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Ethical and Legal Issues Related to Surrogacy

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Abstract

With the latest advances of technology and in a fast-changing world how prepared are we to accept the new changes? How are we supposed to know right from wrong or separate one from the other? Does what we consider right always remains as such or in such a fast-developing society morals, values and principles do also change? We live in a world of 'living' rights and living Constitutions, where human rights are interpreted in today's settings. However, while some principles seem easy to discuss in general terms, it is just as difficult to elaborate them in concrete terms, particularly when the subject of discussion is a personal matter. Hence, people seem divided between what one would, could, or should do when the matter concerns their own rights. A particular issue that has generated many discussions in recent years is the one related to surrogacy, the ethical and legal dilemmas surrounding the subject, as well as the challenges facing surrogate and biological mothers, children born via surrogacy or families of surrogate children. The practice of surrogacy also raises human rights concerns in particular with regard to personal identity, dignity, family or legal status, as well as civil rights and obligations. Such concerns must be carefully examined paying particular importance on the rights of the children, also bearing in mind society's everchanging values. This article discusses such issues, with a special focus on the case law of the United States of America and the European Court of Human Rights.

Abbreviations: ECHR: European Convention on Human Rights; ECtHR: European Court of Human Rights.

History of Surrogacy

The history of surrogacy dates back to old times and can even be traced back as far as Biblical times [1]. It consisted in a woman using her eggs and carrying the child for another woman, by becoming impregnated though intercourse with the intended father. While this method of surrogacy is still used nowadays, with today's advancement in technology such can also be achieved through artificial insemination where a woman is artificially inseminated with intended father's sperm and carries the child to term for the intended family. Another form of surrogacy is the gestational one, a process in which an intended parent's or donor's eggs are used for the embryo transfer and fertilization.

Unofficial history claims that the first attempts to artificially inseminate a woman, were done by Henry IV (1425-1474), King of Castile. His wife gave birth to a daughter after six years of marriage launching the possibility of artificial insemination, since he was assumed impotent [2].

The first recorded experiment with artificial insemination in humans occurred in the late 1700s, when Scottish-born

surgeon John Hunter, also known as the founder of scientific surgery, impregnated a woman with her husband's sperm, resulting in a successful pregnancy [2]. In 1884 American physician William Pancoast performed a modified artificial insemination procedure when he injected sperm from a donor into a woman who was under anesthesia. The woman, who was married, gave birth to a baby nine months later and did not know that she had been impregnated with donor sperm. Her husband, whom Pancoast determined was infertile, later found out about the procedure from Pancoast [3].

In 1899 the first attempts to develop practical methods for artificial insemination were described by Ilya Ivanovich Ivanoff. Although Ivanoff studied artificial insemination in domestic farm animals, dogs, rabbits and poultry, he was the first to develop methods as we know today in human medicine. Meanwhile, the first reports on human artificial insemination originated from Guttmacher (1943), Stoughton (1948) and Kohlberg (1953a; 1953b), marking the start of a new era in assisted reproduction. Furthermore, in 1978 Steptoe and Edwards introduced in vitro fertilization Ombelet, et al. [2], Louise Joy Brown being the world's first baby to be conceived via IVF (History, 2022).

Issues and Dilemmas Surrounding Surrogacy

In latest years many issues that brought about many ethical discussions, such as p.ex. death with dignity, are no longer seen as ethically wrongdoings, at the contrary they are considered an important aspect of fundamental rights and freedoms [4]. Same can be said for surrogacy. While a barren/infertile woman was previously considered as unworthy, with today's advances in technology, she too can have her own child, surrogacy being now considered part of individual's rights in many states. Surrogate pregnancy may be an option for men or women who want to have children but are unable to do so due to different reasons, such as age, medical treatments, p.ex. chemotherapy or radiation therapy, which can cause infertility [5]. Some women might have reached a certain age where it is impossible for them to carry to terms a pregnancy, but nevertheless wish to become a parent and have a family.

Surrogacy is defined as the action of a woman (called a surrogate mother) having a baby for another woman (the intended parent) who is unable to do so herself [6]. In a surrogate pregnancy, eggs from the woman who will carry the baby or from an egg donor are fertilized with sperm from a sperm donor to make an embryo. The embryo is implanted in the uterus of the surrogate mother, who carries the baby until birth. However, such definition is considered to be quite general as it does not provide for the other form of form of surrogacy arrangement such as in vitro fertilization (also known as gestational surrogacy) [1].

The process is becoming more and more "today's norm" with some women, even though fertile and able to carry to terms a pregnancy, considering it optional to a normal pregnancy for different reasons. While at first there seems to be no issue, as each and every female enjoys a right to choose between a normal pregnancy or surrogacy, or to take part in the process as a surrogate mother, in legal terms such activity is very often of commercial nature and, as such, is regulated by general contract laws. Although it has become a widespread business generating huge amounts of money, in practice several human rights issues arise. On one side, the ones at risk are considered to be young surrogate mothers, who risk of been potential victims of exploitation in surrogacy arrangements, on the other side, children born through surrogacy, who risk of being sold and/or exploited. Some argue that surrogacy arrangements are harmful to a woman's parental rights and reproductive freedoms as a surrogate mother cannot, by simply signing a contract, waive her right to make her own decision as to whether to parent a child or whether to choose to have an abortion [7], while others view it as an excellent opportunity for women with more threats [8]. Although surrogacy contracts and the contractual conditions are based in the principle of contractual autonomy, such principle was considered not absolute. The parties could stipulate the terms of the contract to the extent that they did not violate the internal legal order of the state in which the contract was concluded or did not violate the principle of "contra bonos mores", meaning that such contracts needed to be in accordance with society's morals, otherwise they were considered void [9]. However, the exchange of money for the adoption of a child was, and still is, prohibited [10].

Since 1909 in the United States of America and the 1940s in Europe, surrogacy has raised a series of legal, moral and ethical issues and controversies, and the risks involved have also become the topic of discussions among academics, legal authorities, researchers and the general public due to the subject of the contract being a human [2], as well as the fact that the practice implicates significant human rights concerns related to family, legal status, and nationality rights, among others. As recognized in the Universal Declaration of Human Rights, human dignity is at the "foundation of freedom, justice and peace in the world." Therefore, it must also be central to discussions of surrogacy in practice, as must "the equal and inalienable rights of all members of the human family".

Hence, these potential human rights violations need to be examined in the development of regulations and laws regarding surrogacy, including within the use and application

of contract and family law [11], which require the existence of clearly defined provisions, as well as of a set of procedural legal norms in order to fully protect the relevant substantive rights at issue. Such rules serve to provide a roadmap and guidance for resolving the many difficulties encountered in the adjudication of surrogacy disputes.

However, when discussing surrogacy at the international level, it is clear that some counties and/or states have opted for the recognition of such practice and the contracts related thereto, while others expressly prohibit it [12]. Lack of unification of the legislation on surrogacy at the international level leads to further legal problems due to situations where the child is born in a country which permits use of such practice, by parents who are citizens and live in a country that prohibits it. In this regard, according to some authors, cherishing law as a symbol of culture, whatever the circumstances, will inevitably lead to intellectual rigidity and isolate us from the benefits of comparative law and of harmonization and unification of law [13]. Therefore, the legal doctrine should seek to promote and stimulate the harmonization of legislation and the development of international standards in this regard, while courts should influence the approximation of the legal systems even in countries where surrogacy is prohibited, always bearing in mind the best interest of the child and individual's right to a family life.

Surrogacy Case Law

United States of America Case Law on Surrogacy

The first judicial decision on surrogacy in the United states of America was taken in 1988 in Baby M case [14]. The case concerned a surrogacy contract entered between W.Stern and M.B. Whitehead, providing for the later to become impregnated through artificial insemination using Mr. Stern's sperm. Mrs. Whitehead would deliver the born child to the Sterns and terminate her maternal rights so that Mrs. Stern could thereafter adopt the child. Mrs. Whitehead's husband was also a party to the contract, while Mrs. Stern was not. After giving birth to the child, Mrs. Whitehead refused to hand over the child to the Sterns. Such resulted in a complaint being filed by Mr. Stern seeking enforcement of the surrogacy contract. Since the Whiteheads left the country with the baby, Florida police intervened to recover the baby.

The Sterns brought suit for the enforcement of the surrogacy contract and permanent custody of the child. The trial court held the contract was enforceable, Mrs. Whitehead's parental rights should be terminated, and permanent custody of the child should be awarded to Mr. Stern. The court reasoned, among other things, that the right to procreate by whatever means available furthered the value and interests underlying the creation of family. In the case at hand, since the child resulting from the surrogacy arrangement was biologically connected to the intended father, the later could not purchase what was already his. On appeal, the Supreme Court of New Jersey invalidated the surrogacy contract on the grounds it violated state adoption statutes and contravened public policy. The court applied family law principles and concluded that the best interests of the child would be served by awarding custody to Mr. Stern. Focusing on the best interests of the child standard, the court held a contract in which parents decided who would get custody of the child before the child's birth was against the child's best interest. With respect to other issues, the court determined the $10,000 fee paid to Mrs. Whitehead by the Sterns was not for the personal services of Mrs. Stern, but rather for the adoption of the child [1].

In re Paul [15], the surrogate mother entered into a contractual agreement with Mr. Greg T. whereby she agreed to be artificially inseminated with the semen of Greg T. so that she might conceive and give birth to his child. The contract provided for the payment of $10,000, plus expenses to the surrogate mother, upon her surrender of the custody of the child of Mr. Greg T. After the child was born, the surrogate mother petitioned the court for the adoption of her son by the natural father and his wife. The New York Family Court held that the surrogacy contract was void because it violated public policy against the acceptance of compensation in exchange for the adoption of a child. The court, relying also on the New Jersey Supreme Court's decision in In re Baby M, held that New York's adoption statutes prohibited the request, acceptance, receipt, payment or gift of "any compensation or thing of value, directly or indirectly, in connection with the placing out or adoption of a child or for assisting a parent, relative or guardian of a child in arranging for the placement of the child for the purpose of adoption" by any person other than an authorized agency, namely the Social Services. According to the court, the frequently articulated argument that "surrogate motherhood" was analogous to sperm donation in that it provided to infertile couples a means to achieve parenthood and should therefore be approved as a matter of equal protection, was not convincing. Hence, such remuneration to a mother, in exchange for her surrender of the child for adoption, violated New York's well-established policy against trafficking in children.

The California Court of appeal took a similar approach in Moschetta v. Moschetta case [16] holding that traditional surrogacy contract was unenforceable because the contract was incompatible with the parentage and adoption statutes of the state.

In Johnson v. Calver [17], the California Supreme Court held gestational surrogacy contracts did not violate the

United States Constitution, state law, or public policy. The case concerned a married couple, the Calverts, who wanted to have a child but the mother was unable to bear one due to her having undergone a hysterectomy procedure. The Calverts entered into an agreement with Mrs. Johnson, who would serve as surrogate and relinquish all parental rights to the Calverts upon the birth of the child. In return, the Calverts agreed to pay Ms. Johnson $10,000 for her services, as well as all medical and related childbearing expenses.

Since the relationship between the Calverts and Mrs. Johnson deteriorated prior to the birth of the child, both parties sought judicial declaration that they were the legal parents of the child. As such, the cases were consolidated by the court. The test results after the child was born showed that the child was biologically related to the Calverts, hence the trial court held that they were the child's "genetic, biological, and natural parents" and the surrogacy contract was legally enforceable. The Court of Appeals affirmed the trial court's decision, and the California Supreme Court followed suit, holding the Calverts were to be the child's parents at birth based on their genetic relation to the child and the original intent of the contract.

In deciding the case the Supreme Court of California was faced with the questions whether the child's 'natural mother' under state law was the genetic mother or the birth mother and whether gestational surrogacy arrangements contravened the constitutional guarantees and public policies of the state statutes. With regard to the first question, the court held that the legislation in force provided that a parent/child relationship between a child and a natural mother might be established by proof of her having given birth to the child. However, according to the court's reasoning, other legal provisions of the law in force, applicable to finding a father/child relationship, such as blood tests, could also apply in determining the existence of the mother/child relationship. Since the genetic material was provided to Mrs. Johnson by the Calverts with the intent of having a child, the court held that she who intended to bring about the birth of a child that she intended to raise as her own, is the natural mother under California law. Furthermore, the court noted that surrogacy agreements did not contravene public policy because, under the adoption statutes, payment for consent to the adoption of a child was illegal, while gestational surrogacy was very different to adoption.

In re Marriage of Buzzanca [18], Mrs. Buzzanca and her husband agreed to engage a surrogate to carry to term an implanted embryo that was genetically unrelated to either of the Buzzancas. Subsequently, the Buzzancas separated, and the husband filed for divorce and denied any responsibility for the unborn child. After the child was born, Mrs. Buzzanca filed a separate petition to establish herself as the child's mother. The surrogate who had given birth to the baby also appeared in the matter, asserting that she was not baby's lawful mother. Both actions were consolidated. After a hearing, the trial court held that the baby had no biological or lawful parents because Mrs. Buzzanca had neither contributed the egg nor given birth. Mr. Buzzanca could neither be the father, because, not having contributed the sperm, he had no biological relationship with the child. The trial court stipulated that the surrogate and her husband were also not baby's parents. The appellate court overturned the decision of the lower court, holding that the baby never would have been born had not the Buzzancas both agreed to have a fertilized egg implanted in a surrogate. The court held that the same rule which makes a husband the lawful father of a child born because of his consent to artificial insemination is also applied in such cases, the same parity of reasoning that guided our Supreme Court in the first surrogacy case, Johnson v. Calvert to both husband and wife. Just as a husband is deemed to be the lawful father of a child unrelated to him when his wife gives birth after artificial insemination, so should a husband and wife be deemed the lawful parents of a child after a surrogate bears a biologically unrelated child on their behalf. In each instance, a child is procreated because a medical procedure was initiated and consented to by intended parents.

In Baby H. case (PM, CM v TB, DB) [19], the Supreme Court of Iowa held on February 16, 2018 that surrogacy contracts were enforceable under Iowa law and did not violate public policy or the constitutional rights of the carrier or the child. The case concerned the Montovers, who agreed to pay $13,000 to the Muscatine woman, but after the child's birth she wanted to keep the child. The District Court ruled that he gestational agreement was enforceable and didn't violate Iowa public policy or the constitutional rights of the birth mother or the baby. In affirming the lower court ruling, the Iowa Supreme Court noted that Iowa's 1989 statue specifying surrogacy exceptions was written only a year after the high-profile "Baby M" case in New Jersey, where that state's supreme court invalidated a surrogacy contract. The court held that the parties entered into the surrogacy agreement voluntarily, and the gestational carrier did not allege she signed it under economic duress. Hence, baby's legal parent was the father who agreed to pay the surrogate mother for the birth of the child, and not the birth mother.

The European Court of Human Rights Case Law on Surrogacy

The European Court of Human Rights (ECtHR) has discussed surrogacy cases from the optics of article 8 of the European Convention on Human Rights (ECHR) providing for the right to private and family life, in both aspects of such article "private" and "family" life.

In Mennesson v. France [20] and Labassee v. France [21], the cases concerned the non-recognition by French authorities of the legal parent-child relationship established between them in the United States through surrogacy treatment. While the American courts had recognized parentage of the children born for both couples, the French authorities maintained that the surrogacy agreements entered into by Mr. and Mrs. Mennesson and Mr. and Mrs. Labassee were unlawful. The French authorities refused to enter the birth certificates in the French register of births, marriages and deaths and the applicants' claims were dismissed by the national courts. The ECtHR held that the right to identity was an integral part of the concept of private life and there was a direct link between the private life of children born following surrogacy treatment and the legal determination of their parentage. The Court stressed the wide margin of appreciation awarded to States in making decisions relating to surrogacy, in view of the difficult ethical issues involved and the lack of consensus on such matters in Europe. Nevertheless, that margin of appreciation was narrow when it came to parentage, which involved a key aspect of individuals' identity. The Court held that there had been no violation of Article 8 of the Convention concerning the applicants' right to respect for their family life and a violation of Article 8 of the Convention concerning the children's right to respect for their private life, as the denial by the French authorities of children's status under French law deprived them of their identity within French society.

The ECtHR held a similar approach in D v. France [22] reaffirming her standing on Mennesson v. France and Labassee v. France that the existence of a genetic link did not mean that the child's right to respect for his or her private life required the legal relationship with the intended father to be established specifically by means of the recording of the details of the foreign birth certificate. According to the ECtHR, the refusal of the request to register the details of the third applicant's Ukrainian birth certificate simply because the first applicant was the genetic mother did not amount to disproportionate interference with the child's right to respect for her private life.

D. and Others v. Belgium [23] concerned the refusal of the Belgium authorities to issue a travel document for the baby of a Belgian couple born via surrogacy in Ukraine, whith the Ukrainian authorities had issued baby's birth certificate. The applicants complained of having been obliged to return to Belgium without the baby, since their residence permit in Ukraine was about to expire, while the child was looked after by a nanny in their absence. Their complaints at the national level were dismissed by the courts. The ECtHR declared the application inadmissible as manifestly ill-founded with regard to the applicants' complaints concerning the temporary separation of them and the child, finding that the Belgian authorities had not breached the Convention in carrying out checks before allowing the child to enter Belgium and that Belgium had acted within its margin of appreciation on deciding the matter.

In Paradiso and Campanelli v. Italy [24], the Grand Chamber of ECtHR held that the authorities' removal of a child born from gestational surrogacy who had no biological ties to the intended parents was not contrary to the ECHR, hence there was no violation of Article 8 of the ECHR. The case concerned the placement in social-service care of a nine-month-old child who had been born in Russia following a gestational surrogacy contract, entered into with a Russian woman by an Italian couple who had no biological relationship with the child. Having regard to the absence of any biological tie between the child and the applicants, the short duration of their relationship with the child and the uncertainty of the ties between them from a legal perspective, and in spite of the existence of a parental project and the quality of the emotional bonds, the ECtHR held that a family life did not exist between the applicants and the child. It found, however, that the contested measures fell within the scope of the applicants' private life. The Court considered that the contested measures had pursued the legitimate aims of preventing disorder and protecting the rights and freedoms of others. On this last point, it regarded as legitimate the Italian authorities' wish to reaffirm the State's exclusive competence to recognize a legal parent-child relationship – and this solely in the case of a biological tie or lawful adoption – with a view to protecting children [25].

In Valdis Fjolnisdottir and Others v. Iceland [26], the ECtHR found no violation of Article 8 of ECHR on the part of Iceland's authorities' non-recognition of a parental link between the applicants, intended parent, and their child born in the United States through surrogacy. It held that the decision not to recognize the applicants as the child's parents had a sufficient basis in Iceland's domestic law, which provided that surrogacy was illegal, and that Iceland had acted within its discretion.

The S.H. v. Poland [27] case concerned Mr. S. and M. S.-H., the applicants, born in the United States of America via gestational surrogacy agreement. The applicants' parents had both Israeli citizenship, one of them having, in addition, a Polish one. The Superior Court of California recognized both parents as natural, joint and equal ones of the twin babies and one of them as the biological father. The Polish authorities refused the applicants' biological father application for confirmation of the applicants' Polish citizenship, holding that he applicants had failed to submit copies of their birth certificates as issued by a Polish civil registry office and that the Polish legal system did not allow for the concept of

surrogacy. The ECtHR declared the application inadmissible finding that there was no factual basis for concluding that there had been an interference with the right to respect for private and family life and that the applicants had not put forward any claims of hardship they had suffered as a result of the decisions. Although not recognized by the Polish authorities, the parent-child link was recognized in the State where the applicants resided.

However, the ECtHR seems to have recently changed its approach on the matter. In the cases D.B. and Others v. Switzerland [28] and K.K. and Others v. Denmark [29], decided respectively in November and December 2022, it found a violation of the right to respect for the private life. The first case concerned the refusal to allow the applicant K.K. to adopt the child applicants (twins) as a "stepmother" in Denmark. The twins were born to a surrogate mother in Ukraine who was paid for her service under a contract concluded with K.K. and her partner, the biological father of the children. Under Danish law, adoption was not permitted in cases where payment had been made to the person who had to consent to the adoption. The second one concerned a same-sex couple who were registered partners and had entered into a gestational surrogacy contract in the United States. The applicants complained that the Swiss authorities had refused to recognize the parent-child relationship established by a US court between the intended father and the child born through surrogacy, while had recognized the parent-child relationship between the genetic father and the child. The ECtHR held that Switzerland had not acted in the best interest of the child and had therefore overstepped its margin of appreciation.

Conclusions/Remarks

When discussion surrogacy one has to weight in not only the benefits, but also the risks involved to all parties, including the child. The issue becomes even more difficult in countries where the procedure is considered illegal, which must nevertheless legally "deal with the consequences" of the children born through such procedure. Such was the case of Baby Gummy, born with the Down syndrome through surrogacy procedures in Thailand which received international attention. The parents, an Australian couple, were accused of leaving the twin boy born, known as Baby Gammy, with his surrogate mother after they discovered he had Down syndrome. Even though they were later found not guilty by the Australian court, Thailand's parliament passed legislation in this regard, banning commercial surrogacy, which put a halt on foreign couples seeking to have children through Thai surrogate mothers [12].

While United States of America seems to have recognized individual's right to have children through surrogacy, Europe still seems to be refusing to recognize such right, with the European Court of Human Rights accepting that the matter falls under state's margin of appreciation. Such approach means that there will still be cases of "clashes" between United States of America courts' decisions and the decisions rendered by European countries, in cases of children born through surrogacy in countries that recognize the practice. Hence, the global dimension of surrogacy requires a closer cooperation between all countries involved, focusing in particular on the best interest of the child, as well as for international collaboration on the development of international principles on the matter.

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