

# Surrogacy and Its Impact On Women's Rights

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## Abstract

Surrogacy: a marvel of modern biotechnology, or a threat to the inherent dignity of women and children? This paper explores the human rights implications involved with the process of splitting motherhood across two or more parties. The compromise of principles that should protect female bodies from exploitation as 'gestational ovens', accompanied by factors that pose serious risk to women's health, bears alarming consequences for women across the world. Such is particularly accented by the experience of women in developing countries, typically hired for their wombs by wealthy westerners. Equally, a child carried via surrogacy faces severe violations of their rights – including through their sale upon birth and deprivation of access to their true identity. After investigating the outcomes faced by the most vulnerable parties in a surrogacy arrangement, this paper analyses global pattern of surrogacy laws and provides recommendations for policy-makers looking to deal with the complex issue.

**Keywords:** Surrogacy, Its Impact On Women's Rights, Laws and Recommendations

## 1. Introduction

Surrogacy as a reproductive practice is on the rise. It refers to a form of third party reproductive practice in which intending parent(s) contract a surrogate mother to give birth to a child. While modern practices of surrogacy offer new reproductive opportunities, they also introduce new legal and ethical dilemmas. Furthermore, the international regulatory vacuum that exists in relation to international surrogacy arrangements leaves children born through this method vulnerable to breaches of their rights, and the practice may often amount to the sale of children. With a growing industry driven by demand, surrogacy is an area of concern for the rights and protection of the child. Surrogacy is an arrangement where a surrogate mother bears and delivers a child for another couple or person. It refers to a form of third party reproductive practice in which intending parent(s) contract a surrogate mother to give birth to a child. While modern practices of surrogacy offer new reproductive opportunities, they also introduce new legal and ethical dilemmas. Regardless of individual State positions on surrogacy, all States have a duty to protect the human rights of all children born through surrogacy without discrimination, including ensuring appropriate legal and regulatory frameworks exist at the national level to protect and promote their rights.

In its opening line, the Universal Declaration of Human Rights enshrines 'the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family' as 'the foundation of freedom, justice and peace in the world.'<sup>9</sup> The belief that human beings are set apart from animals and objects, and can therefore not be commoditised into property, is at the core of human rights philosophy, and is an ethical rule underpinning one the greatest legal reformations of history—the abolition of the slave trade. Surrogacy flouts these principles by commodifying women and the babies

that they can carry<sup>1</sup>. In India by 2012, over 25,000 babies had been born via surrogacy.<sup>7</sup> Women signed surrogacy contracts in the hope of building financial security. They spent much of their pregnancies living in tightly-controlled hostels with limited access to their families. They signed contracts written in languages that they did not understand. At the whim of western couples, they agreed to abortions, or to caesarean sections according to flight schedules.<sup>2</sup>

## Types of surrogacy

There are many forms your surrogacy can take: gestational or traditional, compensated or altruistic, independent or agency-assisted, domestic or international.

## Safeguards for the protection of the rights of children born from surrogacy arrangements

The Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, presented a 2019 thematic report to the General Assembly in October 2019 on safeguards for the protection of the rights of children born from surrogacy arrangements (A/74/162). For the preparation of the report, the Special Rapporteur sent out a questionnaire to Member States, civil society, and other stakeholders. The call for submissions and the responses received are available on the **report page**. This report was written as a follow-up to the 2018 thematic report on surrogacy and sale of children (A/HRC/37/60), presented at the 37<sup>th</sup> session of the Human Rights Council.

## Surrogacy and the sale of children

During the 37<sup>th</sup> session of the Human Rights Council in March 2018, the Special presented a **thematic report** on surrogacy and the sale of children. The **statement**, a **press release**, a summary of the **interactive dialogue** with Member States, and a **summary of the side event** organized on this subject are available through the relevant links. There is growing unease that the practice of engaging surrogate mothers in States with emerging economies to bear children for more wealthy intending parents from other States entails power imbalances and thus risks for both the children and surrogate mothers. The report presented by the Special Rapporteur on the sale and sexual exploitation of children to the Human Rights Council noted the presence of abusive practices in both unregulated and regulated contexts and provided analysis and recommendations on implementing the prohibition of the sale of children as it relates to surrogacy.

## Key recommendations for Member States from the report:

- **Adopt clear and comprehensive legislation that prohibits the sale of children**, as defined by the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, **in the context of surrogacy**;
- Create safeguards to prevent the sale of children in the context of commercial surrogacy, **which should include either the prohibition of commercial surrogacy until and unless properly regulated systems are put in place to ensure that the prohibition on sale of children is upheld, 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;

- Create safeguards to **prevent the sale of children in the context of altruistic surrogacy**, which should include, where altruistic surrogacy is permitted, proper regulation of altruistic surrogacy (e.g. to ensure that all reimbursements and payments to surrogate mothers and intermediaries are reasonable and itemized and are subject to oversight by a court or other competent authority, and that the surrogate mother retains parentage and parental responsibility at birth);
- Ensure that in **all parentage and parental responsibility decisions involving a surrogacy arrangement, a court or competent authority makes a post-birth best interests of the child determination**, which should be the paramount consideration;
- Closely regulate, **monitor and limit the financial aspects of all surrogacy arrangements**, with a requirement for full disclosure of the financial aspects of all surrogacy arrangements to the court or competent authority reviewing the surrogacy arrangement;
- **Regulate all intermediaries involved in surrogacy arrangements**, in regard to the financial aspects, relevant competencies, use of contractual arrangements, and ethical standards;
- **Protect the rights of all surrogate-born children, regardless of the legal status of the surrogacy arrangement under national or international law**, including by protecting the best interests of the child, protecting rights to identity and to access to origins, and cooperating internationally to avoid statelessness;
- Ensure that any **international regulation developed in regard to surrogacy**, or in regard to legal recognition of parentage in international surrogacy arrangements, **focuses on both private international law and public international law**, providing in particular for the protection of the rights of the child, of surrogate mothers and of intending parents, and recognizing that there is no “right to a child” in international law;
- **Encourage other human rights mechanisms**, such as the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women, and United Nations entities **to contribute, with further research, to discussions on surrogacy** and its impact on the human rights of women and other stakeholders concerned, in order to develop human rights-based norms and standards and prevent abuses and violations.<sup>3</sup>

## THE IMPACT OF SURROGACY ON WOMEN'S RIGHTS

Surrogacy violates the human rights and inherent dignity of women, whether money is exchanged for the service or not. This chapter explores how the commoditisation of female bodies poses risks to their life, personhood, and dignity by first examining, within an international legal framework, the harm caused by even ‘best case scenario’ surrogacy arrangements to the physical and mental health of the surrogate mother. Section 1.2 will explore the damage the practice inflicts upon the social institution of motherhood, disintegrating family roles otherwise celebrated in law and foundational to society. Finally, having established the integral harms caused by the practice to women and to womanhood, the chapter will explore the illicit links between surrogacy and the criminal enterprise of human trafficking. Throughout each section, the argument that surrogacy can be an ‘empowering’ experience shall be dismantled, given that consent is never a justification for the abuse of human rights, and that the inherently exploitative nature of surrogacy can easily create conditions of coercion.<sup>4</sup>

**A. Right to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health**

The right to 'a standard of living adequate for the health and well-being of himself and of his family' is enshrined in Article 25 of the UDHR, which in part (2) states that 'Motherhood and childhood are entitled to special care and assistance.'<sup>5</sup> This right is reaffirmed in Article 12 of the International Covenant of Economic, Social and Cultural Rights (ICESCR), which has been ratified by 170 states.<sup>6</sup> Drawing on this provision, the UN Committee on Economic Social and Cultural Rights—the body charged with monitoring the implementation of this Treaty—affirmed that 'every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.'<sup>10</sup> The health dangers of surrogacy are numerous and shouldered exclusively by the women: the egg donor and the surrogate mother. While there is a paucity of longitudinal studies on the consequences of egg donation, and despite assurances from fertility companies that the procedure is 'safe',<sup>7</sup> multiple medical researchers have raised concerns that breast and endometrial cancers are related to total endogenous oestrogen exposure, as occurs during the oocyte harvesting procedure.<sup>8</sup> Indeed, the hyper-stimulation of any human tissue can lead to malignant transformation.<sup>9</sup> Gestational mothers are often expected to maximize the investment of the commissioning parties by carrying twins, triplets or, in some countries, higher multiples, thus placing them at a higher risk of experiencing pre-eclampsia and/or gestational diabetes.<sup>10</sup> The US Food and Drug Administration (FDA) label for the drug, Lupron, which is used to transfer embryos, also notes considerable side effects.<sup>11</sup>

**B. Protection of Maternity and the Family in International Law**

International law strongly supports the family as a foundational social institution. Simultaneously, it protects this natural unit from manipulation and exploitation. Article 10 of the ICESCR requires States to accord 'the widest possible protection and assistance' to the family, which is described as 'the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.'<sup>12</sup> Article 23 of the International Covenant on Civil and Political Rights (ICCPR) affirms the right of men and women of marriageable age to marry and to found a family.<sup>13</sup> Researchers who pioneered IVF in the 1970s and '80s premised their work on these provisions,<sup>14</sup> with supporters of surrogacy today using this foundation to argue for the existence of a human right to procreate, no matter the technology required.<sup>15</sup> However, legal scholar Maja K. Eriksson notes that the family principle affirmed in, *inter alia*, ICCPR Article 23 is a 'reaction against Nazi racial and reproductive policies that culminated in genocide', rather than a demand for States to provide a spouse and/or children to those who cannot conceive on their own.<sup>16</sup> International law does not, therefore, endorse a right to surrogacy and there is no obligation to make it available.

**C. Surrogacy as a Form of Reproductive Prostitution and Exploitation**

Philosopher Stephen Wilkinson's study of 'exploitation' identifies two key factors of the term's definition: f. that the exploited person derives (or is at risk of deriving) an unfairly low level of benefit and/or suffers an unfairly high level of cost or harm; g. that the exploited person's consent to the arrangement is defective or invalid.<sup>17</sup> The low level of benefit and high level of harm that surrogate mothers derive (or are at risk of deriving) has been thus far expounded in the paper. Yet the practice's qualification as 'exploitation' under the 'defective or invalid consent' criterion is also demonstrable. Such consent may be nullified by the promise of 'life-changing' amounts of money in return for the significant risk shouldered by the woman. Or, for those who engage in surrogacy without payment, the

very uniqueness of the pregnancy she is about to undergo and her unforeseeable physical, emotional and psychological reaction to the point of severance with the child she carries defies the concept of 'informed consent'.

Furthermore, surrogacy contracts require women to give advanced consent to rescind control of significant medical decisions – whether paid or unpaid. The surrogacy procedure requires a commitment to months of invasive medical treatments, usually beginning with various hormones and fertility drugs, and IVF; and continuing with efforts to implant fertilized embryos in the womb. Next comes the various screenings and medical interventions of pregnancy and finally the birth itself, which is increasingly done by C-section. While standard medical practice usually mandates a meaningful, informative conversation before each treatment or operation takes place, with full and clear consent obtained at the time; the surrogate in essence waives the right to give full consent on interventions which affect both her body and that of the baby she carries. As was explored earlier in this chapter, the contracts can even see the surrogate mother purport to sign away her right to object to an unwanted abortion. In comparison, in medicine, there are very few other circumstances where personal patient consent at the point of treatment is waived.<sup>18</sup>

## **THE IMPACT OF SURROGACY ON THE RIGHTS OF THE CHILD**

Surrogacy not only violates the human dignity and rights of the surrogate woman, but also the child she carries. The preamble to the Convention on the Rights of the Child (CRC) highlights that 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'.<sup>19</sup> Yet, as children are commodified for the benefit of others at the expense of their own wellbeing, the rights of children born via surrogacy are compromised from conception, through gestation, at birth, and throughout the rest of their lives. Building on the UDHR, the ICCPR, and the ICESCR, the CRC affirms that the family is 'the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children'.<sup>20</sup> By placing a child in a position of planned abandonment and fragmenting parenthood across multiple stakeholders, surrogacy fractures this fundamental unit and thus compromises the child's wellbeing. In permitting surrogacy, States shirk their duties to accord the 'widest possible protection and assistance' to the family unit as laid out in a plethora of international treaties.<sup>21</sup> As such, the best interests of the child are not prioritized, contrary to the principle enshrined in Article 3 of the CRC.

### **A. Right to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health**

The child's right to the enjoyment of the highest attainable standard of physical and mental health is codified in Article 24 of the CRC. Despite the increasing practice of surrogacy, its negative impact on the healthy development of surrogate-born children has been under-researched and is often disregarded by national laws that permit the process, leaving children as the unintended victims of placing an adult's desire first. There is consistent evidence that the risk of poor birth outcomes is higher for children conceived through medically-assisted reproduction (MAR) than for children conceived naturally.<sup>22</sup>

### **B. Identity/Access to origins**

The CRC recognizes the right of children to a name and nationality from birth. It also recognizes a right for them to be in the preferential circumstance of being cared for by his or her parents as far as possible: The child shall be registered immediately after birth and shall have the right from birth to a

name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.<sup>23</sup> Surrogacy models vary widely. Some feature two commissioning parties and a surrogate; others require either one or two additional gamete donors; and the assumed legal parentage of a birth mother's husband within many legal systems brings the count of parental claims up to a potential six.

### **C. Sale of Children**

The sale of children is clearly prohibited in Article 35 of the CRC: State 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.<sup>24</sup> The Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (OPSC) defines the sale of children as: any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.<sup>99</sup> Notably, unlike the definition of human trafficking in the Palermo Protocol, the criterion of exploitative purpose is not required to meet the threshold for this crime. Thus, the good intentions of the commissioning parties are irrelevant to the consideration of whether a child's dignity and fundamental freedoms have been compromised<sup>25</sup>

## **CURRENT PRACTICES UNDER NATIONAL LAWS**

Due to the lack of universal agreement in regard to the extent surrogacy should be prohibited, clashing interpretations emerge in the realm of international private law. This chapter explores the diverse legal issues generated through an analysis of regional laws and practices. While approaches vary within and between continents, global trends have emerged. Countries with a high 'demand' for commercial surrogacy have witnessed great profitability; until high costs and increasingly protective regulation pushed consumers to look overseas. Countries with a rich supply of 'raw material'—willing surrogate mothers—in turn have likewise experienced a temporary enjoyment of profit maximization, before exploitation proliferates and triggers prohibition on grounds of protecting human rights. Prohibition frequently pushes agencies to migrate to neighbouring countries, where the cycle repeats.

## **EVALUATION & RECOMMENDATIONS**

### **Evaluation**

Various international experts and entities have acknowledged the plethora of human rights issues that arise in every surrogacy arrangement. The UN Committee on the Rights of the Child first drew attention to the need for action in 2014, issuing a General Observation stating that 'commercial use of surrogacy, which is not properly regulated, is widespread, leading to the sale of children and the violation of children's rights'.<sup>26</sup> In 2019 they reaffirmed this link, stating that surrogacy 'may...constitute sale of children'.<sup>27</sup> The 2016 PACE report similarly condemned commercial surrogacy, recognizing not only that it 'reduc[ed] children to commodities to be bought and sold...putting them at risk of abandonment or abuse', but that it also exploits surrogate mothers who cannot give their consent 'freely, unconditionally, and with full understanding of what is involved', especially when a 'life-changing' amount of money changes hands', which can 'put into question the validity of the consent given'.<sup>28</sup>

Adoption, rather than the transcription of inaccurate birth certificates in the case of non-genetically related parents, could be one approach to upholding the right of the child to have access to his/her family history and genetic information. The giving or withholding of payment, the obtaining of

full consent, and the affirmation of biological truth on a birth certificate, even together, cannot repair the negative impact on a child and a woman's physical and emotional health following separation at birth. Surrogacy cannot take place without commodifying and denigrating the dignity of a person. Nor can any 'solution' resolve the fundamental fracturing of the traditional family unit which is cherished in the CRC as the 'natural environment for the growth and well-being of all its members and particularly children'.<sup>29</sup>

## Recommendations

The proposals outlined above are insufficient to address the concerns outlined in this paper. None can fully avoid the exploitation of women and children involved in all forms of surrogacy; and none can address the slow rollover of bans from country to country, bringing harm across borders to impact one nation and its women at a time. In light of the shortcomings of proposed international solutions, and in consideration of all the arguments outlined in this paper, ADF International recommends that each state protects their citizens by following the recent example set by Lithuania in adopting a 'resolution to condemn all forms of surrogacy',<sup>146</sup> which comprehensively prohibited surrogacy in the following manner<sup>30</sup>

## Conclusion

The text emphasizes 'that women and children are subject to the same forms of exploitation and both can be regarded as commodities on the international reproductive market, and that these new reproductive arrangements augment the trafficking of women and children and illegal adoption across national borders.' Though references to a 'reproductive market' can often be construed as applying only to commercial surrogacy transactions, the text is careful to equally condemn 'expenses only' arrangements too. surrogacy and adoption are distinct practices that reflect two fundamentally different approaches to the rights of the child, since adoption is linked to the specific needs of the already born child, and surrogacy is focused on adult desires with regard to a non-existing child.' the complications that arise from parental rights being claimed on different genetic, biological, or legal bases, leading to chaos and unresolvable, competing claims both in national and international situations. It is an immensely important to take active steps, at the international level...to ban surrogacy as a form of trafficking in human beings and women.' Such a proactive response is particularly relevant in light of international conferences such as the HCCH, which have the potential to see surrogacy legalised in States via the 'back door'.

It is suggested that the government to exercise its right to decline recognitions of parentage claims based on surrogacy arrangements. It also stresses that, in declining to recognize parentage, the State has the right to turn to adoption procedures formalized under the Convention on the Protection of Children and Cooperation in Respect of Inter-country Adoption. Moreover, it is crucial to impose heavy fines on those partaking in international surrogacy agreements, including mediation agencies, healthcare institutions, lawyers, and medical staff. By specifically targeting agents of the industry, the legislation has 'teeth' and penalizes the culprits who manipulate situations of emotional, social, and economic vulnerability. Such legislation tackles the root of exploitation to secure the freedom and safety of women, children and families.

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