Takis Vidalis

Senior Scientist, Legal Advisor

Hellenic National Bioethics Commission

EC Expert

Surrogacy "Tourism"

With the rulings of the Strasbourg Court[1] , condemning for France, surrogacy has stopped being a taboo issue for Europe. Let us remember the two landmark aspects to these rulings.

First, while in accordance with the Court case law assisted reproduction constitutes an issue which leaves great room for national regulation (margin of appreciation); more than any other family relations issue it does not allow for some kind of 'European' control, according to the ECHR[2]. However in this particular case an exception was made.

And secondly, this exception- i.e. the right to national identity of the children born through the method of surrogacy[3] - goes to show that in the end moral values of national societies – under the mantle of "public order" as they may be – are but relative and can only subside when compared to the best interests (see: rights) of the child.

This latter ascertainment can also be interpreted in a different light: that is that moral standards yield before the technology which has enabled us to have children in the most novel of ways and, perhaps, also subside before the financial activity involved in the use of this technology. It is precisely this alternative interpretation that we shall focus and briefly elaborate on in the example of surrogacy.

Following the Strasbourg rulings Greece came to receive great attention by the French mass media[4]. If a couple of French people can have reason to hope that the children they are planning on having legally, in another country, with the use of a

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[1] See *Mennesson v. France* (2014), *Labassée v. France* (2014).
[2] See e.g., *Evans v. U.K.* (2007), *S., H. and others v. Austria* (2011).
[3] See *Mennesson* (par. 96, 97).
[4] See e.g. Figaro, issue of 4-5/ 10/2014 (p.19) and relevant transmission of the French television channel ARTE (1.6.2014).

surrogate can actually be granted full rights (with the right to naturalization being the first among them), wouldn't it make more sense if they could come to our country to pursue their aspiration rather than go to the exorbitantly expensive USA, to England or to Asian countries- where the safety of services is rather low? After all, Greece is one of the four best known destinations for 'fertility tourism' in the EU together with Spain, the Czech Republic and Cyprus, which have not legalised the method, however.

To date, those in favour of the surrogacy method are few, despite the reasonable interest in the method that has increased after the acknowledgement of marriage between couples of the same gender[5]. The mass media keep asking: what is it that the Greek law provides for, what is it that the court examines before granting permission, is the surrogate examined or not, are there fees involved (be they legal or illegal), is the method safely implemented, what are the figures up to now, what does the assisted reproduction Authority do and why hasn't it operated to date?

By a strange coincidence, within this framework the Ministry of Health has paved the way to all parties interested by abolishing the prerequisite of permanent residence in Greece[6], which definitely hindered not only the surrogacy "tourism" expedition but also the very application of the method in general.

All the above indicate that we are to expect a true surge of "surrogacy" visitors, not only from France but from any other country of the Council of Europe (which follows the ECHR case law). This can be expected at least until the moment moral resistance fronts collapse one by one and the method becomes legal in more European countries.

Here there exist two crucial questions, which we'll need to tackle. Both are in fact related to the choice of the Greek legislator to prohibit the commercialization of the method[7].

The first question concerns the present probabilities of implementing the latter regulation. In theory one can think that surrogacy 'tourism' does not have a direct effect on its application. Indeed, one cannot rule out the possibility of having couples

[5] For the discussion of the issues during public discourse vide article published in *Le Point* (31.1.13) available at: http://www.lepoint.fr/politique/les-meres-porteuses-font-irruption-dans-le-debat-sur-la-marriage-gay-31-01-2013-1622136_20.php
[6] See Art.17 of Law 4272/2014, modified by Article Eight of Law 3089/2002
[7] See Art. 1458 of the Civil Code

from other European states visiting our country, accompanied by a dear relative or friend of theirs who would be willing to help them have a child by assuming the role of the surrogate mother herself. Now that the obstacle of permanent residence in Greece has been lifted perhaps it will prove easier for one to find a surrogate mother from among their circle of relatives or friends in their own country, instead of looking for one here. With a bit of imagination we can hypothesize the likelihood of pan-European and even non profit-making solidarity organizations which may as well be established, providing socially conscious surrogate mothers with no financial demands to the parties interested, willing to accompany them to Greece.

Are these assumptions realistic, one might ask? By lifting the residence requirement has the legislator achieved this minimum "opening" to "tourism" by safeguarding a few more treatment cycles in the domestic MAR centres of our country?

According to the figures derived from a study carried out by the colleague Mr. Ravdas, on the occasion of the open seminar organised by the National Bioethics Commission, in which he collected all the rulings of the Athens Court of First Instance which granted permission for surrogacy from 2003 to 2009, over 50% of all surrogate mothers had a foreign surname, mainly of Eastern European origin, irrelevant to the surname of the commissioning couple[8]. One can hardly believe that there exists so much solidarity after all! Was there a fee involved in these cases? We shall never know of course, however, employing a bit of logic we can only guess. Could the court have investigated the relation between the couple and the surrogate? In theory, yes, but the case law to date has not reflected particular zeal to that direction. It is commonly known that the judge grants permission following, more or less, the same rationale as that governing "circumscribed powers" of authority.

So, if this is indeed a true indication of the law's actual implementation, at a time when the requirement of 'permanent residence' did apply, what can we actually expect now that the requirement has been abolished?

The second question regards the choice of commercialization per se, this time de lege ferenda. If the legislator has done away with the balance offered by law. 3089/2002 (which correctly established the requirement of "permanent residence", thus strictly delineating a very limited geographic framework for the application of

[8] *P. Ravdas,* Surrogate Motherhood in Greece: Statistical Data Derived from Court Decisions (2013), unpublished study.

the method, **precisely** because it truly took the incentive of solidarity seriously) , this leaves the regulation of remaining issues pertinent to surrogacy totally open to the development of a true 'market' for all intents and purposes. Under the circumstances- and with the Strasbourg case law already a landmark- is it perhaps high time that the law cast aside 'moralisms' and grew more sincere in the face of reality and actually allowed a controlled commercialisation?[9]

The law-making committee of the first MAR law had left the whole issue open to discussion. The prohibition of commercialisation was added in Parliament, following insistence on the part of well-known moralists. But where did all that insistence come from?

Exactly how is it that it constitutes an insult to the value of a human being, in this case the surrogate, to provide for a fee for the services she renders? In what sense is the surrogate turned into a “means” or an “instrument” in the Kantian sense of the respective constitutional provision?[10]

If the issue is about the strain on the human body during the period of gestation, we happen to know a lot of arduous occupations (in mines, shipyards, chemical factories etc) which entail not only a greater strain – inducing in fact permanent damage to the human body- but also frequently shortening life-expectancy, something which of course does not happen with pregnancy.

In the case of the above occupations why is it that we have no problem whatsoever with the value of a human being undermined?

If, on the other hand, the issue concerns the psychological bond developed between the surrogate and the foetus, why is it that in the case of solidarity this incentive supersedes the importance of the above bond, with no psychological traumas involved, and in the case of a fee the incentive of compensation stifles the above bond? Could it actually be, conversely, that whoever gets paid has already solved any psychological issues inside, in fact more so than any other person has?

If, finally, the fee is an incentive that is bound to lead to the exploitation of the- weak by definition both financially and socially- surrogate mother , how can we

[9] For a review of arguments in favour and against the established payment for the services of surrogacy, see *Th. D Trokanas*, Human Reproduction. Individual autonomy and its limits, Sakoulas publications, Athens - Thessaloniki 2011, p 355-356.
[10] See Art 2, section 1 of the Constitution.

be so certain that a couple that desperately yearns for a child, and looks on surrogacy as their last resort, is always the 'strong' party in the equation?[11]

Is it, perhaps, that the surrogate's fee equals to "purchase and sale of children"', thereby annihilating their value? However, using a similar terminology borrowed from property law- the 'donation' of children as well could, according to the present system, be accused of something similar, mutatis mutandis of course, given the fact that all these terms allude to an "object subject to transaction"[12] and a "owner", therefore legally speaking they are not valid.

To come to the gist: the surrogate receives payment for her services- not for 'something' that she 'owns' or 'is in possession of' while she is pregnant – in the same way as the wet nurses of the past or baby sitters of today are also paid for their services. The kind of services rendered by a surrogate- the biological support of the embryo's growth, given the fact that the body of the pregnant woman "loses" nothing but fully bounces back to normality after gestation- differs only in quantity from the (admittedly small) participation of the body of the above helpers of the family facilitating the development of a child through breast-feeding in one case or staying awake by the baby's side when the child is ill in the other.

In conclusion: All those in favour of a pro bono contribution of the surrogate mother will also have to stand their ground convincingly in the light of the pressing circumstances created today by a true industry of "fertility tourism". Because apart from the arguments based on 'principle' regarding the value of the human being and fundamental human rights presented above- so as not to demonize compensation-there is also the argument of 'prudence', which we should not fail to invoke. According to this any legal market of services can be controlled in a better way compared to the respective underground economy. Enabling the judge to evaluate the fairness of an agreed fee in a written contract, in conjunction with the other terms regulating surrogacy, constitutes after all the only guarantee for the deterrence of exploitation phenomena of either one or the other party to the agreement.

[11] Cf. *E. Kounougeri – Manoledaki*, Assisted Reproduction and Family Law. The new law 3089/2002 on medically assisted procreation, Sakoulas publications, Athens- Thessaloniki 2003, p. 42. For the constitutionality of the establishment of payment for the method see *T. Vidalis*, Life with no Face. The Constitution and the use of human genetic material, 2nd edition, Ant. N. Sakkoulas publications Athens – Komotini 2003, p. 170 *et seqq*.

[12] And of course not the foetus which, even though it is an 'object' it does not fall under this category. Regarding the legal status of the embryo and foetus see e.g. Vidalis, see supra, p. 52 *et seqq*.

Strange though this argument may sound to some – since they believe it actually legalises "immoral" transactions- in effect it is not that different from the past decision to regulate through our legislation assisted reproduction as a whole. In fact many spoke of all sorts of "immoralities" back then but, fortunately, their voices did not prevail.