

SURROGACY

The Commoditization of Children and Women

Terminology

Surrogacy is a practice whereby a woman becomes pregnant with the intention of giving the child by agreement to someone else upon birth. It raises a number of ethical, practical and legal concerns. Surrogacy arrangements can be distinguished in a number of ways:

- So-called 'traditional surrogacy' uses the surrogate's eggs. She is therefore the genetic mother of the child. The sperm is provided either by the commissioning party or by a donor, and pregnancy comes about either by artificial insemination or by sexual intercourse.
- Gestational surrogacy is based on an agreement in which the surrogate acts as a 'service provider' by carrying a child to birth, but without using her eggs. Therefore, there is no genetic relationship between her and the child. The pregnancy comes about through an IVF procedure using egg and sperm donors, one or both of whom can be the 'commissioning couple'.

Both 'traditional' and 'gestational' surrogacy arrangements can be further categorized according to the nature of the agreement made:

- 'Altruistic' surrogacy is a broad term most commonly used to describe an agreement in which the surrogate

gives away the child upon birth and is not paid (although certain costs can be claimed).

- Commercial surrogacy is a term used to describe all agreements in which the surrogate and the 'commissioning couple' enter into a commercial contract that foresees payment for the surrogate upon delivery of the child.

In cases of surrogacy, up to six adults can claim parental rights in respect of the child:

- The providers of the egg and sperm are termed the genetic parents.
- The surrogate who carries the child is the biological mother. In most countries, if married, her husband would be automatically presumed to be the legal father.
- The commissioning couple, also called the 'intended parents', are the parties who commission the surrogate to carry the child with the intention to be legally recognized as the parents of the child. The commissioning party can be couples of opposite, or the same sex, or an individual person, depending on national laws.

Legal Overview

The legal position with regard to surrogacy differs significantly from country to country. While a small number of countries allow commercial surrogacy (including Ukraine, Panama, South Africa, and some US States), others have legalized (or otherwise permit) only non-commercial surrogacy (among them New Zealand, Australia, Israel, the UK, the Netherlands, Portugal). In many countries, surrogacy is not regulated, but often practised (Belgium, Greece, Ireland, Czech Republic, Romania, Bulgaria). Other countries (India, Nepal, Thailand) are working to tighten their laws to respond to 'reproductive tourism', i.e. foreigners using surrogacy agreements, because of growing concerns over exploitation and the mistreatment of women.

The number of surrogacy agreements is increasing and, in an internationalized world, the parties involved can be spread across different jurisdictions around the globe and are subject to different legal regimes regarding the practice of surrogacy. This leads to complicated legal situations that can easily end up in court.

Concerns

The practice of surrogacy raises a number of concerns. These include:

The commoditization of women and children

Surrogacy, whether commercial or 'altruistic', objectifies women and children. The woman becomes the object of a contract; the child is treated like a traded good or commodity. He or she becomes an object that is bought and sold on a growing surrogacy market. This undermines human dignity,¹ and infringes upon a number of internationally codified human rights including the right to be protected from sale² and ownership by another

person,³ the right to know and maintain a relationship with one's biological parents⁴ and the right to family reunification.⁵ In addition, international law prohibits financial gain and disposal of the human body⁶ and the abandonment of a child induced by payment or compensation of any kind.⁷

Any surrogacy agreement involves a succession of planned abandonments

First, there is genetic abandonment, as the child will not have the possibility to know one or both of his or her genetic parents; second, the child is abandoned by the birth mother who surrenders him or her after birth; third, the child can be abandoned by the commissioning party if he or she doesn't meet the 'standards' demanded in the contract (disability, disease). Such cases have been highlighted in the media.⁸

Surrogacy creates international legal chaos

Because of the legitimate refusal by States where surrogacy is illegal to recognize commissioning parties as legal parents, children can be exposed to statelessness. It can take time to find out information about the circumstances in which a child was brought into the world and this gives rise to a period of uncertainty for the child, and a costly burden on national legal systems.

Surrogacy places the desires of adults above the needs of children

The surrogacy process begins with one or two adults and enlists the help of lawyers, doctors, and government officials to realize their desire for a child, without due regard for the needs of that child. The adoption process – by contrast – *begins* with a child in need of a loving family and home environment in which to grow and develop.

1 Universal Declaration of Human Rights, Article 1: 'All human beings are born free and equal in dignity and rights.'

2 Convention on the Rights of the Child, Article 35: 'State Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.'

3 United Nations Slavery Convention, Article 1: 'Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are executed.'

4 Convention on the Rights of the Child, Article 9 (3): 'State Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interest.'

5 International Covenant on Civil and Political Rights, Article 17 and Convention on the Rights of the Child, Article 16: 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.'

6 Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Article 21: 'The human body and its parts shall not, as such, give rise to financial gain.'

7 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, Article 4 (4): State authorities must ensure that 'consent [to give up a child for adoption] has not been induced by payment or compensation of any kind.'

8 See for example <<http://www.dailymail.co.uk/news/article-2734374/Surrogate-mother-twins-gave-birth-disabled-girl-told-woman-intended-child-didnt-want-dribbling-cabbage.html#ixzz3DR5DbTQ>> and <<http://www.telegraph.co.uk/news/worldnews/australiaandthepacific/australia/11005285/Australian-couple-abandon-surrogate-twin-with-Downs-syndrome-but-keep-his-sister.html>>

European Jurisprudence on Surrogacy

The European Court of Human Rights (ECtHR) has handed down a series of judgments in surrogacy cases in recent years. These cases have generally involved commissioning parties from countries where surrogacy is illegal and who have made surrogacy agreements in countries where the practice is either explicitly allowed or unregulated. The cases deal with the refusal of the couples' states of origin to recognize them as legal parents when they tried to enter their countries with the child.

In the cases of *Mennesson v. France*,⁹ *Labassee v. France*,¹⁰ and *Paradiso and Campanelli v. Italy*,¹¹ the countries of residence of the commissioning parties, France and Italy, refused to recognize the effects of the surrogacy arrangements made abroad. The ECtHR approached the cases through the lens of the rights of the child, with the child's best interests being the paramount consideration.

Early decisions

In *Mennesson* and *Labassee*, the children had a genetic link to the commissioning father, but not to the mother. In both cases, the ECtHR declared the recognition of the commissioning parties as the legal parents as being in the best interest of the child. In doing so, the Court *de facto* legitimized surrogacy arrangements which were contrary to French policy.

The ECtHR took the same approach in *Foulon v. France* and *Bouvet v. France*,¹² in which a single man and a same-sex couple purchased children from a commercial surrogacy clinic in India. The Court applied the *Mennesson* decision to these two cases and ordered that the French authorities recognize the commissioning parties as legal parents.

Recent Grand Chamber decision

Paradiso and Campanelli v. Italy concerned the non-recognition of a surrogacy agreement made in Russia by an Italian couple who had no biological ties to the child. The Grand Chamber ruled that in light of the absence of any genetic link and the short duration of the relationship between the child and the couple, the Italian authorities had acted lawfully in refusing to recognize the commissioning couple as the child's parents. Importantly, the Grand Chamber concluded that States are entitled to uphold their laws prohibiting

surrogacy and stressed that 'the public interests at stake weigh heavily in the balance' and that a recognition of the foreign surrogacy agreement 'would have been tantamount to legalizing the situation created by them in breach of important rules of Italian law.'¹³

SURROGACY, WHETHER COMMERCIAL OR 'ALTRUISTIC', OBJECTIFIES WOMEN AND CHILDREN. THE WOMAN BECOMES THE OBJECT OF A CONTRACT; THE CHILD IS TREATED LIKE A TRADED GOOD OR COMMODITY.

Surrogacy in Private International Law

The Hague Conference on Private International Law, an intergovernmental institution comprising 82 Member States, is currently drafting an international convention dealing with transnational surrogacy agreements and parentage.

Any resolution, convention or other legal text should uphold human dignity by:

- Condemning any kind of surrogacy (commercial or otherwise) as a practice that violates human rights law and undermines human dignity.
- Condemning sexual exploitation of women and reproductive tourism.
- Explicitly recognizing and securing the right of a State to decline to recognize foreign judgments or claims for parentage based on surrogacy agreements.
- Making clear that such States may apply their own established adoption procedure for children in such situations.
- Calling for heavy penalties for those who facilitate this practice.

9 *Mennesson v. France*, no. 65192/11, 26 June 2014.

10 *Labassee v. France*, no. 65941/11, 26 June 2014.

11 *Paradiso and Campanelli v. Italy*, no. 25358/12, 27 January 2015.

12 *Foulon and Bouvet v. France*, nos. 9063/14, 10410/14, 21 July 2016.

13 *Paradiso and Campanelli v. Italy*, § 215.



ADF INTERNATIONAL

What You Can Do

Raise awareness

Raise awareness in your own country about the dangers of surrogacy and its impact on women and children.

Build an alliance

Develop a list of political actors, NGOs, academics, and journalists who share a critical view towards surrogacy.

Organize a hearing

Organize a hearing at your national Parliament together with Members of Parliament to inform them about the practice.

Organize an event

Organize an event or a conference on the topic. Feel free to reach out to ADF International for assistance with arguments to be presented or speakers to invite.

OFFICES



VIENNA
BRUSSELS
GENEVA
STRASBOURG
LONDON
NEW YORK
WASHINGTON DC
MEXICO CITY

ADF International is a faith-based legal advocacy organization that protects fundamental freedoms and promotes the inherent dignity of all people.

ADFinternational.org

 facebook.com/ADFinternational

 [@ADFIntl](https://twitter.com/ADFIntl)

© May 2019 ADF International.
All rights reserved.