

“Surrogacy” or Pregnancy for others. A first round of opinions

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Introduction

The theme of gestation for others (GPA), more commonly known as ‘surrogacy’, is very complex. Nevertheless, the public and scientific debates do not focus much on it; when they do, this is often seen from the wrong perspective, as has recently happened in the Italian debate, which has stood out for its poverty: a simple ideological opposition between those for and against GPA.

We believe it necessary to deepen the analysis and expand the debate, since people’s lives – and women’s lives in particular – are at play. This round table is a first attempt to make a contribution in this direction, arguing more calmly and going into a number of ethical issues raised by the spread of GPA.

Therefore, taking into account a perhaps irreducible complexity, trying to throw a little light on the issue, it seemed important to start adopting the perspective of women, who are

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the protagonists of this story, clearly remaining well aware that the issue involves other subjects and raises further problems.

We start from the premise that technology now makes it possible to develop a type of GPA by artificial insemination that seems to introduce changes that could give the practice a new function, and therefore a new value. In particular, it is now also possible for the intentional mothers who have eggs to be inseminated to perpetuate their genes in the offspring. This equates to some extent the position of the woman who brings the eggs to that of the man who brings the sperm (it being understood that the conditions through which we obtain the gametes of one and the other are very different).

Although the practice of surrogacy is ancient and has developed within a homosocial culture², one wonders if the new biomedical technologies can make it overcome the original patriarchal connotations³ and allow us to read it today as a case of female empowerment. Or, conversely, one wonders whether it should be considered as a further step in the wake of patriarchy, because the equality of the intentional mother is obtained by positioning her as the father who, after yielding his genes, waits for another woman to handle pregnancy and give birth to the offspring he wants to be a parent of.

We wonder then how to make out the relationship of equality / difference with regard to the birth mother, who, once separated from the child thanks to someone else's embryo, is likely to be perceived as a mere container, destined to guard something that does not belong to her. Thus, the question arises whether the focus on genetics, typical of contemporary society, may perhaps, paradoxically, weaken the importance given to human relationships in favor of that recognized to the ownership of seeds.

The round table presented here is intended as a first approach or attempt to solicit a serene and thoughtful debate on the so called 'gestation for others' or 'surrogacy'. A practice that is spreading with considerable speed, but has not received adequate attention as regards its reasons or motive, nor its implications and effects. We believe instead that

² I.e., where social and political issues revolve only around men.

³ The GPA was pursuing the goal to transfer the patriarch's genes to the offspring, through the use of a woman other than his wife, and then raising the progeny in the father's family, excluding the birth mother.

the issue deserves to be placed at the center, so that one of the tasks we are given is to bring to light what the mainstream discourse, to different extents, conceals or misrepresents, accustomed as it is to traditional schemes and interests.

For a first approach to the issue, we chose to address only two general questions and for the occasion it was decided to interview only women, as subjects directly concerned by the practice. For the first exchange of ideas, we chose women within the European academic area, that is, from a space where the practice is evolving; we decided, however, to also add an intervention by an American scholar, that is from a space where women have been urging attention to the issue for a long time. Our interviewees were sent a track, but also an invitation to feel free to start a reflection on such terms as they considered most appropriate or interesting or incisive. We chose to give them the floor in alphabetical order, with one exception. Neither has every point, as the reader can easily notice, obtained the same attention in this occasion of debate. Since the European interviewees mainly focalized on the legal aspect, avoiding in some sense the feminist inquire, we decided to give the floor first to the two interviewees that focalized on feminism, as suggested with the first question, thus subverting the order, by following Barbara Katz Rothman's contribution, as she focused on this aspect, too. We hope that, in the next RT, this could act as a driving force for the development of this aspect of the matter. We want to underline once again that this Round Table is only meant to be the first step to a larger debate, spanning different perspectives and disciplines.

1. However, there are different opinions about surrogacy even between feminists. From your theoretical perspective, which point(s) is/are not negotiable, and which could be the basis for agreement with other perspectives?

Antonia Durán Ayago⁴ (University of Salamanca, Spain) – First, I would like to clarify that I do not consider myself to be a feminist, at least, not a militant or activist of this movement. Simply, I believe in the royal equality of sexes and act in consequence.

I am aware that in feminism there is no unanimous position about the surrogacy arrangements, which on the other hand is normal, because feminism itself is not a homogenous movement. But it is also true that, so far, the positions on gestation substitution in feminism have basically revolved around two poles: for and against it. Those against argue that women's bodies cannot be used as a commodity and hypothesize that women who choose to gestate other people's children are exploited, that people take advantage of their situation of economic weakness to achieve their objectives. The movement *No somos vasijas* <http://nosomosvasijas.eu/> represents this sector faithfully.

On the other side are those who believe that women are perfectly independent to decide whether or not to donate their ability to gestate to others who need it, emphasize the act of solidarity involving surrogacy arrangements and reject maximalist approaches imposing what women can or cannot do.

I'm with the latter sector. In Spain, the possibility is being considered of regulating this technique to primarily protect the children born as a result of it, eliminating the uncertainty of their parentage and ensuring that the pregnant woman has given her free and informed consent. A grant from the ability to gestate is being proposed, so that the contract would be free, there would be no payment but simply compensation, just like is already being done with donor eggs and sperm. ###

Anika König⁵ (Freie Universität Berlin, Germany, and Universität Luzern, Switzerland) – Empirical research shows that there are great differences between the ways in which surrogacy is performed. This depends on the country and its legal regulations, but also on

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⁵ She started working on surrogacy in 2012. She is particularly interested in the networks that link intended parents (particularly from the German-speaking region), surrogates, medical professionals, agencies, lawyers and other actors in the surrogacy business. Her research is based on the multi-sitedness of the issue of surrogacy, especially the movements of people, tissue, technologies, knowledge, and money.

the agencies, clinics, doctors and lawyers, who are involved. Finally, there is a wide range of women who decide to become surrogates – ranging from women in financial despair – often living in so-called developing countries – to those who voluntarily decide to become pregnant for others. As a result, it is difficult to make general statements about surrogacy.

However, it is certainly not negotiable that the wellbeing and rights of the surrogate mother and the child that is born through surrogacy must be protected. But even such a simple statement already poses a first problem: how do we define something like ‘wellbeing’? May the term refer to financial stability, happiness, or physical and/or mental health – just to name a few possible forms of wellbeing? And what do we understand as the ‘rights’ that are appropriate for the surrogate and the child? While especially in Euro-American cultures the right to know one’s origin is very highly valued, this is not necessarily true for other parts of the world.

In interviews I have done with surrogates in the United States, some of them said that they were fine with the fact that the child was not theirs and that they did not find it difficult to give it up after birth. What they complained about was the fact that they were often presented as oppressed and passive women without rights. They found this offensive because they were very well aware of their rights and felt empowered through surrogacy rather than disempowered. It was the public view of surrogacy, and not surrogacy itself, that made them feel disempowered because their voices were not heard and their views ignored (which, interestingly, is similar to the discussions on sex work).

Moreover, with our current terminology and concept of kinship, ties that have been created through surrogacy are still difficult to describe. So we cannot tell whether the egg donor, the gestational surrogate, or the social mother is the ‘real’ mother. Or does the child possibly have three mothers – a genetic, a gestational, and a social mother? While, from a legal point of view, in some countries the woman who gives birth to a child is regarded to be the child’s mother, in others the social mother is seen as the mother. This shows that there is no simple answer to this question. Perhaps we have to move away from traditional concepts of kinship and descent and, rather than banning family forms that are new or different, find ways to integrate them into the existing system.

Generally, it seems to me that researchers, politicians and the public spend a lot of time speaking about surrogacy and the people involved in it, but that very few of the latter are allowed to speak for themselves. If we want to learn more about surrogacy and what it means especially for the surrogate mothers and the children, we should try to include them and their opinions much more in the discussion.

Barbara Katz Rothman⁶ (University of New York, U.S.A.) – What is not negotiable for me is this: Every pregnant woman is the mother of the child in her body and must have full legal, social, cultural and political rights over her body and thus the potential child.

This means that I reject the concept of ‘surrogacy’ – in a pregnancy one is not in a ‘substitute’ or ‘replacement’ or ‘surrogate’ relationship – the woman and the baby are in an intimate physical and social relationship.

Surrogacy is based on the rejection of the primacy of relationships and rather on the assumption of the primacy of intentions, and the primacy of the genetic tie. I reject both and ask us to respect the existing intimate, physical, psychological and social relationship that is pregnancy.

Mothers feel their babies’ movement, but the relationship is yet more intimate: blood is mingled, the fluids of life are mixed. Fetal cells are in maternal circulation; maternal muscle and blood hold and nurture the forthcoming child.

Fetuses are cradled in amniotic fluid that smells of the garlic, curry, paprika, or fennel of their mother’s diet. They learn the sound of their mother’s voice and the language she speaks. At birth, newborn babies demonstrate recognition of all of that: language, smell, voice.

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Those who speak of surrogacy are able to dismiss a woman who might be standing before them, heavily pregnant, ankles swollen, belly extended, the movement of the baby within observable through her clothing, as a “gestational carrier”, while viewing the purchasers as “intended parents”. The business of ‘surrogacy’ puts enormous weight on intentionality in parenthood. No society has ever offered this as a definition of parenthood. If intentionality made parents, most people would have been orphans. Parenting is a relationship, and not an intention.

Our law has recognized that intentions and desire do not determine parenthood: In cases of adoption, no matter what the agreements decided upon before the birth of the child, the mother is the parent of the child she births. Nothing in that pregnancy relationship is changed by changing the source of the egg or the sperm. Surrogacy is a form of adoption and the rights of birth mothers must continue to apply: a woman who births a child is the birth mother of that child. Some children would not exist but for rapists, and women who have been raped most assuredly entered into the pregnancy without the desire or intention for a child. Yet we would hardly claim that such children can be removed from the mother against her will because she did not ‘intend’ her motherhood. At the time of birth, motherhood is a fact determined by the lived physical experience, and not by the intentions of the parties who began the pregnancy.

The second presumption of surrogacy is the genetic tie, the idea that a child is the product of the seed. This concept has its roots in our patriarchal history, in which men ruled as fathers. Men can and do rule over women all over the world, but in the Judeo-Islamic-Christian tradition, that rule is based on the idea that children are the product of men, planted within women. It is this that made what is called ‘biblical surrogacy’ quite palatable – Hagar and others who substituted for a ‘barren’ wife were not surrogate mothers: they were surrogate wives. They were the mothers of the children they bore, but like all mothers, had no rights over those children. The seed of Abraham was to cover the world; Daddy plants a seed in Mommy, and Mrs. John Smith bears John Smith Junior. In this tradition, women are a vulnerability men share in achieving the next generation.

It is not much more than a century since the ovum was recognized as ‘equal’ to the sperm in its genetic contribution. And now we speak of ‘three parents’, separating out the mitochondria and the nuclear contribution of the ovum, but still dismissing pregnancy, and speaking of “natural” desires for genetically related children.

In sum, accepting the primacy of genetics and intention, this is how surrogacy works: Women donate eggs because they need the money. Like the owner of a used car lot donates cars for money. Or the guy on Craig’s list who donated the couch I bought from him. Donate. That used to mean sell, but not in this context.

Those donated eggs do not make the ‘donors’ mothers of the children so produced. It’s only an egg, after all, a medical procedure a woman undergoes for money, so it doesn’t have anything to do with her motherhood.

Then this same woman who donated an egg for money needs more money so she gets pregnant with a zygote made out of someone else’s donated egg. It might be a purchased egg, so if a gay man or a woman who can’t make eggs buy an egg, they own it and it’s theirs. It’s not the egg of the seller. Excuse me, I meant donor. It belongs to the people who purchased that donated egg. So it’s theirs.

But the woman who gets pregnant with that egg, she’s not the mother of course because it’s not her egg. It belongs to... the woman who sold it? No, no, remember, that is not what makes her a mother. The purchaser! That’s the real mother. OK, all clear now?

And we all know that you can hire someone to do as much of the childcare work as you want or need to, and that won’t make her the mother. So, if someone wants to, they can purchase an egg from the person who donates it, hire that same woman to be pregnant, then hire her to raise the child for a few years. And she will have no rights over the child. That’s our new world of surrogacy. Or wait, actually – isn’t that the old one? A man could buy a woman from her father, marry her, get her pregnant and if he wanted the child, this child of his seed and intention, she had no legal rights over it. The only difference I see is that now, with our wonderful new technology and enlightened view of women, women can do the same thing that men used to be able to do.

I cannot accept a feminism that simply gives women of wealth and means all of the rights and privileges of wealthy men, including rights over the bodies of poorer and less privileged women.

Nor can I accept a world in which relationships are discounted in favor of ownership.

If we want to permit baby-selling, then we should create legislation that permits baby-selling, but that acknowledges that the woman who bears the child is the one with the right to sell, donate, or raise that child.

2. From your theoretical perspective, which point(s) is/are not negotiable, and which could be the basis for agreement with other perspectives? Although GPA is largely forbidden by national legislation, taking into account that it is in growing demand and expanding from Europe to third countries (from India to California), do you believe that the European law should proceed with its regulation and standardization? Or do you believe that European legislation already offers the tools for protection of the woman and the child, so as to contrast GPA as a normalized practice, avoiding recourse to regulation?

Pilar Benavente Moreda⁷ (Madrid Autonomy University, Spain) – The questions posed lead us to the same reality analyzed from two different perspectives. On the one hand, if surrogacy should be admitted by domestic legislation, and if so under what conditions, and should this be the case what limits are essential for its regulation. On the other hand, what position should European legislation take and if the means which it counts on are sufficient, faced with an unstoppable reality at an international level.

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In response to these matters, my personal position, upon which my answer will be based, is that it is auspicious that surrogacy is accepted and regulated, provided that it is balanced on the grounds that essential limits should be applied.

The second matter to be considered takes into account the same reality, but starting out from the undisputable and unquestionable fact that, more than just a personal opinion of being for or against surrogacy, reality and facts dictate regulation – seeing as there are already numerous births that have taken place in the last few decades using the aforementioned technique of assisted reproduction, under permissive laws (USA, Russia, India amongst others) and used by citizens of countries whose legislation prohibits or does not regulate such practices. Based on this, as I said, it is absolutely unquestionable, it is not possible to deny the evidence and not to try to give an adequate answer to the problems arising from determining the parentage of those born, considering their right to identity and its derivatives which the situation gives rise to or indeed the possible exploitation of the women who give themselves up for surrogacy services – voluntarily or involuntarily – as well as the problems of International Privacy Law due to the divergence of national laws on this issue (including the problem of international public order).

Even if the first matter can be answered, taking our own ethical, juridical or even religious convictions into account, for or against surrogacy and where appropriate, considering if it is necessary or not to establish a limit to its acceptance, regarding the second matter, the international community must give an answer, as they have been trying to do since the Hague Conference years ago, which I will refer to later on, to establish criteria which will serve as essential support to confront an unstoppable reality. The response given up until now in my opinion is insufficient.

Certainly, at a European level and through decisions made by the European Human Rights Court, answers are being given to specific situations prioritizing the superior rights of the minor to attribute effects to surrogacy cases whose contractors were nationals of countries which completely prohibited this action (ECHR Judgment 26 June 2014, case *Labassee vs. France*; 29 June 2014, case *Mennenson vs France* o 27 January 2015, case *Paradiso and Campanelli vs. Italy*), the cases of *Laboire v. France* and *Foulon v. France*

still awaiting resolution. Nevertheless, such decisions oppose those taken in the internal framework of each nation, such as the Spanish Supreme Court's ruling on 6th February 2014 and later Decision on 2nd February 2015, in which the High Court rejected the registration in the Birth Register of two minors, of Spanish parentage, born in California, resolving in a different manner the ruling taken by the European Humans Rights Court, with the understanding that such a case would weaken domestic public order as surrogacy is a forbidden practice in Spain, which implies the commercialization of pregnant women; in any event, the interests of the minors were abundantly protected by the possibility of determining the parentage of the client who gave their genetic material (ex.art. 10.2 LTRHA 2006), the spouse being able to later adopt the minors. It was understood, hence, that the circumstances were different to those established in the cases resolved by Strasbourg, in the framework of the existence of a prohibitive norm (art.10 LTRHA) but considering that Spanish legislation did not leave the minors unprotected, as their parentage could be legally determined. ###

In any case it remains evident, as the Permanent Bureau of the Hague Conference in 2015 manifested (<https://assets.hcch.net/docs/d96dd6e7««94e3-4b17-8cf8-b0342fc92f53.pdf>), that despite the decisions taken by the ECHR there are still a number of linked matters that remain unresolved, such as the evaluation of the implementation of the requisites of Article 8 of the ECHR in relation to the legal parentage of the children in the cases in which the circumstances of the case cannot be compared to those of the *Mennesson / Labassee* cases, and the response to the wider preoccupations that arise particularly in the context of surrogacy. All of which is caused by the absence of an international regulation of the subject.

As I already stated, my opinion is in favour of permissive regulation of surrogacy. This is something that obviously, at a national level, stays within the States' margin of appreciation; hence, under no circumstance should European legislature or a Union European court of justice be able to impose on a case, yet nevertheless it should safeguard the superior interests in conflict – of those born as a result of assisted reproduction and of the surrogate mothers as well as the rest of the interests concerned. If we analyse the matter

starting from the fact, already stated, that numerous children are born from this practice, we should not only answer the problem at an international level, but also reject the possibility of this practice existing at a domestic level on behalf of the member countries. It is equivalent to establishing a dividing line between those who can make use of the same practice outside their country and those who do not have access to such an option, within a country with prohibitive regulations.

On the other hand, only by regulating the matter can parameters be established within which the permissive regulation limits can be fixed and at the same time protect the interests of those involved. The recent reform operated in Portugal can serve as an example (Law 32/2006, of 26th July, of medically assisted Reproduction, by Decree 27/XIII which regulates the access to surrogacy (in force since 1st July 2016.) According to this (art. 8) surrogacy is exceptional in character and cost free in the case of the absence of a uterus, or lesions or damage to this organ that make it absolutely and completely impossible to become pregnant, or in situations that are clinically justified. Furthermore, it is limited to pregnancy in which the gametes come from at least one of the beneficiaries, the mother never being able to provide her own genetic material. Additionally, previous authorization is required from the National Counsel on Medically Assisted Reproduction, it being expressly prohibited when there exists a subordinate economical relationship between the implicated parts, either of a working nature or a loan service.

Another example is the failed art. 562 from the Draft Civil and Commercial Code of Argentina (message from the National Executive Power n. 884/2012), in which in order for a surrogacy agreement to be valid the following is required: previous consent, informed and free, of the implicated parts; juridical homologation after accrediting the attention of the superior interest of the child; full capacity and good physical and mental health condition of the mother to be; gametes provided from at least one of the contractors and the impossibility of them conceiving or carrying a pregnancy to full term; the inexistence of genetic material from the surrogate mother; absence of compensation; limitation of the number of surrogacy processes of the surrogate mother; and finally, that the surrogate mother has previously given birth to at least one child.

This is not the place to analyze each of the legal texts in which this matter is expressly regulated. However, we can state, taking as an example the cases explained above, that at least in both of them impassable limits are taken into consideration that have to do specifically with what we can call NON NEGOTIABLE ISSUES in relation to a potential regulation of surrogacy. These issues mainly concern the following:

a) The autonomy and rights of the pregnant women and their right to decide over their own body making it compatible with a project of the future life of a child which does not end with the agreement of the wishes of the parties, but affects the very process of pregnancy, without which limits on their rights and ability to decide could be implicated.

b) The necessary and non-waivable protection of those born through these techniques of assisted reproduction, acquiring the same rights as any child regardless of how they were created: nationality, social protection, determination of parentage, birth registration, amongst other matters.

c) The need for those born from these techniques to be protected and to have a unique parentage determined from their birth. The right of these minors to an identity should not be violated.

In any case, only from a serious reflection on the current state of surrogacy in Europe and the rest of the world, can these issues, which are or have to be nonnegotiable in this matter, be developed.

In order to do so, it is pertinent to approach the matter starting from the work carried out since 2010 in The Hague Conference (<https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>) in relation to the way that the Member States deal with the topic of surrogacy.

It is thus imperative to demonstrate those aspects that the Expert Group who was assigned the project on surrogacy highlighted as fundamental in the latest conclusions presented, to date, in their February 2016 report (<https://assets.hcch.net/docs/abf15fe3-18dc-4155-867b-2aaefe5016ed.pdf>). Such aspects are related fundamentally to the necessary protection of the interests of the minors born from surrogacy, due to the absence of uniform legislation in the different member countries (determining single parentage

from the beginning, nationality, cross-border problems...) and the problems derived from the absence of regulation in terms of competence or jurisdiction. These aspects are resumed subsequently, as a pending subject on the topic, on which an international consensus should exist:

a) The absence of uniform private international law rules or approaches with respect to the establishment and contestation of parentage can lead to conflicting legal statuses across borders and create significant problems for children and families, e.g. uncertain paternity or maternity, limping parental status, uncertain identity of the child, immigration problems, uncertain nationality or statelessness of the child, abandonment without maintenance. The Group recognised that common solutions are needed to address these problems.

b) Children's legal parentage is an issue of international concern and it is the gateway through which many of the obligations of adults to children flow. It is a legal status from which children derive many important rights (e.g. identity, nationality, maintenance, inheritance). It was noted that the topic of private international law rules on parentage has not been included in existing Hague Conventions so far.

c) Regarding ART and ISAs, the Group noted that a majority of States do not have specific private international law rules and, as a result, apply in such cases their general private international law rules.

d) Regarding jurisdiction, the Group noted that issues can arise in the context of legal parentage being established by or arising from: (1) birth registration; (2) voluntary acknowledgment of legal parentage; or (3) judicial proceedings. Issues can also arise in the context of the contestation of legal parentage.

e) The Group was of the view that it would be useful to have further discussions, in particular, on the feasibility of indirect jurisdiction rules.

f) The Group thought further consideration of uniform applicable law rules was needed and was of the view that it would be useful to have further discussions on the feasibility of unifying the connecting factors that States use for the purpose of determining which law to apply.

g) The Group was of the view that it would be useful to have further discussions on the feasibility of unifying the rules on the recognition of foreign public acts and judicial decisions on parentage, taking into account public policy concerns, including those stipulated in domestic law.

h) The Group noted that surrogacy arrangements are prohibited in some States, permitted in other States and unregulated in others. The Group recognised concerns at the international level regarding public policy considerations on all those involved with surrogacy arrangements, such as the uncertain legal status of children and the potential for exploitation of women, including surrogate mothers.

Antonia Durán Ayago⁸ (University of Salamanca, Spain) – We must start from the fact that, while in many European countries gestation substitution is not legalized, this does not prevent people who need to move to countries where this technique is allowed from being like fathers / mothers. When the child is born, in the country of birth s/he is registered as a child of principals, but they may have trouble when they want to enroll in the Civil Registry of the State of origin of the parents. In Spain, the General Direction of Registries and Notaries published an Instruction on October 5, 2010 in which it was allowing, under conditions, the inscription of these children born by gestation for substitution abroad in our Civil Registry. Specifically, the basic requirements are as follows: 1) the existence of a strong foreign court decision certifying the transfer parentage and 2) that there has been no infringement of the interests of the child and the rights of the pregnant woman. In particular, one will have to check that the assent of the pregnant woman has been obtained in free and voluntary form, without any error, fraud or violence and has enough natural ability. [?]

Note that in Spain the surrogacy arrangement is null and therefore intentional pregnancy affiliation derived from substitution in our system is not regulated. But reality imposed the need to provide legal certainty to the minor so that this stopgap measure was reached,

⁸ See note 3.

which of course is not the best solution, but has so far been arbitrated. An extensive treatment of the situation in Spain on this issue can be found at <http://www.millenniumdipr.com/archivos/1441706352.pdf>.

It is absolutely necessary to set common parameters globally (Hague Conference on Private International Law, which is already working on the issue <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>) and at the European level to ensure that children born through gestational substitution have their filiation determined from their birth in favour of the parents constituents. Concerning the pregnant woman, it will be necessary to guarantee that her consent is free and informed. With respect to the intending parents, it will be necessary to guarantee the fulfilment of their procreational will.

Susanne L. Goessl⁹ (University of Tulane, U.S.A.) and **Sophie Dannecker**¹⁰ (University of Bonn, Germany) – The practice of gestational surrogacy (GPA) is a very complex issue in terms of the social, economic and legal impacts it has on all the affected parties. This assertion is from a legal perspective and serves to reflect briefly on social, economic and legal impacts, assuming that a legal intervention takes into account all aspects of a human life.

Currently, German law prohibits the medical practice of GPA. Despite this and not surprisingly, the legal position does not have the effect of obliterating the practice entirely. In fact, the practice is shifted to other countries. This issue becomes especially problematic in cases where the practice occurs under critical circumstances, mainly in developing countries, which can result in infringement on the basic human rights for the people involved.

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The outsourcing of gestational surrogacy does not avoid the controversial aftermath of the practice itself; it also creates fundamental legal problems that are imported back once the intended parents wish to return to Germany with their new family member.

In the past few years several cases concerning foreign gestational surrogacy and recognition of parenthood were decided in German courts.¹¹ The legal process is not only time consuming and a financial burden, it also has a significant impact on the physiological wellbeing of the people involved. As German nationality mainly follows the principle of ‘ius sanguinis’, this can lead to a situation in which the child is denied a passport or visa and therefore not allowed to enter the German territory even though the foreign state does not allow him or her any permission to stay, either. In many cases, disputes between the German diplomatic missions in the country where the child is born and local courts can last for months and years on end.

Finally, last year the German last instance court (Bundesgerichtshof) decided that the recognition of parenthood of the intended parents does not per se violate German public policy. Nevertheless, several questions remain open. Hence the court needs to balance the rights of the different parties, which under German law would favour the intended parents and the protection of the family, following Art. 6 I GG (German Basic Law) and Art. 8 EMRK (European Convention for the Protection of Human Rights and Fundamental Freedoms), especially if the intended parents already have an established bond with the child. The gestational carrier, though [?], holds the right to parent their own child following Art. 6 (2) (1) GG, which also applies to the intended father in case he was the sperm donor of the child and the intended mother, in case she was the egg donor. The legal representative of the child can claim the protection of the best interest of the child and its personality, deriving from Art. 6 (2) GG, Art. 2 (1) GG and Art. 1 (1) GG. Additionally, the child has the right to know about his parentage from both paternal sides, according to

¹¹ Whereas due to German law if the child would have been born in Germany, the gestational mother would be the mother and if the child would be born in marriage, the husband of the gestational mother automatically holds the legal position of being the father, §§ 1591 ff. BGB (German Civil Code).

Art. 2 (1) GG, Art. 1 (1) GG, and the right to be protected from being stateless, following Art. 2 (1) GG, 1 (1) GG.

The aforementioned decision only dealt with the situation of surrogacy obtained abroad where a foreign Court decided about the question of paternity. The surrogate mother did not claim any rights to be involved, as she was not the genetic mother. On the other hand, one of the intended parents was indeed the genetic father. The corresponding *judgment of paternity* was recognized in Germany. The question remains open whether the genetic link between intended parents and child is relevant and how a case will be handled where a foreign court decision is missing.

The current legal position in Germany, prohibiting GPA under all circumstances, creates legal uncertainty, especially for the two most vulnerable individuals involved, the child and the gestational surrogate, who are exposed to the practice and are object of different interest. As seen, it does not prevent intended parents from travelling abroad and circumventing this prohibition.

The authors therefore question whether a regulation of the prohibition could instead better serve the interest of the child, redefining it from an individual who is stigmatized because begot in an “illegal” way, to a person whose rights are monitored during pregnancy and after birth.

To achieve its purpose, the regulation must provide a way that enables the protection of the basic rights involved and their adequate balance. Three main aspects must be taken into consideration in this respect: (1) the identification of the rights at stake, (2) the intensity of their derogation and (3) the vulnerability of the parties and their actual - not just theoretical - possibility to seek legal aid. These three indicators might serve as orientation for drafting the standard for a regulation and could be used as a unique scale in case the regulation is not met by the procedure of GPA being undertaken abroad.

The rights of the gestational mother are significantly affected through all aspects of pregnancy, including the act of giving the baby away afterwards. She is physically and psychologically involved, her mental and physical wellbeing is influenced by the process of pregnancy and the delivery.

Therefore, the authors propose to only allow surrogacy (or at least facilitate the recognition from surrogacy abroad) when her wellbeing is guaranteed and it has been made sure that she was not coerced or pressured into her decision to act as a surrogate mother, to deliver the child and to hand it over to the intended parents. Furthermore, there should be regulations according her the right to meet the child later or at least the possibility to be informed about his or her development.

Whereas the intended parents are certainly better off and can afford the financial burden of a trial, the gestational mother who undertook this task initially to improve her financial situation may not have the means to access legal aid when she feels that her rights are being violated. In addition, the gestational mother may not be aware of her rights and in most cases she will have signed a surrogacy contract which regulates all variables pre and post pregnancy in favour of the intended parents and the surrogacy agency.

The anticipated parents choose surrogacy as a method of extending the family when they face challenges relating to fertility, including same sex partnerships. The wish of having a child that is genetically related as a result of being a sperm or egg donor is a fundamental one, yet the question arises whether this wish of becoming a parent is a right in itself. As the use of surrogacy can easily slide into abuse of the surrogate mother and therefore a derogation of her rights as a person, surrogacy should be limited to cases where the intended parents have tried other techniques and got a medical advice on that matter or to cases where, due to a same sex partnership, a pregnancy is physically not possible. Furthermore, it should be assured that the intended parents will take full responsibility of the child and the surrogate mother even before birth, as in providing all necessary financial means to ensure medical observation during pregnancy and that they will be held responsible for the following procedure of providing a caring family and acting in the best interest of the child. Furthermore, they should also be obliged to offer the surrogate mother and the child the possibility to keep later contact (if wished).

The surrogate mother must also fulfil some preconditions to qualify as a surrogate. Besides medical qualification, the states should ensure that she has all the necessary information about legal and actual consequences of surrogacy regarding herself and the

child. For instance, she could be obliged to attend independent legal counselling, to be paid by the intended parents, during which her surrogacy contract and the legal consequences will be explained to her. Furthermore, there should be regulation on the question whether she can change her mind and keep the child as her own. This is all the more relevant in cases where she is also the genetic mother.

The child involved is also subjected to decisions that will eventually affect its personal development at a social and economic level. The best interest of the child is thereby defined by a third person and not by the child itself. His or her rights should therefore be protected, including the right to have at least two responsible parents but also the possibility to know about his or her origins and get to know the surrogate mother if he or she would like to.

Finally, the legislator should regulate whether commercial surrogacy must be prohibited or not. While it should be assured that the intended parents meet costs of the surrogate mother's pregnancy and further medical or social necessities which might result from the surrogacy, the legislator should be very careful when giving economic incentives that may start a surrogacy "trade". On the one hand, this is ethically highly problematic, at least from the German legal point of view, as respect for human dignity prohibits any objectification of the human body.¹² On the other hand, allowing commercial surrogacy may encourage poor women to become surrogate mothers as a profession and might also attract surrogacy agencies, especially in developing countries, to exploit poor women.

Therefore, we propose to only allow altruistic surrogacy and make sure that it remains the exception in human reproduction. A regulation of those exceptions should be considered to avoid abuse or exploitation. If a national legislator wants to prohibit it in his country, at least she should regulate under which circumstances the recognition of the intended parents' paternity can be possible to maintain the best interest of the child who has already been born.

¹² Prostitution is only allowed if the woman's free will is ensured in every moment of the procedure. This, on the other hand, is not possible in case of surrogacy as the surrogate mother, once pregnant, cannot change her mind easily.

Anika König¹³ (Freie Universität Berlin, Germany, and Universität Luzern, Switzerland) – Surrogacy is a practice that is not going to go away. In its traditional form it has existed for a very long time (we can find examples of this even in the Bible). And in the form of gestational surrogacy, it is in growing demand. Even when surrogacy markets, such as in India or Thailand are closed down, new clinics open in other countries and the market moves there. In my opinion, more regulation and better control will contribute to the surrogates' and children's protection, rather than bans or inadequate regulation. Especially when the practice is banned, surrogates have no ways of claiming their rights. In addition, intended parents who would like to do surrogacy in a responsible and fair way will not be able to do so. Instead, they will be forced to perform surrogacy in illegal contexts which do not provide protection to the different parties involved and make all of them unnecessarily vulnerable.

Laura Nuño Gómez¹⁴ (University of Juan Carlos Madrid, Spain) – We cannot analyse commercial surrogacy without taking into account the counter-geographies of globalization (as described by Saskia Sassen) that are extending and diversifying the forms of exploitation and appropriation of the bodies and lives of women; especially those in a situation of extreme poverty. Destitution markets that turn poverty and need into lucrative business niches. The debate on the legalization of commercial surrogacy can't be settled on the wishes of each and every one of us nor on the alleged individual liberty of the surrogates, which is not only false, but irrelevant. In a globalized context of feminization of poverty and rearmament of patriarchal neoliberalism, the ethical requirements that would guarantee the imperative autonomy of free will are not applicable. The debate needs

¹³ See note 4.

¹⁴ She writes about herself and the theme of this TR: «Mercantilization of women's body, and in this context, surrogacy, is among the research areas of the Gender Equality Observatory of URJC, which I am Director of, and I have been linked to research projects on this issue for 10 years».

She is political scientist, researcher and feminist activist. Director of the Chair of the Institute of Public Gender and Equality Observatory law at the Universidad Rey Juan Carlos and proponent of the first academic degree in Spain on Gender, she is the author of many articles and books (*El mito del varón sustentador*, Icaria Editorial, Barcelona 2010). Ever since its creation (by the law *Ley para la igualdad efectiva de mujeres y hombres*), she is member of the Consejo Estatal de Participación de la Mujer.

to take into account that, quite apart from commercial interests or personal wishes, public policies regulate the rules of civil coexistence. Legality grants legitimacy and both establish together an ethical framework that can't be defined by the "greater evil" of no regulation nor by the "lesser evil" of standardization, but rather by choosing common good. Common good must be based on the right to dignity and physical and moral integrity of each and every human being and the right of minors to have a non-commercializable guardianship. The right to be a mother or a father does not exist, as much as one might desire it to. Legalizing commercial surrogacy has serious ethical implications, like, for example, allowing anyone with a sufficient economic capacity to buy a human being, imposing on the more vulnerable women the physical and psychological effects of pregnancy and establishing a censitary citizenship where only those with sufficient economic resources can guarantee that the free market will provide them human beings on demand. Human beings cannot be sold, despite how much one might desire them, want them or want to buy them.

Cinzia Picciocchi¹⁵ (University of Trento, Italy) – As a constitutional lawyer, my perspective deals with the legal regulation of surrogacy and the protection of fundamental rights. The development of assisted reproduction techniques had a great impact on the definition of family and there are many examples of laws describing in detail who is to be considered as 'a mother' or as 'a father' and who is not to be considered as such, from the legal point of view. One well-known example in this regard is the UK law on assisted reproduction ([HFEA Act, 2008](#)), whose sec. 33 to 47 are devoted to this matter.

From an overall perspective, there is an ongoing process of dissociation between the biological and the (so to say) social perspective of what family is and, consequently, how it should be defined from the legal perspective. Definitions like 'social' or 'non-biological'

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parent, ‘gestational mother’, ‘biological’ mother or father, ‘gametes donors’ are used to illustrate this phenomenon, showing the need but also the difficulties of adopting a legal regulation and coping with the dissociation between sociological, biological and legal aspects of parenthood.

Genetic ties are becoming less relevant and ‘family’ appears to be as a group of people sharing love and affection, rather than (or at least irrespective of) biological features.

Nevertheless, surrogacy raises many questions, which go far beyond the impact of assisted reproduction techniques on parenthood and deal with the fundamental rights at stake, with regard to all the subjects involved: parents which will raise the child (the so called ‘social parents’), the possible donors of gametes (egg and sperm, if provided) and, most of all, the surrogate mother and – of course – the child.

I think that health and autonomy of the surrogate mother and the ‘best interest’ of the child raise serious concerns and that explains why many States chose to outlaw surrogacy tout court.

Many fundamental rights of the gestational mother are at stake (like, for example: health rights, custody rights, abortion decisions and so on) but I think they might be summed up in one word: self – determination, which requires that surrogacy (with all its implications) is the result of free choice. Social and financial constraints might affect individual autonomy, inducing women to become surrogate mothers under economic need. Significantly, the Thailand government decision to ban surrogacy agreements for foreign couples, limiting it to Thai citizens under certain circumstances, came after the well-known “baby Gummy scandal” and aimed, as it has been reported: «to stop Thai women’s wombs from becoming the world’s womb» (Wanlop Tankananurak, member of Thailand’s National Legislative Assembly, Reuters)¹⁶.

I think that prohibition tout court is not effective and, if women’s autonomy is at stake, a ban might be counterproductive, promoting this practice in countries where it is legal and

¹⁶ <http://www.reuters.com/article/us-thailand-surrogacy-idUSKBN0LO07820150220>

where women in vulnerable economic conditions are more likely to enter surrogacy agreements.

Surrogacy exists and it should be regulated, preventing commercial agreements, and favoring surrogacy which is based on solidarity, for example allowing only expenses reimbursement (e.g. medical and insurances costs), which should be proportional to the average income in the country where the agreement takes place.

The other fundamental right at stake is the best interest of the child. The European court of human rights has ruled that States should «to ensure that a child is not disadvantaged on account of the fact that he or she was born to a surrogate mother» and that the best interest of the child should be considered as a priority, disregarding the fact that the parents have circumvented the prohibition of surrogacy in their own country (see for example the case of [Paradiso and Campanelli v. Italy](#), ECHR, 27 January 2015, ap. n. 25358/12 – referred to the Grande Chambre on 1 June 2015 and the case of [Mennesson v. France](#), ap.n. 65192/11 [Labassee v. France](#), Application n. 65941/11, ECHR 26 June 2014). Courts should take into consideration, for example, the circumstance in which parents seeking surrogacy have been deemed “unfit” for adoption.

Provided that the fundamental rights of these subjects are taken into consideration and protected, law should regulate the relation between gestational mother and the (same-sex or opposite-sex) couple, with regard to the aspects like, for example, abortion and the consequences in case the surrogate mother changes her mind and wants custody of the child. These were some of the most controversial issues raised in custody battles between couples and surrogate mothers.

Again, the adoption of legislation only at regional level (European for example) would be ineffective, as people would bypass State prohibitions simply going abroad, thus disregarding laws providing for the protection of the fundamental rights at stake.

I think that international agreement is crucial to regulate a global phenomenon like surrogacy and that an international treaty is needed.

Judit Zeller¹⁷ (University of Pécs, Hungary) – Notwithstanding all ethical, psychological and legal ambivalence, surrogacy has fought its way through in many legal systems by now. GPA is a highly complex issue, embracing questions that go from the nature of parenthood, through bodily integrity to freedom of contract. Considering the above, I would only like to highlight a few moments that may be worth further reflection.

However questionable, at the end of the day GPA can indeed contribute to female empowerment and equality, for the following reasons: 1. Surrogacy helps to reduce female infertility and the social stigma attached to this condition. Through GPA, women who are not able or not willing¹⁸ to carry a pregnancy to term or give birth, have the possibility – just like their male counterparts – to have a genetic offspring. In the process of natural conception women have a double role: providing gametes and providing the necessary environment for the embryo to develop into a baby. This also means a double chance to be considered as infertile: in the case of not being able to provide eggs and not being able to provide the “appropriate” womb to bring the pregnancy to term. Surrogacy may reconstruct this double requirement towards women. 2. Considering the other party of the surrogate agreement, women have the opportunity to make economic use of their unique physical capacity of bringing children into the world, or use this capacity to evolve their altruism towards other women. If men seek advantage of their physical capacity at work, why shouldn't women do this as well?

Speaking of commercial surrogacy, however, inevitably leads us to the possibility of exploitation of disadvantaged women, where the anti-essentialist perspective has to be taken seriously. Reproductive tourism is a common phenomenon and the motives are not always and not only rigid legal provisions. Surrogacy is usually cheaper in developing

¹⁷ She is graduated from the University of Pécs (Hungary) with a degree in law and psychology and holds a PhD in law. She is currently working as an assistant professor at the Department of Constitutional Law of the University of Pécs. Her research focuses on challenges of human rights in the 21st century, especially in the field of health care and medical research. Parallel to her academic career, she is also active in the NGO sector as an expert on human rights of vulnerable groups. She has work experience as a legal officer from the Office of the Commissioner for Fundamental Rights, where she engaged in the children's rights project and later in torture prevention.

¹⁸ Although it has to be mentioned that women who are not willing to bring a pregnancy to term because of the fear of their postpartum body image are certainly victims of the pressure exercised by homosocial culture.

countries, for intended parents from Western Europe or USA even in Eastern European countries, indicating that huge differences exist in the measure of compensation of surrogate mothers. This is a phenomenon that should definitely be tackled – even if it is questionable how realistic this fight against inequality might be.

Many countries choose to adopt the altruistic surrogacy model to avoid the abovementioned exploitation of the disadvantaged. At first glance, altruistic surrogacy also guarantees that GPA is not considered a modern form of slavery, or – as some indicate – a certain form of prostitution. In my opinion, however, this is an excessively optimistic attitude, not counting on possible illegal payments made to the surrogate mother outside the contract. The exclusivity of altruistic surrogacy may develop a certain “grey zone” of surrogacy agreements. This might blur relationships leading to an even greater exploitation of the disadvantaged, as their claim for compensation is not even in the contract, therefore not enforceable in court.

Turning to a rights-based approach, a non-negotiable point is – besides the awareness of the best interest of the child, which, I think, is obvious – the equal access to surrogacy. If legally allowed, surrogacy shall be accessible to couples – irrespective of their sexual orientation – and to singles on an equal basis.¹⁹ The regulation should provide just conditions to everyone and be consistent with the provisions concerning other assisted reproductive techniques as well as those of adoption (e.g. if singles are allowed to adopt, they should be allowed to take part in surrogacy arrangements as intended parents).

Equality should come forward in establishing legal parenthood as well. Although I have argued for surrogacy being a means for equality per se, when addressing the regulatory framework, we might see that women are still in a less favourable position than men if they intend to establish their legal status as a mother. Although some experts have already urged for a change, legal systems are still based on the ancient Roman principle of *mater semper certa est*. Following this principle means that the intended mother is not entitled to

¹⁹ Current UK regulation, for example, makes it harder for lesbian couples to establish their legal parenthood in the case of surrogacy combined with egg donation, as it requires at least one of the partners to be a genetic parent.

challenge the motherhood of the surrogate mother. Bearing the importance of human relationships in mind, I think this is the point where the equality principle should kick in, transforming maternity into a rebuttable presumption instead of basing motherhood on the fact of giving birth.