
Surrogacy Contracts and International Human Rights Law

by

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Abstract. This paper analyses human rights-related concerns which arise when individuals enter into surrogacy contracts with each other. As is well known, surrogacy is a peculiar reproductive technique involving carrying and delivering a child by a surrogate mother on behalf of other intended parents. This method is forbidden in many European countries, because it could facilitate child trafficking and women's exploitation. These risks are quite evident by the reading of sample surrogacy contracts, which usually contain detailed provisions regulating rights of the intended parents and duties of the surrogate. These clauses are likely to seriously impair the dignity, life and health of the surrogate, the children and the unborn. From an international human rights perspective, these kinds of provisions affect the human rights of women and children, established by several international conventions. This article will outline human rights issues emerging during the negotiation and enforcement of surrogacy contracts, and it will describe the achievements of the international harmonization process to suggest the need for further attention to human rights-related risks involved in surrogacy.

Introduction

Surrogacy is a peculiar reproductive technique involving carrying and delivering a child by a surrogate mother on behalf of other intended parents. This method, which was known even in ancient times as a tool to grant the continuation of dynasties¹, is nowadays forbidden in many European countries². Thanks to facilitated transnational mobility, however, numerous couples living in States, which do not permit surrogacy, go abroad for the purposes of having a surrogate child, thus cir-

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¹ References to surrogacy can even be found in the Bible (see Genesis 16 and Genesis 30), as pointed out by Lagarde 2009: 512. References to peculiar reproductive techniques have been also made in relation to the dynasty of Prince Max von Baded and are known also as "Die Therapie auf Capri". See Machtan 2013: 159; Vettorel 2015: 523.

² A study of surrogacy regulations of European Union Member States was carried out in 2013 by the European Parliament. Specifically, see the Policy Department on Citizens' Rights and Constitutional Affairs of the European Parliament 2013.

cumventing European bans. Ukraine, Russia, India and California are the surrogacy destinations commonly chosen by Europeans. For example, numerous Italian couples travel to Kiev. Indeed, Ukraine as a Euro-Asiatic country is relatively close to Italy, and it offers cheap packages and services. Italian intended parents can pay only 50,000 Euros for surrogacy in Ukraine, certainly a low price relative to the \$100-150,000 of a U.S. surrogacy.

In spite of its global popularity, however, surrogacy raises serious human rights issues and leaves numerous problems unresolved (Thomale 2015). First of all, it brings the risk of treating children as commodities, as well as the risk that poor women will be exploited by the wealthy, the former being treated as modern slaves. These risks are inherent to surrogacy, and become evident when looking at certain contractual clauses and issues related to their enforcement. Secondly, surrogacy also leaves open human rights concerns regarding recognition of foreign civil status acquired abroad, to the detriment of child protection. Indeed, once a couple returns home, national authorities invoke public policy in order to not recognize the surrogated baby as the child of the intended parents. These situations have come to the attention of the European Court of Human Rights and of several European domestic courts. As of yet, such issues are not univocally resolved (Vettorel 2015)³.

As far as this analysis is concerned, however, this paper will not address this latter topic, i.e. human rights concerns arising at the recognition stage of civil status acquired abroad. Rather, it will focus on human rights issues arising during the negotiation and implementation of the surrogacy contract. To this end, the article will first outline human rights-related problems emerging in the stage of enforcement of the contract, as shown by certain domestic case-law (section 2). It will then specify human rights which could be adversely affected by surrogacy clauses (section 3), and it will describe the ongoing international harmonization efforts aimed at regulating surrogacy (section 4). The final section will highlight the final remarks and, in particular, the need for further attention to surrogacy-related risks by international legal scholars (section 5).

Human rights concerns and surrogacy contractual obligations

As mentioned above, the regulation and implementation of surrogacy agreements raises serious human rights concerns, which are clearly evident by a simple reading of surrogacy contractual provisions. Specifically, this is the case of contractual clauses which oblige the surrogate mother to deliver the baby as well as clauses which permit the intended parents to demand a specific diet or lifestyle during pregnancy or, and primarily, to compel the surrogate mother to abort or to reduce the number of fetuses, as emerged in the famous *Baby Gammy* case, concerning an intended couple from Australia, who asked the Thai surrogate mother to

³ On civil status issues related to surrogacy see Thomale 2015. On Italian issues related to the recognition of the legal status acquired abroad on the basis of a surrogacy contract see, inter alia, Feraci 2015, 2019.

abort one surrogate twin with Down's Syndrome⁴. Since the intended parents did not succeed in compelling the surrogate to abort the fetus, they refused to keep the developmentally impaired twin once he was born and abandoned him.

To date, requests to enforce obligations provided in surrogacy contracts are regulated in different ways depending on the national law applicable to the case (A. (Teun) V. M. Struycken 2012: 249-254; Cyra Akila Choudhury 2016). Some countries, such as the United Kingdom, admit surrogacy but do not enforce the obligations established therein; by contrast, in other countries some form of enforcement is at times granted, as happened to Melissa Cook, in the *MC v. CM* case⁵.

Melissa Cook ("Melissa" or "M.C.") was a surrogate mother, who entered into a surrogacy agreement and become pregnant with triplets. Since the triplets were not desired by the intended father ("C.M."), the latter asked Melissa to abort one of the fetuses. His request was based on the selective reduction clause set forth in the surrogacy contract. According to the intended father, pregnancy reduction was necessary because of his critical financial situation and alleged health problems of the fetuses. By contrast, Melissa argued that the fetuses were all healthy and rejected the intended father's request, offering to raise one of the children herself. Notwithstanding Melissa's proposal, C.M. continued to request that Melissa abort one of the fetuses. At this point, Melissa and the intended father started several lawsuits in different domestic courts; in the meantime, the three babies were born prematurely and, notwithstanding the intended father's claims, were released to his care. Indeed, the competent Californian Children's Court, with a decision then confirmed by the California Court of Appeal, granted C.M.'s petition for parental rights and terminated Melissa's parental rights.

The issue related to selective reduction is not rare in surrogacy contracts, and it has also happened that intended couples asked the courts to issue a specific performance order, i.e. an order which obliges the surrogate to perform her contractual duties as agreed in the contract assuming that money compensation is not an adequate remedy. This emerged in the case involving Helen Beasley, a gestational surrogate who contracted with a married couple and refused to selectively reduce the pregnancy when it was discovered that she was carrying twins. The intended couple sought specific performance. In light of fundamental rights considerations, the complaint was dismissed, and the twins were adopted by a third party (Jones 210: 610).

Human rights potentially affected by surrogacy contracts

The aforementioned examples highlight the tensions that could arise in implementing surrogacy contracts. Specifically, from an international human rights perspective, surrogacy could affect human rights protection provided by several international legal documents on human rights.

⁴ Permanent Bureau of The Hague Conference on Private International Law, *The Parentage/Surrogacy Project: an Updating Note*, February 2015, Annex II, p. i, available at <http://www.hcch.net> (accessed October 7, 2021).

⁵ *C.M. v. M.C.*, 7 Cal.App.5th 1188, 213 Cal. Rptr. 3d 351 (Cal. Ct. App. 2017).

First of all, the aforementioned surrogacy contractual terms can impinge the human right to be free as well as dignity of human beings. On this latter regard, it has been noted that “[s]urrogacy compromises the dignity of the child by making the child the object of a contract – a commodity. It further compromises the dignity of the mother, even if her participation is voluntary, by merely treating her as a gestational oven. The exploitive reality of surrogacy arrangements and the resulting commodification of women and children have united unusual allies” (ECLJ 2012:5). Indeed, “[r]eligious fundamentalists, the Roman Catholic Church, and feminists alike have condemned the practice of contractual surrogacy as ‘baby selling’ – one that demeans and threatens women” (Ciccarelli, Beckman 2005: 22-23). Given this, several international human rights provisions could be infringed, such as the Universal Declaration of Human Rights, which sets out in Article 1 that “all human beings are born free and equal in dignity and rights”. Similarly, the Charter of Fundamental Rights of the EU also sets out in Article 1 that “Human dignity is inviolable. It must be respected and protected”; its Article 3 then establishes that “1. Everyone has the right to respect for his or her physical and mental integrity. 2. In the fields of medicine and biology, the following must be respected in particular: (...) the free and informed consent of the person concerned, according to the procedures laid down by law, (...) the prohibition on making the human body and its parts as such a source of financial gain”. Moreover, it is worth recalling that the Convention on Human Rights and Biomedicine sets in its Article 21 that “[t]he human body and its parts shall not, as such, give rise to financial gain”.

In addition, it has been noted that surrogacy compensation schemes could lead to women’s exploitation, which put women at risk of falling into a kind of modern slavery. This concern is enshrined in the Model Law against Trafficking in Persons (“Model Law”), developed by the United Nations Office on Drugs and Crime to assist States with the implementation of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol)⁶. The commentary related to Article 8 of the aforementioned Model Law mentions the “use of women as surrogate mothers” as possible examples of “exploitation” that States may wish to consider when legislating to criminalize “trafficking”.

The adverse impact of surrogacy on human dignity and the risks of exploitation of the human body in turn jeopardize women’s reproductive freedom, which has been encompassed within human rights by way of interpretation⁷. Furthermore, surrogacy also potentially undermines the prohibition of sale of children, which is clearly stated in Article 1 of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography⁸. Specifically, Article 2 (a) of said Optional Protocol defines sale of children as “any

⁶ See the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol), signed in New York on 15 November 2000 and entered into force on 25 December 2003.

⁷ On the conceptualization of reproductive rights as human rights, see The Danish Institute for Human Rights 2014.

⁸ The text is available at <https://www.ohchr.org/> (accessed on October 7, 2021).

act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration". Moreover, Article 35 of the Convention on the Rights of the Child requires that *"States 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"*. Similarly, the 1993 Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption requires States to create safeguards to prevent the sale of or traffic in children from being used as a means of family formation. On this latter regard, it is worth noting that the Committee on the Rights of the Child stated that if not properly regulated, surrogacy can constitute sale of children⁹. In light of these considerations, any enforcement of surrogacy contracts, even in the form of monetary damages compensation, would impair protection included in said legal documents. Finally, it is worth noting that any eventual enforcement request cannot be justified on the basis of an alleged "right to a child". Indeed, although some international and regional human rights instruments protect the right to "found a family" or the right to "respect for private and family life", there is no "right to a child" under international law¹⁰. As stated also by the UN Special Rapporteur on the sale and sexual exploitation of children, in its Report of 26 February – 23 March 2018, *"[a] child is not a good or service that the State can guarantee or provide, but rather a rights-bearing human being. Hence, providing a "right to a child" would be a fundamental denial of the equal human rights of the child. The "right to a child" approach must be resisted vigorously, for it undermines the fundamental premise of children as persons with human rights"*¹¹.

Because of the aforementioned human rights concerns and political choices based on ethical values, in the majority of EU States, surrogacy is prohibited and punished by criminal law. In this realm, and in order to avoid problems that arise in surrogacy cases and depend mainly on differences in domestic legal regulation of surrogacy (or on the lack of such a domestic regulation), a growing interest for international harmonization has emerged.

International attempts towards harmonization: which protection for women, children and the unborn?

At the international level, it is the Permanent Bureau of the Hague Conference on Private International Law, which has intensely been working on this topic, together with a group of experts ("Experts"). Thus far, its documents and studies affirm the need for common solutions and provide some hints at how to prevent limping personal and family civil status conditions.

⁹ Human Rights Council 2018: 11. See also CRC/C/OPSC/USA/CO/2, para. 29; CRC/C/IND/CO/3-4, para. 57 (d); CRC/C/MEX/CO/4-5, para. 69 (b); CRC/C/OPSC/USA/CO/3-4, para. 24; and CRC/C/OPSC/ISR/CO/1, para. 28.

¹⁰ Human Rights Council 2018: 15-16.

¹¹ Human Rights Council 2018: 64.

These studies are certainly a precious contribution towards uniform solutions. However, whilst focused on the need to prevent limping situations, they fail to examine in depth matters of applicable law, in spite of these matters' apparent utmost importance. Indeed, in the absence of broader conventions, concrete law applicable to the cases is the only means to address human rights concerns arising in surrogacy contracts' enforcement.

Admittedly, most of the Experts acknowledged the importance of discussing matters other than prevention of limping situations when it comes to legal status, such as, among others, the prevention of sale and trafficking of children, the prevention of exploitation and trafficking of women, and the eligibility and suitability of the surrogate and intending parents. Nevertheless, to date, this opportunity has only been mentioned but not meaningfully acted by the Experts¹².

These crucial concerns have been addressed by Trimmings and Beaumont instead, who suggested adopting a convention on surrogacy, including, beyond rules on regulation of recognition of surrogacy arrangements and parental relationship established abroad, also substantive safeguards against trafficking in women and children and regulation of administrative authorities and private intermediaries (Trimmings, Beaumont 2001: 635)¹³. Specifically, according to them “[r]ather than focusing on traditional rules on jurisdiction and applicable law, the Convention should establish a framework for international co-operation with emphasis on the need for substantive safeguards and on procedures for courts, administrative authorities and private intermediaries” (Trimmings, Beaumont 2001: 535).

Notably, the UN Special Rapporteur encouraged the international community to develop “international principles and standards governing surrogacy arrangements in accordance with human rights norms and standards and particularly with the rights of the child [...], recognizing that there is no “right to a child” in international law”¹⁴. In particular, he highlighted the need to “[c]reate safeguards to prevent the sale of children in the context of commercial surrogacy, which should include either the prohibition of commercial surrogacy [...], or strict regulation of commercial surrogacy which ensures that the surrogate mother retains parentage and parental responsibility at birth and that all payments made to the surrogate mother are made prior to any legal or physical transfer of the child and are non-reimbursable (except in cases of fraud) and which rejects the enforceability of contractual provisions regarding parentage, parental responsibility, or restricting the rights (e.g. to health and freedom of movement) of the surrogate mother”¹⁵.

¹² See, for instance, the Report of the July 2021 meeting of Experts' Group on the Parentage / Surrogacy Project (9th meeting), and the Report of the October 2020 meeting of the Experts' Group on the Parentage / Surrogacy Project (7th meeting). Both reports are available at <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy> (accessed on October 7, 2021).

¹³ On the need for a convention on surrogacy see also Engel 2014; Boele-Woelki 2013. According to these scholars, such a co-operative convention could be modeled after the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Adoption Convention). On this topic see also Hannah Baker 2013.

¹⁴ Human Rights Council 2018: 20.

¹⁵ Human Rights Council 2018: 19.

Final remarks

The analysis has shown numerous human rights concerns emerging in the enforcement of surrogacy contracts. Indeed, surrogacy contractual clauses providing rights on the side of intended parents and duties on the side of the surrogate mother can lead to the exploitation of women, children and the unborn, impairing their fundamental right to be free and their dignity. This is particularly the case of selective reduction contractual provisions.

In light of human rights concerns surrounding surrogacy, some efforts to find harmonized solutions have been conducted by the Hague Conference on Private International Law. To date, however, these works have dealt mainly with recognition issues rather than applicable law concerns. These latter aspects should be further investigated instead, and concrete proposals should be presented, as suggested by Trimmings and Beaumont as well as by the UN Special Rapporteur.

The dialogue on this matter certainly involves political decision and could lead either to the adoption of a convention regulating surrogacy or even to a convention prohibiting this practice worldwide. Without opting for a specific political choice, which is not at the core of this paper, it is nevertheless important to foster the academic and social dialogue on this topic so that any political decision could be taken paying attention to the need to protect human rights of the most fragile people involved in surrogacy.

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