XIII Annual Conference: Medicine and Law in the 21st Century

Faculty of Law, St. Petersburg State University

24-25 December 2021

**Intercountry surrogacy and the best interest of the child**

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1. **Introduction**

Surrogate motherhood is the practice of conceiving and carrying out a pregnancy for the express purpose of relinquishing the baby to a third party after birth, generally in exchange of an amount of money.

Surrogacy raises many complex ethical, legal and social issues. I will focus here on *the challenge that the practice of intercountry surrogacy poses to domestic legislations that prohibit this practice.*

Today, most Western European states prohibit this practice on the grounds that it is degrading and exploitative of vulnerable women, and that it is also contrary to the best interest of the child, as the child is somehow reduced to the condition of a ‘merchandise’ that can be bought and sold.

However, recent jurisprudence of the European Court of Human rights is compelling those same states that prohibit surrogate motherhood to accept the effects of surrogacy arrangements made abroad, and to recognize the parent-child relationship. Paradoxically, this jurisprudence is also based on the best interest of the child principle.

1. **Surrogate motherhood and the best interest of the child**

The principle of the best interest of the child is well established in international and domestic laws. It aims to guide the choices of those who are called to make decisions concerning children (such as legal representatives, judges, etc.). This standard can be found, for instance, in the UN Convention on the Rights of the Child of 1989 (Art. 3).

This best interest of the child principle plays also a central role in the Hague Convention on Intercountry Adoption of 1993 (Art. 1). Among the conditions for an intercountry adoption are: that the consent of the family of origin has not been “induced by payment or compensation of any kind” (Art. 4) and that the consent of the mother “has been given only *after* the birth of the child” (ibid., para c.4).

There is no standard definition of the best interest of the child, but there are a number of factors that are taken into account when considering if something is in the best interest of the child or not (the child’s physical and mental health, the child’s identity, the contact with parents and siblings, the child’s safety, etc.).

In the context of surrogacy, one problematic feature is the *fragmentation of maternity* caused by this procedure. Indeed, children will have two “mothers”: the intended mother and the surrogate mother. They could even have a third “mother” if the egg was donated by another woman. The obvious question is: Is this fragmentation not contrary to the best interest of the child?

Moreover, the reduction of children conceived by surrogacy to a kind of ‘merchandise’ becomes especially visible in certain situations. For instance, it happens sometimes that the intended parents refuse to take the child because he or she suffers from an unexpected disease or is not of the sex they wanted[[2]](#footnote-2).

1. **Intercountry surrogacy and international law**

It is important to point out that there are no specific provisions in international law prohibiting intercountry surrogacy agreements.

At the domestic level, the legislations are very different. Some countries, especially in Western Europe, explicitly prohibit surrogate motherhood based on the grounds that it is contrary to human dignity as it “instrumentalizes the woman” and “is contrary to the interest of the child”.

In other countries like Russia, Ukraine, India and in some US states (for example, California and Florida), commercial surrogacy is legal. It should be mentioned, however that, in the case of Russia, a bill has been introduced this year to the Duma in order to restrict the practice and to ban foreign citizens from using surrogacy services in Russia[[3]](#footnote-3).

The fact is that the disparity of domestic legislations has led over the last decade to the emergence of a *global market of surrogacy*. People from all over the world who are looking for a surrogate mother travel to these destinations in order to get a baby. This global market moves constantly and new destinations emerge all the time as a result of changes in the legislation.

The problem is that the prohibition of surrogacy in some countries is difficult to implement when the intended parents go abroad to circumvent the national law and then bring home a baby born under a surrogacy arrangement.

In such cases, national courts are confronted with the *fait accompli*, and have a tendency to recognize parental rights to the intended parents, even if they have circumvented the national law.

National courts are under pressure of the jurisprudence of the European Court of Human Rights (ECtHR), which obliges them to recognize the effects of the surrogacy agreements made abroad. Paradoxically, the decisions of the ECtHR are based on the principle of the best interests of the child… The argument is that depriving those children from legal parents would be contrary to the principle of the best interest of the child.[[4]](#footnote-4)

**Conclusion: The need for a multilateral approach to intercountry surrogacy**

The current situation is clearly unsatisfactory. Why?

First, becausethe jurisprudence compels States to disregard their own laws and public policy principles regarding this matter and recognize the efficacy of surrogacy agreements, even if they prohibited by national law;

Second, because this trend is likely to encourage more and more intended parents to travel abroad and to contribute to the exploitation of vulnerable women and the commodification of children.

This is why several experts consider that there is a need for a multilateral, comprehensive approach to this matter.[[5]](#footnote-5) Such a convention could be inspired on the Hague Convention on Intercountry Adoptions of 1993.

If negotiations for a multilateral agreement fail, another option could consist in negotiating **bilateral agreements** between those countries that prohibit surrogacy agreements and those that allow them (for instance, restricting access to surrogacy to citizens from those countries in which the practice is prohibited).

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2. # “Australian couple abandons surrogate Down's Syndrome baby”, BBC News, 2 August 2014. At: http://www.bbc.com/news/world-asia-28617912

   [↑](#footnote-ref-2)
3. https://www.economist.com/europe/2021/03/18/russias-liberal-surrogacy-rules-are-under-threat [↑](#footnote-ref-3)
4. The Mennesson v. France case (ECtHR, 2014) is paradigmatic in this regard. But there have been many other similar decisions. [↑](#footnote-ref-4)
5. See: **Paul Beaumont and Katarina Trimmings,** International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level, *Journal of Private International Law,* 2011, vol. 7, n° 3, pp. 627-647. [↑](#footnote-ref-5)