence in the literature, my data suggest that the view that these agreements limit the surrogate's autonomy is weak.³⁸ Rather, many interviewees in Greece, including both surrogates I interviewed there, considered the agreement as fostering the development of a relationship between the parties and as a tool that helps them make a well-considered decision to participate in that arrangement.³⁹ For example, a Greek lawyer said:

[T]he agreement is (...)merely an agreement between the parties. It just clears things up from the start and helps the parties build their relationship, but it's important in helping them realise what they're getting into. It doesn't impact on the surrogate's freedom at all. You can't force her to do anything she doesn't want to do.

While under UK law surrogacy agreements have no direct legal force, many UK interviewees considered them very important. Surprisingly, all UK surrogates and IPs I interviewed had signed an agreement, while they were aware it would have no legal effect. Moreover, all UK interviewees believed that it provides the opportunity for the parties to discuss things thoroughly from the start, it helps them make a conscious and informed decision to participate in surrogacy, and it limits the possibility of legal disputes.⁴⁰ Again, this suggests that autonomy is respected in practice, but this is despite the law not because of it. Lastly, the vast majority of my UK interviewees were in favour of written surrogacy agreements being legally mandated and binding if it were guaranteed that the surrogate can control all medical and day-to-day decisions during her pregnancy,⁴¹ as in Greece. This confirms evidence of a recent UK study.⁴²

³⁵ Lena, Elina, Areti, Giota, anonymous lawyer, Dr Tarlatzis.

³⁶ Trokanas (n31) 358; Vidalis T, *Life without the person. The Constitution and the use of human genetic material* (Sakkoulas 2003) 118; Papachristou T, *The right to have a child and its limits* (Tsinorema, S. and K. Louis eds, Issues of Bioethics. Life, Society and Nature before the biomedical challenges, Cretan University Press 2013) 55. However, they suggest that a surrogate who proceeds to a non-medically necessary abortion may be liable for damages due to breach of contract.

³⁷ *Ibid*

³⁸ Vidalis, anonymous Greek lawyer, Lena.

³⁹ Areti, Lena, Elina, Giota, Dr Pantos, Dr Tarlatzis, anonymous Greek lawyer.

⁴⁰ Vasanti Jadv, Professor Brazier (UK legal academic), Natalie Gamble, Helen Prosser, Jamie, Sarah, Marina, Natalie, Simon.

⁴¹ As will be seen in Chapter 7, some worried about the message that comes with enforceability, namely loss of autonomy.

⁴² Horsey K, *Surrogacy in the UK: Myth busting and reform* (Report of the Surrogacy UK Working Group on Surrogacy Law Reform, Surrogacy UK November 2015) 21.

Therefore, while the legal frameworks in the two countries look very different on paper, the practice is actually quite similar.

6.2.3 The role of counselling in ensuring valid consent

Some commentators have argued that professional counselling helps ensure valid consent to surrogacy,⁴³ with one going so far as to argue that the mere availability of counselling is sufficient to show the law's respect for autonomy.⁴⁴ Under both regimes, clinics should inform ARTs participants about a wide range of issues related to their chosen treatment and should offer counselling to everyone seeking treatment with donor gametes and surrogacy.⁴⁵ However, this option is only available if the parties go through a clinic, and not if they have surrogacy at home, which is allowed in the UK but not in Greece.

All Greek clinicians I interviewed considered counselling instrumental in ensuring robust consent in surrogacy and emphasised that many clinics have policies making surrogacy counselling mandatory, although it is not legally required.⁴⁶ However, my data suggest that there is scope for differences in the medical practice regarding surrogacy counselling. For example, a few Greek interviewees revealed they were not offered counselling but they did not consider it necessary,⁴⁷ and another said she was offered counselling but did not take it up.⁴⁸ Based on previous studies and my own findings,⁴⁹ in the UK, counselling is likewise seen as fundamental in ensuring valid consent to surrogacy, and it is generally treated as mandatory, though legally only the offer of counselling is mandatory. Dr Avery said:

ARTs counselling is absolutely vital. (...) [I]t gives us [clinics] a bit of reassurance that they [ART participants] have had the option to talk through the implications, particularly when it's a more complex treatment, where it involves donated gametes or surrogacy or PGD, for example. (...) Everyone who's having donated gametes, surrogacy, PGD will see a counsellor. We make it compulsory to them.

⁴³ Appleton T, *Emotional Aspects: Effective Counselling and Support* (Cook *et al* n13) 203; van den Akker O, 'Genetic and Gestational Surrogate Mothers' Experience of Surrogacy' (2003) 21 *Journal of Reproductive and Infant Psychology* 179.

⁴⁴ Cook R, *Safety in the Multitude of Counsellors: Do we Need Counselling in Surrogacy?* (Cook *et al* n13).

⁴⁵ In Greece: Article 5 Law 3305/2005, 22 GCoP (2017); In the UK: s.13(6) HFE Act 1990; Sch.3ZA HFE Act 2008; HFEA CoP (2009) [3.2].

⁴⁶ Dr Tarlatzis, Ms Chatziparasidou, Dr Pantos. The GCoP and Law 3305/2005 stipulate that medical professionals "should" (not "must") offer information and counselling to ART participants.

⁴⁷ Elina, Aria and Katerina (Greek lesbian couple who had a child through "surrogacy").

⁴⁸ Lena.

⁴⁹ Lee E, Macvarish J and Sheldon S, 'Assessing Child Welfare Under the Human Fertilisation and Embryology Act 2008: a case study in medicalisation?' (2014) 36(4) *Sociology of Health and Illness*.

UK IPs and surrogates I interviewed agreed with the above: some said they undertook counselling because they thought it was mandatory,⁵⁰ and others knew it was optional but took it up because it was suggested.⁵¹ Notably, one interviewee remarked that, if the parties go through a surrogacy organisation, then counselling in clinics is considered almost redundant not only by the parties themselves, but also by the clinics, since clinics know that the parties have gone through processes that encouraged them to think through the most significant issues.

Natalie: We had one counselling session [in the clinic], but it was more process than anything meaningful. (...) [E]specially because they [the clinic] knew we had come through SUK, we were pretty sorted with it all. (...) They knew we'd spoken about everything already, they know SUK's processes. We showed them our agreement forms, and it was obvious we'd already gone through all different aspects. They knew (...) that we had a strong relationship, and that we were all involved in each other's lives (...). So, it wasn't like we hadn't considered it properly.

Other interviewees suggested that counselling in clinics is not always helpful. Some reported that it caused unnecessary nervousness,⁵² and one gay male IP couple reported feelings of bias.⁵³ Although recent UK studies note that same-sex parenting through ARTs has become common and widely accepted,⁵⁴ Simon and Steve said the clinic counsellor questioned their parenting abilities in a way which they saw as both suspicious of same-sex parenting and lacking an understanding of surrogacy.

Simon: The counsellor asked if we were in an enduring relationship, and we talked a lot about our relationship, and our relationship with Lauren [surrogate].

Steve: [The counsellor] asked a lot of questions like 'how do you know it's not going to be co-parenting?' and 'how do you know you can bring up a child?' (...) [The counsellor] was a bit homophobic, we think.

Simon: Yes, and one of the things that came up in counselling is 'how you're going to stop Sophie wanting to be with her surrogate mother?'. I think [the counsellor] called her [the surrogate] "mother", which is something that we wouldn't have said.

⁵⁰ Lauren, Simon, Steve, Natalie.

⁵¹ Natalie and Sarah. Sarah said she found it 'funny' that the clinic asked her to undergo counselling (because by that time she had already had three successful surrogacies), and the feeling was shared by the counsellor, too.

⁵² Lauren, Simon.

⁵³ Lauren, Simon, Steve. Lauren had a positive experience with counselling, whereas Simon and Steve did not.

⁵⁴ Lee, Macvarish, and Sheldon (n49); Sheldon S, Lee E and Macvarish J, 'Supportive Parenting'. Responsibility and Regulation: The Welfare Assessment under the Reformed Human Fertilisation and Embryology Act (1990)' (2015) 78(3) MLR 461-492. However, there is still some suspicion against single women.

Other interviewees commented that some people express fear and suspicion of counselling, associating it with a sense of stigma, and considering it a ‘check’.⁵⁵ On the other hand, some said counselling is useful in some cases, especially where there is concern about coercion in consent, as in the case referred to in Chapter 5, where Dr Avery’s clinic refused to go ahead with the agreement between a couple and their niece living with them.⁵⁶

Dr Avery: *She’d [the niece] come from abroad to live her aunt and uncle, and it [her acting as a surrogate] was more or less a condition for remaining in their house. All these came up in counselling.*

In summary, the literature suggests that consent, which is one strategy for operationalising the concern with autonomy, is very important in the Greek and UK surrogacy regimes, with the Greek system appearing to be doing a better job than the UK did. My evidence suggests that people are generally clear in their wishes and aware of what they are agreeing to do, which challenges assumptions that valid consent is impossible in surrogacy. Counselling was seen as an integral part of ensuring respect for autonomy in Greek and UK clinics, with some making it mandatory, thereby confirming evidence of previous UK studies. Nevertheless, in each country, opinion was divided regarding the utility of the role played by counselling in promoting autonomy. Also, in the UK, I found that respect for autonomy is sometimes operationalised outside formal legal structures, for example, through surrogacy organisations and other unregulated communities. However, my UK sample allowed me to capture and discuss a wider range of kinds of surrogacy relationships, including those which are less regulated, than my Greek sample did. In both countries, respect for autonomy seemed to work well, but sometimes this was despite, rather than because of, the law.

6.3 Protection from harm

In Chapter 2, I argued that regulation should only limit autonomy and equality based on well-grounded welfare concerns that such limitations are necessary. In this section, I explore whether and to what extent the specific mechanisms employed by the Greek and UK surrogacy regimes sufficiently and successfully address the welfare concerns laid out in Chapter 2, focusing on harms to the parties *during* the surrogacy

⁵⁵ Dr Avery, Jamie.

⁵⁶ Chapter 5, p.154.

arrangement.⁵⁷ I begin by examining who may cause harm and what kinds of harms might occur (6.3.1). I then discuss how regulation responds to these concerns, focusing on the prohibition of commercial surrogacy (6.3.2), the monitoring systems during the arrangement (6.3.3), and the residence requirements (6.3.4).

6.3.1 Who may cause harm and what kinds of harms may occur?

As discussed in Chapter 2, much of the literature notes that surrogacy could be harmful in various ways, for example because surrogates are unnecessarily exposed to certain physical and emotional risks; because one of the parties decides to renege on the agreement; because one party may want to exploit the other party; or because surrogacy agencies may intentionally exploit the parties.⁵⁸ Many commentators focus on the risk of exploitation during a surrogacy arrangement, which involves the unethical and improper use of the person to achieve someone else's (the exploiter's) aims, arguing that surrogacy should be banned on this ground.⁵⁹

However, there are others who believe harm is impossible if one is not used *solely* as means to an end,⁶⁰ if surrogacy is mutually beneficial (to the IPs and the surrogate), and if both parties validly consent to it.⁶¹ Some suggest that the risk of harm is higher in case of commercial surrogacy arrangements,⁶² whereas others argue that commercial surrogacy can be empowering and valuable to surrogates and to society.⁶³ Previous studies show that in the UK and US context surrogates do not feel harmed,⁶⁴

⁵⁷ Concerns relating to harm to the child would necessarily need to be considered before the child's birth. Hence, they relate to issues of access, which have been discussed in Chapter 5. Other WoC concerns regarding the status of parenthood are discussed in Chapter 7.

⁵⁸ Chapter 2, 'Harm to the surrogate' and 'Harm to the IPs'.

⁵⁹ Chapter 2, Section 2.3.2, 'The surrogate is harmed because she is degraded by being exploited, commodified and objectified' (p.70-77).

⁶⁰ Ramsey J, 'Paying for Reproduction: The Case Against Paid Surrogacy' (2006) 4 *Juridical Review* 331.

⁶¹ Wilkinson S, *Bodies for Sale. Ethics and Exploitation in the Human Body Trade* (Routledge 2003) 12.

⁶² The literature refers to exploitation, commodification, and objectification as harms that may arise in surrogacy. These terms are closely connected and sometimes used interchangeably. All three imply that one is 'wrongfully' used by another, and the literature suggests that the risk of harm is higher when there are commercial elements in the surrogacy arrangement.

⁶³ Campbell A, *Sister Wives, Surrogates and Sex Workers: Outlaws by Choice?* (Ashgate, Surrey England 2013) 106; Munyon JH, 'Protectionism and Freedom of Contract; The Erosion of Female Autonomy in Surrogacy Decisions', 36 *Suffolk ULRev* (2002) 744.

⁶⁴ Ragoné H., *Surrogate Motherhood – Conception in the Heart* (Westview Press 1994); Blyth E, "'I wanted to be interesting, I wanted to be able to say 'I've done something interesting with my life'": Interviews with Surrogate Mothers in Britain' (1994) 12 *Journal of Reproductive and Infant Psychology*; Jadvá V and others, 'Surrogacy: The Experience of Surrogate Mothers' (2003) 18 *Human Reproduction*; van den Akker OBA, 'A longitudinal pre-pregnancy to post-delivery comparison of genetic and gestational surrogate and intended mothers: Confidence and genealogy' (2005) 26 *Journal of Psychosomatic Obstetrics and Gynaecology*; van den Akker (n43); Jadvá V, and others, 'Surrogate

and there is evidence that UK IPs have had positive experiences of surrogacy,⁶⁵ although the potential harm to IPs is largely understudied. Additionally, little is known about whether exploitation happens in UK surrogacy and what kinds of harms this may entail, while there is virtually no knowledge about the Greek situation. Therefore, my evidence makes a significant contribution.

Despite the assumptions of many commentators and many Greek surrogacy professionals in my sample that surrogates are more susceptible to exploitation, the surrogates that I interviewed did not identify as being the most vulnerable party in the arrangement. Rather, they said they had a sense of power and that they were being taken care of by their IPs and the IPs' families, with whom they still enjoy close relationships of friendship. These confirm findings of previous UK and US studies.⁶⁶

Some Greek interviewees remarked that, while regulation does a lot to ensure that the surrogate is protected from exploitation by the IPs, it does not sufficiently protect the IPs,⁶⁷ who were described as equally, if not more, vulnerable to exploitation by surrogates.⁶⁸ For instance, Takis Vidalis said:

*[The IPs] will be the child's parents. They have a strong interest in ensuring that the pregnancy goes well, so they take good care of the surrogate. (...) We forget that exploitation can come from either side. The surrogate may exploit the IPs' hopelessness; they are already in a difficult position because surrogacy is their last resort solution.*⁶⁹

Additionally, some provided anecdotal evidence of IPs having been financially extorted by surrogates. Some said they had heard that surrogates threatened to terminate the pregnancy to get more money from the IPs,⁷⁰ and Areti revealed that her surrogate had insisted on extra payments during their arrangement, which Areti perceived as an attempt of exploitation.

Our surrogate asked for more money after she found out she was pregnant with twins. (...) I felt like we were being exploited. (...) [The lawyer] explained to her that we had already agreed on a payment for her expenses, and that it was unfair for her to ask

mothers 10 years on: a longitudinal study of psychological well-being and relationships between the parents and child' (2015) 30(2) Human Reproduction 373.

⁶⁵ MacCallum F and others, 'Surrogacy: The Experience of Commissioning Couples' (2003) 18(6) Human Reproduction; Blyth E, 'Not a Primrose Path: Commissioning Parents' Experience of Surrogacy Arrangements in Britain' (1995) 13 Journal of Reproductive and Infant Psychology 188; Jadva (2015) *ibid.*

⁶⁶ References in n64 and Horsey's study (n42).

⁶⁷ Professor Hatzis.

⁶⁸ Professor Hatzis, Vidalis, Dr Tarlatzis, Giota, Lena, Areti.

⁶⁹ In Greece, surrogacy is only allowed if there is a medical need for it.

⁷⁰ Ms Chatziparasidou, anonymous Greek lawyer, Lena.

for more. She understood, and she backed down. We didn't want to exploit her, and neither did she [want to exploit us]. (...)I guess she was afraid. The issue was resolved quickly, and we went back to being friends.

Moreover, Giota mentioned that she had formed an agreement with a surrogate, but decided to break it off early, because there were signs the surrogate would attempt to exploit her financially.

I had already agreed with her about her compensation, and she asked for an advance payment which wasn't part of our original agreement. She was insisting so much on it. (...)Of course I'd pay for her travel expenses and accommodation and whatever else she wanted. She asked us to rent her a flat, and we were willing to do that too. We'd also pay for the care of her children. (...)I thought she cared a bit too much about the money, and I was afraid of being exploited.

Other interviewees referred to the possibility of IPs being exploited by medical professionals,⁷¹ and both surrogates I interviewed showed that surrogates sometimes try to protect the IPs from such harm. For example, Elina described IVF clinicians as 'businessmen', and mentioned an incident she viewed as financial exploitation of her IPs by the physician who monitored the pregnancy.

My couple are normal working people. The IVF doctor is a businessman. (...)They [doctors] will try to get as much as they can from the couple. (...)I've always been anaemic, but my body works perfectly. (...)During the surrogate pregnancy, the tests showed anaemia again, and the doctor suggested treatment. (...)When I refused, the doctor told [the IM] that it's very dangerous and scared her a lot. So, [the IM] said she'd pay as much as necessary to prevent all risks for me and the baby. (...)I decided to have the treatment, though I knew it wasn't necessary, and the mother had to pay €300 for it. This is exploitation!

Others expressed fears that unregulated aspects of surrogacy which do happen in practice, such as matching over the internet, also leave IPs open to exploitation by surrogates and other people acting as agents-mediators.⁷² However, Giota, who used a surrogacy mediator she found through an online advertisement, said she never felt exploited but, rather, was grateful to that person.

As in Greece, despite the perception that surrogates are most vulnerable and in need of protection from regulation, my interviews found that UK surrogates express a sense of empowerment, act as volunteers, and have positive experiences.⁷³ This is in line

⁷¹ Vidalis, Professor Hatzis, Ms Chatziparasidou, Dr Pantos, Elina, Aria and Katerina.

⁷² Dr Pantos, anonymous Greek lawyer.

⁷³ Vasanti Jadv, Professor Brazier, Kirsty Horsey, Andrew Powell, Dr Avery, Natalie, Marina, Sarah, Jamie, Lauren, Steve.

with evidence from other studies.⁷⁴ Also, my data suggest that, as for Greece, IPs may be more vulnerable to exploitation than are surrogates.⁷⁵ For example, some said:

Vasanti Jadva: [IPs] *desperately want to have a child, and almost this is their last hope, and often they've tried everything. (...)If you're going to say a surrogate is vulnerable, then you can also say the IPs are vulnerable, because [it] is a highly stressful situation. (...)I don't think that the surrogates that we've spoken to felt vulnerable. If anything, they know that they they're the decision-makers, because they know that the IPs are desperate to find someone to act as a surrogate for them.*

Sarah: *People tend to forget the IPs, and they're focused on the surrogate a lot. (...)There is always a possibility that somebody is going to be exploited, whether that will be the surrogate or the IPs. Sometimes IPs are much more vulnerable.*

Jamie: *[T]he IPs are more open to exploitation than the surrogates are. (...) [IPs may] have done IVF countless times. They've tried everything, and they become desperate. I've seen it myself when I first signed up to become a surrogate. (...)You've got people throwing themselves at you(...), and that leaves them so vulnerable and so open to being exploited.*

Generally, several interviewees argued that it is largely a matter of luck that very few exploitation cases have been reported in the UK,⁷⁶ and that no serious harm has been caused,⁷⁷ while some said there are more exploitation cases which go under the radar.⁷⁸ Additionally, though these are mostly unverified anecdotes, some referred to cases where surrogates used the need for their consent to the PO as a leverage over the IPs,⁷⁹ and others said there are cases where the surrogate may claim money for her expenses and then fake a miscarriage,⁸⁰ as we know happened in *Re N*.⁸¹ Others noted concerns about surrogates potentially exploiting the IPs financially, for example, by claiming false expenses,⁸² and some spoke about unreported cases where the IPs exploited the surrogate, leaving her with the child.⁸³

Sarah: *I do know of surrogates who have been left with the children because the IPs said they didn't want them anymore. These have not been publicised at all. So, we were all really unaware. When the [SUK] Board of Trustees started looking at*

⁷⁴ Horsey (n42) and references in n64.

⁷⁵ Vasant Jadva, Andrew Powell, Kirsty Horsey, Professor Brazier, Dr Avery, Natalie, Marina, Sarah, Jamie.

⁷⁶ For example, *H v S* (n4), where a woman tried to deceive her gay male IPs by agreeing to become their surrogate, whereas she wanted to have a child through sperm donation and keep it. In *Re N* (n4) the surrogate faked a miscarriage.

⁷⁷ Andrew Powell, Sarah, Dr Avery, Marina.

⁷⁸ Andrew Powell, Marina.

⁷⁹ Marina, Professor Brazier.

⁸⁰ Jamie, Marina.

⁸¹ n4

⁸² Marina, Dr Avery, Jamie.

⁸³ Vasanti Jadva, Sarah, Professor Brazier.

proposals for reform they found this case which was not reported, and it certainly wasn't a SUK case, where the surrogate has been left with three children.

Moreover, some assumed that the current system leaves surrogates at risk of being deceived by IPs who, in their desperation to have a child, may promise to retain contact after the completion of their arrangement and disappear afterwards.⁸⁴ However, none of the UK surrogates I spoke to said she felt exploited by her IPs in these ways and several interviewees noted the motivations of UK surrogates are usually not exploitative,⁸⁵ which matched both my evidence from Greece, and evidence from previous UK studies.⁸⁶ Furthermore, some UK interviewees noted that IPs and surrogates may be exploited by surrogacy agencies, especially if the IPs choose to go abroad for surrogacy, where it is practised on a commercial basis, which they believed potentially increases the risk of exploitation.⁸⁷ This concern is often mentioned in the literature and case law.⁸⁸

Both the literature and my data suggest that there is potential for everyone involved in surrogacy practice to cause harm and everyone is potentially vulnerable to be harmed. Although it is possible that my sample does not represent the whole variety of experiences of surrogacy in these countries, it clearly challenges the theoretical assumption that surrogates are the most vulnerable party in a surrogacy arrangement. I now focus on how well the mechanisms employed by the Greek and UK regimes safeguard the parties in surrogacy arrangements from the harms noted above.

6.3.2 Prohibition of commercial surrogacy

As a response to the concern that harm is more likely when surrogacy is practiced on a commercial basis, Greece and the UK employed a mixed altruistic compensatory model for surrogacy, whereby only payments for 'reasonable expenses' are allowed. Under Greek law, payments for surrogacy other than for 'reasonable' expenses,

⁸⁴ Vasanti Jadva, Marina, Sarah.

⁸⁵ Vasanti Jadva, Andrew Powell, Natalie, Lauren, Marina, Sarah.

⁸⁶ Horsey (n42) and references in n64.

⁸⁷ Helen Prosser, Vasanti Jadva, Andrew Powell, Professor Brazier, Simon, Steve, Marina, Sarah, Jamie.

⁸⁸ Fenton R, Heenan S and Reece J, 'Finally fit for purpose? The Human Fertilisation and Embryology Act 2008' (2010) 32(3) *Journal of Social Welfare & Family Law*; Crawshaw M, Blyth E and van den Akker O, 'The changing profile of surrogacy in the UK. Implications for national and international policy and practice' (2012) 34(3) *Journal of Social Welfare & Family Law*; *Re X & Y (Foreign Surrogacy)* [2008] EWHC 3030; *Re L (a minor)* [2010] EWHC 3146 (Fam); *Re W* [2013] EWHC 3570 (Fam); *Re C (A Child) (Parental Order)* [2013] EWHC 2408 (Fam); *Re G, M* [2014] EWHC 1561 (Fam); *Re A (Foreign Surrogacy: South Africa)* [2015] EWHC 1756 (Fam), and many more.

advertisement and paid mediation for surrogacy are all illegal.⁸⁹ In 2008, the non-governmental body that monitors and regulates ARTs in Greece (NAMAR), issued guidance specifying what ‘reasonable expenses’ could entail, and set a limit for a legally acceptable compensation up to €10,000 (approximately £8,800).⁹⁰ The altruistic character of a formal legal surrogacy arrangement is assessed at the preconception stage during the judicial scrutiny of the surrogacy agreement. However, regulation does not stipulate any process for monitoring commercial activities during the surrogacy arrangement or after its completion. Consequently, the sanctions prescribed are possibly intended to have a ‘chilling effect’. In 2013, the National Bioethics Commission reported that commercial surrogacy takes place in Greece.⁹¹ Also, Hatzis notes that “under the table” payments of over €12,000 are taking place for surrogacy in Greece,⁹² but does not provide concrete evidence of this happening, and he does not specify whether these payments covered more than the surrogate’s expenses. Generally, though, evidence of excess payments is largely anecdotal, while no harm resulting from that has ever been reported.

My Greek data suggest a broad approval of the principle of altruism enshrined in regulation. Yet, as Professor Hatzis remarked, Greek regulators have not always been against commercial surrogacy: the draft 2002 law was deliberately vague as to whether surrogacy should be altruistic or commercial. Parliament revised the law to clarify the illegality of commercial arrangements. Despite a shared sense of approval of the principle of altruism, some Greek interviewees believed the regulation creates inequalities: law recently allowed for the compensation of gamete donors for ‘physical strain’ but did not change the ‘reasonable expenses’ rule for surrogacy, although the surrogate’s physical strain is much more intense than that of donors.⁹³

Several Greek interviewees believed that some surrogacy arrangements in Greece present commercial elements,⁹⁴ with the amount of compensation paid to surrogates often exceeding the €10,000 limit set by NAMAR. Vidalis said that one study of surrogacy court applications in which he was involved found that at least 50 per cent

⁸⁹ Article 26(8) Law 3305/2005 introduced sanctions of imprisonment and a fine.

⁹⁰ NAMAR Decree 36/2008, article 4. On top of that, IPs also bear the cost of IVF for the surrogacy pregnancy, the legal costs for the judicial process, and the cost of childbirth and post-natal care.

⁹¹ Hellenic National Bioethics Commission Annual Report (2012-2013) http://www.bioethics.gr/images/pdf/ETHSIES/Annual_2012-2013.pdf .

⁹² Hatzis A, ‘From soft to hard paternalism and back: the regulation of surrogate motherhood in Greece’ (2009) 49(3) Portuguese Economic Journal.

⁹³ Vidalis, Professor Hatzis, Dr Pantos, Dr Tarlatzis, Cazlaris (embryologist and policy-maker).

⁹⁴ Mr Cazlaris, Ms Chatziparasidou, Vidalis, Professor Hatzis,

of surrogacy arrangements in Greece are truly altruistic (whereby the surrogate is a close friend or family of the IM), but in the rest of cases the surrogates are usually foreign women, especially from Eastern European countries, living in Greece,⁹⁵ raising the possibility that they might be motivated primarily by economic concerns. Nevertheless, the study did not provide robust evidence that payments over and above ‘reasonable’ expenses take place and that harm has come out of it.

Additionally, some thought the parties in surrogacy arrangements use the vagueness implied by the ‘reasonable expenses’ rule to conceal payments.⁹⁶ However, my data did not provide a clear basis for the claim that surrogacy in Greece is indeed commercial or that this is harmful. For example, Elina, a Greek surrogate said she received compensation of €20,000 from her IPs. Two Greek IMs said that, in their experiences, compensation for surrogacy in Greece ranged between €20,000 and 40,000,⁹⁷ and others referred to ‘rumours’ about payments of €30,000.⁹⁸ Although these amounts are higher than the NAMAR limit, they might be judged to represent ‘reasonable’ expenses. My interviewees said these payments mostly covered the surrogates’ cost for pregnancy clothing, vitamins and drugs during pregnancy, rent, and compensation due to loss of earnings.⁹⁹

Lena, a Greek surrogate, said she received no compensation at all the first time she acted as a surrogate for her best friend. The second time, where the IPs were not close friends, she received a monthly fee of €200 to cover the cost of transportation for medical checks during pregnancy, which would fall under the ‘reasonable expenses’ definition. Additionally, other interviewees stated that, to their knowledge, only ‘reasonable’ expenses are being paid to surrogates, but also emphasised that there can be no certainty there are no ‘under the table payments’.¹⁰⁰ For instance, an anonymous Greek lawyer said:

A breakdown of expenses is usually included in the surrogacy agreement for the court to see. Most times it’s approximately €100 per month for the cost of food for the surrogate. Sometimes the parties agree on a monthly salary to be paid to the surrogate, which is calculated against the cost of expected loss of wages, and medical checks and medicine. The amount of compensation is agreed between the parties. We

⁹⁵ Ravdas (n11).

⁹⁶ Vidalis, Cazlaris, Dr Pantos, Professor Hatzis.

⁹⁷ Areti, and Giota.

⁹⁸ Dr Pantos, Ms Chatziparasidou.

⁹⁹ Such costs have been deemed ‘reasonable’ by UK judges, as noted in the recent DHSC guidance for IPs and surrogates (n24: 10-11).

¹⁰⁰ Anonymous Greek lawyer, Dr Tarlatzis.

[lawyers] *don't get involved in this. To my knowledge, it's just reasonable compensation for food, clothing, and medicine, and the cost of the surrogates' living expenses. I couldn't know if they've agreed on any other payments.*

Other interviewees confirmed the lawyer's statement of what 'reasonable expenses' usually include.¹⁰¹ However, there are currently no other sources of evidence about the effectiveness of the 'reasonable expenses' rule or the kinds of harm that have arisen through excess payments, and my data offer no clear answer either. In any case, as most Greek interviewees suggested, there are likely to be altruistic elements in most surrogacy arrangements, and, although money could be an important motivation, it is usually not the main one.¹⁰² Moreover, some believed there are advantages in tolerating and/or formally allowing payments in surrogacy: this can provide the parties with a sense of empowerment, thereby increasing the parties' autonomy, and promoting their welfare.¹⁰³ Further, some interviewees thought the criminal sanctions against the commercial surrogacy were 'too strict' and should be reconsidered.¹⁰⁴

All the Greek clinicians I interviewed emphasised that they were not involved in mediation for surrogacy for a fee,¹⁰⁵ although it would be unlikely that they would share such information, since they would thereby be admitting criminal liability. My findings rather suggested that, despite the legal prohibition, advertisement of surrogacy services by surrogates, IPs, and clinics, as well as mediation for matching for surrogacy (for a fee) often takes place on Internet platforms,¹⁰⁶ which are probably illegal. Also, Professor Hatzis expressed fears of a 'black market' of surrogacy operating in Greece but offered no supporting evidence.

Furthermore, many Greek interviewees said that there is no effective mechanism to monitor payments for surrogacy,¹⁰⁷ and others that judges monitoring surrogacy arrangements at the preconception stage do not ask, and, in some cases, even tolerate payments.¹⁰⁸ Takis Vidalis also said that NAMAR, which can bring claims of commercial surrogacy to the court if a formal complaint is made, had seemed unwilling to act in the past. Although this is speculative, NAMAR's lack of involvement with surrogacy could be seen as an effort to demarcate the boundaries of

¹⁰¹ Dr Pantos, Areti, Giota, Lena, Elina.

¹⁰² Ms Chatziparasidou, Dr Tarlatzis, Takis Vidalis, Professor Hatzis, Lena, Elina, Areti, Giota.

¹⁰³ Professor Hatzis, Dr Tarlatzis, Elina.

¹⁰⁴ Professor Hatzis, Dr Tarlatzis, Mr Cazlaris. The latter two were in the 2005 draft law Committee.

¹⁰⁵ Dr Pantos, Ms Chatziparasidou, Dr Tarlatzis.

¹⁰⁶ Vidalis, Dr Pantos, Ms Chatziparasidou, Professor Hatzis, Giota, Elina, Areti.

¹⁰⁷ Vidalis, Ms Chatziparasidou, Dr Pantos, anonymous lawyer, Lena.

¹⁰⁸ Vidalis, Professor Hatzis, Areti, Elina.

its remit in a way which excludes surrogacy. However, since NAMAR is responsible for all ARTs, and surrogacy is considered a form of ARTs, NAMAR cannot waive responsibility for formal legal surrogacy. Lastly, though a move to commercial surrogacy was not favoured by almost half of my Greek interviewees,¹⁰⁹ many said they would accept it if regulation would set an effective mechanism to monitor payments.¹¹⁰

As in Greece, UK regulation allows altruistic surrogacy, with an exception for payments for ‘reasonable’ expenses. Excess payments are not illegal *per se*, but they must be authorised by the court post-birth if the IPs apply for a PO, which severs the parenthood of the surrogate (and her husband or consenting partner, if she has one) and confers it on the IPs. As in Greece, advertisement and paid mediation for surrogacy are illegal.¹¹¹ Nevertheless, UK surrogacy practice *during* the arrangement is largely unregulated, and there is no mechanism to monitor payments and commercial activity. However, studies indicate that surrogates and IPs have had positive experiences of surrogacy in the UK.¹¹²

My UK findings parallel with those for Greece in many respects. UK interviewees were content that the principle of altruism is the basis of surrogacy regulation. Whilst reporting that money still changes hands in many cases, most interviewees believed that this is usually to ensure that surrogates are not ‘out of pocket’ during the arrangement, and, in most cases, that surrogates do not use surrogacy to profit from it financially.¹¹³ On the other hand, the vast majority of my UK interviewees suggested that there is a common misconception that law prohibits all payments, which is untrue, and causes a lot of worry,¹¹⁴ and some said there is another common belief that £12,000-15,000 must be paid as expenses, which is equally untrue.¹¹⁵

Simon: *They say normally it’s around £15,000, so when it is that much, so long you can justify why, it’s fine.*

¹⁰⁹ Ms Chatziparasidou, Dr Pantos, Cazlaris, anonymous lawyer, Giota, Lena.

¹¹⁰ Professor Hatzis, Vidalis, Dr Tarlatzis, Elina, Areti, Giota.

¹¹¹ ss.2(1)(2),3(1),4 SAA 1985.

¹¹² n64, n65.

¹¹³ Vasanti Jadvva, Kirsty Horsey, Natalie Gamble, Sarah, Lauren, Marina, Jamie, Natalie, Steve and Simon.

¹¹⁴ Vasanti Jadvva, Natalie Gamble, Kirsty Horsey, Andrew Powell, and all IPs and surrogates.

¹¹⁵ Steve, Simon, Marina, Lauren.

Several interviewees said surrogates do not charge IPs extortionate amounts of money, with the surrogates' compensation ranging from zero to £20,000.¹¹⁶ Marina said COTS has a policy of £15,000 as a maximum amount, and that many UK surrogates receive that amount as compensation. All SUK members said the organisation helps the parties with agreeing what are reasonable expenses and provides an indicative list of what can be claimed.¹¹⁷ Although they did not specify whether SUK advocates for a maximum amount for compensation, they explained that surrogates' expense claims usually range between £5,000 and £12,000.

Contrary to the view expressed both in the literature and by some UK interviewees that payments over 'reasonable' expenses take place especially in the independent world of UK surrogacy, Jamie said that the total cost of their arrangement was £10,000.¹¹⁸ However, she suggested that other independent surrogates ask for more money, and 'give independent surrogacy a bad name'. The amount of compensation for 'reasonable' expenses mentioned by my interviewees confirms findings of a recent study, which reported that UK surrogacy 'is very much undertaken by women on an altruistic basis', with compensation ranging from nothing to £15,000.¹¹⁹ Also, all interviewees noted that UK surrogates and IPs have positive experiences of surrogacy, emphasised that money is a secondary motivation, and argued that there are altruistic elements in all UK surrogacy arrangements. Again, this confirms findings of other studies,¹²⁰ and matches my Greek findings.

Furthermore, many UK interviewees highlighted the lack of an effective system to monitor payments before or during the arrangement and criticised the regulation for failing to clarify which expenses should be considered 'reasonable'. Though the Brazier Committee emphasised that lawful payments should be defined and limited by regulation,¹²¹ this proposal, as most of the Brazier proposals, was not implemented by formal regulation. In her interview, Professor Brazier, referred to the shortcomings of UK regulation, but noted that surrogacy works well despite that.

*[I]n practice, in intra-UK arrangements there don't seem to be very pressing problems, partly I think because surrogates themselves and surrogates working with commissioning couples have done so much work on how to make it work. (...)*At the

¹¹⁶ Vasanti Jadvā, Kirsty Horsey, Sarah, Lauren, Marina, Jamie, Natalie, Steve and Simon.

¹¹⁷ Sarah, Lauren, Natalie, Steve and Simon.

¹¹⁸ This included the cost for at-home insemination and Jamie's expenses.

¹¹⁹ Horsey's study (n42) 58.

¹²⁰ *Ibid* and UK studies cited in n64.

¹²¹ Brazier Report [7.3(iii)].

moment we're dishonest about expenses and there's a policy vacuum. (...)We [Brazier Committee] asked for this to change. (...)The Report must be turning yellow somewhere on the shelves of the DoH. (...)I just think the 2008 reform for surrogacy was a waste of time and space.

My findings confirm those in the Brazier Report regarding the work of surrogacy organisations filling the policy vacuum.¹²² All interviewees said that those involved in UK surrogacy are doing a good job, and try hard to make regulation work well, citing this as the major reason for why no problems have arisen yet. Moreover, many UK interviewees said IPs and surrogates are self-regulated; they keep track of expenses paid during the arrangement, and follow the guidance given by experienced members of surrogacy organisations.¹²³

Others revealed that there is also a lot of information on expenses available through online platforms (such as surrogacy groups on Facebook, and other forums), but noted that misinformation may exist.¹²⁴ The same interviewees added that UK courts do not monitor or define what 'reasonable expenses' include, which confuses those involved in UK surrogacy.

Natalie Gamble: *[T]here's no real forensic analysis of what's going on. I think it perpetuates the myth that surrogates are being paid expenses when actually they're being very clearly compensated, and nobody has a problem with that, but it's just not done very transparently, and it's so confusing to people.*

Helen Prosser: *And then you get those Facebook groups and forums that are saying "just put in this", and surrogates' groups are saying "this is what my IPs gave me".*

Natalie Gamble: *We see people fabricating expenses to fit the figure. (...)It just doesn't seem clear.*

Additionally, Natalie Gamble clarified that payments are not that important for the making of the PO. Other interviewees agreed, adding that the rule requiring the judge to prioritise the WoC when deciding for a PO means that it will be extremely difficult for a PO to be refused just because there were payments over 'reasonable' expenses.¹²⁵ This is also evident in case law.¹²⁶ Furthermore, many noted that the courts often do not ask about payments,¹²⁷ and others believed there is no need for increased monitoring of payments in intra-UK surrogacy arrangements.¹²⁸

¹²² *Ibid* [3.1].

¹²³ Sarah, Simon and Steve, Lauren, Natalie (all from SUK), and Marina (from COTS).

¹²⁴ Jamie, Natalie Gamble, Helen Prosser.

¹²⁵ Professor Brazier, Andrew Powell, Natalie Gamble, Kirsty Horsey, Steve and Simon, Sarah.

¹²⁶ Chapter 4, n163.

¹²⁷ Simon, Jamie, Natalie, Natalie Gamble.

¹²⁸ Natalie, Sarah, Marina, Kirsty Horsey.

Simon: *We were worried that in the PO they [Cafcass and the judge] would question some of the expenses, whereas it was kind of the opposite. They didn't even care. (...)Even if you can't really justify it, I don't think there would be a problem. It wouldn't have been a case where the judge would say "you seem to have paid a lot of money, so we're going to take the baby off you", if that's not in the best interests of the baby. What else can judges do?*

Further, some interviewees emphasised that the UK system of monitoring payments does not work well because there are different approaches between the Magistrate's Court, which processes PO applications arising from intra-UK surrogacy arrangements, and the High Court, where PO applications arising from international surrogacy arrangements are heard.¹²⁹ In their view, this creates inconsistencies and confusion regarding the issue of payments, which, in some cases, sits in tension with the important principles regarding autonomy and WoC.

Natalie Gamble: *There's a different approach in the High Court and the Magistrate's Court. In the High Court they want to know absolutely down to the last penny what's paid. They separate out the bits that are actual expenses, which means actually identified, receipted costs, lost wages, travel costs, etc. You must provide receipts. (...)It's very different in the Magistrate's Court. (...)The PO Reporter and Cafcass will go and see the parents, they'll ask them what they paid; they'll ask the surrogate what she was paid. They always set out in the report what they're told, and then they come to an analysis of that amount. They rarely ask for receipts. They often are just told that the surrogate was paid a lump sum and they kind of accept that on a face value, and they don't go in any great detail (...)In any case, [judges] always authorise the payment, so much so that it's now become just routine. (...)The courts always act in the child's best interests so the rules are unenforceable and completely meaningless.*

According to some interviewees, many users of surrogacy, whether they go through an organisation or do it independently, often take advantage of the vagueness regarding 'reasonable expenses' and of the disinterest of the court, to conceal payments,¹³⁰ which I also found to be the case in Greece. For example, Jamie said:

There are too many things that you can exaggerate as "expenses". I know some surrogates that expect holidays after they've had a baby. (...)It's not the same for all surrogates. One surrogate got a Tiffany necklace from her IPs after she had their baby(...). [I] 've seen surrogates getting mobility scooters from their IPs. (...)One surrogate expected her IPs to rent a flat for her near to where they lived, because she didn't agree with the distance. (...)Money is going under the table, gifts are handed over under the table, cars, mobile phones, tablets. (...)That's what you get when there are no questions being asked about the level of expenses. The courts don't really care.

¹²⁹ Andrew Powell, Natalie Gamble, Helen Prosser.

¹³⁰ Andrew Powell, Natalie Gamble, Professor Brazier

Although most UK interviewees criticised the vagueness around ‘reasonable’ expenses, there were also some who believed that it may offer significant advantages to the parties, the most important of which is a sense of empowerment because they could decide themselves what counts as a ‘reasonable’ expense.¹³¹ This finding also emerged from my Greek sample. However, many noted that more guidance on what is ‘reasonable’ is absolutely necessary.¹³²

Steve: It never crossed our minds that she [surrogate] would take a penny more. If anything, she’d probably give it back. She did give some money back to us in the end.

Simon: [S]he wanted to itemise everything from the start. We were lucky we had that information and guidance from SUK. We might have just thought “a gay average surrogacy journey would cost £12,000, so we can give you £1,000 a month for a year”. She was really taking everything into consideration.

Steve: It was her project. (...) It can be a thorny issue, and there’s only so much that SUK can help you with. Some guidance would be good.

To address these concerns, the DHSC recently published guidance (with no legal force) on what ‘reasonable expenses’ could entail,¹³³ but my interviews were performed before that time. Hopefully, this new guidance will resolve some of the problems noted above.

Generally, UK interviewees were against commercial surrogacy, because they were worried that that a surrogacy industry could be created, which could out-price some IPs and change the surrogacy relationship, as well as the motivations of UK surrogates, who now act mostly out of altruism.¹³⁴ However, most of them indicated that their disapproval of commercial surrogacy is due to the stigma still associated with it. Although it should be remembered that this evidence comes from people who use the current system, which works for them, my findings suggest that the prohibition of payments beyond ‘expenses’ to surrogates does not work well in in practice neither in Greece nor in the UK. However, there was no evidence of harm resulting from these payments.

¹³¹ Kirsty Horsey, Andrew Powell, Natalie, Marina.

¹³² Natalie, Lauren, Simon and Steve, Sarah, Jamie, Helen Prosser, Natalie Gamble.

¹³³ DHSC guidance for IPs and surrogates (n24) 9,10.

¹³⁴ Lauren, Natalie, Steve, Marina, Sarah, Jamie, Dr Avery, Natalie Gamble, Helen Prosser, Kirsty Horsey, Professor Brazier. Only Andrew Powell favoured a commercial model for surrogacy in the UK, if regulation guaranteed effective monitoring processes that protect the parties from exploitation.

6.3.3 Monitoring during the pregnancy

ARTs, including IVF-surrogacy, have been available in Greek clinics since the early 1990s, but there was no oversight until 2005, when NAMAR was established. However, NAMAR never functioned fully,¹³⁵ and it ceased its operations between 2010 and 2015, when it was formally re-instated.¹³⁶ More recently, NAMAR has undertaken the monitoring and licensing process of all Greek clinics performing ARTs.¹³⁷

Several Greek interviewees commented on the lack of oversight in surrogacy practice in clinics, which they believed leaves everyone, including surrogates, IPs, and surrogacy professionals, potentially open to exploitation.¹³⁸ Two Greek clinicians, though, highlighted that Greek clinics were self-regulated, and had processes in place, such as mandatory counselling, filling the gap left by regulation.¹³⁹ Indeed, several interviewees were worried that more intense oversight and monitoring would lead to overregulation that would complicate surrogacy practice. For instance, Mr Cazlaris said:

The law hasn't been fully applied yet. It prescribes monitoring processes that can prevent and eliminate harm. It's a good law. It's correctly designed. We knew what we were doing when we drafted it. We don't need any more regulation. We just need to apply this law first. Clinics have been unregulated for too long.¹⁴⁰ We now have to wait and see how this pans out, and whether law will be correctly applied from now on.

In the UK, the 1990 Act established the HFEA to monitor ARTs practice in UK clinics. Since surrogacy may require treatment in a clinic, it is assumed that the HFEA is responsible for monitoring this practice, but there is no evidence on how this operates.

¹³⁵ Paparrigopoulou F, 'National Authority of Medically Assisted Reproduction: Experiences and future perspectives' in Kaiafa-Gbandi, M., E. Kounougeri-Manoledaki and E. Symeonidou-Kastanidou eds, *Medical assistance in Human Reproduction: 10 years of the application of Law 3089/2002* (Sakkoulas 2013); and evidence from Dr Tarlatzis, Mr Cazlaris, Ms Chatziparasidou,

¹³⁶ Presidential decree (31/07/2015).

¹³⁷ NAMAR's Chairman, Dr Arntsaklis, recently reported that there are currently 44 fertility clinics in operation, and they have all received licenses by the Authority (Kougiannou, A. 'Huffington Post's big study on IVF in Greece' (05/12/2017) http://www.huffingtonpost.gr/entry/e-meyale-ereena-tes-huffpost-via-tis-exosomatikes-sten-ellada_gr_5a25615de4b0a02abe928cf3 accessed on 10/12/2017).

¹³⁸ Dr Pantos, anonymous Greek lawyer, Vidalis, Professor Hatzis, Dr Tarlatzis, Ms Chatziparasidou, Mr Cazlaris.

¹³⁹ Dr Pantos, Ms Chatziparasidou.

¹⁴⁰ Note that my interviews took place before the NAMAR licensing process started, but after NAMAR was re-instated.

As with Greece and NAMAR, many UK interviewees noted the lack of oversight by the HFEA, which they believed leaves users of surrogacy unprotected.¹⁴¹

Natalie: [The HFEA] *said to me that they don't deal with surrogacy. They said they deal with clinics, but they have nothing to do with surrogacy other than the IVF side of it. I mean, it's odd, isn't it? That it's the HFE Act that governs how surrogacy works, but the HFEA doesn't have any responsibility for us? To listen to us, or to report data. I think that's hugely missing.*

Dr Avery similarly noted that the HFEA is not involved in the surrogacy practice, suggesting this shows the HFEA's desire to demarcate the boundaries of its remit in a way that excludes surrogacy. Moreover, all UK interviewees said that the lack of oversight means that informal support mechanisms had to be developed to protect the parties from potential harm, and that surrogacy organisations often fill this gap.¹⁴² Both based on Horsey's recent study,¹⁴³ and on my own evidence, the three reputable UK surrogacy organisations work well, although they are completely unregulated and unmonitored. However, given that these organisations are unlikely to allow an arrangement to proceed in those cases where people are not prepared to follow their processes and rules, this might be considered as a kind of regulation, namely self-regulation.¹⁴⁴ For example, Natalie said:

The UK system (...)involve[s] putting a lot of trust onto somebody. (...)I felt particularly vulnerable when we were looking into surrogacy. (...)We were afraid that someone might take advantage of us. The way the law is set up it kind of leads you to worry about these things. [T]he way that we felt we could do it was by going through a reputable organisation that had processes and checks and that whole community; (...) we felt that we were very safe there from those risks. (...)The surrogacy community has had to sort out themselves; we've put good practice in place to mitigate the risks that the system presents.

Some interviewees (who were involved in surrogacy organisations) believed there is possibly a need for greater regulation of UK surrogacy organisations, suggesting that they do not see the space left by regulation as 'productive' in a good way.

Sarah: *I have faith that Brilliant Beginnings are doing a great job, and I have faith that COTS are doing a great job. (...)We [SUK] recommend these organisations because we know the people who are running them, and we know they have the same processes that we have, the same checks. (...)However, there's no one making sure that we [surrogacy organisations] are acting appropriately. (...) [W]e are very lucky that*

¹⁴¹ Sarah, Marina, Professor Brazier, Kirsty Horsey.

¹⁴² Natalie, Marina, Sarah, Lauren, Steve and Simon, Helen Prosser and Natalie Gamble.

¹⁴³ Horsey's study (n42).

¹⁴⁴ This confirms evidence in Brazier Report [3.1].

we do have a community where we all know each other and work well together. (...)I genuinely think we should be accountable to somebody.

However, Natalie who is involved in SUK noted the possibility of state-monitoring possibly making it difficult for the organisation to handle the increased costs and bureaucracy that such a process would bring.

In some respects, I can see that regulation of surrogacy organisations would be good, but I think the reality of it would be that organisations like SUK, which don't have huge amounts of money or resources would find it very hard to survive having to go through so much administration. (...)And that would meet my concern about possible over-professionalisation of it.

Furthermore, despite the assumption in the literature and case law that informal independent surrogacy arrangements can be dangerous,¹⁴⁵ because they are completely unmonitored, Jamie noted that such processes and checks are common in practice, which is again evidence of self-regulation filling the gap left by formal regulation.

On the other hand, the lack of efficient monitoring of UK surrogacy organisations leaves room for other less 'well-intentioned' surrogacy organisations to operate, which appear to be an exception. Although no cases of exploitation of IPs and surrogates by such organisations have been publicised, my data suggest that some IPs have been harmed financially by a profit-making surrogacy organisation that used to operate in the UK.

Marina: There was an organisation called [...].¹⁴⁶ I knew about four or five couples that handed over £30,000-40,000. They lost it all. Now they've got children, but they've got them through COTS. I don't even know if that organisation has been punished.

Despite the concerns and discontent evident in my UK sample due to the lack of formal monitoring processes, the great majority of my interviewees emphasised that surrogacy works well because the parties form strong relationships of trust and friendship.¹⁴⁷ This confirms the findings in Horsey's study,¹⁴⁸ and shows that law is largely irrelevant to preventing exploitation during UK surrogacy arrangements.

Natalie: The reality of surrogacy in the UK is that it works really well in spite of the regulation. (...)I don't think that exploitation is an issue in the UK at all. Everyone I know from SUK has a relationship of friendship and trust with their surrogates and

¹⁴⁵ n4; Jackson (n25).

¹⁴⁶ The name of the organisation has been removed to avoid potential libel.

¹⁴⁷ Vasanti Jadvā, Lauren, Natalie, Simon, Steve, Marina, Sarah, Natalie Gamble and Helen Prosser, Professor Brazier, Jamie, Kirsty Horsey.

¹⁴⁸ Horsey's study (n42) 34.

surrogates have good relationships with IPs. (...)Actually, I've spoken to independent surrogates and it is very similar.

In summary, my data showed that surrogacy generally works well both in Greece and the UK, although there is little formal oversight. In the UK, informal systems of self-monitoring have developed, mostly through surrogacy organisations, which appear to be working well, apart from the case of a rogue organisation noted above. Many UK interviewees who are involved in those organisations were in favour of their practices being formally regulated, but there were also fears that overregulation could have adverse effects.

6.3.4 Residence requirements

In the UK, residence is only a criterion for the acknowledgement of the IPs' parenthood following surrogacy; it is monitored after the child has been born, if the IPs apply for a PO. In Greece, until 2014, law required both the surrogate and the IM to live permanently in Greece, and residence was monitored at the start of the arrangement by the judiciary. The residence rule was presented as guarantee against commercialisation and exploitation,¹⁴⁹ but there is little evidence regarding whether it achieves its aims.

In 2012, Ravdas tried to gather evidence of potential exploitation by researching the transcripts of judicial hearings for surrogacy, and this is the only source of evidence currently available in Greece. He found that 38 per cent of surrogates were foreigners who lived in Greece, but, in most cases, there was a reference to a close friendship between the IPs and the surrogate,¹⁵⁰ and no evidence that the surrogates had been trafficked merely to act as surrogates.¹⁵¹ While the data available to Ravdas was inevitably limited, he concluded that the profile of surrogates alone cannot lead to safe generalisations about whether exploitation takes place. In 2014, regulators lifted the residence requirement, and now either the surrogate or the IM must live in Greece at least temporarily.¹⁵² This change was explained as an attempt to bring the law in line with the modern realities of surrogacy, referring to the phenomenon of 'reproductive

¹⁴⁹ Minutes of the parliamentary proceedings (27/11/2002, 3/12/2002). This was also noted by Vidalis, Dr Tarlatzis, anonymous lawyer.

¹⁵⁰ However, it is possible that this is something the parties felt that they should say to secure approval, with the judge having no way of checking whether it is genuine.

¹⁵¹ Ravdas (n11).

¹⁵² Article 17 Law 4272/2014.

tourism'.¹⁵³ However, it is possible that the legislative change increases the risk of exploitation.

My interviewees were divided on this issue. Some remarked that the profile of women who usually offer to become surrogates in Greece raises concerns about exploitation;¹⁵⁴ Vidalis said it is mostly foreign women living in Greece, and Ms Chatziparasidou that it is usually women who are unemployed or of low income, whereas IPs are usually wealthier (though not necessarily rich). On the other hand, some interviewees said surrogates are mostly friends or relatives of the IPs, and that there is no exploitation.¹⁵⁵ However, the possibility of exploitation in surrogacy arrangements that occur within the family cannot be excluded, as the surrogate in such cases may be subject to many forms of subtle coercion.¹⁵⁶

Additionally, for some, the financial crisis, paired with the refugee crisis in Europe, and the 2014 legislative change regarding residence for surrogacy in Greece, intensified their concerns that vulnerable women of lower socio-economic status may be tempted to act as surrogates.¹⁵⁷ However, speculative considerations of harm are insufficient to counteract the importance of respecting autonomy, and here it is uncertain whether harm is or will ever be incurred. Also, some interviewees criticised the regulation as 'hypocritical' because, on one hand, it prohibits commercial surrogacy, but, on the other hand, it promotes reproductive tourism.

Lastly, several Greek interviewees noted that there is no evidence in the media or through cases appearing in the courts to suggest exploitation.¹⁵⁸ Yet, one interviewee emphasised that exploitation cases possibly do not go through the formal legal route, meaning that we have no knowledge of them.¹⁵⁹ Generally, my sample, though small and partly self-selected, suggested that the residence rule never worked effectively, that there is generally a strong environment of mutual respect, friendship, care and support during and after the surrogacy arrangement, and revealed no instances where anyone felt exploited.¹⁶⁰

¹⁵³ Memorandum-4272/2014, Ch.3.

¹⁵⁴ Vidalis, Ms Chatziparasidou, Professor Hatzis, anonymous Greek lawyer.

¹⁵⁵ Dr Pantos, anonymous Greek lawyer.

¹⁵⁶ Raymond JG, 'Reproductive Gifts and Gift Giving: The Altruistic Woman' (1990) 20(6) The Hastings Center Report 7.

¹⁵⁷ Vidalis, Professor Hatzis, Dr Tarlatzis, Dr Pantos, Ms Chatziparasidou, anonymous Greek lawyer.

¹⁵⁸ Professor Hatzis, Vidalis, Dr Tarlatzis.

¹⁵⁹ Professor Hatzis.

¹⁶⁰ Giota, Areti, Lena, Elina, Takis Vidalis, anonymous Greek lawyer.

6.4 CONCLUSION

In this chapter, I explored how well the Greek and UK surrogacy regimes address concerns related to autonomy and welfare *during* a surrogacy arrangement. In both countries, the autonomy concern is operationalised primarily through the requirement of consent. I found that Greece has a more robust formal system of ensuring valid consent through monitoring by the judiciary and clinics. In the UK, consent is formally monitored by clinics only, meaning that regulation fails to provide oversight of mechanisms to ensure valid consent in surrogacy arrangements not going through clinics. Nevertheless, there could be informal surrogacy arrangements happening under the radar in Greece that we know nothing about. Also, my UK interviewees expressed complaints about the way consent is operationalised in clinics.

Based on my evidence, UK surrogacy organisations play a significant, informal role in consent-provision, but their role is under-studied, and they are currently unregulated. The latter was highlighted both as a good a bad thing by my interviewees. Nonetheless, the DHSC recently acknowledged their significant role in UK surrogacy practice through new guidance to medical professionals and surrogates and IPs. Further, I found that clinics in both countries usually make surrogacy counselling mandatory, though it is not legally mandated, and counselling is seen as another way to operationalise autonomy concerns. Another important finding is that UK interviewees considered surrogacy agreements very important, and had signed one, though they are not legally mandated and have no direct legal force. Within my sample, there was a high level of contentment with the status-quo regarding respect for autonomy in surrogacy in both countries, although it was suggested that this often happens despite the law, not because of it.

With regards to welfare concerns, I found that IPs are possibly at a greater risk of being harmed, which challenges the widely held assumption that surrogates are most vulnerable. My interviews failed to uncover any direct experience of exploitation in either country and few are reported in the literature. However, there may well be some cases of exploitation which go unreported, as for example the exceptional case of a rogue UK organisation that disappeared having taken large payments from IPs noted by one interviewee.

Further, my evidence showed that UK surrogacy arrangements are largely unregulated, and informal systems have been developed to fill the gap in formal

regulation. Again, this is evidence of things working despite, not because of, the law. Additionally, in both countries, I found an overwhelming support for the principle of altruism, but it was suggested that the ‘reasonable’ expenses rule does not work well in either country, because there is a lot of vagueness around what it entails. However, some believed this offers a sense of empowerment to the parties in a surrogacy arrangement, and there was no evidence of harm from excess payments. Despite criticisms about the lack of effective regulation of surrogacy practice in both countries, surrogacy appears to work relatively well, and some expressed fears about the negative effects that overregulation might bring.

I now move to discuss how parenthood following surrogacy operates in Greece and the UK.

CHAPTER 7

Parenthood following surrogacy in Greece and the UK

7.1 Introduction

This chapter is concerned with how and to what extent the Greek and UK parenthood provisions for surrogacy meet the criteria for a ‘good’ law laid out in Chapter 2. In this context, respecting the principles of autonomy, welfare, and justice entails that regulation has clear rules and transparent processes guaranteeing certainty of parenthood, and processes on how to resolve potential disputes. Moreover, a ‘good’ surrogacy regime should ensure that the intentions of the parties in a surrogacy arrangement are respected and enforced, unless harm may be caused as a result. This would guarantee that, in so far as possible, the ‘right’ people are recognised as parents; children are recognised as part of the ‘right’ family; and the best interests of everyone involved in the arrangement receive due regard. Lastly, a ‘good’ surrogacy law should guarantee equality of all social groups in accessing legal parenthood, again subject only to constraints imposed by welfare concerns.

Before turning to this critical evaluation of the legal provisions, it is worth first recalling the main contours of the legal position regarding parenthood under the Greek and UK regimes. Greek law stipulates a full intention-based model of parenthood following surrogacy based on a preconception, court-authorized, gestational, altruistic surrogacy agreement that becomes enforceable after the child’s birth.¹ As a result, the IM is presumed to be the legal mother at birth. The IM’s husband or consenting partner, if she has one, is also automatically acknowledged as the legal father at birth. Additionally, neither party can renege on the agreement after the child is born. However, the legal presumption of motherhood is refutable: if the surrogate has evidence that the child is genetically linked to her, she can apply to the court within six months of the birth and dispute the parenthood status.

¹ Articles 1458,1464 GCC.

UK law allows both traditional and gestational surrogacy, and the surrogate and her husband or consenting partner are considered the legal parents at birth, with the IPs having the possibility of gaining parenthood through a PO (or adoption) several months after the child's birth.² Therefore, in the UK, parenthood is based on gestation and birth, not on intention, as in Greece, and surrogacy agreements are non-enforceable. UK law lays out several PO eligibility criteria, relating to the mode of conception, the altruistic character of the surrogacy arrangement, the IPs' relationship status, the surrogate's consent, a time limit, the child's residence with the IPs at the time of the PO application, and the child's genetic relationship with at least one of the IPs. Lastly, and most importantly, the PO must be in the child's best interests, which, since 2010, is the court's paramount consideration.³ If the PO is granted to the IPs, a new birth certificate is issued to capture the new parenthood status. From the above, the Greek and UK regimes differ considerably regarding determination of parenthood following surrogacy. I now discuss how well these provisions operate in practice.

7.2 Respect for and promotion of autonomy

The Greek parenthood provisions for surrogacy (and other ARTs) came into effect in 2002,⁴ and have been described, mostly by Greek commentators, as very progressive and liberal.⁵ Greece is one of only few countries worldwide to employ an intention-based model of parenthood, and to make surrogacy agreements enforceable. Through the enforceability rule, regulation aims to show that it trusts the sincerity of the parties' intentions, and respects their reproductive autonomy.⁶ However, to date, there has been no evidence about whether these provisions achieve these aims.

My Greek interviewees voiced overwhelming support for intention-based parenthood and enforceability.⁷ According to some, the automatic acknowledgement of the IPs'

² s.30 1990 Act, as amended.

³ PO Regulations 2010. The rule was established by Hedley J in *Re L (a minor)* [2010] EWHC 3146 (Fam).

⁴ Law 3089/2002 (2002 Law), which reformed parts of the GCC.

⁵ Kounougeri-Manoledaki E, *Assisted reproduction and family law. The Greek legislation: Laws 3089/2002 and 3305/2005* (Sakkoulas 2005) 6; Hatzis A, 'From soft to hard paternalism and back: the regulation of surrogate motherhood in Greece' (2009) 49(3) Portuguese Economic Journal 207; Trokanas T., *Human Reproduction. Personal autonomy and its limits* (vol 13 (Kaiafa-Gbandi, M., E. Kounougeri-Manoledaki and E. Symeonidou-Kastanidou eds, Publications on Medical Law and Bioethics, Sakkoulas 2011) 407; McCandless J. *et al*, *A Comparative Study on the Regime of Surrogacy in EU Member States* (European Parliament, 2013).

⁶ 2002 draft law Committee, 5/10/2002. Secondly, Greek law aims to protect the parties, and the child, from potential harm, which will be discussed later.

⁷ Vidalis (legal academic and advisor of the Hellenic National Bioethics Commission), Dr Tarlatzis (clinician and policy-maker), Professor Hatzis (legal academic), Giota (IM), Lena (surrogate and

parenthood shows the law's respect of the IPs' intentions, and provides them comfort and security.⁸ Areti, a Greek mother of twins through surrogacy, recounted her experiences of dealing with infertility,⁹ and noted her satisfaction with the Greek rule acknowledging the IPs' need to be legally recognised as the surrogate-child's parents at birth, and to be certain they will remain so:

Ever since I was 18 years old (...)I've known that surrogacy was my only chance of becoming a mother. (...)When you can't have a child, you want it even more. I know now that there's life without a child, but I couldn't see it back then. (...) [The fact] that we [Areti and her husband] would be legal parents from the moment of birth gave us a sense of comfort and security. (...)I like the rules about parenthood here. It's a shame for law to make it difficult for IPs to become legal parents, because everyone who's going through surrogacy has certainly had many difficult experiences in their past [due to infertility].

Additionally, the great majority of my Greek interviewees considered the intention-based model a positive measure, because it guarantees the IPs' parenthood even in cases where they have no genetic link to the child.¹⁰ Also, they described this model of parenthood as 'fair' and 'justified' by the IPs' great investment in the process. For instance, Professor Hatzis stated:

The IPs are investing greatly; they're the ones who invite the surrogate, who compensate her, and possibly provide their genetic material; therefore, they should have priority. We should only give priority to the surrogate if she's offering her genetic material as well. However, here [in Greece] the surrogate is acting as a donor. Donors don't intend to parent any children that may be created from their genetic material.

The intention-based model of parenthood was welcomed by both surrogates I interviewed in Greece, which is surprising and disputes assumptions often made in the literature. Each saw it as recognising the correct respective roles of the parties in a surrogacy arrangement, and as safeguarding the surrogates' autonomy. They believed it protects the surrogate from having to raise a child she never intended to, ensures she will never be forced to be financially and legally responsible for that child, and allows her to return to her family and her 'normal' life soon after the completion of the

clients' manager in large Greek fertility clinic), Areti (mother of twins through surrogacy), Elina (surrogate). Complete list of interviewees and short biographies in Appendix C.

⁸ Areti, Giota, Elina, Lena.

⁹ As discussed in Chapters 3 and 5, surrogacy in Greece is only allowed if there is a medical need for it.

¹⁰ In contrast to the UK, Greek law allows double donation in surrogacy. The argument presented in the main text was endorsed by Dr Tarlatzis, Professor Hatzis, Dr Pantos (clinician), Areti, Giota, Vidalis, anonymous lawyer, Elina, Lena.

agreement without legal complication.¹¹ Importantly, not one of my Greek interviewees was critical of the intention-based parenthood model.

Moreover, many interviewees suggested that surrogacy is primarily a path to (at least partial) biological parenthood, since double donation and surrogacy cases are extremely rare.¹² Additionally, IPs revealed they chose surrogacy because it offered them the chance to have a genetic offspring, which they considered important.¹³ All Greek surrogates and IPs said they had very positive experiences at the fertility clinic and the hospital, and that everyone involved in the practice (lawyers, medical professionals, officials at the Registry of Births) was generally aware of and understanding towards the particularities of surrogacy.¹⁴ Professionals in Greek surrogacy practice presented the same image, noting this is due to the clear-cut rule that the IM is the legal parent from birth.¹⁵ This shows that the law is embedded into the consciousness of those involved in surrogacy in Greece, although it is possible for some amount of bias to exist within my sample.

To avoid discrepancies and doubts regarding the process for registering the child following a surrogate birth at the hospital, NAMAR issued guidance in 2005 instructing midwives to register surrogate-born children under the IM's name immediately after birth, as Dr Tarlatzis explained. However, Professor Hatzis suggested that, a year after this guidance was issued, midwives in Greek public hospitals were unaware of it and rather too ready to register the child under the IM's name without supporting legal documentation.

When I presented my research at a midwifery conference in 2006, I met three midwives who recounted their experiences with (...)surrogacy. When I described the legal process and the preconception court decision to them, they were surprised. They told me there was no court decision (...) [and] that the surrogates they had helped were admitted to the hospital under the [IM's] name without supporting documentation. This is the black market, and it's very dangerous. Both the IM and the surrogate would be unprotected.

This suggests that there have been some discrepancies in Greek surrogacy practice, some informal surrogacy arrangements have taken place, and some children have been

¹¹ Lena, Elina.

¹² Professor Hatzis, Dr Pantos, Dr Tarlatzis, Ms Chatziparasidou (clinician).

¹³ Areti, Giota, Aria (lesbian mother through 'surrogacy'), Katerina (lesbian woman who acted as her partner's 'surrogate').

¹⁴ Aria, Areti, Elina, Lena. Areti and Lena considered it a positive measure that the child is registered under the IPs' names right away, and there is no mention of surrogacy at all.

¹⁵ Dr Tarlatzis, Dr Pantos, Mr Cazlaris (embryologist and policy-maker), anonymous lawyer.

registered under the IPs' names illegally, nonetheless without causing subsequent problems and disputes over parenthood. Furthermore, it indicates that there is a need to explore whether medical professionals have gained more knowledge and awareness about surrogacy law, and whether the law is now being properly applied. Though the medical professionals I spoke to in Greece demonstrated detailed knowledge of and significant commitment to the formal legal process of surrogacy, it is possible that others are far less well-informed.

The UK parenthood provisions for surrogacy have received much criticism by scholars. McCandless and Sheldon suggest that they do not value the intentions of the parties in a surrogacy arrangement and reproduce 'traditional' ideas about the 'family'.¹⁶ Some note the parenthood rules perceive surrogacy as a type of adoption rather than ARTs,¹⁷ and fail to reflect the realities of surrogacy.¹⁸ According to Horsey, the UK parenthood regime for surrogacy 'creates or maintains ambiguity by failing to recognise and legally acknowledge this visible social family unit that is intended to be formed'.¹⁹ Others comment that the UK parenthood model is 'grudging[,] incomplete...[and] deficient',²⁰ 'clumsy and convoluted',²¹ 'thoroughly confused',²² and 'incoherent and inadequate'.²³ Moreover, some suggest the non-enforceability rule shows no respect for the parties' autonomy,²⁴ while case law shows that surrogates

¹⁶ McCandless J and Sheldon S, 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family' (2010) 73(2) *Modern Law Review* 183.

¹⁷ Brazier Report 1998 [6.13]. For criticisms: Elsworth M and Gamble N, 'Are Contracts and Pre-Birth Orders the Way Forward for UK Surrogacy?' (2015) *IFL* 157,160; Blyth E, 'Parental Orders and Identity Registration: One Country Three Systems' (2010) 32(4) *Journal of Social Welfare & Family Law* 345; *Re A & B (Children: POs: Time Limits)* [2015] *EWHC* 911 (Fam) [41].

¹⁸ Horsey K, 'Unconsidered Inconsistencies. Parenthood and Assisted Conception' in Horsey, K. and H. Biggs (eds), *Human Fertilisation and Embryology: Reproducing Regulation* (Routledge-Cavendish 2007) 159.

¹⁹ *Ibid* 160.

²⁰ Johnson MH, 'Surrogacy and the HFE Act' in Cook, R., S. Sclater and F. Kaganas (eds), *Surrogate Motherhood: International Perspectives* (Hart Publishing 2003) 95.

²¹ Fox M, 'The Human Fertilisation and Embryology Act 2008: Tinkering at the Margins' (2009) 17 *Feminist Legal Studies* 334; McCandless and Sheldon (n16) 175,180.

²² Warnock M, *Making Babies. Is there a right to have children?* (OUP 2002) 88. Here, she says she came to regret the Warnock Committee's recommendations which were hostile towards surrogacy.

²³ Horsey K, *Swept Under the Carpet: Why Surrogacy Law Needs Urgent Review*, vol 5 (Wrigley, A. and N. Priaux eds, *Ethics, Law and Society*, Ashgate 2013), Introduction.

²⁴ Nelson E., *Law, Policy and Reproductive Autonomy* (Hart Publishing 2013) 347.

very rarely change their minds,²⁵ and Horsey's recent study reveals that many UK surrogates disagree with the legal right to change their minds following birth.²⁶

The vast majority of my UK interviewees agreed with these critiques. Almost all of them said UK law does not recognise the 'right' people as parents at birth, and does not promote the autonomy of the parties in a surrogacy arrangement,²⁷ and some remarked that the UK parenthood rules fail to reflect the social reality of UK surrogacy.²⁸ Others thought the IPs' intention to have a child and their commitment to their parental role starts even before pregnancy and birth, and expressed resentment as to why they are not treated as legal parents.²⁹ Also, some noted it is difficult for IPs, particularly those who are the child's genetic parents, to understand why the surrogates' (and, if she's married, their husbands') names go on the birth certificates,³⁰ and that UK IPs are often surprised when they find out they are not legal parents of the child they are raising.³¹

Further, some interviewees revealed that, due to the way parenthood is determined in the UK, they experienced 'uncomfortable' situations: for example when the surrogate had to complete the birth register or had to sign all legal paperwork for the child.³² Most UK interviewees reported that surrogates do not wish to be named as the child's mother after birth, because it does not represent their real feelings and intentions.³³ For example, Sarah said:

The biggest problem for me is that the surrogate is considered the mother and [so] my husband is considered the father. The surrogate doesn't want to be known as the mother. It's an uncomfortable situation when you have to go and register the birth.

²⁵ *CW v NT & another* [2011] EWHC 33; *Re N (A Child)* [2007] EWCA Civ 1053; *H v S (Surrogacy Agreement)* [2015] EWHC 36 (which was presented as a case of enforceability, but it was a child welfare decision).

²⁶ Three quarters of the surrogate respondents in Horsey's study said so (Horsey K, *Surrogacy in the UK: Myth busting and reform*, Report of the Surrogacy UK Working Group on Surrogacy Law Reform (Surrogacy UK, November 2015) 21).

²⁷ Vasanti Jadva (psychology academic), Andrew Powell (family law barrister), Kirsty Horsey (legal academic), Natalie (SUK mother and SUK Trustee), Sarah (SUK surrogate and SUK Chair), Jamie (independent surrogate).

²⁸ Natalie, Sarah, Andrew Powell, Kirsty Horsey, Marina (COTS surrogate), Natalie Gamble (family lawyer and BB co-founder) and Helen Prosser (BB co-founder).

²⁹ Vasanti Jadva, Kirsty Horsey, Lauren (SUK surrogate) Simon and Steve (gay fathers through SUK), Jamie, Sarah.

³⁰ Vasanti Jadva, Professor Brazier, Kirsty Horsey.

³¹ Kirsty Horsey, Andrew Powell, Natalie Gamble.

³² Vasanti Jadva (referring to evidence from her own studies), Sarah, Natalie, Steve.

³³ Sarah, Marina, Jamie, Natalie, Vasanti Jadva, Kirsty Horsey, Andrew Powell, Helen Prosser, Simon and Steve.

She doesn't want to do that. It's a really special time and the parents should go and register their own child. My husband doesn't want to go on as the father.

Jamie also described the law's lack of respect towards the IPs' intentions:

It's a bit of a backward issue that I've got more rights as the birth mum of this baby than the man who's bringing her up,³⁴ who's going to work to put food on the table, who's putting a roof over her head. (...)I think that whole perception is wrong.

Most UK surrogates I interviewed thought that law awards them the 'wrong' identity by identifying them as mothers, which confirms findings in Horsey's recent study.³⁵ For example, Marina said that having been called a mother for the surrogate-children made her 'feel offended for [her] own kids', and thought she should be called 'an incubator, not a mum'. Sarah identified as an 'egg donor, not a mum', while Jamie described surrogacy as 'an extreme version of babysitting'. Only Lauren (SUK surrogate) mentioned that, although she never felt like the child's mother,³⁶ it was 'right' that her name was on the birth certificate, as this consists a formal recognition of her contribution to the creation of this child.

Lauren: I didn't really feel like a mum. (...)I went on that birth certificate because I gave birth to her, and even though I wasn't her mum, I was the mum in the eyes of the law. That's just the way it is. (...)The child's still going to be living with you [IPs]. You're still going to be a parent to her, so what's the big deal really? (...)It's just a piece of paper.

Professor Brazier (a leading UK legal authority on surrogacy) said that the problems arising from the principle of motherhood enshrined in UK surrogacy law are due to bad design, and that they reflect of the 1990s regulators' lack of real understanding of the particularities of surrogacy, and the society's unpreparedness to accept and comprehend surrogacy at the time.

[T]he problem is the maternity provisions are designed to deal with the much more common process of egg donation, not surrogacy. (...)I remember in 1990 sitting down and trying to draft a Bill that would provide two separate routes to parenthood, and it's hellishly difficult. (...)And, social attitudes have changed a lot since when I was [working on] surrogacy.

Although the UK surrogacy law was revisited in 1998 by the Brazier Committee, most of the Committee's proposals were ignored by the 2008 regulators. Some scholars

³⁴ Jamie's IPs were a gay male couple.

³⁵ Horsey (n26) 34.

³⁶ Although Lauren was a gestational surrogate, she showed signs of some maternal feelings towards the child. She said: 'They say that when you're giving birth, you get that overwhelming sense of love and bond for that child, and I did get that, but I didn't get it for her as like "my baby", I've got it for them [IPs]. (...)I didn't want Sophie, to be around me because, well, obviously she would feel that I'm her mum.'

argue that the regulators missed the opportunity to fully review and update the surrogacy parenthood provisions, and to make law more ‘fit for purpose’.³⁷ During our interview, Professor Brazier emphasised that the government that commissioned the Brazier Committee was indeed interested in reforming surrogacy law, but later lost interest.

The people who engaged us [the Brazier Committee] to carry out the review, including the then Minister of Health, Tessa Jowell, (...) seemed to be genuinely interested and genuinely concerned, very helpful, and quite measured in their approach. Having produced the report and the “hoo-ha” of recent cases having died down, I think other people from the DoH [Department of Health] just lost interest.

Other UK interviewees struggled to find positive elements in the current UK parenthood provisions, with most indicating that the law is outdated and ripe for reform.³⁸ Although gestational surrogacy is more popular nowadays, there are still many UK traditional surrogates.³⁹ While only half of the surrogates I interviewed (two out of four women) had a genetic relationship with the surrogate-born children, the rest of them said they would try traditional surrogacy if they could,⁴⁰ and all thought the genetic link was not important at all.

Additionally, several interviewees believed the UK parenthood rules offer a less than ideal schema, because it is founded on the false supposition that surrogacy is a type of adoption,⁴¹ which does not represent the views of the parties in UK surrogacy arrangements.⁴² Professor Brazier, considered this hypothesis to be false (and in need for reform) now, but true at the time when the parenthood provisions were constructed.

³⁷ Horsey K and Sheldon S, 'Still Hazy After All These Years: The Law Regulating Surrogacy' (2012) 20 Med Law Rev 74; Fenton R, Heenan S and Reece J, 'Finally fit for purpose? The Human Fertilisation and Embryology Act 2008' (2010) 32(3) Journal of Social Welfare & Family Law 282; Horsey K and Neofytou K, 'The fertility treatment time forgot: What should be done about surrogacy in the UK?' in Horsey, K. (ed), *Revisiting the Regulation on Human Fertilisation and Embryology* (Routledge 2015) 119,120,132.

³⁸ Except for 4 interviewees: Dr Sue Avery (clinician) stated that the rule of motherhood is difficult to change, and we should focus on resolving parenthood sooner but definitely after birth. Lauren, Simon and Steve believed the parenthood provisions are largely fine, but language and attitudes must change.

³⁹ Kirsty Horsey said she was ‘surprised’ by how many women wanted to be traditional surrogates, adding that this is probably down to cost. In her survey, 35.1% of the surrogate respondents were traditional surrogates (Horsey (n26) 20).

⁴⁰ Marina said she regrets having had elective sterilisation at a younger age (after she completed her own family and before she became a surrogate), and that she would have liked to be a traditional surrogate. Lauren only offered to be a gestational surrogate, because she ‘*didn’t know that straight [traditional] surrogacy really existed*’, and ‘*just assumed that if you had straight you’d have to have sex*’ but she now knows this is false. Also, she wanted to wait to have children of her own and then offer her eggs for surrogacy, but has now reconsidered, because she realised ‘*genetics are not important when you’re building a family*’.

⁴¹ Brazier Report 1998 [6.13].

⁴² Kirsty Horsey, Andrew Powell, Natalie Gamble, Helen Prosser, Professor Brazier.

I suppose in 1990 we never really thought in terms of [IPs]; it kind of seemed to be a starker choice for the genetic parent, the genetic mother, or the gestational mother. (...)I've come to the view that you have to accept surrogacy is a hybrid. (...)I remember then gestational surrogacies happened but they were very rare, so there were largely partial [traditional] surrogacies. Probably in our minds (...)we were kind of [looking] more towards the adoption model than than we do now. (...)I would want to look more at how far we could re-define the notion of commissioning parents as [IPs], and how it might be easier then to grant them the status they want without having to wait [for the PO].

Andrew Powell, went further than Professor Brazier and remarked that the perception of surrogacy as akin to adoption is a mismatch, because it awards a false identity to the surrogate-born child.

[Surrogacy is] more like assisted conception than it is adoption, because with adoption you're dealing with a child whose birth family is not the same as the actual legal parents(...). With surrogacy, the conception of the child comes from the IPs. The effects of the PO and the adoption order are very similar; they terminate the birth parents' parental rights and vest full parentage on the IP or adopter. But I think that's about it. (...)The life story of an adopted child is so different to a surrogate-born child's. The only family that a child born through surrogacy knows in theory is the IPs [or the IP].

Additionally, although under UK law surrogacy agreements have no legal force, all the IPs and surrogates I interviewed had signed a surrogacy agreement,⁴³ and many were displeased that the law did not enforce the intentions of most UK surrogates, who do not want to keep the child after the completion of the arrangement.⁴⁴ Furthermore, many participants disagreed with the rule regarding a six-week 'cooling-off' period following birth, after which the surrogate can legally consent to a PO. They suggested it only causes anxiety to the parties, and limits the surrogate's autonomy, since it prevents her from returning to her 'normal' personal and family life.⁴⁵ Notwithstanding the criticisms and problems mentioned by UK interviewees about the failures of UK law in respecting and enforcing the intentions of the parties in a surrogacy arrangement, some identified as an important positive development that UK regulation allows the genetic father to register as the child's father even before the PO, if the surrogate is single.⁴⁶

Based on my evidence, the Greek parenthood provisions for surrogacy clearly better reflect the intentions of the parties in a surrogacy arrangement, and, thus, more

⁴³ Including Jamie, which challenges the claim often made about parties in independent surrogacy arrangements not signing an agreement.

⁴⁴ Sarah, Natalie, Lauren, Jamie, Natalie Gamble, Vasanti Jadva.

⁴⁵ Vasanti Jadva, Sarah, Marina, Jamie, Natalie.

⁴⁶ Dr Sue Avery, Jamie, Lauren.

effectively promote their autonomy. In the UK, I found a lot of discontentment with the parenthood provisions for surrogacy, and many interviewees indicated that the law's idea of legal parenthood is significantly out of line with their views. Lastly, though it is possible that there are (or were) good policy reasons for the law to limit the extent to which autonomy is recognised (for example, to protect the welfare of the surrogate who might change her mind), none of the surrogates in my sample felt they needed or wanted this protection. This will be further discussed later.

7.3 Achieving equality of access to legal parenthood

Under Greek law, ARTs, including surrogacy are available to single infertile women, and heterosexual couples married or in a partnership (of opposite sex), either legally acknowledged as a civil partnership or *de facto* relationships. Nevertheless, Greek law does not expressly make surrogacy available to same-sex couples, and it remains unclear whether it is available to single infertile men, with clear implications for their ability to be accorded legal parenthood. As discussed in Chapter 3, there have been two cases of single infertile men who sought and obtained permission from Greek courts to access formal legal surrogacy,⁴⁷ which meant that they could automatically benefit from the parenthood provisions. One of these cases was dismissed on appeal and the man had to share legal parenthood with the surrogate, who was recognised as the legal mother by birth.⁴⁸ However, no appeal was sought against the other case, so it remains a moot point whether single men can benefit from the Greek parenthood provisions for surrogacy.

Some Greek interviewees commented on this issue and suggested that the law's failure to recognise legal parenthood rights to single men reveals inequalities that are entirely unjustified and potentially harmful.⁴⁹ Takis Vidalis referred to the Appeal Court decision above, and deemed it as 'unfair' and 'incorrect', while also arguing for the need 'to change the law and remove the limitation to surrogacy based on gender'.

Moreover, there is a gap in Greek law regarding same-sex couples' right to attain (shared) legal parenthood following ARTs, including surrogacy. The latter is a major and topical concern, especially since the recent recognition of a statutory right of

⁴⁷ Single-Member Court of Athens no.2827/2008; Single-Member Court of Thessaloniki no.13707/2009.

⁴⁸ The 2008 case cited above was dismissed by the Appeal Court of Athens no.3357/2010.

⁴⁹ Professor Hatzis, Dr Tarlatzis, Vidalis, Cazlaris.

same-sex couples to form legal civil partnerships and to adopt and foster children.⁵⁰ Finally, although same-sex parenting is not legally recognised, reports suggest that there are at least 200 children being raised by same-sex couples in Greece,⁵¹ but in a situation of legal limbo.

Recent surveys show that a large percentage of the Greek public still does not support same-sex parenting,⁵² but the vast majority of my interviewees clearly identified the ambiguity regarding same-sex couples' ability to attain legal parenthood following surrogacy as Greek law's weakness.⁵³ Only Elina strongly disagreed with such a development, because she believed a child should have both a female and male role model. However, empirical evidence suggests there is no basis for Elina's belief in terms of child welfare.⁵⁴

⁵⁰ Law 4356/2015 for same-sex civil partnerships and Law 4538/2018 for same-sex couples' right to adoption and fostering. Kipouridou K and Milapidou M, 'Homosexuals' right to procreation in Greece' (2015) 1(1) *Bioethica* 39; Papadopoulou L, *Restrictions in medically assisted reproduction in Greece* (Kantsa, V. ed, Kinship and medical technology. Assisted reproduction in Greece, Aleksandrea 2015) 13.

⁵¹ G. Brekoulakis, M. Papafilippou and S. Belia, *Same-sex Parenting in Greece and Internationally* (Attachment Parenting Hellas, 2017).

⁵² A 2016 poll shows that 85% of respondents were against same-sex parenting (Kostopoulou M, 'Attitudes towards same-sex civil partnership' Public Issue 10/07/2017 <<http://www.publicissue.gr/12596/varometro-jan-2016-coh/>>. Also, Thanopoulos, V. 'In favour of rights to civil partnership but against adoption by same-sex couples' (11/02/2016) <<http://avmag.gr/61882/iper-tou-simfonou-simviosis-alla-kata-tis-iiothesias-apo-omofila-zevgaria/>> accessed on 10/07/2017). A 2016 survey reports a lower rejection rate: 77% (Georgakopoulos T, 'What do Greeks think: A Survey' (February 2016) DiaNeosis 10/07/2017 <http://www.dianeosis.org/2016/02/what_greeks_believe_post/>).

⁵³ Takis Vidalis, Dr Tarlatzis, Dr Pantos, Professor Hatzis, anonymous Greek lawyer, Aria (lesbian mother through 'surrogacy'), Katerina (lesbian mother who acted as a 'surrogate'), Lena. Cazlaris had reservations as to whether children should grow up in same-sex families but recognised that law should nevertheless allow it for equality reasons. Others noted that law should not make it difficult for any IPs to have a child through surrogacy in Greece (Areti and Giota).

⁵⁴ Blake L and others, 'Gay father surrogacy families: relationships with surrogates and egg donors and parental disclosure of children's origins' (2016) 106(6) *Fertility and Sterility* 1503; Jadvá V, and others, 'Surrogate mothers 10 years on: a longitudinal study of psychological well-being and relationships between the parents and child' (2015) 30(2) *Human Reproduction* 373. Golombok S and others, 'Families Created Through Surrogacy Arrangements: Parent-Child Relationships in the 1st Year of Life' (2004) 40(3) *Developmental Psychology*; Golombok S and others, 'Surrogacy families: parental functioning, parent-child relationships and children's psychological development at age 2' (2006) 47(2) *Journal of Child Psychology and Psychiatry* 213; Golombok S and others, 'Non-genetic and non-gestational parenthood: consequences for parent-child relationships and the psychological well-being of mothers, fathers and children at age 3' (2006) 21(7) *Hum Reprod*; Golombok S and others, 'Families created through surrogacy: Mother-child relationships and children's psychological adjustment at age 7' (2011) 47(6) *Dev Psychol*; Readings J and others, 'Secrecy, disclosure and everything in-between: decisions of parents of children conceived by donor insemination, egg donation and surrogacy' (2011) 22(5) *Reproductive BioMedicine Online* 485; Golombok S and others, 'Children born through reproductive donation: a longitudinal study of psychological adjustment' (2013) 54(6) *J Child Psychol Psychiatry* 653. The children's positive attitude towards surrogacy was also noted by Vasanti Jadvá during our interview.

Finally, Vidalis noted that the vagueness regarding single men's and same-sex couples' right to attain legal parenthood following surrogacy sits in clear tension with the constitutional right to have a child.⁵⁵ However, Mr Cazlaris indicated that this is owed to lack of foresight rather than design:

[I]t couldn't have been foreseen back in 2002 that there would be such cases. It was almost 20 years ago. (...) Surrogacy and parenthood after that can be accessed by single women; why not by single men too? There's inequality here. The 2002 Greek society wasn't ready to accept single men or gay couples having a child through surrogacy. This needs re-looking at.

As we saw in Chapter 5, although Greek surrogacy law does not expressly allow access to ARTs in clinics to same-sex couples, Aria and Katerina, a lesbian couple, have been able to have a child through 'surrogacy' with the clinician's permission and help. Nevertheless, the couple could not attain shared legal parenthood, since this is currently unregulated. Katerina explained how they found a way to acknowledge Aria's role in the child's life by making her proxy for all decisions relating to the child. They also described the regulatory and public approach towards same-sex parenting as 'hypocritical' and 'unfair', and suggested discontent because the reality of their family is not formally recognised. Additionally, some interviewees reported the incidence of surrogacy in cases of gay male couples in Greece but emphasised that these are informal arrangements.⁵⁶

On balance, UK law appears to be more effective in achieving equality in parenthood following surrogacy, as it makes POs available to heterosexual couples who are married, unmarried, in formally recognised civil partnerships or in enduring family relationships, and, since 2008, POs are open to same-sex couples. However, it has yet to do so for single people, and people needing double donation and surrogacy,⁵⁷ and, as discussed in the previous section, it has been criticised for not representing the realities of the family created through surrogacy. Recently, the discrimination against single IPs was recognised in *Re Z*,⁵⁸ and the government has now submitted a proposal for a remedial order, which, if approved, will make single IPs eligible for POs.⁵⁹

⁵⁵ Article 5(1) Greek Constitution.

⁵⁶ Anonymous lawyer, Dr Pantos.

⁵⁷ PO applicants must be a couple and at least one of them to be genetically related to the surrogate-born child ((s.54(1) HFE Act 2008).

⁵⁸ *Re Z (A Child) (No 2)* [2016] EWHC 1191 (Fam).

⁵⁹ Hansard (29/11/2017) Written statement-HLWS282. Also, the Law Commission confirmed that surrogacy will feature in its 13th Programme of Law Reform (LawCom No.377,2017). Note that my UK interviews were completed before the submission of the remedial order.

UK interviewees unanimously considered the non-recognition of single parenting as a major weakness of UK surrogacy law, especially since law allows single parenting through adoption and ARTs. Moreover, some said it shows the law's attachment to 'traditional' ideas about the family and an unjustified disapproval of certain people's parenting abilities.⁶⁰ Additionally, UK participants were in favour of making POs available to people in need of double donation, but a few expressed their concern about surrogacy becoming a substitute for adoption, if double donation were allowed. Their concern was, however, based on the assumption that 'there are many children waiting to be adopted',⁶¹ which the literature notes as probably untrue.⁶²

In summary, neither regime currently achieves full equality regarding access to legal parenthood following surrogacy, compounding the inequalities in access to the practice discussed in Chapter 5. However, UK law is better at making parenthood following surrogacy available to a wider group of people than is Greek law. Most interviewees in both countries supported developments towards opening the boundaries of legal parenthood.

7.4 Protection from harm and promotion of welfare

In this section, I explore to what extent Greek and UK surrogacy regulation meets the aspiration of protecting IPs and surrogates from harm, and whether existing limitations on autonomy and equality are justified by reference to welfare considerations. I focus on harm that may arise due to legal uncertainties regarding parenthood (7.4.1), due to one of the parties reneging on the surrogacy agreement (7.4.2), due to welfare concerns regarding donor anonymity (7.4.3), and due to stigma (7.4.4).

7.4.1 Lack of certainty regarding parenthood

In Chapter 2, I argued that a 'good' surrogacy regime should minimise harm that may be caused due to ambiguities in parenthood.⁶³ In Greece, due to the legal presumption of motherhood in favour of the IM, the IPs' (or IP's) parenthood is automatically recognised upon the child's birth. Consequently, there is little room for ambiguity and

⁶⁰ Natalie, Sarah, Marina, Andrew Powell, Professor Brazier.

⁶¹ Jamie, Andrew Powell.

⁶² Due to the rising numbers of infertile persons, the demand for adoption is higher than the supply of children available to be adopted (Freundlich M, 'Supply and Demand: The Forces Shaping the Future of Infant Adoption' (1998) 2(1) Adoption Quarterly 21).

⁶³ Chapter 2, 'Harm-based arguments'.

dispute, which meets the law's aim.⁶⁴ Greek literature commends the law's approach.⁶⁵ However this arrangement may raise concerns for the surrogate's welfare: she cannot change her mind following birth if she is not biologically linked to the child and may thus be harmed by having to give up a child who she has now decided she wants to keep. My study is the first to offer some (albeit limited) empirical evidence about whether the Greek law's response to these potential welfare concerns is adequate.

My Greek interviewees showed overwhelming support for, and satisfaction with, the legal presumption of motherhood in favour of the IM at birth. They described the rule as 'the strongest element' of the law,⁶⁶ noting that it promotes and protects the child's interest to have certainty of parenthood immediately after birth and recognises the 'right' people as parents at birth.⁶⁷ For example, two interviewees said:

Professor Aristides Hatzis: *This clear-cut rule [legal presumption of motherhood at birth] is very important, because it is in the best interests of the child to have clarity regarding parenthood as soon as possible. (...)I don't find it cruel to the surrogate. (...) [T]here's an agreement in place and no biological link.*

Takis Vidalis: *[I]t is important that the child (...)is not genetically linked to the surrogate at all. I believe it is fair. If there's a genetic link, she [surrogate] can reverse the legal parenthood status. (...)I believe that, in general, it is a guarantee for the child's best interests if her parents desire her deeply. (...)It is in the child's best interests to be with them, not with someone who may have formed a bond with her. I believe that bond will be short-lived.*

Others suggested that this rule guarantees legal clarity, which then facilitates the building of more straightforward and less emotionally charged relationships between the parties,⁶⁸ and reduces the possibility of disputes during and after the surrogacy arrangement.⁶⁹ Moreover, all IPs and surrogates I interviewed in Greece fully supported the Greek parenthood provisions, with surrogates noting they did not feel the need to be protected by the law, because they were certain they would complete the agreement and never wavered. Additionally, they said they still enjoy close relationships with their IPs.⁷⁰ Moreover, a few interviewees believed the exception to

⁶⁴ Memorandum-3089/2002, II(1).

⁶⁵ References and accompanying text of n5.

⁶⁶ Takis Vidalis, Professor Hatzis, Dr Tarlatzis, Dr Pantos, Mr Cazlaris, Aria, Giota, Lena, Areti, Elina, anonymous lawyer.

⁶⁷ Vidalis, Hatzis, Dr Tarlatzis, Dr Pantos, anonymous lawyer, Areti, Giota, and Lena, Elina.

⁶⁸ Vidalis, anonymous lawyer, Dr Pantos, Lena, Elina, Areti, Giota, Aria, Katerina.

⁶⁹ Areti, Giota, Lena, Elina.

⁷⁰ Lena and Elina said they are the godmothers of the IPs' children, and have regular contact with the IPs. Also, Areti said she had a good relationship with her surrogate, but recently lost touch with her. For the first 3,5 years of the twin's life, the two women had frequent telephone contact, and used to

the legal presumption of motherhood protects the surrogate's welfare by not forcing her to permanently waive her parenthood rights if she is genetically related to and has bonded with the child.⁷¹

Moreover, several interviewees disclosed that some Greek medical practitioners have adopted further measures and processes to preserve certainty of parenthood and limit harm that may arise from a parenthood dispute later in the child's life. Dr Pantos described how his clinic performs a DNA test to affirm the lack of genetic link between the surrogate and the child, and Elina and Lena said it is common for surrogates to receive contraception prior to their IVF treatment to eliminate the possibility of the child being genetically related to the surrogate.

The UK legal model provides for the PO, a post-birth process which transfers parenthood from the surrogate and her husband/consenting partner, if she has one, to the IPs. However, it offers far less legal certainty regarding the IPs' parenthood, since the PO is subject to several eligibility criteria, judicial scrutiny, and the surrogate's consent. Also, the most important requirement is that the PO must serve WoC, which is the court's paramount consideration when making the Order. The UK parenthood rules have been described by scholars as inconsistent, uncertain, and heavily dependent on judges' discretion.⁷² In a recent study, some Cafcass officials involved in the PO process criticised the lateness of the point at which the state takes part in regularising UK surrogacy arrangements.⁷³

According to Horsey's recent study, the UK parenthood model 'creates or maintains ambiguity',⁷⁴ thereby harming the parties in a surrogacy arrangement and the child. Others suggest that, due to the uncertainty of legal parenthood in the UK, many IPs choose to travel abroad for surrogacy and some do not apply for POs,⁷⁵ whereas others

send each other pictures. Areti was trying to locate the surrogate and wanted to introduce her to the children.

⁷¹ Vidalis, Professor Hatzis, Dr Tarlatzis.

⁷² Campbell A, 'Conceiving Parents Through Law' (2007) 21 *International Journal of Law, Policy and the Family*: 242,248. Brinsden PR, 'Clinical Aspects of IVF Surrogacy in Britain' in R. Cook, S. Sclater and F. Kaganas (eds), *Surrogate Motherhood: International Perspectives* (Hart Publishing 2003) 115.

⁷³ Crawshaw M, Purewal S and van den Akker O, 'Working at the Margins: The Views and Experiences of Court Social Workers on Parental Orders in Surrogacy Arrangements' (2012) *British Journal of Social Work* 15-16.

⁷⁴ Horsey (n18) 160.

⁷⁵ Crawshaw M, Blyth E and van den Akker O, 'The changing profile of surrogacy in the UK. Implications for national and international policy and practice' (2012) 34(3) *Journal of Social Welfare & Family Law* 270; Jackson E, 'UK Law and International Commercial Surrogacy: 'the very antithesis of sensible'' (2016) 4(3) *JMLE* 197-214.

‘illegally register themselves as the child’s parents (sometimes at the explicit advice of lawyers)’.⁷⁶ Lastly, the majority of Horsey’s respondents had numerous complaints against the parenthood provisions, and called for better laws which would simplify domestic surrogacy, and would ensure easier and more automatic recognition of parenthood of the IPs.⁷⁷

The vast majority of my UK interviewees shared these criticisms and noted that the concern to protect the surrogate’s welfare does not justify uncertainties in legal parenthood.⁷⁸ Natalie Gamble and Helen Prosser described the PO framework as ‘clumpy’, ‘clumsy and problematic’. Also, many UK interviewees suggested that uncertainties regarding parenthood harms the IPs, the surrogates, and the child.⁷⁹ For example, Vasanti Jadvā said:

I think IPs are always a bit anxious about the fact that the surrogate is the birth mother and is named on the birth certificate. There’s uncertainty. (...)IPs have to wait for six weeks before they can apply to become the legal parents of their child, and that’s [a] really anxious six weeks. And it’s a big thing. You’ve got to go to court, and there’s a legal process, and (...)a lot of anxiety.(...)The other thing is that the (...)surrogate has to sign all the paperwork. And that’s really difficult for IPs because on the one hand, their child’s just arrived, they’re parents, and someone else has to sign all the paperwork. And the surrogate doesn’t want to be doing this either. They want it to just be their responsibility up until the birth and then they’ve got their own family to go back to. (...)Also, the child is vulnerable because (...)there’s a lot of uncertainty regarding parenthood.

Natalie, SUK mother of twins and SUK Board Member, emphasised the significance of the legal acknowledgement of the IPs’ parenthood, and noted the frustration and anxiety she and her husband felt when their legal parenthood was questioned.

Our anxiety was more around the PO and the hospital. All the areas where there was a question about ‘who was the parent’ from the system; that was where we felt more frustrated and anxious. (...)Practically and legally [the PO] is very important because of inheritance rights, medical decisions, and legal parenthood. And for [the surrogate] as well; she doesn’t want to have responsibility for our children, (...)and make decisions about schools and travelling, getting passports. So practically it’s important, emotionally it’s important. And for the children it’s important. It’s a huge part of their identity.

⁷⁶ Blyth (n17) 345.

⁷⁷ Horsey (n26) 37-38.

⁷⁸ As we will see below, UK surrogates do not wish to have a right to change their minds and keep the child.

⁷⁹ Vasanti Jadvā, Andrew Powell, Helen Prosser, Natalie Gamble, Professor Brazier, Kirsty Horsey, Lauren, Natalie, Simon, Marina, Sarah.

The surrogates I spoke to also confirmed the above.⁸⁰ Others remarked on the emotional harm that children may experience when they find out that the people they recognise as parents (IPs) were not their legal parents for some time.⁸¹ Some also believed the law's perception of parenthood awards children the 'wrong' identity, which could be harmful.⁸² Marina, COTS surrogate, noted the possibility for the surrogates' children to feel upset when they find out that their mothers were considered the legal mothers of the surrogate-born children. Although recent studies report that, generally, surrogacy is a non-issue for children,⁸³ two interviewees suggested that some distress was experienced by children (the surrogate's children and the children born through surrogacy), which, according to their parents, was due to the legal uncertainties created by the UK parenthood provisions.⁸⁴

Some UK interviewees also remarked on the harm caused by the extended waiting times until a PO is legally obtained,⁸⁵ and some referred to administrative errors, which further delayed and/or complicated the process, which increased the angst and frustration felt by IPs and surrogates.⁸⁶ Moreover, they emphasised that no serious harm has been incurred so far, but this is despite, rather than because of, the law. For instance, Sarah said:

It's absolutely crazy that the genetic parents of the child have to wait for so long to be recognised as the child's legal parents. (...)The children need to be protected. They need to know who their parents are without waiting for a year or a few months for the courts to hear the case and grant them a PO. (...)It's bad for the surrogate, too. It's a

⁸⁰ Lauren, Jamie, Sarah, Marina. Jamie said the Cafcass check was 'a nerve-wrecking thing' for both the IPs and the surrogate, and that the PO process places the 'burden of proof' on the IPs. Marina said the PO process forces IPs to 'fight for their right to their own child, even if it's genetically theirs', which she considered to be unfair. However, Lauren, Simon and Steve's surrogate, said she felt annoyed by the couple's impatience and anxiety to gain legal parenthood through the PO.

⁸¹ Natalie, Sarah, Simon and Steve, Marina.

⁸² Vasanti Jadva, Natalie, Sarah.

⁸³ n54.

⁸⁴ Natalie, Marina. However, my findings need to be contextualised within the broader understanding that surrogacy is, generally, not harmful to children. Sarah said none of the children were harmed; rather, they gained useful knowledge from surrogacy, 'in the sense that they (...)know that they can always help somebody even if it is a little bit of a sacrifice'. She also thought that the key to avoid harm to children is to be open and honest with them from the start, which confirms findings from other UK studies (references in n54 and Turner A and Coyle A, 'What does it mean to be a donor offspring? The identity experiences of adults conceived by donor insemination and the implications for counselling and therapy' (2000) 15 HumReprod 2041-2051).

⁸⁵ Sarah, Marina, Jamie, Natalie Gamble, Helen Prosser. This included both the time till the PO application can be submitted and the period between the submission of the PO application and the court decision, which, according to my data, can vary between 3 to 15 months: Natalie said it took 15 months, Simon and Steve said 3 months, Marina 4-8 months, Sarah 9-10 months, Jamie 3 months, and Natalie Gamble said it takes 9 weeks for special reasons and 6 months to a year as an average.

⁸⁶ Sarah, Marina, Jamie, Natalie.

long time to be financially and legally responsible for that child. (...) [I]t's only down to everybody's good graces that something bad hasn't happened.

Additionally, other UK interviewees mentioned practical problems that arose due to the uncertainty regarding legal parenthood.⁸⁷ For instance, Natalie complained about awkwardness in the hospital following the birth of their children. She mentioned that they (IPs and the surrogate) were 'ignored a lot' by the medical staff in the hospital after the twins were born, and that 'no one came and sat with [her] as the new mum and treated [her] like one'. Others reported the lack of policies that respects the IPs and the new-born child after a surrogate birth, and a few revealed their discontent with the hospital insisting that the new-born children must leave the hospital premises with the legal mother, namely the surrogate.⁸⁸ Sarah said such cases are very common and that the reason why, in most cases, surrogacy works well is due to the good will of medical professionals, therefore, despite the law, not because of it.

[W]e've had surrogates who have been in hospitals, and the hospital has asked the IPs to leave after the babies were born, and she [the surrogate] had to look after the child. We [SUK] had another surrogate who wanted to leave the hospital, and the midwife said: "if you go, I would have to call social services". [I]t's confusing for the midwives and the health care professionals, because the surrogate is the legal mother. It's only on the good graces of the hospital that the IPs are there for the birth, and [that] they [can] look after the child, that they make the medical decisions. Sometimes the hospital will not have any consideration for the IPs at all, which is a real problem. (...) Most of the time common sense prevails, but it would be different if the law was clearer.

Furthermore, some UK interviewees said the uncertainty of legal parenthood creates practical difficulties, especially when children born via surrogacy need emergency medical care before a PO is granted to the IPs. For example, Natalie (mother through SUK) had to take the twins to the hospital for emergency treatment, but the surrogate was not there to provide consent. When Natalie was asked if she was the mother, she replied 'yes', although legally she was not, which made her feel very vulnerable. Steven and Simon likewise said they felt unsupported by the medical system, and had trouble registering the child with their local doctor, because their parenthood status was unclear at the time.

Steven (gay father through SUK): *Before [the child] was born I really wanted to meet the midwife to talk about post-birth care, and my [local doctor] said the midwives aren't going to see us [IPs]; they see the woman [the surrogate]. (...) When I went to register [the child] at the [local medical centre] they told me to put [the child] under*

⁸⁷ Sarah, Jamie, Natalie.

⁸⁸ Natalie, Lauren.

Lauren's [surrogate] name, because she hadn't been registered under our names yet. That was annoying, and very problematic.

These findings are confirmed by other sources. Respondents in Horsey's study revealed their unhappiness with how they were treated in the hospital, and called for policies that ensure better treatment of those concerned.⁸⁹ Cases of hospitals insisting the baby leaves with the surrogate, and of surrogate-born babies changing hands in hospital car parks, were also recently reported by the media, and re-sparked public debate about a legal reform of the UK parenthood rules.⁹⁰ Recently, the DHSC addressed these problems through new guidance clarifying that IPs should be offered the support that all new parents receive, that the parties should be able to be discharged separately, and that the 'hand-over' of the child should take place inside the hospital premises.⁹¹

Moreover, it was evident in my UK sample that the uncertainty regarding parenthood leads many IPs and surrogates to find comfort and security in UK surrogacy organisations.⁹² For Jamie, a UK independent surrogate, the relationship of trust she built with her IPs provided that sense of security. Furthermore, it is often noted in the literature that some UK IPs, namely those who can afford it, will go abroad for surrogacy mainly because UK law fails to guarantee certainty of parenthood.⁹³ Although my sample comprised only of people who have done surrogacy within the UK and of people with professional experience of UK surrogacy, I heard this claim from many interviewees.⁹⁴

Many also noted that international surrogacy could be harmful, especially if the IPs choose destinations where surrogacy is not well-regulated.⁹⁵ Additionally, some interviewees revealed that IPs who have undertaken surrogacy abroad often do not

⁸⁹ Horsey (n26) 27-28.

⁹⁰ Fenton, S. 'NHS hospitals forcing surrogate families to hand over newborn babies in car parks due to 'dire and outdated' laws' (29/10/2016) <<http://www.independent.co.uk/news/uk/home-news/nhs-surrogate-births-rules-laws-parents-babies-handed-over-car-parks-a7381646.html>> accessed on 30/07/2017; BBC Radio 5. 'Surrogate: "I've had to hand over babies in the car park"' (31/10/2016) <<http://www.bbc.co.uk/programmes/p04dqv71>> accessed on 30/07/2017.

⁹¹ DHSC, *Care in Surrogacy. Guidance for the care of surrogates and intended parents in surrogate births in England and Wales* (28/02/2018) 14; DHSC, *The Surrogacy Pathway. Surrogacy and the legal process for intended parents and surrogates in England and Wales* (28/02/2018) 17,18.

⁹² Natalie, Steve and Simon, Sarah, Marina.

⁹³ For example, Crawshaw *et al* (n75); Jackson (n75); Horsey (n26).

⁹⁴ Vasanti Jadva, Kirsty Horsey, Andrew Powell, Helen Prosser, Natalie, Sarah.

⁹⁵ Helen Prosser, Vasanti Jadva (psychology academic). See also references in Chapter 4, n96 and accompanying text in the main body.

apply for a PO in the UK,⁹⁶ because they think they have already gained legal parenthood, most likely because they have been provided with a birth certificate abroad with their names on it, or because they do not see why a PO is required.⁹⁷ Lastly, the literature suggests that some IPs do not apply for a PO because they are afraid of the legal scrutiny and the legal costs.⁹⁸ While Horsey's study found no evidence to support this concern,⁹⁹ it was reported to me by an experienced family law barrister.¹⁰⁰

It is clear both from the wider literature and from my own evidence that the uncertainty of parenthood stemming from the UK parenthood rules has had a negative effect on the experiences of IPs, surrogates, and surrogate-born children. Importantly, UK surrogates, whose welfare these rules assumingly protect, were as critical of them as other groups. My relatively small data-set confirmed the findings of other studies that UK surrogacy is mostly unproblematic, and the experiences are primarily positive.¹⁰¹ However, it was suggested that surrogacy works despite the law, not because of it. My data offered a particularly powerful confirmation of the importance of trust in surrogacy, a theme which has also been noted in the literature.¹⁰² Lastly, while my interviewees noted the important role played by the sympathy and flexibility of the

⁹⁶ Kirsty Horsey, Andrew Powell, Vasanti Jadva, Helen Prosser, and Natalie Gamble.

⁹⁷ Kirsty Horsey, Andrew Powell, Natalie Gamble.

⁹⁸ Crawshaw *et al* (n75).

⁹⁹ Horsey (n26) 34.

¹⁰⁰ Andrew Powell.

¹⁰¹ All UK IPs and surrogates I interviewed were close with the other party after the arrangement was completed, and some surrogates had an important role in the surrogate-children's lives (e.g. as godmothers), which mirrors my Greek findings. Read further: van den Akker OBA, 'Genetic and Gestational Surrogate Mothers' Experience of Surrogacy' (2003) 21(2) *Journal of Reproductive and Infant Psychology* 145; Jadva V and others, 'Surrogacy: The Experience of Surrogate Mothers' (2003)18 *Human Reproduction*; Jadva V and Imrie S, 'Children of surrogate mothers: Psychological well-being, family relationships and experiences of surrogacy' (2013) 29(1) *Human Reproduction* 90; Jadva and others, 'Surrogate mothers 10 years on' (n54) 373; Horsey (n26).

¹⁰² Beier K, 'Surrogate Motherhood: A Trust-Based Approach' (2015) 40(6) *Journal of Medicine and Philosophy* 633-652; O'Neill O, *Autonomy and Trust in Bioethics* (Cambridge University Press: Cambridge 2002) 12.

judges deciding POs in the UK,¹⁰³ they equally highlighted the need to update the PO rules, because ‘there will be a case [where] judges will not be able to grant a PO’.¹⁰⁴

In Greece, where parenthood is certain at birth, I found no complaints and negative experiences. Rather, all Greek participants considered the automatic intention-based model of parenthood a positive measure that protects from delays and minimises disruptions in the life of the family created through surrogacy. Lastly, my data suggest that the Greek parenthood provisions are better at fostering and promoting trust in surrogacy.

7.4.2 Protection from harm if someone changes their mind

In Chapter 2, I argued that if one reneges on the agreement, the other party may be harmed legally, financially, and emotionally. However, this risk could be minimised through proper and effective regulation. In Greece, surrogacy agreements are enforceable upon the child’s birth, which is an extension of the intention-based parenthood model. As I mentioned earlier, little is known about Greek surrogacy, and evidence is largely anecdotal, therefore, my data make a significant contribution to the literature.

All Greek interviewees commended the legal rule for the after-the-birth enforceability of surrogacy agreements, and many believed it reflects the real intentions of the parties and promotes the surrogate’s autonomy.¹⁰⁵ Further, all Greek IPs and surrogates emphasised that Greek surrogates do not have maternal feelings towards the child. Evidence from Greek surrogates also suggests that they are content with the law recognising that free, autonomous surrogates have the right to make legally binding commitments. For example, Elina stated:

No one forced any woman to be a surrogate. She shouldn’t have the right to change her mind. She should know why she’s doing it and what it means. I knew why I was doing it. Why would I cause more pain and heartache to this woman [IM]? She should

¹⁰³ Kirsty Horsey, Andrew Powell, Natalie Gamble, Helen Prosser, Professor Brazier. For example, the 6-month time limit for the PO application has been successfully challenged in *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam), [2015] 1 FLR 349. The child’s residence with the IPs criterion was challenged in *A & B (No.2)* [2015] EWHC 2080 (Fam); *Y v Z & Ors* [2017] EWFC 60; *X (A Child: foreign surrogacy)* [2018] EWFC 15. The requirement that the IPs should be a couple was successfully challenged in *Re Z (No 2)* [2016] (n58), and *B v C (Surrogacy-Adoption)* [2015] EWFC 17. The requirement for the surrogate’s consent for a PO was disputed in *A & B* [2016] EWFC 34. Lastly, payments over and above ‘reasonable expenses’ will rarely hinder the making of a PO (*Re X & Y (Foreign Surrogacy)* [2008] EWHC 3030).

¹⁰⁴ Professor Brazier.

¹⁰⁵ Vidalis, Professor Hatzis, Dr Tarlatzis, Dr Pantos, anonymous lawyer, Aria, Giota, Lena, Elina, Areti.

be protected by law. If the surrogate is initially cool with everything, and she then changes her mind and keeps the child... It's just wrong! (...)The IPs give their time, money, their soul. (...)You can't treat them like fools.

Moreover, both Greek surrogates referred to a sense of pride and relief, not sadness, when their arrangements were completed, which challenges an assumption often made in the literature that a surrogate needs the law's protection because of being forced to give up a child when she has changed her mind, or feels harmed in other ways if she does give up the child.¹⁰⁶ In fact, both said this protection would be unnecessary and inappropriate, because they did not want to keep the child. Also, they mentioned they had a good relationship with their IPs, which was retained long after the completion of the arrangement.

Elina: I didn't want to keep that child(...). I would never bond with that child, I knew it from the start. Even during the pregnancy, I never felt affection for the baby. (...) [I]t's a different kind of love. It's like I love my niece and nephew. (...) I have no regrets. (...) I felt relieved when it was over, not sad. (...) We are still very close with [the IM] and her family. (...) I'm very proud of what I'm doing. (...) [The law] should provide more protection to the IPs, not the surrogates, and it does, so it's good.

Lena: I've had two surrogate journeys with two sets of IPs. (...) I have no bond with the children. I made a very conscious and well-thought-out decision to be a surrogate. (...) I often say I'm the kids' first nanny. I never felt like their mum. (...) I feel very proud about this, because I helped those couple become parents, but I also created aunts and uncles and grandparents. (...) We have very close relationships, and both sets of IPs were always there for me when I needed them. (...) I felt protected by the law. There was no way I would have to care for a child I never wanted to raise. (...) There are no negative aspects in the Greek surrogacy law.

While it is impossible to know with certainty whether there are cases where surrogates change their minds, it is worth noting that no cases of surrogates leaving with the child or disputing parenthood have been reported in Greek media or the courts, and neither first-hand nor anecdotal accounts of such problems emerged during my interviews. Some Greek interviewees said the IPs initially experience 'anxiety' and 'fear' about the surrogate potentially leaving while she is pregnant with the child,¹⁰⁷ or about the surrogate potentially refusing to give the child over to the IPs.¹⁰⁸ However, they

¹⁰⁶ For example: Raymond JC, *Women as Wombs: Reproductive Technologies and the battle over Women's freedom* (Spinifex Press 1995); Corea G, *The Mother Machine: Reproductive Technologies from Assisted Insemination to Artificial Wombs* (Harper and Row 1985); Franklin S, *Embodied Progress: A Cultural Account of Assisted Conception* (Routledge 1997); Rowland R, *Living Laboratories: Women and Reproductive Technologies* (Indiana University Press 1992); Dworkin A, *Right-Wing Women* (Perigee Books 1983) 181-188, and many more.

¹⁰⁷ Areti, anonymous Greek lawyer, Ms Chatziparasidou.

¹⁰⁸ Lena, Areti, and Giota.

recognised that Greek law minimises, as far as possible, these possibilities through the enforceability rule.

Others emphasised that enforceability only impacts on parenthood issues after birth, while it also supports the development of strong and trusting relationships between the parties.¹⁰⁹ For example, a Greek lawyer who spoke under terms of anonymity, said:

The parties usually sign the agreement because they have to, not because they want it enforceable. In any case, the agreement is not enforceable per se, it's not like other contracts. It's merely an agreement between the parties. It just clears things up from the start and helps the parties build their relationship. It doesn't impact on the surrogate's freedom at all. She can't claim for any expenses the IPs haven't paid for. She can even leave the country, and the court can't do much about it. (...) [Enforceability] is just an extension of the legal presumption of the [IM's] parenthood rights upon the child's birth, nothing more.

The above points were supported by all Greek surrogates and IPs I interviewed. Elina disclosed she never signed an agreement with her IPs and enforceability was, thus, irrelevant, because she trusted that her IPs would honour their agreement. However, she agreed that the rule of enforceability is helpful and useful, because it asks the parties to clarify important issues from the start of the surrogacy relationship. The rest said the written agreement was 'merely a safety net' rather than a binding contract, but that they liked that it has legal force.¹¹⁰ Additionally, some interviewees believed enforceability guards against exploitation.¹¹¹ For example, Takis Vidalis said:

I see the right of the surrogate to change her mind as grounds for potential exploitation of the IPs. She can claim she has bonded with the child and extract more money from the IPs after the birth. But the IPs can't change their mind and leave the child with the surrogate either. So, it's good for both parties.

In the UK, surrogacy agreements are non-enforceable. Mackenzie notes that the UK non-enforceability rule aims at protecting the parties from exploitation, and that it was retained due to the Brazier Committee's 'assumption that surrogacy should be governed by family values',¹¹² though it is difficult to understand what this means. Although non-enforceability shows a concern for the surrogate's welfare, namely that she will not have to give up a child she has bonded with and wants to keep, in reality, there have only been two reported cases where UK surrogates wished to keep the

¹⁰⁹ Lena, Elina, Areti, Giota, anonymous lawyer.

¹¹⁰ Lena, Elina, Areti, Giota.

¹¹¹ Anonymous lawyer, Takis Vidalis, Professor Hatzis, Giota, Lena.

¹¹² Mackenzie R, 'Beyond genetic and gestational dualities. Surrogacy agreements, legal parenthood and choice in family formation' in Horsey, K. and H. Biggs (eds), *Human Fertilisation and Embryology: Reproducing Regulation* (Routledge-Cavendish 2007) 193.

child.¹¹³ Lastly, most surrogates who responded to Horsey's survey said the IPs should be the legal parents at birth, whether they are genetically related to the child or not,¹¹⁴ and three quarters of surrogate-respondents believed they should not have the right to change their minds.¹¹⁵

My UK interviewees were generally critical of the non-enforceability rule. The surrogates I interviewed unanimously agreed that, in the great majority of cases, surrogates are clear about their intentions from the start, and their determination does not waver during pregnancy or after the birth. Many UK participants said the surrogate bonds with the IPs, not with the child,¹¹⁶ and surrogates believed they should not be permitted to change their minds, because this is unfair both towards the IPs and the child. For instance, Jamie said:

I think once you've decided to become a surrogate and fall pregnant, you have entered into an agreement, and you should know that this is what's going to happen. You should not have a right to keep the baby(...). It's unfair for the IPs.

Furthermore, UK surrogates unanimously agreed that they are not in need of protection. Professor Brazier likewise noted that 'clearly the surrogate holds all the cards as long as she can threaten not to hand the baby over', and others thought the non-enforceability gives a lot of control to the surrogate, who could exploit the IPs.¹¹⁷

On the other hand, some said there have been unreported cases in the UK where the IPs have changed their minds, and surrogates have been left legally and financially responsible for those children. Therefore, non-enforceability can be potentially harmful to either party in a surrogacy arrangement. Some interviewees suggested that due to the non-enforceability rule, no one is protected under UK law,¹¹⁸ and many argued that the rule causes a considerable amount of anxiety to IPs and surrogates, who fear that the other party will renege on the agreement, thus harming the parties' relationships.¹¹⁹ Hence, UK parenthood provisions, in their current form, not only potentially cause harm, but also fail to foster the development of trust between the parties, which, again, threatens their welfare. For example, Marina said:

¹¹³ *CW v NT & another* [2011] (n25); *Re N* [2007] (n25).

¹¹⁴ Horsey's study (n26) 21.

¹¹⁵ *Ibid*

¹¹⁶ Natalie, Lauren, Marina, Sarah, Jamie.

¹¹⁷ Marina, Sarah, Jamie. This view was also expressed by Greek interviewees. This is proven by surrogacy cases involving deception (Chapter 4, n5).

¹¹⁸ Sarah, Marina, Jamie, Natalie.

¹¹⁹ *Ibid*, and Vasanti Jadva, Natalie Gamble, Helen Prosser, Professor Brazier.

If the surrogate doesn't feel that the couple are doing it her way or they're being a bit awkward or difficult, it's because they're petrified that she could keep the baby. So, they act inappropriately because they're out of control. There's no relaxation about it. It's very hard for the couples. (...) Sometimes the surrogate is afraid, too. (...) [She's] depressed, or [thinks] that the couple have just dumped her or going to dump her. (...) Things would be clearer if agreements were enforceable.

As mentioned in Chapter 2, much of the literature tends to focus on the potential exploitation of the surrogate by the IPs, and almost completely ignores that exploitation might equally occur in the other direction. My interviewees in both countries strongly endorsed the view that the IPs are at least as vulnerable to exploitation as the surrogate, if not more, especially in countries where surrogacy agreements are unenforceable, as in the UK. Whereas this possibility was noted in Greece, there was less worry about one party renegeing on the agreement.

The vast majority of my UK interviewees argued for a parenthood model that recognises the IPs' intention. While they did not use the language of 'enforceability', they were basically calling for a model which resembled the Greek one. Many argued for a legal regime that would ensure the IPs' parenthood rights pre-birth or at-birth, through a preconception agreement probably with a strong presumption of enforceability that would not be final and an option to enforce the agreement, if necessary.¹²⁰ Others argued for a model which would ensure the IPs' parenthood rights as soon as possible after birth, and definitely sooner than the current regime does now.¹²¹ Some interviewees also emphasised that the UK is probably edging towards a model that resembles enforceability due to the rule that makes WoC the paramount consideration of the court when making a PO.¹²²

Kirsty Horsey: I don't agree we should enforce [surrogacy agreements]. But I'm not entirely sure you'd need to. If you already have the rule that [WoC] is paramount, that's already enforcing orders; we're just not calling it an enforceable order. That's already enforcing people's intentions. We've had cases where the child was given to the IPs, because it wouldn't be in its best interests to be removed from there and taken away.

However, although the judge will ignore various things if it is clearly in the child's best interests to award a PO to the IPs, it could not be deemed that enforceability is accepted or adopted by the UK regime, given that the surrogate needs to consent to

¹²⁰ Natalie Gamble, Helen Prosser, Professor Brazier, Kirsty Horsey, Andrew Powell, Vasanti Jadv, Sarah, Natalie, Marina.

¹²¹ Dr Sue Avery, Lauren, Simon, and Steve said there is no need to change UK parenthood rules in terms of enforceability and certainty of parenthood.

¹²² Kirsty Horsey, Andrew Powell, Professor Brazier.

the PO.¹²³ Yet, the evidence noted above suggests that the discontentment with enforceability is more of an issue of language rather than an issue of disagreement with the principle itself.

In summary, UK law is ostensibly more closely concerned with the prevention of harm to a surrogate than is Greek law. However, it fails to recognise the realities of UK surrogacy without providing a convincing justification for the choice of non-enforceability, especially considering that, according to my evidence and findings of relevant UK studies, UK surrogates do not wish to have a right to change their minds. Surrogates in Greece also rejected this option. Additionally, my evidence suggests that enforceability better supports the development of the surrogacy relationship, posing no real threat to the surrogate. Although some UK interviewees disagreed with enforceability, many of them supported a future legal reform which would place more weight on the intention of the IPs and would help IPs attain legal parenthood sooner than they do now.

7.4.3 Welfare concerns regarding donor anonymity

The ethical standards for a ‘good’ surrogacy law laid out in Chapter 2 dictate that law should promote and protect the WoC, thereby preventing harm to the child. One important WoC concern relates to donor anonymity.¹²⁴ Some commentators argue that the establishment and preservation of donor anonymity could violate the child’s right to know her genetic origins, and harm the child’s sense of identity, while also limiting the child’s autonomy rights.¹²⁵ This would suggest that the law should prioritise the child’s right to know her origins above the intention of the adults who act as donors (and surrogates). A striking difference between the Greek and UK models is that Greek law endorses donor anonymity in all forms of ARTs,¹²⁶ as an extension of the intention-based perception of parenthood underlying Greek law,¹²⁷ whereas UK law

¹²³ Except if she cannot be found: *Re D & L (minors) (surrogacy)* [2012] EWHC 2631; *A & B* [2016] (n103).

¹²⁴ Though I do recognise that this is an important welfare concern, my main focus is on other important ethical values that relate more closely to surrogacy than gamete donation. This discussion forms part of this chapter because it was considered important to many interviewees as a welfare concern that may come into play in deciding parenthood following surrogacy.

¹²⁵ Turkmendag I, 'The Donor-Conceived Child's 'Right to Personal Identity': The Public Debate on Donor Anonymity in the United Kingdom' (2012) 39(1) *Journal of Law and Society* 58-75; Blyth E and Farrand A, 'Anonymity in donor-assisted conception and the UN Convention on the Rights of the Child' (2004) 12 *International Journal of Children's Rights*; Turner and Coyle (n84).

¹²⁶ Article 1460 GCC.

¹²⁷ Memorandum-3089/2002, II(2).

has, since 2005,¹²⁸ abolished donor anonymity. The Greek rule that foregrounds intention and protects the autonomy of the adults arguably sits in tension with child welfare concerns.

Again, there is no empirical data about how the Greek rule of donor anonymity works in practice. Many Greek interviewees did not agree with preserving donor anonymity. In fact, some perceived it as the law's failure to protect the child's identity, and her right to know and potentially trace her biological family.¹²⁹ However, others considered it a good and fair measure, because it reduces the donor shortage problem, it enables the free exercise of reproductive autonomy, and is line with the intention-based parenthood model.¹³⁰

Interviewees in the UK, where known donation is now very well embedded, considered it 'good' law.¹³¹ Yet, a few believed there is an imbalance between the child's right to access the genetic donor's identity and the inability of the child to know the surrogate, unless the IPs decide to disclose her identity.¹³² However, it does not seem to be a big problem, given the good relationships and ongoing contact during and after the surrogacy arrangement shown by my sample.

Although it could be accepted that the child has a *prima facie* right to know her biological origins, it is also important to note that this right needs to be balanced against the adults' privacy rights. This choice will, however, be culturally contingent. It is possible that donor anonymity plays a useful role in Greek surrogacy. As I argue in the next section, surrogacy is still a taboo issue, and the importance placed on donor anonymity might be read as representing an attempt to minimise and challenge stigma.

7.4.4 Entrenching or challenging stigma

While surrogacy is now established as a legally accepted practice both in Greece and the UK, recent research on ARTs in Greece suggests that it is still subject to significant stigma.¹³³ This also emerged as a clear theme in my interviews. Despite the Greek

¹²⁸ HFEA (Disclosure of Donor Anonymity Information) Regulations 2004, and s.33(1) HFE Act 2008.

¹²⁹ Haris Cazlaris, Dr Pantos, Aria and Katerina (lesbian couple who had a child through anonymous sperm donation and 'surrogacy'). Aria and Katerina wished that their child could find out the donor's identity.

¹³⁰ Takis Vidalis, Professor Hatzis, Dr Tarlatzis.

¹³¹ Vasanti Jadv, Sarah, Simon and Steve, Dr Sue Avery.

¹³² Vasanti Jadv, Sarah.

¹³³ A. Chatjouli, I. Daskalaki and V. Kantsa, *Out of Body, Out of Home. Assisted Reproduction, Gender and Family in Greece* ((In)FERCIT, 2015) 204,218. The study reported a high rejection rate of

law's liberal position on surrogacy, there is still a lot of secrecy and suspicion around it.¹³⁴ For instance, Lena said:

[S]urrogacy is still a taboo, more so than any other form of ARTs, and nine out of ten IPs are secretive about surrogacy in this country.

Additionally, she disclosed that some IMs, especially if they live in the countryside and not in a large city, may wear a prosthetic stomach to conceal the surrogacy arrangement. Elina agreed that surrogacy is still a taboo issue, adding that people often judge her when she reveals she is a surrogate. Furthermore, an anonymous Greek lawyer suggested that many IPs choose to submit their surrogacy applications to Athenian courts, because there is then less chance that it will become known. The very fact that this lawyer spoke on condition of anonymity is perhaps symptomatic of that stigma.¹³⁵ On the other hand, all Greek IPs and surrogates I spoke to showed signs of openness, pride, and disclosure.¹³⁶ Lastly, all Greek professionals in surrogacy had a very positive view about surrogacy, and said they can see a change, though slow, in public perceptions about the practice.

Although more research is needed to make a strong claim, arguably enforceability provides some acceptance of surrogacy, but at the same time, recognising the IPs' parenthood at birth makes it easier to maintain privacy and that fosters secrecy, which then feeds stigma. According to Carol Sanger, 'secrecy' and 'privacy' are two distinct concepts: 'secrecy' is 'more desperate and more necessary..., a much darker, more psychologically taxing, and socially corrosive phenomenon',¹³⁷ often being 'a response to the threat or prospect of harm, whether harassment, stigmatisation, loss of one's self-conception, or fear of violence'.¹³⁸ Based on my data, surrogacy concealment in Greece is less associated with privacy and more with secrecy, which maintains stigma that could be harmful.

surrogacy (on a total of 235 respondents, 39,27% rejected the practice, and 29,84% did not wish to answer).

¹³⁴ Mr Cazlaris, Dr Pantos, anonymous Greek lawyer, Ms Chatziparasidou, Elina, Lena, Areti, Giota.

¹³⁵ Additionally, Lena presented herself as the clients' manager at a Greek fertility clinic, and two months later she disclosed she has acted as a surrogate twice in the past. She did not agree to a face-to-face, Skype or telephone interview, because she was 'afraid someone would overhear', so we had an email interview. In an email, she confided in me that she (and her husband) had signed a non-disclosure agreement with the IPs, which is also symptomatic of the stigma against surrogacy.

¹³⁶ Except for Giota, who was searching for a surrogate at the time of our interview, who said: '*We will never tell the child about surrogacy. At least this is what we've agreed on now. We might change our opinion in the future. I don't know*'.

¹³⁷ Sanger C, *About Abortion: Terminating Pregnancy in 21st Century America* (Cambridge, MA: Harvard University Press 2017) 9.

¹³⁸ *Ibid*

In the UK, I found that, although the public perception of surrogacy has become more positive in recent years, the parenthood rules entrench and preserve some stigma against surrogacy,¹³⁹ which confirms an assumption made in the literature.¹⁴⁰ For instance, Natalie said:

Surrogates don't feel the way people assume them to. And that's exactly what's wrong with the principle of parenthood, (...)because actually it's reinforcing this false truth that surrogates are giving away their babies. [T]hey're saying to everyone "we're not giving away our babies, we're giving them back to their parents". But the law itself is saying something different in the way it is set up, and that's just not helpful.

The same interviewees noted that the UK parenthood provisions show that regulators did not have a clear idea about the realities of surrogacy when they introduced surrogacy legislation, and approached it with some suspicion, which remained until today. Dr Avery noted:

[B]ack in the 1980s, before the Act [SAA] came in, I remember going to a meeting(...), and somebody from the statutory licensing authority, which was one of the things we had before the HFEA, said: "surrogacy is a big yuck factor; we don't like talking about it". And it has moved on hugely since then. (...)Though they changed the law in 1990, they didn't change the law for surrogates [meaning the parenthood rules], and at that time really it did say "we really don't like this. We're really uncomfortable with this, because we think it's a step too far".

Other interviewees noted that the law's suspicion of surrogacy has a negative effect on some professionals involved in the practice. For example, Marina said the doctor who dealt with her pregnancy and delivery at the hospital treated her badly, because she and her IPs 'put a strain on the NHS' by choosing surrogacy. Moreover, some interviewees said the PO process is set in a way that involves IPs having to prove themselves, and routinely being questioned about their intentions and their abilities to become parents.¹⁴¹

Despite the complaints about UK parenthood rules promoting a negative image of surrogacy, I found a far more pronounced environment of honesty, openness, and disclosure in the UK than in Greece. Most UK IPs had told their children about surrogacy from a very young age, and those who had not were planning to do so soon. UK surrogates followed the same paradigm. These findings confirm evidence from previous UK studies,¹⁴² and mirror what is recommended (and written about) in

¹³⁹ Kirsty Horsey, Andrew Powell, Vasanti Jadva, Dr Avery, Sarah, Marina, Natalie, Jamie.

¹⁴⁰ Horsey (n18) 159.

¹⁴¹ Simon and Steve, Marina, Jamie, Natalie, Sarah.

¹⁴² Readings and others (n54); MacCallum F and others, *Surrogacy: The Experience of Commissioning Couples* (2003) 18(6) *Human Reproduction*: 1333-1342; van den Akker (n101); Blyth E, Not a Primrose

relation to donor conception. Nevertheless, a few interviewees noted that there are layers of openness, since many IPs do not disclose that the child is genetically related to the surrogate in cases of traditional surrogacy until later,¹⁴³ a possibility also noted in Readings *et al*'s study.¹⁴⁴

7.5 CONCLUSION

In this Chapter, I explored the extent to which the parenthood provisions in these countries fulfil the criteria of a 'good' surrogacy law I laid out in Chapter 2, namely the promotion and protection of autonomy, equality, and welfare. In terms of achieving equality of access to parenthood, my findings suggest that both laws have some weaknesses, but, on balance, UK law is more effective at making legal parenthood available to a wider group of people than is Greek law. I found that the non-recognition of legal parenthood to same sex couples and possibly single men, who have a child through surrogacy in Greece, sits in clear tension with the constitutionally recognised right to have a child. Also, UK law does not make POs available to people who are single and people who need double donation. My evidence suggests general discontent with the inequalities enshrined in both regimes.

The Greek parenthood rules were considered to promote the parties' autonomy by recognising and respecting the parties' intentions, and the rules appear to work well. In contrast, UK interviewees noted that UK law fails to sufficiently recognise autonomy and intention in how legal parenthood is determined and often leads to various practical problems. My evidence also confirmed the findings of previous studies in showing that surrogates think law awards them the 'wrong' identity by recognising them as mothers. Lastly, despite widespread unhappiness with the workings of the parenthood provisions, UK surrogacy arrangements appear to work well in practice, but this is often despite (not because of) the law. This, again, confirms findings of other studies.

Moreover, based on my data, UK law is weaker in achieving certainty of parenthood after surrogacy, which can be harmful to IPs, surrogates, and children. I found that enforceability does not limit Greek surrogates' autonomy or cause harm to them,

Path: Commissioning Parents' Experience of Surrogacy Arrangements in Britain (1995) 13 *Journal of Reproductive and Infant Psychology*.

¹⁴³ Vasanti Jadva, Jamie.

¹⁴⁴ Readings *et al* (n54) 499.

thereby challenging the assumption often made in the literature. Greek interviewees also perceived enforceability as supporting the development of strong relationships of trust and friendship between the parties in a surrogacy arrangement. Additionally, my evidence confirms findings of UK studies that, although the UK's non-enforceability rule was introduced to protect the surrogates' welfare, surrogates themselves do not feel that this is necessary or appropriate and do not wish to have a right to change their minds. Greek surrogates also rejected this option. While UK interviewees did not use the language of 'enforceability', they were calling for a model which resembled the Greek one, with the IPs' legal parenthood coming into effect at birth or soon after it.

Another important welfare concern relates to donor anonymity. Greek law protects donor anonymity, whereas UK law has, since 2005, abolished it. My data suggests that there are two concerns at play here, which sit in clear tension: the adults' privacy rights and the child's right to know her genetic origins. The majority of my Greek interviewees were, however, against the abolition of donor anonymity. Lastly, in both countries I found evidence of stigma surrounding surrogacy, which was, however, far greater in Greece. Although the evidence is sparse and mostly anecdotal, Greek law is arguably helping to entrench secrecy, which may foster stigma. In the UK, too, some interviewees thought the parenthood provisions entrench and maintain some stigma.

In the next chapter, I summarise the key findings of this thesis, highlight its contributions and limitations, and suggest further academic research.

CHAPTER 8

Concluding Remarks

This concluding chapter provides a summary of the key arguments and findings presented in this doctoral research. I revisit the overarching question of this thesis, namely how surrogacy should be regulated in law, and re-evaluate how appropriately and successfully the Greek and UK legal frameworks address ethico-legal concerns regarding surrogacy based on the theoretical and empirical evidence gathered throughout this thesis. Finally, drawing on the theoretical and empirical knowledge gathered through this research, I propose the principles underpinning ‘good’ regulation in surrogacy. I then consider how this research contributes to academic knowledge as well as its limitations and suggest possible paths for further fruitful research in this area.

8.1 SUMMARY OF KEY FINDINGS AND CONTRIBUTIONS OF THIS THESIS

This thesis explored how surrogacy should be regulated through a sustained feminist comparative socio-legal methodology, and it is the first study that compares the Greek and UK models. I began my investigation by reviewing the autonomy thesis (Chapter 2). Although autonomy is a contested concept in the literature, it is undoubtedly very important in the reproductive context: it creates a rebuttable presumption that one should be free to enter into a surrogacy arrangement and helps us understand the responsibilities of the state in relation to surrogacy. I argued that the negative right to autonomy entails that the State should not impose barriers to surrogacy, but, once surrogacy is permitted, the State has a general duty to ensure equality of access to the practice and legal parenthood following surrogacy and prevent discrimination against certain groups.

I then examined a range of objections to surrogacy that purport to offer ‘good’ reasons to limit reproductive autonomy: first, that true autonomy is impossible in surrogacy; second, that surrogacy causes harm; third, that surrogacy practices offend against a concern with justice. The autonomy-based arguments are linked to concerns that autonomy is impossible because the surrogate’s response to pregnancy and

relinquishment is unpredictable, because the surrogate's consent is influenced by certain conditions, and because consent can never be fully informed.

The harm-based arguments relate to harm that can be caused to the surrogate due to her unnecessary exposure to physical and emotional risks, due to alienation, due to the IPs' reneging on the arrangement, or due to exploitation, commodification, and objectification. Moreover, there are claims in the literature that the child can be harmed due to legal uncertainties regarding parenthood, due to commodification, and due to finding out the story of her creation. Additionally, although this is severely under-researched, some concerns relate to harm to the IPs if the surrogate reneges on the arrangement, if their parental status is uncertain, and if the surrogate and/or surrogacy agencies exploit them. Lastly, justice concerns might offer reasons to impose a ban or certain limitations because surrogacy risks fuelling inequality (allowing rich people to exploit poorer women by having them carry their babies). Also, if we think surrogacy should be permitted, we should be concerned with how it is made available, and this should reflect a concern for social justice.

I found that much of the literature is very dismissive of surrogacy on a theoretical level, and many arguments against it are made primarily based on a presumed harm to surrogates and children, without any empirical evidence of such harm or despite such evidence as exists. Also, most harm-based arguments largely relate to commercial surrogacy, which presumably intensifies the risk of harm,¹ again without evidence of generalised harm. I argued that a total prohibition on surrogacy is not the answer unless this is the only way of preventing the harms alleged, namely where appropriate and effective regulation is unable to remedy them. This requires a detailed, concrete consideration of how surrogacy operates in practice and what role regulation can play in respecting and promoting reproductive autonomy, protecting the welfare of key participants, and ensuring equal, fair, and affordable access to surrogacy and to legal parenthood following surrogacy. Having first explored whether these concerns might justify a ban, I found that these concerns could be dealt with through specially designed, appropriate and effective regulation informed by empirical evidence

¹ For example: McLeod C, *For Dignity or Money: Feminists on the commodification of women's reproductive labor* (Steinbock B ed, The Oxford Handbook of Bioethics, OUP 2009); Radin MJ, 'What, If Anything Is Wrong with Baby Selling?' (1995) 26 PAC LJ; Corea G, The reproductive brothel (Corea, G. and others eds, Man-Made Women: How New Reproductive Technologies Affect Women, Routledge 1985); Anderson ES, 'Is women's labor a commodity?' (1990) 19(1) Philosophy and Public Affairs.

representing, as far as possible, the ‘real’ experiences of those involved in the practice. I then envisioned what a ‘good’ law on surrogacy would look like.

Surrogacy is governed by diverse regulation worldwide. To increase my understanding of how surrogacy should be regulated, I examined two regimes, namely those of Greece (Chapter 3) and the UK (Chapter 4). While they have both recognised the need to regulate surrogacy, they vary significantly concerning the content of regulation, and contrast very interestingly with each other, hence they offer the potential for an interesting and fruitful comparative study. Greek law provides for altruistic, gestational surrogacy agreements that, if approved by the judiciary at the preconception stage, become enforceable after the child’s birth, and parenthood is based on intention. In contrast, UK law allows for altruistic gestational and traditional surrogacy agreements but only regulates surrogacy performed in clinics. Surrogacy agreements are unenforceable, and parenthood is based on genetics. The IPs’ legal parenthood is subject to several eligibility criteria and a successful PO application, which is decided by the judiciary after the child’s birth, if the IPs apply for one.

Although the Greek model offers an innovative response to surrogacy, it is currently severely lacking proper attention from Greek scholars, and is almost entirely missing from the international literature, while empirical data are extremely limited. Therefore, there is an important gap in scholarship. The UK model has long gathered the interest and attention of both national and international scholars and, although many have noted its inadequacies and failures, they have not investigated the possibility of the Greek regime becoming a model for a UK legal reform, and *vice versa*. Though there is some knowledge of the experience of surrogacy regulation in the UK, the available studies are, in their majority, out-dated, and provide little information about whether the UK regime has appropriately and effectively addressed the concerns raised by surrogacy.

My analysis of the two regimes was based on the criteria of ‘good’ law identified in Chapter 2, and focused on three themes: access, regulation during a surrogacy arrangement, and determination of parenthood. These themes help bring out the features of the regulation that are interesting, significant, potentially problematic, and starkly different in each country, and allowed for a nuanced socio-legal comparison of the two legal models. In order to detect how regulation works in practice and how well the Greek and UK regimes address these ethico-legal concerns, I performed my own

qualitative research in these countries. I gathered evidence from 28 interviewees involved in surrogacy in different ways, namely surrogates, IPs, and other key actors, such as medical and legal practitioners, academics, policy-makers, and representatives from UK surrogacy organisations. My findings are presented in three chapters structured around the themes identified earlier: access (Chapter 5), regulation during surrogacy arrangements (Chapter 6), and determination of parenthood (Chapter 7). My analysis also draws on the wider literature and earlier analysis.

8.1.1 Access to surrogacy

In Chapter 2, I argued that a ‘good’ surrogacy law should promote and protect one’s autonomy in accessing surrogacy, and ensure that access to the practice is easy, equal, fair, and affordable. In Chapter 3, we saw that access in Greece is limited to women who are under 50 years old, who are married, single, in a legally recognised civil partnership (a status only available to opposite sex couples till recently), or in an enduring family relationship, and who demonstrate a medical need for surrogacy. Moreover, access to surrogacy depends on a preconception judicial assessment. Since only gestational surrogacy is allowed in Greece, all parties in surrogacy arrangements must go through a clinic, where they are also subjected to a WoC assessment. However, single men’s and same-sex couples’ access to surrogacy is unregulated and uncertain. In Chapter 4, we saw that access to surrogacy in the UK is dependent on two factors: consent and WoC. Access is available to everyone, subject to a WoC assessment in clinics, thereby making clinics the main gatekeepers to formal legal surrogacy, where it involves donated gametes or ex utero creation of embryos. Informal (at-home) traditional surrogacy arrangements are wholly unregulated at this stage.

In Chapter 5, I combined my findings and evidence from the literature and discussed access to surrogacy. In Greece, I found that the IM’s age is a significant limitation, and that it reflects a concern with WoC rather than with women’s health, as the literature suggests. Additionally, the requirement for a medical need for surrogacy poses a significant limitation, not least because it is strictly perceived by medical practitioners as entailing a physical inability to attain a pregnancy and/or bring a pregnancy to term, which challenges assumptions that medical need also covers cases of ‘unexplained’ and social infertility. This, however, sits in tension with the constitutionally recognised right to have a child. My Greek interviews also revealed

that relationship status does not always exclude people from accessing ARTs, including surrogacy, in clinics. I found that a lesbian couple had been successful in accessing formal legal surrogacy (albeit in an unusual form) with the clinic's help and support, even though it involved deceiving the Greek authorities. Nevertheless, access to surrogacy in Greek clinics is unlikely to be as easy for gay male couples (or fertile women) without deception. UK law does not set relationship status as an access requirement.² Therefore, it makes surrogacy available to a wider group of people than does Greek law, and this is an area where Greek law could improve.

Furthermore, my findings confirm assumptions in Greek literature that judges do not examine surrogacy cases in detail. Rather, judges generally facilitate access to surrogacy, where there is a medical need for it, which arguably decreases the value of the scrutiny process. Lastly, I found that WoC assessments in Greek clinics are generally light-touch, and access is rarely restricted (if justified by a medical need), but counselling for surrogacy in clinics is usually made mandatory, although only the offer of counselling is legally mandated, because it is regarded as a tool to ensure WoC. The latter was also purported from my UK interviewees, and it confirms evidence from other studies.

My UK research showed that the clinical WoC assessment does not act as a considerable limitation on access for the same reasons as in Greece. Moreover, I found that WoC assessments are also performed by surrogacy organisations, which are currently unregulated and severely under-researched in the literature. Additionally, despite the judicial beliefs which are sometimes expressed about the risks of independent surrogacy,³ I found that rigorous processes and checks to ensure attention to the WoC are common in those arrangements. Generally, access to UK surrogacy works relatively well, but this is often despite, rather than because of, the law.

Furthermore, my empirical work allowed the identification of various informal limitations on access to surrogacy in Greece and the UK, including the availability and quality of information for surrogacy, the difficulty in finding surrogates, the

² This is possibly because UK law acknowledged same-sex couples as partners and parents earlier than Greek law did.

³ Namely arrangements that do not go through a clinic or a surrogacy organisation. Recent cases define the practice 'dangerous': *Re TT (Surrogacy)* [2011] EWHC 33, [2011] 2FLR 392; *Re X (A Child)* [2016] EWFC 54, [2016] EWFC 55; *Re N (A Child)* [2007] EWCA Civ 1053; *H v S (Surrogacy Agreement)* [2015] EWHC 36; *JP v LP & Others (Surrogacy Arrangement: Wardship)* EWHC 595 (Fam), [2015] 1 FLR 307; *Re M (Child)* [2017] EWCA Civ 228.

surrogates' preferences, cost and access to public funding. Though these factors may vary even within the same cultural and regulatory context, it is important to take them into account, because they may act as informal barriers to access to surrogacy. However, there is a question about whether reproductive autonomy imposes an obligation on the state to attempt to bring these barriers down, which could not be addressed in the space of this thesis.

Those interested in UK surrogacy choose independent sources, such as the Internet and the media, to find information, while Greeks primarily depend on the information that formal gatekeepers (medical professionals and lawyers) decide to share with them. This may limit some people's access to surrogacy. Interviewees in both countries noted the serious lack of available surrogates, but, the UK has a better, though informal, system to put interested parties in touch through non-profit surrogacy organisations. Moreover, clinics often refer interested parties to these organisations recommending them as places where people can find reliable information, advice and support. Also, I found that surrogates have their own preferences and red lines, which may limit access. Lastly, interviewees in both countries indicated that the most important limitation is cost, and that both regimes fail to secure public funding for surrogacy, thereby failing to ensure fair, affordable, and equal access to surrogacy.⁴

8.1.2 Regulation during surrogacy arrangements

In Chapter 6, I discussed how and how well the Greek and UK surrogacy regimes respond to concerns regarding autonomy, welfare, and justice *during* a surrogacy arrangement. Justice is more directly relevant to issues relating to access to surrogacy and to legal parenthood following it, but such concerns emerged occasionally in this context. The autonomy concern is primarily operationalised through the legal requirement for free, informed, and unconditional consent. In Greece, consent is monitored by the judiciary and the clinic where surrogacy takes place. In the UK, consent is formally monitored by clinics, if the parties decide to go through one, while informal surrogacy arrangements are wholly unregulated. Therefore, UK regulation appears to fail to ensure proper respect for autonomy in some arrangements that we know occur in practice and have been described as 'dangerous'.⁵

⁴ This, in some cases (especially for the UK), might mean that some people will go abroad, where surrogacy is probably cheaper.

⁵ n3

Based on my data, Greece has a robust system for ensuring valid consent in formal legal surrogacy, but we have no knowledge about how consent operates in informal surrogacy arrangements which likely happen. In the UK, surrogacy organisations play an important role in consent-provision, with these informal systems often filling the gap left by regulation. This was identified as both a good and a bad thing by my interviewees. While many recognised that the information, advice and support offered by UK surrogacy organisations is vital, they believed regulation should do more to help the parties make a fully informed choice.

Further, as mentioned above, in both countries surrogacy counselling in clinics is used to ensure valid consent and it is usually made mandatory, though not legally mandated.⁶ Additionally, in both countries written surrogacy agreements were regarded fundamental in ensuring respect for autonomy. Contrary to Greece, in the UK, such agreements are neither legally mandated nor have legal force. I found that most UK interviewees were in favour of written surrogacy agreements being legally mandated and binding, and most IPs and surrogates I interviewed had signed one. Therefore, although regulation in each country has reached a starkly different position on this issue, the practice is actually quite similar, and, in the UK, this is evidence of things working despite, not because of, the law.

Additionally, according to my interviewees, IPs are possibly at a greater risk of being harmed than are surrogates, which challenges the widely held assumption that surrogates are most vulnerable. Even though I did not find any direct experiences of exploitation in either country, it is possible that such cases happen under the radar, as for example the exceptional case noted by one interviewee of a rogue UK organisation that disappeared having taken large payments from IPs.

Both countries employ a mixed compensatory model for surrogacy, whereby payments to surrogates are allowed but only for 'reasonable' expenses, which responds to the welfare concern that commercial practices increase the risk of harm. However, the 'reasonable' expenses rule was found to work badly in both countries, because of vagueness as to what it entails. On the other hand, no harm resulting from excess payments was reported by my interviewees. Also, some believed that the current system provides certain advantages, with some noting a sense of empowerment, because it offers the parties space to negotiate payments (both for

⁶ However, in both countries, the offer of counselling is legally mandated.

‘reasonable’ expenses and for other compensation) and build trust between them. Lastly, interviewees in both countries thought the lack of oversight meant that informal support mechanisms had to be developed to protect the parties from potential harm, but suggested that surrogacy works relatively well, with some adding that overregulation might create more problems.

8.1.3 Determination of parenthood following surrogacy

In Chapter 7, I explored how and how well the Greek and UK parenthood provisions for surrogacy meet the criteria for a ‘good’ law laid out in Chapter 2. It was seen that the Greek idea of welfare has translated into the provision that the people who intended the child to be born are her parents, whereas the UK model is predicated on the idea that welfare is best served by recognising the birth mother initially and only disrupting that when welfare considerations demand. The Greek parenthood rules appeared to work well and were considered to promote the parties’ autonomy by recognising and enforcing the parties’ intentions. Contrastingly, UK interviewees believed that law awards the ‘wrong’ identity to IPs, surrogates, and children born through surrogacy, and it can cause various practical problems. Despite the complaints and unhappiness with the UK parenthood provisions, I found that most arrangements and transfers of care of the child worked well in the experience of my interviewees, but this is despite the law. Also, both my research and other literature has shown that the uncertainty surrounding POs is one driver in people having surrogacy overseas, which introduces a different set of problems and concerns.

In terms of achieving equality of access to parenthood, both laws have some weaknesses but, on balance, UK law is more effective at making legal parenthood available to a wider group of people than is Greek law. However, POs are still not available to single IPs and IPs needing double gamete donation, and because of this some people never apply for a PO, which has WoC implications. My interviewees expressed significant discontentment with the inequalities enshrined in both regimes. In Greece, I found that the non-recognition of parenthood rights to same-sex IPs and single men sit in clear tension with the constitutionally recognised right to have a child. Furthermore, in Greece, surrogacy agreements are enforceable after the child’s birth, with direct effects for the IPs’ parenthood rights. This mechanism was regarded as ‘good’ law because, despite assumptions in the literature, it was seen as protecting the surrogate’s welfare and supporting the development of strong relationships of trust

between the parties. Moreover, I found that, although the UK's non-enforceability rule was introduced to protect the surrogates' welfare, surrogates themselves do not feel that this is necessary or appropriate and do not wish to have a right to change their minds. Surrogates in Greece also rejected this option. Importantly, UK interviewees were in favour of a parenthood model that resembles the Greek one and thought that UK law fails to recognise the realities of UK surrogacy without providing a convincing justification for the choice of non-enforceability.

Another welfare concern in surrogacy relates to donor anonymity. Greek regulation maintains the donor anonymity rule, whereas the UK has abolished anonymity since 2005. Although many Greek interviewees recognised that the protection of the adults' privacy rights provided by donor anonymity potentially infringes the child's right to know her genetic origins, they rejected a change in the current system. Lastly, my data suggested that some stigma is still attached to surrogacy in both countries. Although the evidence is sparse and mostly anecdotal, Greek law arguably helps to entrench secrecy, which may foster stigma. In the UK, some interviewees thought the parenthood provisions entrenched and maintained stigma, which suggests that legal reform is desirable. These data could feed into the reform process currently happening in the UK,⁷ and highlight potential avenues of a future change of the Greek regime. For example, the IPs' parenthood in the UK could become more immediate, and parenthood following surrogacy could become available to a wider group of people than is now in both countries.

Due to the paucity of empirical research in both countries, Greece especially, my findings make an original contribution to the literature. Although my sample is small and partly self-selected, it serves to pinpoint elements of the regulation in each country that work well and others that are potentially problematic. My evidence revealed that both regimes are guided by the same principles, namely autonomy, equality, and welfare. However, the weight ascribed to those principles by each jurisdiction is different, which explains why they have reached starkly different positions on many issues, with significant implications for who can access surrogacy, how surrogacy is regulated during the arrangement, and how parenthood is determined.

⁷ In December 2017, the Law Commission announced that surrogacy forms part of its 13th Programme for law reform (Law Com Report No.377, 2017).

In the UK, WoC is the court's paramount consideration when determining parenthood following surrogacy, whereas, in Greece, WoC is one of a number of important considerations, weighed in the balance with the IPs' and the surrogate's rights to autonomy. Also, in Greece, the WoC assessments occur at the preconception stage (by the judge and the clinic), when the child is not yet in existence, while, in the UK, there are two different types of WoC considerations occurring at different stages. In IVF-surrogacy and clinically-undertaken traditional surrogacy, not only is there greater scrutiny of WoC than home-based traditional surrogacy, but also the WoC assessment by clinics considers slightly different factors than judges do during the PO process. Further, I found that the broader perception of 'surrogacy' within the parenthood provisions is different in these countries: in Greece, surrogacy is perceived as a form of ART, whereas, in the UK, surrogacy is considered a form of fast-track adoption, with direct implications for who is considered the child's parent at birth.

My evidence challenges and, in some cases, confirms, various assumptions made in the literature and other studies about surrogacy. Especially regarding Greece, where evidence is sparse and largely anecdotal, my evidence makes an original contribution to the literature. Another contribution of this thesis lies in its use of a feminist, more fluid methodological approach to the analysis of qualitative data, which challenges and escapes the theoretical binary of classifying interviewees as 'experts' and 'non-experts', according to their presumed expertise and knowledge. I suggest that there may be cases, as in this research, where people who would traditionally be considered 'non-experts' may actually have more expert knowledge due to their personal or professional experiences with the subject of research. Namely, in this research, surrogates and IPs were experts, and it was important for their knowledge to be treated equivalently to that of traditionally conceived 'expert' interviewees. This approach enables a more nuanced understanding of the experience of regulation and could lead to proposing legal changes that better reflect the variety of those experiences.

8.2 The principles underpinning 'good' surrogacy law and the implications of this research for feminist ethics

Based on the above analysis, a 'good' surrogacy law would permit surrogacy (albeit within limits) and would offer carefully designed, appropriate and effective rules and guidelines which are capable of regulating the practice; determining legal parenthood resulting from it, and, so far as possible, protecting all parties from potential harms. It

should also ensure equal, fair and affordable access to surrogacy, within the constraints of current health budgets, and offer effective provisions for ensuring fully informed and voluntary consent from all parties. Additionally, a ‘good’ law would provide clarity regarding legal parenthood and regarding how to resolve disputes that might arise in this context.

I have also argued that the theory, policy and regulation of surrogacy must be grounded in the ‘real’ experience of surrogacy, and especially the question of ‘who’ is most vulnerable in a surrogacy arrangement, something that is currently notably lacking. Based on my research, although regulation (particularly in the UK) is founded on the assumption that surrogates are the most vulnerable party in a surrogacy arrangement, I found that IPs are at least as vulnerable as surrogates, if not more so in some cases. Therefore, a ‘good’ surrogacy law should not begin from this assumption but should rather weigh the interests of IPs along with the interests of surrogates and children in the surrogacy context. This would entail that the legal determination of parenthood is clear and, as far as possible, certain, and that parenthood should be awarded to IPs sooner than the current UK regime does now.

As regards Greece, although I found a high level of contentment with the current parenthood rules for surrogacy, it was suggested that there is a need for the development of monitoring mechanisms which, however, would leave space for the parties to form their own rules regarding the surrogacy relationship. Furthermore, a ‘good’ surrogacy law should provide access to the practice of surrogacy and parenthood following it to a wider group of people than is currently the case in Greece and the UK. It should ensure that no one is unjustifiably formally or informally excluded from surrogacy, subject always to public budget constraints.

Additionally, I showed that many positive aspects of surrogacy practice in both countries, especially in the UK, work well despite the regulation rather than because of it. Although the lack of regulation was criticised as a negative element in many respects, it was also recognised that too much law and regulation could do more damage than good in this area. Moreover, many interviewees felt that the lack of current regulation has left a productive space for individuals and groups to develop informal regulation which works for them. Hence, law and policy should ensure that, on one hand, they provide support and protection to the parties in surrogacy arrangements, as well as to other individuals who are involved in the practice, and, on

the other hand, they should leave room for an appropriate level of self-regulation, which was seen as offering a significant amount of empowerment and satisfaction.

For example, according to many of my interviewees, regulation should leave it up to the parties to decide how they meet each other (through informal pathways, such as the Internet, through surrogacy organisations, or through surrogacy professionals, for example as clinicians and/or lawyers); it should be up to the parties to decide how pregnancy should be achieved for the purposes of surrogacy (through artificial insemination at home or through ARTs in a clinic); and they should be free to decide whether they should sign and be bound by a written surrogacy agreement, or what compensation (for 'reasonable' expenses) surrogates should receive.

Although the options of enforceability and of commercial surrogacy arrangements were rejected by many of my interviewees, it was also suggested that this rejection was mainly due to stigma attached to these terms rather than by a principled disagreement with their essential elements. Tentatively, then, it is suggested that surrogacy regulation should perhaps attempt to disrupt the binary categorisation of 'enforceability' and 'non-enforceability', and 'commercial' and 'altruistic' surrogacy. These divides appeared to no longer reflect the experiences of modern surrogacy, at least in Greece and the UK and within the limitations of my sample. It would be desirable to formulate new language in the surrogacy context that will better express these 'real' experiences.

Importantly, it was evident in my sample that law can make surrogacy more empowering for women as a collective by re-defining 'motherhood' more in the terms of having the intention to have and raise a child rather than in the terms of gestation and birth, and by re-conceptualising and reforming the law so as surrogates are not deemed as necessarily most 'vulnerable' in the surrogacy arrangement. Moreover, surrogacy can be empowering for women collectively if law allows space to women to decide the terms of their arrangement, should they choose to enter into one. Lastly, along with the above, law should be concerned with removing stigma from surrogacy, and with resolving wider structural issues that can cause and maintain the oppression of women; for example, public policy should support research on the causes, effects and treatment of infertility; it should raise awareness about why people might use and/or need ARTs and/or surrogacy; and it should offer guidance on how best to pursue them.

8.3 Limitations of this research and avenues of future research

Despite its larger significance and contributions, this thesis has certain limitations. Notably, the empirical arguments made in this thesis are based on a small pool of evidence (14 interviews in each country), and all interviewees were selected because of their experience of ‘formal’ legal surrogacy in these countries.⁸ Hence, my findings may not represent the full range of experiences of surrogacy in these countries. People with experience of surrogacy which goes ‘under the radar’ may be more likely to reveal instances of abuse that my sample could not uncover.

Further, from its outset, this thesis acknowledged that it could not conclusively address all the questions surrounding surrogacy. Nonetheless, my sample has allowed the identification of the strengths and limitations of the surrogacy regulation in Greece and the UK and the elements that are interesting, significant, potentially problematic, and different, and has facilitated the evaluation of the two regimes. Lastly, the high degree of agreement within my sample gives some grounds for confidence in the robustness of the conclusions reached.

The comparative socio-legal qualitative feminist methodology employed in this research has hopefully made a solid contribution to knowledge that future research can refer to and expand upon. More extensive qualitative research is necessary both in both countries, Greece especially, and future legal reforms should make sure to reflect, as much as possible, the ‘real’ experience of surrogacy in these countries and elsewhere. Equally, future researchers should perform more qualitative work in the national contexts that have not been included in this project and cast more light into how surrogacy is practised in other jurisdictions and inform legal reforms beyond Greece and the UK, which could not be conducted in the space of this thesis. Such projects will be invaluable, especially considering the upward trajectory regarding the incidence of surrogacy at national and international levels.

⁸ Admittedly, I am missing evidence from people who have not been successful in their surrogacy arrangements and from people who have had particularly negative experiences, but this is not due to my lack of trying to gather such data. My assumption is that people who had positive experiences were more open to share them with me, which is a risk that exists in empirical research in general. Also, I am missing evidence from IPs and surrogates from the UK organisation Brilliant Beginnings, the HFEA and NAMAR and from Cafcass (for more details see Chapter 1, section 1.4.3.1).

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APPENDICES

APPENDIX A

Ethical approval from the Research Ethics Committee of Kent Law School, University of Kent, Canterbury, UK (email confirmation)

Eleanor Curran

Actions

To:

[Katia Neofytou](#)

30 June 2015 14:37

You replied on 30/06/2015 14:39.

Dear Katia,

Re: "How I met my mothers". Surrogate motherhood and the law: a comparative socio-legal analysis of the responses to surrogacy in Greece and the UK.

I am pleased to tell you that your project has ethical approval.

Good luck with it.

Best wishes,

Eleanor

Dr Eleanor Curran
Senior Lecturer
Senior Tutor
Chair, Research Ethics Advisory Group
Kent Law School
Eliot College
University of Kent
Canterbury
Kent CT2 7NS

Tel: 01227 827136
email: e.a.curran@kent.ac.uk

APPENDIX B

Certificate confirming that no NHS Research Ethics Approval was necessary for this project

Source: <http://www.hra-decisiontools.org.uk/ethics/resultN2.html>



Do I need NHS REC approval?

This decision tool suggests that you do **not** need NHS REC approval, however, you may still require another type of ethics committee review, e.g. Higher Education Institutions (HEIs) ethical approval. Researchers in HEIs are advised to check whether, under their institution's policy and internal arrangements, ethical review is required by their HEI research ethics committee.

Exceptionally, the Research Ethics Service may accept an application for review of research at the request of the sponsor, chief investigator or host organisation, where it agrees that the proposal raises material ethical issues. Agreement should be sought from the responsible operational manager for the local REC centre prior to submission of the application.

Requests should be sent by email, including a summary of the research proposal (maximum one page) and explanation of why the project raises significant issues which cannot be managed routinely in accordance with established guidelines and good practice, and requires ethical consideration and advice from an NHS REC. Contact points for operational managers can be found on the HRA website.

Researchers requiring further advice (e.g. those not confident with the outcome of this tool) should contact their R&D office or sponsor in the first instance, or the HRA to discuss your study. If contacting the HRA for advice, do this by sending an outline of the project (maximum one page), summarising its purpose, methodology, type of participant and planned location as well as a copy of the previous results page and a summary of the aspects of the decision(s) that you need further advice on to the HRA Queries Line at HRA.Queries@nhs.net.

APPENDIX C

Information on research participants - List of interviewees

The interviewees are listed here as ‘professionals’ and ‘non-professionals’, which reflects whether one receives payment for the role that gives one the relevant expertise.

List of Greek interviewees - Non-professionals:

Name	Way of involvement with surrogacy
1. Areti	Mother of twins through surrogacy in Greece
2. Aria	Lesbian mother through ‘surrogacy’ and egg provider
3. Elina	Surrogate
4. Giota	Intended mother who was looking for a surrogate in Greece
5. Katerina	Lesbian woman who acted as a gestational ‘surrogate’ for her partner (Aria, above)
6. Lena	Surrogate and clients’ manager of a large Greek fertility clinic involved in surrogacy practice. I interviewed Lena twice. ¹

List of Greek interviewees – Professionals:

Name	Way of involvement with surrogacy
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¹ Lena initially spoke under her role as a clients’ manager in a large Greek fertility centre. Three months later, because she saw that all my efforts to find potential interviewees had been fruitless, she confided in me that she had twice acted as a surrogate and agreed to be interviewed by email.

1. Anonymous Greek lawyer	Lawyer experienced in handling surrogacy cases in Greek courts
2. Cazlaris Haris, Mr	Embryologist, policy-maker (member of the 2005 draft law committee) and former member of NAMAR
3. Chatziparasidou Alexia, Ms	Clinician
4. Hatzis Aristides, Professor	Legal academic
5. Pantos Konstantinos, Dr	Clinician
6. Tarlatzis Basil, Dr	Clinician, medical academic (Professor), policy-maker (member of the 2005 draft law committee) and former member of NAMAR
7. Vidalis Takis, Mr	Legal academic, practising lawyer and advisor at the Hellenic National Bioethics Commission

List of UK interviewees – Non-professionals:

Name	Way of involvement with surrogacy
1. Jamie	Independent surrogate (traditional surrogate [genetically related to the child]. Did not go through a surrogacy organisation or a clinic.)
2. Lauren	SUK surrogate for gay male IPs (Simon and Steve, below. Gestational surrogate [not genetically related to the child].)

- | | |
|------------|--|
| 3. Marina | COTS surrogate (traditional) and professional counsellor at COTS |
| 4. Natalie | Mother of twins through SUK and SUK Trustee |
| 5. Sarah | SUK surrogate (traditional) and SUK Chair |
| 6. Simon | Gay father through SUK |
| 7. Steve | Gay father through SUK |

List of UK interviewees – Professionals:

- | Name | Way of involvement with surrogacy |
|--------------------------------|--|
| 1. Avery Sue, Dr | Clinician |
| 2. Brazier Margaret, Professor | Legal academic |
| 3. Gamble Natalie | Solicitor and co-founder of surrogacy organisation Brilliant Beginnings (BB) |
| 4. Horsey Kirsty | Legal academic |
| 5. Jadvā Vasanti | Psychology academic |
| 6. Powell Andrew | Family law barrister |
| 7. Prosser Helen | Co-founder of BB |

APPENDIX D

Invitation for an interview given to potential research participants



Information Sheet

Name and title of researcher:	Aikaterini (Katia) Neofytou, PhD Candidate
Researcher's email:	kn229@kent.ac.uk (academic email)/ katia_neof@yahoo.gr (personal email)
Name of programme:	PhD in Law
Name of Institution:	Kent Law School, University of Kent, Canterbury (UK)
Academic Supervisors:	Professor Sally Sheldon Dr Kirsty Horsey

'How I met my mothers': Surrogate motherhood and the law: a comparative socio-legal analysis of the responses to surrogacy in Greece and the UK (working title)

Who am I?

I am a PhD Candidate and a Graduate Teaching Assistant, based in Kent Law School (KLS) in the UK. I completed my master's degree in Medical Law and Ethics at KLS in 2012 and worked as a named research assistant for an EU-funded project evaluating the legal framework for surrogacy in EU that was completed and published in 2013. I

am also a qualified lawyer and a registered member of the Bar Association of Thessaloniki, Greece. My research interests focus on issues relating to law and reproduction, and my current project explores the law and practice of surrogacy in Greece and the UK.

What is the project?

My doctoral research engages in an exploration of how surrogacy, as a form of assisted reproduction, should be regulated in law. The project aims to recognise and assess the ethical and legal concerns relating to surrogacy, as well as the challenges for regulating this area. I have two case studies; Greece and the UK. With my research I wish to place the Greek surrogacy law at the centre of academic discourse, investigate its strengths and limitations, and explore the possibility of this law being a model for a reform of the UK legal framework. I also examine how the current UK model can be an inspiration for a Greek legal reform in some respects.

Through the interviews I hope to gain a deeper understanding of how effective the Greek and the UK surrogacy laws are in medical, legal and social practice, and achieve a more complete knowledge of the ‘real’ experience of surrogacy in these two countries based on a variety of perspectives ranging from views of surrogates, intended and/or actual parents, and key actors involved in the regulation and practice of surrogacy (academic scholars, judges, legal and medical practitioners, and members of organisations relating to surrogacy). The interviews will take place in Greece (mainly in Athens and Thessaloniki) and the UK (mainly, though not exclusively, London and Southeast England).

How will person-identifying information be used?

Interviewing professionals (academics, judges, legal and medical practitioners, policy-makers, representatives of surrogacy organisations etc.): If you agree, the interview will be provided ‘on the record’. If you do not wish to speak on the record, then I will agree with you how anything you tell me may be used in project publications in a way that protects your anonymity.

Interviewing individuals who have/ have had personal experience of surrogacy (surrogates, intended parents): If you agree, I will assign you with a pseudonym which will later be used in project publications. No mention will be made to person-identifying information (your full real name, your address and/or other contact

details). If you so wish, all personal references will be removed from those data, so it cannot be linked to you. You may of course choose to remain identifiable, in which case I will use your real name. We will discuss and agree on which information can be made public (for example only your first name and way of involvement with surrogacy or full name).

What will the interview involve?

I will ask your permission to record the interview on a digital recorder, so that I have a full record of the conversation. If you agree to your interview being recorded, I will save the digital file containing your interview into a password protected folder, to which only I have access. If you do not wish to have the interview recorded, I will ask to take detailed notes during the conversation.

If I wish to quote from your interview in any publications that come out of this study, I will seek your prior approval of the quotation, using an e-mail account of your choice, offering you the opportunity to amend it to your satisfaction. A transcript of the interview will be sent to you once the data collection is completed.

The interview will be semi-structured: I will ask some general questions, covering your role, experience and knowledge regarding surrogacy and your views on how well current law is working and how it might be improved. The interview will be run as a conversation, with open-ended questions following a general topic guide that I will supply in advance. We can skip any questions that are not relevant or that you do not wish to answer.

I estimate that the interview will last around one hour to ninety minutes. You can stop the interview at any point.

Some questions that you may have:

Q: "How, precisely, will my interview be used in the research?" A: Your interview will be used to help me understand how surrogacy works in practice and any problems that the regulation of surrogacy may cause (or has caused to you). Some quotations may be used in my PhD thesis and other future publications.

Q: "Can I change my mind about participating?" A: Yes. If you change your mind about being interviewed, you can say so at any point. You do not need to give a reason.

Q: “Can I ask you to turn the digital recorder off after we have started the interview?”

A: Yes. You can ask me to turn off the recorder at any point. You do not need to give a reason.

Q: “What will happen to the interview, when the project ends?” A: the recording of the interview will not be accessible by anyone apart from me. It will be destroyed five years after the end of the project (i.e. in 2022). You can also ask for the recording to be destroyed at any point before that, without needing to give a reason.

Q: “What will happen if you want to quote anything that I say in the interview?” A: I would seek your prior approval before using any quotations from your interview in any publications or presentations drawing on the research. However, once a quotation approved by you has been used in a publication, it will not be possible for you to change or to withdraw it.

Q: “What else will I be asked to do, other than the interview?” A: Nothing, with the exception that I may contact you by e-mail with a follow up question or to ask you to approve the use of a quotation taken from your interview.

Q: “Will I get anything out of the research?” A: I hope that the research findings will be of interest and use to those involved with regulating surrogacy in Greece and the UK, as well as possibilities beyond these countries. I hope that my research becomes an inspiration for policy changes and for further academic research. My aim is to use your views to make recommendations for legal reforms that will better express and protect the experiences of all parties to a surrogacy arrangement and the resulting child. If you wish, you can ask for a summary of the research findings.

Many thanks for agreeing to take part in this research. If you have any questions or comments, please let me know: k.neofytou@kent.ac.uk (academic email)/ katia_neof@yahoo.gr (personal email).

Aikaterini (Katia) Neofytou
PhD Candidate/ Graduate Teaching Assistant
Kent Law School, Eliot College, Office: E3.N3
Canterbury, Kent, CT2 7NS, UK

APPENDIX E

Interview Consent Form



***‘How I met my mothers’*: Surrogate motherhood and the law: a comparative socio-legal analysis of the responses to surrogacy in Greece and the UK (working title)**

Interview Consent Form

If you feel that you have enough information and are happy to do so, please tick each of the boxes below. If not, please let me know.

I have read and understood the research project information sheet.	
I have been given the opportunity to ask questions about the project and issues of confidentiality.	
I am aware that I can stop the interview at any point and/or withdraw from the research at any time, without needing to give a reason and that I can request that any recording or notes relating to my interview be destroyed.	
I agree for the interview to be recorded.	

I agree for quotations to be attributed to me in any publications, reports, web pages, and other research outputs. This is subject to my being given the opportunity to see and to revise any quotations before they are used.	
--	--

_____ Interviewee	_____ Signature	_____ Date	_____ E-mail address to use for any further communication
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Aikaterini (Katia) Neofytou

_____ Researcher	_____ Signature	_____ Date
---------------------	--------------------	---------------

Aikaterini (Katia) Neofytou
PhD Candidate/Graduate Teaching Assistant
Kent Law School, Eliot College,
Kent University, Canterbury CT2 7NS
E-mail: k.neofytou@kent.ac.uk (kn229@kent.ac.uk) / katia_neof@yahoo.gr

APPENDIX F

Indicative Interview Questions – UK

Information about the interview participants

- Can you please provide some information about yourself and your involvement with surrogacy in the UK?

Frequency of surrogacy

- Based on your professional/academic/personal experience with surrogacy in this country, how often would you say people use surrogacy as a form of family-formation is (domestic and cross-border arrangements)?
- Do you believe that the demand surrogacy is increasing, decreasing, or the same as in previous years? How has this changed throughout the years? Why is that?
- Do you believe that there are more IPs than women offering to become surrogates in the UK or the opposite? Why would you say that is? How do you know this?
- In your opinion, who do you think uses surrogacy the most in this country? Heterosexual couples, female couples, male couples, single people?

Source of information about UK surrogacy

- In your opinion, how do interested parties find information about surrogacy in the UK? (e.g. through medical and legal practitioners, the internet, the media, surrogacy organisations)
- In your opinion, how do IPs get introduced to and matched with potential surrogates and *vice versa*? How do you know this?
- Who provides information on the legal process for surrogacy and parenthood, and the rights and responsibilities of the parties? How do you know this?

UK regulation

- How do you evaluate the UK surrogacy laws? What do you think are the strengths of the UK surrogacy law? Why?
- Do you find any problems with the current UK surrogacy law? Why? How do they affect the practice of surrogacy in this country?
- Who can access surrogacy in the UK and how does the law regulate this matter? Are any people excluded from surrogacy? How? Why?

- How do you evaluate the welfare of the child criterion regarding access to ART in this country? Does this affect surrogacy practice? How? Why?
- Who would you say is most vulnerable in a UK surrogacy arrangement?
- Do you believe that the UK surrogacy laws offer sufficient protection to all parties to a surrogacy arrangement? How? If not, how could these individuals be better protected?
- How do you evaluate the UK laws' provisions regarding consent to surrogacy? Is consent important in this area? Why?
- How do UK surrogacy laws regulate payments in surrogacy and how does this affect surrogacy arrangements in this country?
- To your knowledge, how much money do you think IPs pay surrogates in this country? Is this for 'reasonable' expenses or for something more?
- How do you evaluate the role of non-profit surrogacy organisations in the UK?
- How do you evaluate the role of the HFEA in relation to UK surrogacy?
- How do you evaluate the parenthood provisions for the transfer of legal parenthood in the UK (POs)? What is the role of the judge in this process?
- Do the best interests of the child play a significant role in the judge's decision about whether to grant a PO?
- What is the quality of the relationships between IPs, surrogates and children born through surrogacy?
- Have there been, to your knowledge, any instances of exploitation taking place in the context of surrogacy in the UK?
- Non-enforceability of surrogacy contracts. Why did the legislature choose this? Is it a positive or a negative feature of the law? Should the surrogate be allowed to change her mind after the birth of the child?
- How would you like parenthood to be determined following surrogacy?

Conclusions and future legal reform

- How clear and effective would you consider the UK surrogacy law, in its current state, to be? How does this affect the practice in this country? Are there any problems with it?
- If UK surrogacy laws changed, what kind of changes would you like to see? Why?

APPENDIX G

Indicative Interview Questions – Greece (translated from Greek to English)

Information about the interview participants

- Can you please provide some information about yourself and your involvement with surrogacy in Greece?

Frequency of surrogacy

- Based on your professional/academic/personal experience with surrogacy in this country, how often would you say people use surrogacy as a form of family-formation is (domestic and cross-border arrangements)?
- Do you believe that the demand surrogacy is increasing, decreasing, or the same as in previous years? How has this changed throughout the years? Why is that?
- Do you believe that there are more IPs than women offering to become surrogates in Greece, or the opposite? Why would you say that is? How do you know this?
- In your opinion, who do you think uses surrogacy the most in this country? Heterosexual couples, female couples, male couples, single people?

Source of information about Greek surrogacy

- In your opinion, how do interested parties find information about surrogacy in Greece? (e.g. through medical and legal practitioners, the internet, the media, surrogacy organisations)
- In your opinion, how do IPs get introduced to and matched with potential surrogates and *vice versa*? How do you know this?
- Who provides information on the legal process for surrogacy and parenthood, and the rights and responsibilities of the parties?

Greek regulation

- How do you evaluate the Greek legal model for surrogacy? What do you think are its strengths? Why?
- Do you find any problems with the current Greek surrogacy law? Why? Is the practice of surrogacy affected by these?
- Do you believe that the Greek surrogacy law protects the interests of everyone involved in the arrangement?

- Who is most vulnerable in a Greek surrogacy arrangement? Why? Are they sufficiently protected?
- What is the judge's role in Greek surrogacy? How does the preconception judicial scrutiny for surrogacy work? Are there any problems with it?
- How do you evaluate the Greek rules regarding consent to surrogacy? Is consent important in this area? Why?
- How does Greek surrogacy law regulate payments and how does this affect surrogacy arrangements in this country?
- To your knowledge, how much money do you think IPs pay surrogates in this country? Is this for 'reasonable' expenses or for something more?
- How do you evaluate the role of NAMAR in Greek surrogacy?
- How do you evaluate the parenthood provisions enshrined in Greek regulation for surrogacy? Do you agree with the intention-based parenthood model and the enforceability of surrogacy agreements?
- What is the quality of the relationships between IPs, surrogates and children born through surrogacy in Greece?
- Have there been, to your knowledge, any instances of exploitation taking place in Greek surrogacy?

Conclusions and future legal reform

- How clear and effective would you consider Greek surrogacy law, in its current state, to be? How does this affect the practice in this country? Are there any problems with it?
- If the Greek surrogacy regime changed, what kind of changes would you like to see? Why?

