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Surrogacy, Ethics and International Law: Guaranteeing the Rights of the Child

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Abstract

Surrogacy has created opportunities for individuals and couples facing infertility problems, but it has also raised important ethical and legal dilemmas, particularly regarding the rights of children born through this process. This paper aims to examine the impact of surrogacy on the legal rights of children and the ethical issues arising from this practice. This paper uses comparative and legal analysis methods to examine the various international legislations that regulate surrogacy practices and the protection of the rights of children born through this process. The results show that although some countries have developed a legal framework to protect the rights of children born through surrogacy, some other countries still do not have adequate legal protection for these children, creating space for abuses and legal ambiguity. The results show that there is considerable

inconsistency between different state approaches, while some countries have developed a clear legal framework that ensures full protection of the rights of children born through surrogacy, including the right to know their biological origin, to have a legal identity and protection from any form of abuse. Other countries either do not allow this practice or regulate it with restrictions, creating legal loopholes. In conclusion, this study argues that it is essential to take concrete steps towards unifying and improving the legal framework governing surrogacy. A special focus should be devoted to guaranteeing the child's right to know his or her identity and to have a clear legal status. Such an approach requires international cooperation and the establishment of common ethical standards, ensuring that the best interests of the child remain at the center of any policy or practice.

Keywords: Surrogacy, Children's Rights, Ethics, International Legislation, Legal Protection

1. Introduction

Surrogacy, as a form of assisted reproduction, has received widespread global attention over the past few decades as a solution for individuals and couples facing infertility or medical conditions that prevent pregnancy. It involves a woman, a surrogate mother, who agrees to carry a child on behalf of another person or couple, usually based on a legal or informal agreement. Although surrogacy represents a significant development in medicine and family formation, it raises complex ethical and legal challenges, especially regarding the rights and legal status of the child born through this process. Previous research has focused primarily on the legal status of surrogacy arrangements, the rights of parents seeking this form of reproduction, and the protection of the surrogate mother. This study builds on existing literature by shifting the focus to the rights of children born through surrogacy in order to address the gaps in legal and ethical protection they face, aiming to create a bridge between legal theory and practice at a time when international surrogacy is growing significantly. The main objectives of this study are:

- To examine the ethical and legal challenges related to the rights of children born through surrogacy;
- To compare the national and international legal frameworks that regulate surrogacy and child protection;
- To identify gaps in current legal protection and propose possible approaches for a harmonized international regulation.

By surrogacy we mean that a woman voluntarily carries in her womb until the end of pregnancy a fetus produced through in vitro fertilization techniques and who, before the start of pregnancy, has undertaken to deliver the newborn to the surrogate's parents. Two types of surrogacy can be described: The solidary or (oblationary) one which is free of charge except for the reimbursement of medical expenses and is based on an emotional or social bond between the pregnant woman and the couple

who is responsible for the child to whom it will be given at birth, as well as commercial surrogacy which involves a real payment for the service provided, including the reimbursement of direct health-related expenses.

From a bioethical point of view, surrogate motherhood can be considered morally acceptable based on numerous arguments, where the first theoretical assumption in favor of surrogate motherhood is the presumption in favor of freedom, which can be based on the classic formulation by J.S. Mill: The only aspect of one's behavior for which one is responsible to society is that which has to do with others, as far as he is concerned his independence is absolute, over himself, his mind, and his body. Also a second argument in favor of the practice has to do with the intrinsic morality of the availability of pregnancy for others, which cherishes those values of solidarity which inspire and bind human coexistence (Veronezi, 2017) [7]. From a personal perspective, I can say that surrogacy represents one of those areas where the boundary between individual freedom, ethics and justice becomes delicate. The idea that a woman with full awareness and free will offers her body to help someone else become a parent is an act of altruism and human solidarity, but if we discuss commercial surrogacy, ethical concerns increase as the risk of reducing the woman's body to a 'means of production' and the child to a 'product' that can be ordered and paid for is present. In a society where poverty and lack of economic alternatives are real, it is difficult to talk about free choice without running the risk of exploiting vulnerable women.

2. Materials and Methods

This study was conducted using theoretical legal analysis to examine the impact of surrogacy on children's rights and the challenges associated with this practice. The methodology was based on various sources of international law, bioethical literature and judicial practice. The materials used in this study include:

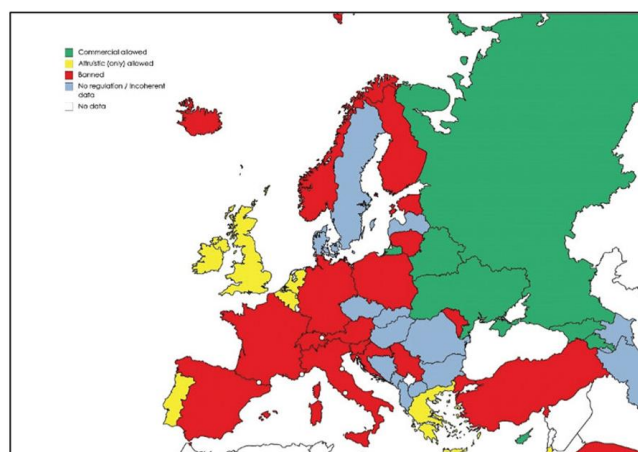
1. International legislation such as the Convention on the Rights of the Child, the European Convention on Human Rights;
2. Legislation of various countries such as Italy, Israel, England, USA.
3. Legal doctrine in the field of family law, children's rights and bioethics;
4. Court cases that have influenced the development of the practice and interpretation of the rights of a child born through surrogacy.

Ethical and legal material has been addressed to draw conclusions about existing gaps in the protection of children born through surrogacy and to propose possibilities for improving legal regulation in accordance with international human rights standards.

3. The ethical and medical aspect of surrogacy

Assisted reproductive technologies were initially considered only as a life-saving treatment that could be applied between couples. Later, the concept of surrogacy was introduced, where a woman could become pregnant for another woman by carrying the baby in her womb and then handing it over to the intended parent after birth. In opposing views such as the Catholic Church which considered surrogacy as "prostitution" where women sell their wombs and give up control of their bodies. Furthermore, women in poor areas

use surrogacy to fulfill the reproductive needs of women who are infertile or delay their reproduction for career reasons. In this case, monetary need is a factor for women to become pregnant and allow their bodies to be used for money and to face any subsequent pain (Terzioglu, 2004). Even though a surrogate mother is free and conscious, there is always the possibility that she will regret carrying and giving birth to a child that does not belong to her, since in the psychodynamic aspect after birth, the separation of a surrogate mother from the newborn has a bad consequence. In some cases, the surrogate mother may feel emotionally attached to the child both during the pregnancy and afterwards, leading her to decide not to give up the child. Therefore, it is important to provide psychological support to the mother during the pregnancy process. Although surrogacy is legal in many countries, in some others it is in conflict with religious rules, for example in Israel, surrogate mothers perform this task by considering the birth of a child as a divine duty, since Islamic law considers the involvement of a third person in the marital relationship between spouses to be adultery (*Ibidem*). In medical terms, the doctor plays an important role in providing medical assistance to infertile couples, by performing a series of examinations, both physical and psychological. The medical confidentiality relationship between the doctor and the patient in what the doctor allows to be given as information.



Source: Revista brasileira de ginecologia e obstetrícia: Revista da Federação Brasileira das Sociedades de Ginecologia e Obstetrícia

Fig 1:

The map shows how some countries in the world allow surrogacy and regulate it by law for all parties, both the surrogate mother and the intended parents and the child. Countries such as the USA, Canada and some EU countries have created a legal framework that regulates surrogacy. For example, in the USA, states such as California allow commercial surrogacy, while in Canada altruistic surrogacy is allowed, where surrogates cannot be paid for the services provided, but the necessary expenses are covered. In the EU, countries such as Denmark and Belgium allow surrogacy, but often with restrictions that protect the rights of the surrogate mother. On the other hand, there are countries that strictly prohibit surrogacy, this as a consequence of the influence of religious and cultural factors. France and Italy have banned surrogacy, seeing it as a practice dominated by social dynamics and the traditional family, while Middle Eastern countries prohibit surrogacy for religious reasons as many religions believe that this form of reproduction is

against the nature of human creation.

4. The rights of children born through surrogacy

In recent years, the issue of the rights of children born through surrogacy has been at the center of political and legal debate in many countries, including Italy. One of the most significant decisions on this topic was that of the Court of Cassation, which in a decision dealt with a delicate case where a child born outside Italy through surrogacy was not legally recognized as the child of an Italian couple. The court has upheld the decision that, although surrogacy in Italy is prohibited, this should not lead to a denial of the child's fundamental rights. Instead of direct recognition of paternity by the partner who has no biological relationship with the child, the Court has suggested an alternative solution, that of adoption in special cases. This type of adoption allows the child to have a legal relationship and full protection from the person who has participated in his or her upbringing and development, even though he or she is not the biological parent, emphasizing that this is in accordance with the best interests of the child, a key principle in international human rights law (Gioia, 2022). I think this decision was a landmark in the treatment of children born through surrogacy, trying to balance respect for national legal norms with the commitment to protect the rights of the child by placing his or her interests at the center of any legal decision. One of the main concerns today is the violation of the dignity of children born through surrogacy, with some critics of this practice arguing that surrogacy can be transformed into a simple commercial transaction, where the child is considered a product that can be bought and sold.

This opinion conflicts with the principles that support children's rights at the international level, where children are not the property of individuals but beings with dignity and indisputable rights. The Convention on the Rights of the Child (CRC), adopted by the United Nations, emphasizes this principle by declaring that the rights of children must be respected and protected in all circumstances. Likewise, the right of the child to know his biological origin is a fundamental aspect of the identity of an individual. When a child is born through surrogacy, it is often difficult to maintain a connection with the mother who carried and gave birth to him or her, and this lack of biological connection can create uncertainty and confusion for the child, affecting his or her emotional and psychological development. In many cases, surrogacy practices involve certain legal agreements that may circumvent the child's rights to know his or her origins, and this problem is present in some countries where biological data may be kept hidden from the parents who have requested surrogacy, including information about the mother who gave birth to the child (Bianchini, 2021) ^[1].

Children born through surrogacy enjoy the same rights as any other child, the right to know and be cared for by their biological parents, the right to a clear identity and protection from any form of exploitation. However, if we refer to British legislation, it often places the interests of adults, especially the prospective parents, above the best interests of the child. An example of this is that the legal parents of a child born through surrogacy can only be recognized after a paternity order is issued, a procedure that occurs after the birth and creates legal uncertainty about the child's status. Children should have the opportunity to participate,

according to their age and development, in decisions related to their life and identity. Also, the lack of institutional support for children and families created through surrogacy, where the state should provide counseling services for all members involved, especially for children (Wade, 2017) ^[8]. One of the key documents that protects children's rights as it is CHIP (Child's Rights in Surrogacy -Child identity Protection), emphasizes that children born through surrogacy have the same rights as any other child, based on the United Nations Convention on the Rights of the Child (UNCRC) and its additional protocols. However, the practice of surrogacy, especially international surrogacy, has raised concerns regarding the protection of these rights in cases such as birth registration or citizenship. CHIP has contributed to the drafting of legislation on surrogacy by providing input aimed at strengthening children's right to identity and preventing the sale of children, including recommendations for improving the civil registration system by ensuring that information on the identity of children born through surrogacy is preserved and made available. An important aspect is the involvement of children in decision-making processes that affect their lives, as is the project "Children's voices in Surrogacy Law" who has collected and analyzed children's opinions regarding surrogacy law reform (Protection, 2023).

According to Article 7 of the Convention on the Rights of the Child (CRC) it is emphasized that "every child has the right to be registered after birth and to have a name and the right to a nationality", where this article is fundamental for the protection of children as it provides them with a necessary link to a nation and protection from the consequences of missing nationality. In this context, citizenship is not only a legal attribute but a protective mechanism that ensures the rights of children at a national and international level. Children born through surrogacy arrangements are often insecure about a clear citizenship and this comes as a result of lack of coordination between states and different citizenship policies and as a result these children may face legal and administrative difficulties including the lack of identification documentation which means that they are unable to use necessary services such as health and education and this situation is not only an administrative problem but a violation of the fundamental rights of children (Iliadou, 2024) ^[3]. In the case *C v. Italy* (2023) involving an Italian couple who had used a surrogacy arrangement in Ukraine to have a child, after which the Italian authorities refused to register the child, considering the birth through surrogacy a violation of Italian public policy, and as a result the child was not recognized as Italian, rendering him without citizenship. The European Court of Human Rights ruled that the refusal to recognise the child's legal parentage and nationality violated his rights under Article 8 of the European Convention on Human Rights, which guarantees the right to respect for private and family life. The court also stressed that every individual has the right to determine his or her identity, including the parent-child relationship. Failure to recognize this relationship leads to uncertainty about one's identity in society. (HUDOC, 2023).

5. The right to dignity of the surrogate mother

Contemporary legal theory links human dignity to the philosopher Immanuel Kant, whose concept is to equate dignity with autonomy, meaning that treating people with

dignity means treating them as autonomous individuals capable of choosing their own destiny. Konstitucionalizmi evropian e njeh dinjitetin e njeriut si koncept plotesisht evropian, ku The European Court of Human Rights presents it in three layers of protection, firstly as the absolute protection given to human dignity in Article 3 of the European Convention on Human Rights, secondly as relative protection and thirdly the Court uses human dignity as a political issue to reflect a desirable outcome for human rights (Sinanaj, 2021)^[5]. If we refer to the philosopher Kant, he argues that dignity as autonomy can form the basis of the right to enter into such a relationship, where treating people with dignity means treating them as autonomous individuals. Dignity is attributed to the individual because of his self-determination and ability to make rational choices (*Ibidem*). One of the arguments that is being floated is that surrogacy can damage a woman's dignity, as when a woman engages in this process she often considers her body as a means to create a life for someone else. This process can create a sense of loss of autonomy and self-esteem for a woman by treating her body as a product rather than something sacred (Miralles, 2017)^[4].

The following court cases show how the aspect of the dignity of the surrogate mother has been interpreted:

*Case *Re A (A child)* -2016, where the United Kingdom High Court dealt with a case involving a woman who had given birth to a child for a couple but had later given up on the relationship with the child for personal reasons. The judges analysed in detail the relationship between the surrogate mother and the child, emphasising that the dignity of the mother and her rights to decide on the life of the child were essential to the protection of human dignity and this is one of the cases where the law protects the rights and dignity of the surrogate mother, considering her as an individual with freedom and responsibility (*Re A (A Child)*, 2016)^[12].

*The “X” Case (1998), This is a case where the Irish High Court dealt with the case of a surrogate mother seeking legal protection with the rights to decide the fate of her child. The case dealt with the autonomy and dignity of the woman and how this autonomy should be treated in a system that may have different laws regarding surrogacy. The court analysed how Irish law should treat the dignity of the mother and her rights as an individual, apart from the contractual relationship signed by the parties (HUDOC, 2012).

*Case *In Re Baby M*, is one of the most discussed issues, where after the birth of the child the surrogate mother refused to hand over the child and in this case the Court decided that despite the fact that she is not the biological mother of the child, she does not have parental rights over the child, since she had signed a contract where after the birth she would hand over the child. However, the Court emphasized that such agreements were not legal in New Jersey and that payment for the services of the surrogate mother is considered a violation of human dignit. (*Matter of Baby M.*, 1987)^[11].

6. Results and Discussion

In analyzing the topic of surrogacy and the ethical issues related to it, a series of issues that directly affect children's rights emerge. Surrogacy, as a reproductive practice, has created a wide debate on ethics, the rights of the surrogate mother, the rights of the biological parents, and the rights of

children born through this procedure. One of the results concerns the legal consequences of surrogacy, where in some countries there is a lack of adequate legislation to protect the rights, especially of the child. In many cases, the laws regulating surrogacy relationships are unclear and often do not provide full protection for the rights of the child born to a surrogate mother. Countries that allow surrogacy have developed various laws that control the process, setting conditions and restrictions to ensure the protection of all. Another result is the emotional and psychological impact on the child. Researchers have noted that children born through surrogacy may experience uncertainty about their identity, as they may be connected to the surrogate mother who gave birth to them and not to their biological parents. What is being discussed is whether it can be considered ethical to create a child through a process that involves a third party, especially when this involves a relationship in which a child is paid to be born. In many countries, surrogacy has been seen as a way to help infertile individuals and couples who cannot have children naturally, but this has raised concerns about whether the practice is fair to the child who is born. Another concern is how the child's right to know his or her biological origin is treated. In some countries, laws do not allow children to know the truth about their origins, which can lead to psychological confusion. This issue has become more important in modern societies, where many individuals seek to understand their biological origins and family history. The rights of children to know their biological origins are an ethical issue that requires a deeper and more legal approach.

7. Conclusion

Surrogacy is an increasingly present reality in modern societies, thanks to advances in reproductive technologies and family changes. However, it brings with it many major ethical, legal and social challenges, especially when it comes to the rights of the child born through this method. From the analysis I have made, I reach these conclusions:

1. The legal protection of the child is unstable and variable from one country to another, thus creating uncertainty about his future and legal and biological identity. In many cases, the lack of clear legislation can leave the child without full rights to his parents or citizenship.
2. The ethics of surrogacy are not only related to the biological process but also to the emotional relationships and personal identity of the child, where it is essential to take measures for his or her well-being.
3. Balancing the desire to have children and the rights of children who have not had the opportunity to make choices is a key ethical issue. Parenthood is not only a right of adults but also a responsibility towards the future of a new life.
4. There is a need for a more unified international approach to regulating surrogacy, where the rights of the child are at the center of policies and laws. This would ensure that every child, regardless of the mode of birth, enjoys the same rights, protection and dignity.

In any case, the child's right to live with dignity, to know their origin and to be legally protected must prevail over any other interest, and I believe that this is the path towards an ethical and fair use of surrogacy in a society that respects the life and rights of every human being.

8. Conflict of Interest

None.

9. Acknowledgements

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