

MATER SEMPER CERTA EST? HUMAN RIGHTS VIOLATIONS IN SURROGACY ARRANGEMENTS

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Abstract. Surrogacy is a complex and controversial practice that has sparked widespread debate across a broad ideological spectrum. Proponents argue that surrogacy can fulfill the desires of individuals and couples seeking parenthood while affirming the contractual autonomy of the surrogate mother. In contrast, detractors raise significant ethical, legal, and human rights objections. This article critically examines the primary arguments from both perspectives, with particular emphasis on the ancient legal principle *mater semper certa est* within the context of modern surrogacy arrangements. The analysis reveals that surrogacy not only undermines the principles governing parenthood, particularly maternal identity, but also raises serious physical, psychological, and legal risks to both the surrogate mother and the child. Additionally, surrogacy involves the commercialization of the mother's body and the commodification of the child. These risks, coupled with contractual conditions that are often detrimental to the welfare of the surrogate mother, render the practice fundamentally at odds with human rights principles. Ultimately, the article argues that these risks and harms are too significant to overlook and that, rather than empowering women, surrogacy exploits their vulnerability, thereby undermining women's rights and dignity.

Keywords: surrogacy; vulnerability; human rights; child commodification; commercialization of motherhood.

INTRODUCTION

On April 5, 2024, during the second Casablanca Declaration conference in Rome, Swedish journalist and left feminist Kajsa Ekis Ekman noted: "When Catholics, Protestants, feminists, and Marxists agree on something, you know it's bad" [Faust 2024]. This statement highlighted the broad consensus against surrogacy, evidenced by the Declaration's 100 signatories from 75 nationalities, advocating for a worldwide ban.¹

Surrogacy, emerging with technologies like IVF, profoundly impacts social, legal, and ethical spheres, involving a contractual agreement between

¹ Declaration of Casablanca for the Universal Abolition of Surrogacy (03.03.2023), <https://declaration-surrogacy-casablanca.org/text-of-declaration/> [accessed: 07. 29.2024].

a woman and a client, usually a couple, whereby the surrogate accepts to become pregnant through assisted reproduction, carry the pregnancy to term, and then relinquish all parental rights to the child once born.²

It is a practice that is often seen as contentious from religious or conservative viewpoints. Nevertheless, opposition to surrogacy extends beyond these circles, with many feminists also voicing strong objections. In fact, there is considerable debate among feminists about whether surrogacy represents a new reproductive freedom or simply another means of exercising social control over women's reproductive capacities. While some argue that surrogacy should be an available choice for women [Shalev 1989, 11-12], a significant number of feminists, on the other hand, view it as a form of exploitation, likening it to slavery or prostitution [Allen 2018, 782].

Contemporary feminist critiques of surrogacy are multifaceted and focus on three main areas: health risks to the surrogate mother, potential risks to the child, and the symbolic societal harm of commercializing reproduction. Additionally, there are concerns about the practical links between surrogacy and human trafficking, suggesting that surrogacy could be a gateway to the exploitation of vulnerable women [Andrews 1990, 167-69]. Notable feminist voices include Gloria Steinem and Julie Bindel, who have both criticized surrogacy vigorously. For instance, in June 2019, Steinem opposed a New York State Assembly bill that would have legalized paid surrogacy, arguing that it reduces women to "vessels for rent" while the fetuses they carry become the property of others. Similarly, Bindel denounced the surrogacy industry as reproductive prostitution: "for everyone who has the means to pursue surrogacy, including gay couples, adoption is also an option. Nobody has the right to a biological child, regardless of their sexuality or sex. The use of impoverished women's bodies for the benefit and convenience of those claiming parenthood as 'their human right' is anathema to women's liberation" [Bindel 2023].

Furthermore, in the legal realm, surrogacy is also a very divisive issue at the national and international levels, and its implications are complex and require careful examination from both human rights and family law perspectives.

² A significant majority of children born through surrogacy arrangements – estimated at 98% to 99% (Committee on Social Affairs, Health and Sustainable Development) – result from commercial surrogacy, warranting a focus on this category. Even when legally designated as altruistic, such arrangements frequently operate in a commercial context due to substantial compensation for specific expenses that can exceed the overall cost of surrogacy. Additionally, variations in the interpretation of "reasonable" compensation can lead to concealed payments that resemble commercial practices. Consequently, altruistic surrogacy frameworks often display characteristics of commercial surrogacy, thereby complicating the practical distinction between the two. See Committee on Social Affairs, Health and Sustainable Development, *Children's rights related to surrogacy*, Ms. Petra De Sutter, 14140/23.09.2016, <https://pace.coe.int/en/files/23015/html> [accessed: 07.29.2024].

1. THE COMPLEXITY OF LEGAL PARENTAGE DETERMINATION

Filiation presents one of the most intricate challenges in contemporary law, as it confronts various assumptions and paradigms. Unlike other species, human filiation is not solely biological but encompasses genetic, epigenetic, affective, cultural, and voluntary aspects, all of which must be legally recognized. For instance, Article 24(2) of the International Covenant on Civil and Political Rights (ICCPR) states, “Every child shall be registered immediately after birth and shall have a name,” thereby establishing their right to an identity through paternal filiation.³ Moreover, the Convention on the Rights of the Child (CRC), along with the Council of Europe, and the Inter-American Court of Human Rights jurisprudence evince a clear inclination towards the biological-genetic paradigm.⁴ In fact, the rule of determination by childbirth is the most “conventional” – in accordance with current interpretation of the Conventions – of all the rules of determination and is the foundational premise upon which decisions pertaining to the protection of the family are made, although modern family structures may challenge these traditional conceptualizations.

Furthermore, in cases where contemporary law presents challenges to the concept of filiation due to the disintegration of identity, judges are faced with the difficult task of determining which parent is effectively “silenced” and which one is given prominence [Basset 2016]. This phenomenon is not entirely new; the deprivation of parental authority silences a parent in their role, as does adoption, wherein an adoptive parent is legally constituted rather than biologically related. In both instances, the law prioritizes the child’s protection, stripping the biological progenitor of their associated rights without denying their biological role. Additionally, advancements in science have further complicated filiation, introducing the concept of “collaborative parenthood,” where multiple intended parents, including biological, gestational, and social parents, may contend for legal recognition. Consequently, the law or a judge’s ruling must determine which parent is removed from the identity chain and which one assumes the parental role, potentially at the expense of another.

³ International Covenant on Civil and Political Rights, United Nations General Assembly Resolution 2200A (XXI), 16 December 1966.

⁴ Although the European Court of Human Rights has addressed issues related to surrogacy – such as the child’s right to identity or nationality, and the recognition of foreign birth certificates or legal parentage in countries that prohibit such practices – it has not yet examined the establishment or recognition of legal parentage *per se* in a surrogacy case. In any event, in ruling on the aforementioned issues, it has allowed solutions that come into conflict with States’ legitimate concerns regarding its domestic law, the protection of children from human trafficking and compliance with the rules on international adoptions

In order to translate real filiation into legal filiation, the law requires multiple elements, not just the will of the parties involved. Specifically, family legal relationships are not contractual, even when formed by the mutual will of two persons, such as in acknowledged parentage. Indeed, the biological bond remains the fundamental premise upon which the legal bond is established. For instance, presumptions – such as the husband being presumed the father – align the biological link with the legal link, emphasizing that will alone is not determinative. In this context, the will is granted legal authority because it generally corresponds with biological reality.

Filiation, however, is more than just biological; it is a complex fact involving multiple dimensions that ideally coincide harmoniously for the child's benefit. This complexity requires a strong point of legal connection to ensure its positive and lasting impact on the child's life. When the unity between biological and other determinants of filiation is broken, jurists must identify the connection that offers the most substantial pre-existing and real bonds – whether genetic, biological, personal, or factual – while ensuring the most durable and effective support for the child.

Therefore, making the notion of procreative will an autonomous and sufficient cause for determining filiation is problematic. This is primarily because it shifts the focus to a contractual relationship between adults, wherein the intended parents decide the child's filiation through a contract. In this scenario, the child's rights become secondary, treated as an afterthought once the adults have exercised their procreative rights. Consequently, this approach places the adult's right to procreate above the child's best interests, which are only considered after the consummated fact. This perspective contradicts the principles that should govern filiation law, where the child's rights are paramount, shaping all rules and limiting parental will in the child's interest.

Analyzing rights through the lens of desire and contracts inherently prioritizes adult rights over those of children, thereby undermining the essential principles needed to balance the power disparity between parents and children. Consequently, this approach legitimizes adult choices without sufficient scrutiny, which may lead parents – motivated by their desire to become parents – to place the child in confusing and legally uncertain situations. Ultimately, when desire governs the law, it risks treating the child as an object of consent and contract, rather than prioritizing the child's inherent rights and best interests.

2. WHO IS THE MOTHER?

For centuries, the principle that a child's parentage is always determined by its mother has been a civil dogma, encapsulated in the Roman legal

principles: *mater semper certa est* (the mother is always certain) and *partus sequitur ventrem* (the offspring follows the womb). However, the rule that maternity is established simply by proof of birth and the identity of the newborn is losing its universality. In this context, modern science challenges jurists to determine who the mother is in complex cases, such as when a woman gives birth without intending to raise the child or when a child is conceived from a fertilized egg implanted into a different woman.

In light of these developments, the American landmark case *Johnson v. Calvert*,⁵ established three tests for determining filiation: the genetic test, the gestational test, and the intent test. Specifically, in cases where a *genetic test* is conducted, paternity is typically ascribed to the genetic parent, according to the question of who provided the genetic material. Nevertheless, in assisted human reproduction, the genetic test alone does not determine filiation, as it would otherwise render gamete donors the legal parents. The *gestational test* considers the impact of gestation on a child's identity, asking who carried and gave birth to the child. This is based on scientific evidence that shows that gestation affects the expression of genes and causes significant changes in the child, making the gestational mother an active factor in the child's identity. For example, research reveals substantial cellular exchanges between maternal and fetal blood, with fetal cells found in the brains of pregnant women [Chan, et al. 2012; Martone 2012]. This exchange, along with epigenetic changes, underscores the gestational mother's integral role in shaping the child's identity [Klonisch and Drouin 2009]. In other words, the determination of filiation by childbirth is not arbitrary; rather, it is based on a factual foundation. Therefore, the gestational test shows that every child is entitled to a relationship with their gestational mother, regardless of the circumstances of conception, including in the case of adoption.

The *intention test* establishes filiation based on the intention expressed by the intended parents, in accordance with legal formalities. At its core, the central question is: who chooses to become a parent? Importantly, this intention must be current and demonstrate factual viability. However, relying solely on the will as the determining factor contradicts the principle of proportional equality of filiations, which ultimately undermines the foundational premise of filiation law – limiting parental autonomy in determining a child's identity. By contrast, filiation by nature exists independently of an individual's will, whereas adoption represents a different paradigm where the will cannot override the natural order. Furthermore, the shift toward the will as the sole determinant of filiation creates an imbalance, allowing parents – who are already the strongest party in the legal relationship – to unilaterally decide who their child is, beyond all other considerations.

⁵ Judgment of the California Supreme Court, *Johnson v. Calvert* 5 Cal. 4th 84 (1993), <https://case-law.vlex.com/vid/johnson-v-calvert-no-892732447> [accessed: 31.07.2024].

Today, however, there is a growing recognition that no single institution has comprehensive autonomy in filiation law. Instead, all relevant factors – including genetic, gestational, and social ones – must be considered in accordance with the principle of the child's best interest in each case. When the continuity of these elements is disrupted, the judge's role becomes that of an identity seeker, tasked with identifying connections determined by factors such as genes, gestation, *de facto* relationships, intentions, and experiential filiation. Ultimately, the judge's responsibility is to discern and establish links between these elements, not to create filiation itself.

3. STRONG VOICES FOR AND AGAINST SURROGACY

Understanding surrogacy requires a comprehensive analysis of the arguments from the perspectives of the intended parents, the surrogate mother, and the children born through surrogacy. Each party has distinct views and concerns, which are crucial for a well-rounded discussion on the topic.

3.1. Arguments in favor of Surrogacy

A) Intended Parents

Surrogacy is often justified by the principle of reproductive autonomy. This principle asserts that individuals and couples should have the right to pursue reproductive options when natural conception is not possible or practical. For many, medical conditions like infertility, pregnancy complications, or high-risk pregnancies make traditional methods unfeasible. Surrogacy also offers single individuals or same-sex couples an alternative path to achieve their family-building goals. Intended parents also ground their claim for surrogacy on the principle of contractual freedom. It is argued that the surrogacy agreement can be structured in a manner that respects the wishes and rights of all parties involved, thereby supporting their reproductive goals while ensuring mutual consent and fairness.⁶

B) The Child

Supporters of surrogacy argue that it reflects the intended parents' strong commitment to raising a child. They view the careful planning involved,

⁶ Among other aspects, it is difficult to consider that in such agreement exists a fully informed consent because, among many other elements, "the surrogate cannot preemptively consent because she would have insufficient information to understand how she feels about the progression of the pregnancy, how she begins to emotionally bond with the fetus, and how her connection to the fetus may impact or change her previously held notions related to screening and diagnosis, or bearing a child with a disability" [Drabiak-Syed 2011, 560].

from choosing a surrogate to preparing for the child's arrival, as evidence of the parents' dedication and intentional approach to building a family.

c) The Surrogate Mother

Surrogacy is regarded as an empowering choice for women who voluntarily and with full knowledge of the facts opt to become involved in the process. They receive a financial compensation for their time, effort, and the medical procedures involved that can be a significant factor, providing economic support for the surrogate and her family. This reward, along with comprehensive medical care, is seen as a fair exchange for their considerable physical and emotional commitment.

3.2. Arguments Against Surrogacy

A) Intended Parents

Surrogacy agreements can be legally complex, especially in areas with unclear or restrictive laws, potentially leading to disputes over parental rights and contract terms. These legal uncertainties can hinder intended parents' ability to secure their parental rights and result in prolonged legal battles. Additionally, the significant financial costs of surrogacy, including medical expenses, legal fees, and compensation for the surrogate, can place considerable financial strain on intended parents, especially if unexpected complications arise.

B) The Child

Children born through surrogacy, particularly via IVF, face a range of significant health risks. To begin with, research reveals that only about 7% of embryos created through IVF result in live births, with many embryos being discarded or failing during thawing and transfer [Doughty 2012]. Moreover, surrogacy is linked to higher rates of premature birth and low birth weight, which often lead to immediate complications such as respiratory distress, feeding difficulties, infections, and jaundice. In the long term, these children may experience developmental delays, learning disabilities, chronic conditions like asthma, and vision or hearing problems. Low birth weight is also associated with heightened risks of neonatal mortality and future health issues, including cardiovascular disease and diabetes [Schieve, et al. 2002]. Furthermore, assisted reproductive technologies (ART), amplify the likelihood of genetic and developmental abnormalities [Pinborg, et al. 2023]. In some cases, correlated with a higher incidence of genetic mutations and imprinting disorders, potentially resulting in congenital malformations and developmental delays. Children conceived through ART are also more susceptible to developmental disorders, such as autism spectrum disorder.

In addition to these health concerns, surrogacy often complicates access to critical genetic and medical information, essential for managing health risks and making informed decisions. This absence of information can affect a child's understanding of their health and family history, further affecting the lives of future generations. Moreover, disputes between the surrogate and intended parents regarding pregnancy management decisions – such as whether to proceed with an abortion – can have direct consequences for the child.

Psychologically, children born via surrogacy may also struggle with understanding their genetic origins and identity, especially when donor gametes are involved. The separation from the surrogate and the lack of a clear genetic link to their social parents can lead to confusion and emotional distress [Golombok, et al. 2013]. Studies suggest that a lack of information about genetic background can result in adjustment difficulties and genealogical bewilderment [Chisholm 2012, 734].

From a human rights perspective, international frameworks, such as the UN Convention on the Rights of the Child (CRC), emphasize the child's right to know their parents and their identity. In fact, the UN Special Rapporteur on the Sale and Sexual Exploitation of Children highlighted in 2019 that surrogacy disrupts the connection between genetic, gestational, and social parenthood, thereby impacting the child's sense of identity [Trimmings, et al. 2024, 108].

Moreover, the process of being carried by a surrogate and subsequently raised by intended parents can affect the child's attachment and bonding [Allen 2018, 780]. Confusion over who the “real” mother is – whether it be the biological mother, the surrogate, or the intended mother – can create emotional conflict. Finally, the inherent commodification of surrogacy can have a detrimental effect on a child's sense of self-worth and identity. Being viewed as the product of a transaction may lead to feelings of being valued only for fulfilling the desires of others. Furthermore, practices such as pre-implantation genetic testing can reinforce eugenic attitudes, placing undue pressure on the child to meet certain selected traits, ultimately affecting their self-esteem and sense of belonging in society.

C) The Surrogate Mother

Surrogacy commodifies the female body by reducing it to a mere vessel for reproduction, ultimately undermining the dignity and autonomy of women. In this context, a deeply personal experience is turned into a commercial transaction. As Allen argues, “Forfeiture of the powerful bonds between mother and child through surrogacy contracts constitutes extreme alienation – it is an ‘invasion of the market’ in a deep, very private realm.” This is because the womb should not be treated as “raw material.” Furthermore, studies indicate that many women perceive themselves

as mothers to the baby they carry, regardless of genetic ties. The gestational bond, in their minds, is as significant as a genetic one [Allen 2018, 777].

Moreover, surrogates, especially those from lower socio-economic backgrounds, face substantial risks. Financial pressure frequently forces them to prioritize immediate economic needs over genuine willingness, which compromises their ability to provide informed and voluntary consent. In addition, power imbalances between surrogates and intended parents or agencies make negotiating terms or withdrawing from contracts challenging. This often leads to restrictive agreements that limit their rights and access to adequate healthcare. Particularly in international surrogacy, where wealthier clients engage with low-income surrogates, these risks become even more pronounced. Severe power imbalances, insufficient legal protections, and complex cross-border legal issues significantly heighten the chances of exploitation, reducing surrogates to instruments of reproduction with little regard for their rights or well-being.

From a health perspective, according to the Center for Bioethics and Culture, surrogacy poses significant risks to pregnant women. These include complications from multiple embryo transfers, gestational diabetes, fetal growth restriction, pre-eclampsia, and premature birth [Kamphuis, Bhattacharya, van der Veen, et al. 2014, 2]. Additionally, gestational surrogacy often involves donor eggs, which carry higher risks than using the surrogate's own eggs. Postpartum challenges, such as the inability to breastfeed, also affect the surrogate's health. In the long term, the effects of hormonal treatments and surgical procedures may result in mood disturbances, blood clots, and more severe conditions such as ovarian hyperstimulation syndrome or hormone-related cancers, all of which impact overall health and future fertility.⁷

Emotionally, surrogacy can also be highly challenging. Surrogates may face psychological distress after separating from the child they carried, especially if they develop a strong emotional bond during the pregnancy. The emotional complexity of surrogacy, including potential conflicts with the intended parents and feelings of loss, can have significant repercussions on a surrogate's mental health. Moreover, privacy concerns arise as surrogates must share personal medical and emotional information, which can lead to discomfort and feelings of intrusion.

In conclusion, surrogacy raises profound ethical, social, and health-related concerns. Taken together, these issues reveal the potential for long-term harm and prompt serious questions about the protection of women's and children's human rights.

⁷ See *Three Things You Should Know About Surrogacy*, https://cbc-network.org/wp-content/uploads/2022/02/3_Things_You_Should_Know_About_Surrogacy-Center_for_Bioethics_and_Culture.pdf [accessed: 08.01.2024].

4. SURROGACY AND HUMAN RIGHTS

The principle of human dignity underscores a crucial distinction between people and objects, emphasizing that humans possess inherent worth that cannot be reduced to mere economic value. Unlike objects, which can be priced and traded, individuals are recognized as subjects with intrinsic dignity. In this sense, people should be treated with respect and acknowledged as ends in themselves, rather than simply as means to an end. This principle forms the cornerstone of human rights frameworks, which aim to safeguard individuals' intrinsic value, irrespective of their economic or social standing. Moreover, human dignity demands that individuals be treated in ways that transcend commodification, which is particularly relevant when considering surrogacy. Despite any arguments for economic compensation, surrogacy raises profound ethical and legal issues due to its contractual nature regarding the use of the human body. In fact, validating surrogacy sets a troubling precedent, potentially opening the door to the commercialization of human organs, prostitution, or other forms of exploitation. This challenges us to consider why similar arrangements, like organ donation, should not be permitted under the same rationale. For instance, if a woman can autonomously choose to become a surrogate, the same logic would suggest she should also have the autonomy to donate organs, such as kidneys or bone marrow. Yet, while surrogacy proponents emphasize “voluntary, informed, and supportive” choices, accepting surrogacy under these terms might lead to a dangerous slippery slope, where other practices involving bodily autonomy could be similarly justified.

Historically, concerns about the commercialization and exploitation of human bodies have been met with strong resistance. This is reflected in the European Parliament resolutions of April 5, 2011, and December 17, 2015, which condemned surrogacy for undermining human dignity by commodifying women's bodies. Notably, these resolutions emphasized that surrogacy, especially when driven by financial motives, should be banned due to its association with trafficking and illegal adoption. Similarly, the Parliamentary Assembly of the Council of Europe rejected a 2016 report proposing surrogacy guidelines, reinforcing its opposition to the practice. More recently, on April 23, 2024, the European Parliament classified surrogacy exploitation as a minimum case of trafficking, comparing it to slavery and forced prostitution, highlighting the severity with which European institutions regard this practice.⁸

⁸ *Trafficking in human beings: MEPs adopt more extensive law to protect victims*, <https://www.europarl.europa.eu/news/en/press-room/20240419IPR20580/trafficking-in-human-beings-meps-adopt-more-extensive-law-to-protect-victims> [accessed: 07.29.2024].

A major objection to surrogacy is that it reduces a natural biological function – pregnancy – to a commercial contract, a view that fundamentally conflicts with the concept of personal dignity as protected by human rights. Accordingly, Article 21 of the Convention on Human Rights and Biomedicine asserts that “the human body and its parts shall not, as such, give rise to financial gain.” This clause underscores that the uterus should not be viewed merely as a biological incubator. Instead, it represents a woman’s unique ability to nurture and connect with the conceived child in an irreplaceable continuum. The intrinsic value of the human body and its natural functions goes far beyond commercial concerns, demanding respect for the natural processes involved in human reproduction.

Supporters of surrogacy often compare it to ART, which are legally accepted in many regions. However, while ART also raises legal and ethical concerns, equating it with surrogacy is misleading. Specifically, although surrogacy and heterologous reproductive technologies (HRT) both involve third parties, their roles differ significantly. In HRT, third parties contribute in a limited, one-time manner, with sperm or eggs being often fungible and interchangeable. In contrast, surrogacy requires the selection of a specific woman to carry an embryo, thus involving her in a continuous and personal commitment. Therefore, the surrogate’s role spans from embryo implantation through gestation and childbirth, with her involvement being integral and extensive. Unlike ART, where contributions are isolated and temporary, surrogacy entails ongoing physical, psychological, and emotional engagement, encompassing all associated risks and personal implications.

Moreover, surrogacy serves as a prominent example of the commercialization of motherhood by reconfiguring the reproductive process into a commercial transaction. In this context, the Note by the Secretariat in the Report of the Special Rapporteur on the Sale and Sexual Exploitation of Children highlights that the justifications for commercial surrogacy might endorse illicit practices in other domains, such as adoption. Consequently, if it were to become legally accepted – whether as international or national law, or through recognition principles – it would undermine established human rights norms and standards. Nevertheless, proponents of commercial surrogacy contend that frameworks similar to those rejected in the context of adoption should be adopted for surrogacy. They argue that surrogacy functions as a market-driven system designed primarily to meet adult demands for children, with parentage being defined through contractual agreements.⁹ However, this commodification of surrogacy raises significant

⁹ UN General Assembly, Human Rights Council, 37th session, 26 February-23 March 2018. Agenda item 3 Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, no. 27, <https://documents.un.org/doc/undoc/gen/g18/007/71/pdf/g1800771.pdf> [accessed: 10.08.2024].

concerns, including the risk of developing black markets, the exploitation of economically disadvantaged women, and the potential for selective breeding for financial gain. Indeed, the commercialization of surrogacy raises serious issues about the commodification of women's bodies, as surrogacy contracts often involve substantial financial transactions, with operating agencies deriving significant profits.¹⁰

Furthermore, surrogacy contracts reveal a significant power imbalance between the intended parents and the surrogate. Typically, key provisions require the surrogate to relinquish all parental rights to the child immediately upon birth, thereby ensuring that the intended parents become the sole legal guardians with full authority over their upbringing, education, healthcare, and other important decisions. Thus, by relinquishing her rights, the surrogate agrees not to seek custody or visitation, thereby ending her legal ties to the child. Importantly, this relinquishment is typically final and irrevocable, preventing the surrogate from changing her mind or seeking a legal relationship with the child later.¹¹ In any case, the prospect of financial consequences, combined with the lack of resources to secure independent legal counsel, may influence surrogate mothers who are reluctant to adhere to certain contractual provisions, regardless of how abusive they may be of their rights.

Another key provision is the requirement for the surrogate to waive her right to confidentiality, granting the intended parents unrestricted access to her psychological and medical information. Additionally, the surrogate must also waive her doctor-patient privilege, which allows intended parents and associated parties to review her medical records throughout the pregnancy. The contracts typically impose strict restrictions on the surrogate's intimate relations, requiring her and any partners to undergo medical screening for sexually transmitted diseases if she engages in intimate relations during the surrogacy process.¹² Furthermore, the intended parents have absolute rights to request an abortion or selective reduction of fetuses, without needing to justify these decisions to the surrogate.¹³ Moreover, in cases where the sur-

¹⁰ The global surrogacy market was valued at USD 22.4 billion in 2024 and is expected to grow at a compound annual growth rate of more than 24.5% from 2025 to 2034, <https://www.gminsights.com/industry-analysis/surrogacy-market> [accessed: 10.08.2024].

¹¹ Unlike adoption, surrogacy does not grant the gestational mother the right to keep the child she is carrying, a principle often referred to as the "right of repentance" and frequently enshrined in international law (see, for example, Article 5(5) of the European Convention on the Adoption of Children, <https://rm.coe.int/1680084823> [accessed: 07.29.2024]). The lack of symmetry or proportionality between the gestational mother's right to retain her child in adoption and the absence of such a right in surrogacy is clearly evident.

¹² See Lahl 2017. For details on the contract content, sample gestational surrogate contracts are readily available online.

¹³ "Surrogate specifically agrees to terminate prior to eighteen weeks at the election and discretion of the Intended Parents. With the exception of termination based on

rogate's life support is necessary to sustain the pregnancy, the intended parents are given the authority to make decisions about the duration of life support, prioritizing the well-being of the fetus. If the surrogate breaches the contract, she may be required to return any fees received and could be held financially responsible for the care of any child born as a result of the breach.¹⁴

The rights of children born from surrogacy arrangements are also a significant concern. The rationale for surrogacy is predicated on a hypothetical "right to filiation," which is fundamentally distinct from the "right to procreation." The latter is a natural human right encompassing the freedom to reproduce and make decisions regarding whether to have children or not. However, this right does not guarantee specific outcomes, such as the birth of a child. The concept of a "right to a child" implies an entitlement to have offspring regardless of the means by which the child is conceived or born, which results in treating children as commodities rather than respecting their inherent rights and needs. Consequently, this approach undermines the child's status as a subject of rights, reducing them to an object of adult desires. Furthermore, surrogacy agreements often reveal a primary focus on obtaining a live child, suggesting that the true object of the contract is the procurement of a live and healthy child itself rather than just the gestational services. Evidence for this assertion is found in the fact that the majority of surrogacy agreements include a clause stipulating a minimal compensation in the event of a miscarriage or stillbirth. This perspective highlights the problematic nature of treating children as commodities.

The global surrogacy market exploits economic vulnerabilities and includes elements of eugenics, with advertisements promoting children with desirable traits. Indeed, media outlets that promote clinics and agencies often include images and photographs of children, along with detailed information

gender selection, which will not be permitted, the right of the Intended Parents to request termination/abortion is absolute and does not require any explanation or justification to the Surrogate, including but not limited to if any genetic abnormality or defect has been determined such as cerebral palsy or Down syndrome." "The Intended Parents reserve the ultimate and sole legal right to selectively reduce before the completion of twenty (20) weeks of gestation [...]. The Intended Parents have the sole right to determine the number of fetuses to selectively reduce taking into consideration the recommendation of the Surrogate's treating physician [...]. The right of the Intended Parents to request a selective reduction is absolute and does not require any explanation or justification to the Surrogate" [ibid.].

¹⁴ "Surrogate understands and agrees that she will surrender any fees received, any future fees and may be liable for damages resulting from breach of this Agreement. Surrogate understands and agrees that reimbursable costs may include but not be limited to the following list of items: IVF Fees, Agency Fees, Attorney's Fees, Medications and Travel Expenses. Surrogate also understands that she may be liable for care and costs for a child born, until that child reaches the age of 18, if the child is born due to a breach of the section X (Abortion/Selective Reduction/Termination) of this agreement" [ibid.].

on prices, in their advertisements. These images and photographs often feature the children alongside the genetic and gestational mothers, with whom the clinics and agencies promise specific results and economic benefits, respectively. As Allen notes, citing Radin, “[w]hen the baby becomes a commodity, all of its personal attributes – sex, eye color, predicted IQ, predicted height, and the like – become commodified as well.’ If children are already manufactured anyway, why not manufacture them with desirable characteristics and specifications? Why not produce children who are more, not less, perfect? The ‘quality control’ aspect inevitably rears its ugly head once children are commoditized” [Allen 2018, 791].¹⁵

As Tieu explains, it is irrefutable that the child is the primary loser when surrogacy does not proceed as planned. Given the unique nature of surrogacy arrangements, disputes over custody are inevitable due to the child’s placement in an unusual family structure with multiple family groups. For instance, what happens if there is reluctance or refusal to honor the original surrogacy agreement? What recourse is available if the surrogate mother or commissioning parents no longer wish to become parents? Such complications can lead to unfavorable outcomes, including litigation and custody disputes, which are detrimental to the child’s best interests. Furthermore, surrogacy is associated with a high incidence of abortions, as intended parents may terminate the pregnancy more easily due to their lack of biological connection with the child and the surrogate mother’s relinquishment of her right to decide. In gestational surrogacy arrangements, the increased likelihood of multiple births could also lead to contractual disputes if the contracting couple intended to have only one infant [Tieu 2009, 171-72].

It can be posited that the argument against the disruption of the mother-child bond in the context of surrogacy is also applicable to instances of mothers placing their infants for adoption. The fundamental distinction is that the surrogacy is an intentional decision to relinquish a child to a commissioning couple without the child’s welfare being the paramount consideration. In contrast, adoption is a process of “rescuing” a child from difficult circumstances, and therefore, the child’s welfare is of paramount importance. In fact, the decision to place a child for adoption is never taken lightly and is fundamentally based on the principle of the child’s best interests. Ultimately, adoption is a matter of identifying the optimal outcome for the child, particularly

¹⁵ See also notes 279-81 of Allen’s article. The growing number of mobile applications exemplifies the commodification of children, with the app “Just a Baby” highlighting this trend. Its keywords – “swipe-match-connect” – and its name emphasize the objectification of children and the commercial intent behind these operations. Users can browse photos and profiles to find donors and surrogates that match their preferences, with certain characteristics commanding higher market values, such as those of Ivy League-educated donors or individuals with specific talents or appearances [ibid., 793, quoting Spar 2006, 81].

given the unfortunate circumstances, which are often irreversible. The fundamental distinction is that the surrogate mother and the commissioning parents have made a deliberate and conscious decision, prior to conception and birth, to give the child to the commissioning parents; the primary objective is not the welfare of the child but to satisfy the wishes of the intended parents. As a result, a child born from surrogacy can be expected to have the same problems as an adopted child, plus those unique to surrogacy.

CONCLUSION

The phenomenon of surrogacy, while often framed as an act of altruism and the fulfillment of parental desires, raises profound ethical and legal concerns that cannot be overlooked. For instance, the cases of high-profile individuals such as Elon Musk, Nicole Kidman, and Elton John, who have utilized surrogacy to become parents, underscore the necessity for a critical examination of this practice. Surrogacy contracts and available data indicate that participants in such arrangements are aware of their departure from established norms of parenthood, resulting in complex ambivalence regarding their parental and familial roles. This complexity is particularly evident for surrogate mothers, who endure significant psychological and physical burdens associated with pregnancy, childbirth, and the eventual relinquishment of the child. Moreover, the practice of surrogacy fundamentally fails to prioritize the child's welfare, which is often subordinated to the desires of the commissioning parents.

In this context, the Hague Conference on Private International Law has been engaged since 2015 in developing a draft international convention aimed at regulating the complexities of parentage in surrogacy arrangements, but not at abolishing the practice.

Given this backdrop, the signing of the Casablanca Declaration represents a significant and commendable step, as it advocates for the absolute prohibition of surrogacy – an action crucial for upholding the dignity of surrogate mothers and safeguarding the rights of children. Ultimately, in a society increasingly disconnected from nature and the common good, it is imperative that the law upholds the inherent dignity of all parties involved. Only an absolute ban on surrogacy would accomplish this objective.

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