

THE ASSISTED REPRODUCTION

Moral and Legal Analysis

(Laws No 3089/02 and 3305/05)

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During the past few years a swift growth took place concerning the medical methods aiming at the assistance of human reproduction. The whole issue of assisted reproduction, or perhaps more accurately of interventionist insemination, is of unique psychological importance, social meaning and intellectual gravity.

According to the modern reproductive techniques, it is possible to vindicate the expectations of **infertile** spouses and satisfy the deep need of fatherhood and maternity. This innovation could enhance the cohesion of marital life and increase the feeling of plenitude and completion of the family notion; nonetheless, it gives birth at the same time to novel problems of moral, medical, psychological, legal and social character as a consequence of the mechanization of an eminently personal, deeply sentimental and holy event.

The assisted reproduction constitutes undoubtedly one of the most spectacular **achievements** of medicine with deep social consequences. The fact of a new human's birth is greeted with particular admiration, awe and joy but the question of quality of life of himself and his family remains critical.

The continuously expanding application of assisted reproduction's medical methods in Greece as well has rendered necessary the legislator's intervention for the regulation of various legal, moral and social problems resulting from the developments in genetic technology. The artificial insemination, the surrogate maternity, the posthumously artificial insemination and the application methods of artificial insemination in single women were regulated by the Law 3089/02.

The right of reproduction, since by its very nature tends to the creation of family (in essence, it is a right for the family's creation) is unbreakably linked to its constitutional protection and the contiguous institutions of marriage, childhood and maternity, and consequently limited up to the extent that it violates these constitutionally entrenched institutions.

Each legislator may shape the content of institutions, but he always owes to safeguard the substance and therefore maintain their core. Hence, the "institutional guarantee" of article 21§1 of Constitution refers precisely to the core of institution and the elements composing its essential structure, as these have been shaped by the perennial cultural tradition and established into modern moral and legal conscience.

The article 16 of Universal Declaration of Human Rights constitutes another foundation of the reproduction's right, which guarantees the right to create a family, without however defining what does constitute a family. Besides, it is widely known how difficult it is to give a culturally neutral, universal definition of 'family'. Moreover, the foundation of the right in reproduction, the right of creating a family, presupposes the acceptance of the fact that couples without children do not constitute families, a fact which cannot be easily accepted in our societies.

A law cannot suppress the structural elements of marriage, **such** as the union of two persons of opposite sex or the precept of formal contracting. Therefore, it cannot legally approve the homosexuals' unions (even if it is realized that they aim at

the permanent and complete life society) or the marriage of two people without the active presence of state representatives.

According to this reasoning, the Law No. 3305/05 is deemed as unconstitutional because the adoption of such methods of medically assisted reproduction it violates: 1) the precept of formal contracting, through the equation of 'unconventional unions' with marriage and 2) the aim of marriage, since it disrupts the cohesion of matrimonial life society with the intervention of a third (or even fourth) person in the process of natural reproduction.

This applies not only to religious but also civil marriage as a 'human right society', i.e. as a moral, social and holy relation. At this point, the notion of sacred is not associated to 'divine' but human dignity (the sacred constitutes a self-contained human value in the area of secular morality as well), which is also infringed by the civil marriage, when i.e. the woman-spouse is transformed into an insemination device of foreign ova or accepts a foreign woman as an insemination device of her own ova.

In this case, the family's structural element is the so-called legal and marital family. In other words, the type of family which is founded by a marriage between a man and a woman and also includes their juvenile single children. Consequently, a law, which establishes a family with three or five parents or with one single parent or with an *a priori* unknown parent, is unconstitutional because it disturbs the family cohesion. And that is exactly what Laws No. 3305/05 and 3089/02 do.

The infiltration of a third person in the process of natural childbearing causes the degradation of the maternity and fatherhood notions, because it may lead to the attenuation or even contestation of the parent-child relationship or an unequal relation between the two parents and the child (since one of them will be the natural parent and the other will stand for a step-father or step-mother) or the intervention of

a bearer mother in the relation of genetic parents etc.

The in vitro insemination by its own nature separates sexual relation from reproduction, which admittedly is one of the most sensitive relation between the two sexes. Furthermore, the treatments in which third parties are involved (sperm or ova donors, 'lent uterus'), unavoidably lead to the redefinition of 'fatherhood', 'maternity' as well as the family notion itself. The concept of 'parent' lacks now its constant biological background and the legal relationship is not primarily based on the biological factor but mainly on the will of the involved parties, which affiliates the child to those who desire it, the 'social' parents, whether they are the genetic parents or not.

The cases of the so-called 'lent uterus', or better 'surrogate uterus' cause the subsequent emergence of major moral problems. These are cases where a woman medically incapable to give birth to children requests another woman to undertake the pregnancy and give birth to the child instead of her.

The therapeutic choice of surrogate uterus necessarily leads to the distinction of the word 'mother' into three different notions: the genetic mother (the one who donates the ovum), the natural mother (the one who gives birth) and the social mother (the one who raises the child).

At this point, it is expedient to examine two cases of surrogate uterus. The first is the one where a foreign woman agrees to gestate for a third couple and submits herself to insemination with the sperm of the infertile woman's spouse. In this case the surrogate mother is not only the genetic but also the natural mother of the child. The infertile woman adopts the child afterwards his birth and constitutes its social mother. Along with the evolution of the in vitro insemination methods this choice has been considerably limited since only one person of the couple is genetically associated to the child.

The second category is the one where fetuses are created by the ova and sperms of both infertile spouses with in vitro insemination – fetuses which are consequently imported into the uterus of a third woman (gestational surrogacy).

The Law No. 3089/2002 foresees the case of the surrogate uterus under certain circumstances. The woman requesting this solution must be medically incapable of gestating and under the ‘age of natural reproduction ability’. The infertile couple should get a judicial authorization before the commencement of the treatment. Both the couple and the surrogate mother must live in Greece and sign a private contract prepared by a notary. No kind of enumeration is allowed for the surrogate mother except the expenses’ coverage for treatment, gestation and childbirth. Following the childbirth, the woman who has received the aforementioned judicial authorization is recognized as the legal mother. The presumption of maternity can be contested by the gestational mother within six months from the child’s birth. If it is proved that she is also its genetic mother, then she will be recognized as the child’s legal mother with an irrevocable judicial decision.

Thus, Law No. 3089/2002 attempts to set terms and conditions about cases which most probably had been unorthodoxically occurring in the past, such as hiring a woman to have sexual intercourse with the infertile woman’s husband in order to get pregnant. In other words, the application of a prescriptive legal frame is attempted in order to ensure the rights of all parties involved. Nonetheless, the problems remain and are not only of legal nature. Social institutions, women organizations, scientific societies/organisations, the Church etc. have expressed their views on the issue favoring one side or the other.

The discourse against the assisted reproduction is manifold: the surrogate mother interferes with the couple and may constitute a disruptive element of marriage since both marital and parental relation remains fragile for a long time after the

treatment and gestation.

As far as the “bearer” mother herself is concerned, the pregnancy establishes by definition a link with the fetus, which is difficult to be broken by any judicial decision. The psychological and physical repercussions to her health have not been requisitely studied; conversely, it is possible that they have been overlooked. The temptation of an economic transaction lurks despite the explicit legal prohibition. The downgrading of altruistic offer to the level of economic enterprise (exactly the way it happens with the illegal trade of human organs) is an unpleasant but likely version which could constitute a facile field of exploitation of poor people, immigrants and refugees.

According to the international practice, the gestation’s surrogation for clearly humanitarian reasons usually occurs by the sister or mother of the infertile woman. The inter-family relations resulting from this kind of action are complex and sensitive. In this case it is crucial to protect the child’s prosperity born by a surrogate mother. In Britain, the supply of fertility treatment to any person is prohibited by Law (HFC Act, 1990), unless previously the future child’s benefit, as well as the benefit of any other existing child possibly influenced by this treatment (e.g. already born child from a previous relation), has been taken into consideration.

I wonder whether the prosperity of a child (who does not have the right of choice) is affected when he/she is separated from the ‘surrogate’ person who has had the decisive role in the evolution of its genetic material in its uterus for nine months. Is it taken into consideration the possibility the child to grow up without a mother, if the legal mother suffers from serious cardiopathy or cancer? There are no easy answers to these questions.

It is noteworthy that Law No. 3089/2002 continues, still after the enactment of the Law 3305/2005, to constitute the main statute on assisted reproduction. However,

the Law No. 3305/2005 has an important mission to play because its specialized rules concern public health and social welfare. The determination of more specialized conditions before resorting to assisted reproduction, the requirements on the foundation and operation of relevant medical units, the precise legal framework on cryopreservation procedures and research over the genetic material, the cryopreservation banks and the National Authority of Medically Assisted Reproduction, the establishment of criminal and administrative sanctions, as well as the provisions on the insurance coverage of the assisted persons, constitute regulations of critical importance which practically strengthen and guide the application of medical methods.

The differences between the Laws No. 3305/2005 and 3089/2002 are the following: 1) Section 4§1 of Law No. 3305/2005 establishes the 50th year of life as the limit age of natural reproduction for woman. 2) It is stated in the same Section that the application of assisted reproduction methods is allowed only exceptionally for juveniles. 3) Sections 7 and 8 of Law 3305/2005 regulate the treatment of genetic material the cryopreservation procedure, the material's disposal, as well as the issue of consent of the interested parties.

The above thoughts render explicit that each legislative regulation concerning the artificial reproduction should henceforth proceed in particularly difficult evaluations. Evaluations which should balance the autonomy of individuals, the guarantee of a better future for the oncoming generations and the possible dangers of causing irreparable damages by certain new reproduction techniques such as cloning or genes' selection. Evaluations that should take under consideration all moral, political, social and legal parameters of the challenge of artificial reproduction.



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