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Rights and Challenges of Surrogate Women in the Surrogacy Process: An Assessment of Legal and Ethical Concerns

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Anti-plagiarism Statement

I, Mariana Moreira da Costa, hereby declare that this dissertation to obtain a Master's Degree in Law, specialisation in International and European Law is a product of my own work and research and constitutes an original text. All use of other contributions or texts is duly referenced.

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Abstract

This study aims to analyse the legal and ethical challenges posed by surrogacy processes, taking into consideration the different human rights at stake in surrogacy — of the intended parents, the future newborn, and, specially, the surrogate's rights. As such, a critical analysis of the international and regional legal frameworks and an examination of the European Court of Human Rights' case-law was carried out. The purpose of this dissertation is to shed light on the legal challenges triggered by surrogacy regarding the recognition of legal rights to surrogates, as well as the irregularities and lack of protection of the carrier throughout the process. In order to do so, this study will start by conducting an historical overview of surrogacy and examining the different systems in place in European countries. Subsequently, it will present the framework of human rights recognised to the intended parents and the child born as a result of the procedure. Lastly, the main goal of the thesis is to provide an overview of the surrogate's role in the process and the different legal and ethical challenges she might get across which could endanger her fundamental rights. In particular, the dissertation tackles the issues of exploitation and commodification of women's bodies in surrogacy contracts; the role of intermediary agencies; the contractual clauses restricting the conduct of the pregnant women; the right to decide on abortion; and the surrogate's right to repent.

Keywords

Surrogate, Carrier, Surrogacy, Exploitation, Commodification, Privacy, Autonomy, Bodily autonomy, Reproductive choices.

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List of Abbreviations

AI	Artificial Insemination
ART	Assisted Reproductive Techniques
CEDAW	Committee on the Elimination of Discrimination against Women
CRC	Convention on the Rights of the Child
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HFEA	Human Fertilisation and Embryology Act
IVF	In Vitro Fertilisation
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UNICEF	United Nations International Children's Emergency Fund

1. Introduction

Advances in science have reshaped the traditional concept of ‘parenthood’, challenging established norms. Previously, parenthood required a genetic link to the parents, but nowadays, technological improvement has brought the possibility of children not being biologically connected to their parents. Through assisted reproductive techniques (ART), adults who want to become parents, but are unable to do it, might have a chance.

Surrogacy motherhood is an arrangement involving, at least three parties where one of them, the gestational mother, is intended to carry a pregnancy for the two others, giving them the rights of the child after the birth.¹ Curiously, this is an ancient method used for centuries, even before all of the scientific evolution through the traditional way — a third person would conceive a child by natural means.

Nowadays, with the evolution of technology, we talk about surrogacy as a technology substitution when we resort to ART. However, there is an international legal void in making this a protected and effective technique because it raises a lot of ethical, social, cultural, and legal dilemmas.²

Against this background, this thesis aims to shed light on the rights of surrogate women throughout the surrogacy process, critically analysing the international legal frameworks that either protect or fail to safeguard their rights and discuss the challenges these arrangements bring to the gestational women. As such, problems with custody and parental rights, compensation, medical care, consent and autonomy, depersonalisation of women, and many others, are some of the issues can be raised throughout the surrogacy process.

Therefore, the present paper intends to reach a conclusion on different issues that the surrogate might deal with throughout the surrogacy process. This dissertation will try to answer to what extent do International and European legal frameworks protect the rights of surrogate women, highlighting some irregularities during the process.

For that purpose, this thesis is based on a legal analysis of relevant primary and secondary sources. In this regard, the thesis focuses on different human rights involved in surrogacy (not only of the bearer, but also of the intended parents and the newborn) and mainly on the issues that surrogacy can raise for women, such as exploitation, commodification and

¹ Trimmings, K., & Beaumont, P. (Eds.). (2013). *International surrogacy arrangements: legal regulation at the international level*. Bloomsbury Publishing.

² González, N. I. (2020). Legal and ethical issues in cross-border gestational surrogacy. *Fertility and Sterility*, 113(5), 916-919.

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different critical contractual clauses on the surrogacy agreement, following qualitative research methods. In particular, international and regional human rights instruments, the jurisprudence of the European Court of Human Rights (ECtHR), studies, and scientific legal writings on the subject were taken into consideration in order to conduct the legal analysis that would identify the legal gaps in the protection of gestational mothers. Moreover, examples from surrogacy cases in the US will be also examined in order to analyse the problems related to surrogacy contracts and the inconsistencies with women's rights and other human rights.

After the introduction, Chapter 2 aims to conduct an overview of what surrogacy is, describe its different types, and explain the historical background — in essence, it is an introductory chapter about surrogacy.

As there can be conflicts between the surrogate's human rights and the human rights of other parties to the arrangement, in Chapter 3 will be emphasized the specific International and European legal instruments that directly relate to the rights of the intended parents and the child throughout the process. The relevant international human rights instruments and legal provisions to assess the extent to which the rights of the intended parents and the baby are recognised and protected will also be examined. Additionally, some relevant case law of the European Court of Human Rights will be presented and discussed.

The next Chapter will delve deeper into the surrogate women and the critical challenges faced by them, such as (a) exploitation and commodification; (b) contractual clauses that restrict the behaviour of surrogates; (c) the access to voluntary interruption of pregnancy; (d) the right to repent; and (e) the role of intermediaries and agencies.

Finally, the concluding remarks will offer a concise summary of the main topics discussed and provide an overall position that surrogacy motherhood is a very sensitive and complex subject to legislate internationally. By examining the complexities of surrogacy motherhood and the rights of surrogate women, this thesis emphasizes the fact that most rights relate to the intended parents and the child, rather than the surrogate. Additionally, it aims to contribute to the ongoing discussions in international and European law advocating for greater protection and recognition of surrogate women's rights.

2. The concept of surrogacy motherhood

The development of science and the emergence of assisted reproductive technologies, such as in vitro fertilisation (hereinafter, IVF) or egg freezing techniques, transformed the way babies can be made. Within these possibilities, surrogacy is one of the methods that have been used in certain countries.

Surrogacy is a method that a couple or singles with infertility issues can resort to, where a third person will conceive a child in their uterus and carry the embryo throughout the gestation period, so subsequently, this child can be hand out to the intended parents once it is born.³ Surrogacy can be defined as an arrangement in which a woman carries and gives birth to a child for another person or couple, who will then become the child's legal parents. The surrogate mother may either carry an embryo created through IVF using the intended parents' gametes, or she may carry an embryo using the donor's gametes.⁴

Nowadays, human gestation is not only an intimate project developed between the couple; it can also assume complicated features that call into question the Roman rule *mater semper certa est*, which attributes legal maternity to the woman who gave birth to the child through medically assisted reproduction existent methods. In addition, it also breaks the ancient *pater est rule* — the presumption of the fatherhood of the man married to the carrier.⁵

Currently, the genetic link is no longer the most important thing in parenthood but the intention of becoming parents through the application of ART. This means that parenthood is no longer seen as a natural, straightforward creation, but it turned into a social concept.⁶

Surrogacy motherhood is a complex and controversial topic that raises important legal, ethical, cultural, and social issues. On the one hand, surrogacy can provide a valuable service to couples or individuals who are unable to have children through traditional means. On the other hand, surrogacy raises concerns about the rights and welfare of surrogate mothers, who may be exploited or mistreated in the process, about the marginalisation of the children, about human trafficking, and about the recognition of parenthood when couples resort to cross-borders' surrogacy.⁷

³ See *supra* Trimmings (2013) (note 1).

⁴ Jadva, V., Murray, C., Lycett, E., MacCallum, F., & Golombok, S. (2003). Surrogacy: the experiences of surrogate mothers. *Human reproduction*, 18(10), 2196-2204.

⁵ Lamm, E. (2013). *Gestación por sustitución. Ni maternidade subrogada. Ni alquiler de vientres*. Ebook. Barcelona: Universitat de Barcelona (Ebook). pp. 17-29.

⁶ Eekelaar, J. (1991). Parental responsibility: State of nature or nature of the state?. *The Journal of Social Welfare & Family Law*, 13(1), 37-50.

⁷ Busby, K., & Vun, D. (2010). Revisiting The Handmaid's Tale: Feminist theory meets empirical research on surrogate mothers. *Can. J. Fam. L.*, 26, 13-93.

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a. Definition and types of surrogacy

As mentioned above, surrogacy motherhood can be defined as “the practice whereby one woman carries a child on behalf of another with the intention that child will be handed over after birth.”⁸ The reasons for resorting to surrogacy are usually health-related — whether it is the infertility of one of the persons in the couple, the woman’s inability to endure the entire gestational process, or the fear of passing on a genetic disease. In addition, people suffering from structural infertility — individuals or couples who are unable to have children through secular relationships and have to resort to other means due to the social structure they are in, such as single people or same-sex couples — have also found their way to build a family through these arrangements⁹.

In that sense, and as mentioned before, the concept of motherhood and the Roman principle *mater semper certa est* are in crisis. This principle is no longer unquestionably true, and its veracity depends on the definition of motherhood that is being used. If motherhood is defined in terms of biological or genetic connection, then the mother is the woman who gives birth to the child. However, if motherhood is defined in terms of social, emotional, and cultural factors, then the mother is the woman who raises the child and assumes the role of the mother¹⁰.

In recent years, there has been a growing movement to define motherhood in terms of social, emotional, and cultural factors. This movement is based on the belief that motherhood is more than a biological or genetic connection. It is also a social and emotional relationship that is built over time, and it is related to the intention of being a mother. Under this definition of motherhood, the woman who is the biological or genetic mother of a child may not be the mother in the social, emotional, and cultural sense¹¹.

Given the above, the surrogate mother, or gestational mother, is the woman who carries in her uterus a child whose rights and duties she is supposed to relinquish. This woman agrees to use her womb throughout the gestational process to carry a baby — who may or may not have a genetic link to her — and also to give birth to that child and renounce kinship¹².

⁸ Wicks, E. (2016). *The State and the Body: Legal Regulation of Bodily Autonomy*. Bloomsbury Publishing.

⁹ See *supra* Lamm (2013) (note 5).

¹⁰ *Ibid.*

¹¹ Van Zyl, L., & Van Niekerk, A. (2000). Interpretations, perspectives and intentions in surrogate motherhood. *Journal of medical ethics*, 26(5), 404-409.

¹² See *supra* Lamm (2013) (note 5).

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There are two main types of surrogacies: traditional surrogacy and gestational surrogacy.¹³

Traditional surrogacy involves the surrogate mother using her eggs for the fertilisation process, being artificially inseminated with the intended father's sperm or donor sperm. In traditional surrogacy, the surrogate is impregnated with the sperm of the intended father or a donor through artificial insemination (AI). The surrogate carries and delivers the child, and she is also the child's biological mother, that is why this type of surrogacy is more controversial and has been legally restricted in some countries.¹⁴

On the other hand, gestational surrogacy, also known as full surrogacy, involves the transfer of a fertilised egg from the intended parents or donors into the surrogate's womb. An embryo created using the intended parents' or donors' eggs and sperm is implanted in the surrogate's uterus. The surrogate carries the pregnancy and delivers the child, but she is not biologically related to the child. This type of surrogacy is becoming more popular due to advances in ART.¹⁵

It is important to note that both types of surrogacies can be further classified based on whether they are (i) commercial, if financial compensation for the surrogate mother is included in the contract, or (ii) altruistic if there is voluntary assistance of the pregnant woman without compensation. However, in altruistic surrogacy, the surrogate is legally entitled to reimbursement for all pregnancy-related expenses, including treatments, doctor appointments, and other costs.¹⁶

Additionally, surrogacy agreements may be categorised as either domestic or international, depending on whether the intended parents and the surrogate reside in the same country.

Furthermore, the legal framework surrounding surrogacy varies widely depending on the country where the agreement takes place — it can range from surrogacy being considered illegal and the contract void to a comprehensive and open approach to these arrangements.

¹³ Field, M. (1990). *Surrogate Motherhood*. Cambridge, MA and London, England: Harvard University Press.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ See *supra* Busby (2010) (note 7).

b. History and development of surrogacy

Surrogacy agreements did not start with the evolution of technology. These agreements can be traced back to the Old Testament of the Bible itself, in the King James version.¹⁷ However, the first documented surrogacy agreement was found in 1976, negotiated, drafted, and written by the lawyer Noel Keane. It was a traditional surrogacy — so the surrogate used her eggs to create the embryo, having a genetic and biological relationship with the child —, and it was an altruistic contract.¹⁸

The current practice of using wombs to bear babies for childless couples or individuals arose from the development of in vitro fertilisation. Early attempts at artificial insemination are said to date back to the 17th century. Still, none of these experiments resulted in a live birth until 1978, when Louise Brown was born in Oldham, England.¹⁹

Thereafter, in 1984, after the emergence of IVF, the first baby without any genetic relationship to the pregnant woman was born — the first gestational surrogacy agreement was celebrated.²⁰ This was a significant leap in reproductive medicine and the treatment of infertility, as it was the first time it was medically possible for people suffering from infertility to have a child genetically of their own, without the woman who gestated also being the genetic mother. This increased the number of surrogacy cases tremendously, as it allows a woman unable to carry a pregnancy to have a child with her genetic heritage, having another woman carrying the baby as a surrogate mother.

However, the public visibility of surrogacy was only achieved in the mid-1980s, when the first case to address the issue of surrogacy worldwide took place in a New Jersey's court: the famous *Baby M* case.²¹ In this case, *Baby M* was born through a traditional surrogacy agreement between the Sterns (intended parents) and Mary Beth Whitehead (surrogate), where

¹⁷ “Now Sarai Abram’s wife bare him no children: and she had a handmaid, an Egyptian, whose name was Hagar. And Sarai said unto Abram, Behold now, the LORD hath restrained me from bearing: I pray thee, go in unto my maid; it may be that I may obtain children by her. And Abram hearkened to the voice of Sarai. And Sarai Abram’s wife took Hagar her maid the Egyptian, after Abram had dwelt ten years in the land of Canaan, and gave her to her husband Abram to be his wife. And he went in unto Hagar, and she conceived: and when she saw that she had conceived, her mistress was despised in her eyes.” (Génésis: 16.1-4).

¹⁸ Van Gelder, L. (1997, January 28). Noel Keane, 58, lawyer in surrogate mother cases, is dead. *The New York Times*. Retrieved from: <https://www.nytimes.com/1997/01/28/nyregion/noel-keane-58-lawyer-in-surrogate-mother-cases-is-dead.html> .

¹⁹ Davies, M. (2017). *Babies for sale?: Transnational surrogacy, human rights and the politics of reproduction*, Bloomsbury Publishing. Pp. 1-15.

²⁰ Trounson, A., Leeton, J., Besanko, M., Wood, C., & Conti, A. (1983). Pregnancy established in an infertile patient after transfer of a donated embryo fertilised in vitro. *British Medical Journal (Clin Res Ed)*, 286(6368), 835-838.

²¹ *Re Baby M*, 537 a.2d 1227 (N.J. 1988).

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Mary Beth would be inseminated with the sperm of William Stern and her eggs were used to create the embryo. In 1986, Whitehead gave birth to Sara Elizabeth Whitehead, or according to the Sterns, Melissa Stern, and , according to the court, *Baby M*.

What brought this case to court in 1987 was the fact that, although the birth mother, Mary Beth, had signed an agreement saying she would not bond with the child and would relinquish all filiation rights to the child, she did not want to give up the baby. Two issues were raised during these different trials: if the contract was enforceable and who would receive the custody of the baby. After the Supreme Court of New Jersey ruling in the United States of America, the contract was considered unenforceable, and Mary Beth saw her parentage recognised. Nonetheless, *Baby M* remained with the Sterns, under the child's best interests, as William Stern was the father. Mrs Whitehead was then granted a right to visitation.²²

Currently, surrogacy agreements are increasingly present in the public debate, as we see celebrities²³ resorting to these agreements (such as Robert de Niro, Cristiano Ronaldo, Kim Kardashian, etc.), or represented in films or TV series. Additionally, there are more and more social movements and proposals for regulation, ranging from a liberal and rather open approach to a proposal for the complete abolition of this market.

c. Overview of surrogacy regimes in European countries

Surrogacy is a topic that is mostly related to family law, which means it is reserved to the competence of each State to regulate it.²⁴ In this sense, we have so many different ways of seeing surrogacy and approaching it — ranging from countries that consider the practice illegal to countries that do not pronounce themselves on this matter or even countries that only prohibit specific forms of surrogacy, such as commercial and/or traditional surrogacy.

²² Peterson, J. (2016). *Baby M: American feminists respond to a controversial case*. *Journal of Women's History*, 28(2), 103-125.

²³ There is a recent debate in the Spanish society regarding the case of Ana Obregón, a famous TV host, and the agreement she did in the United States. For more information see: Fouché, A. (2023, March 30). Spanish anger over TV star Ana Obregón's surrogate baby in US. In *BBC News*. Retrieved from: <https://www.bbc.com/news/world-europe-65122973> .

²⁴ European Parliament, Directorate-General Citizens' Rights and Constitutional Affairs and Directorate-General for Internal Policies of the Union. (April, 2023). *Cross-border Legal Recognition of Parenthood in the EU*. Retrieved from: [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/746632/IPOL_STU\(2023\)746632_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/746632/IPOL_STU(2023)746632_EN.pdf) .

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On the one hand, there are countries that consider surrogacy illegal, such as Austria, Croatia, France, Germany, Spain, and Sweden.²⁵ A variety of reasons are presented by these countries for their stance, including, for example, “the violation of the child’s and the surrogate mothers’ human dignity, reducing both to objects of contracts.”²⁶ On the other hand, the United Kingdom (UK) and Greece allow non-commercial surrogacy agreements, although with totally different ways of regulating it.

The United Kingdom

The United Kingdom regulates it mainly through the Surrogacy Arrangements Act²⁷ of 1985, which has undergone numerous amendments over the years, but some provisions of the Human Fertilisation and Embryology Act of 2008²⁸ are also relevant to the topic. Surrogacy arrangements, according to Section 1A of the 1985 Act, are considered non-enforceable, which means that they are not legally binding, they are just an agreement where people declare their intentions and expectations. In addition, commercial surrogacy is illegal,²⁹ and surrogates can only be reimbursed for their reasonable expenses.

The Human Fertilisation and Embryology Act (HFEA) states that the intended parents will always have to resort to a parental order to have their maternity and/or paternity recognised. The surrogate mother (and her husband or civil partner, if applicable) is going to be considered the legal mother (and the legal father, if applicable) of the child,³⁰ until the parental order and the new birth certificate is issued. Nonetheless, if the gestational mother is neither married nor in a civil partnership, and the intended father is the sperm donor, he will retain the parental responsibilities.

To apply for the parental order, the commissioning parents have up to six months after the birth of the child at a family court (HFEA, Section 54(3) and Section 54A(2)). One interesting fact about the UK Act is that the Court will not recognize the parental order if the agreement of the surrogate is given after the birth but before six weeks (HFEA, Section 54 (7)).

²⁵ Committee on Bioethics of the Council of Europe. (2021, June 16). Developments in the field of bioethics in the case law of the European Court of Human Rights (ECtHR) (DH-BIO/INF(2021)4REV). Retrieved from: <https://rm.coe.int/inf-2021-4-rev-developments-ecthr-e/1680a2daad> .

²⁶ See *supra* Trimmings (2013) (note 1).

²⁷ The United Kingdom. (1985). Surrogacy Arrangements Act, Chapter 49. Available in: <https://www.legislation.gov.uk/ukpga/1985/49> .

²⁸ The United Kingdom. (2008) Human Fertilisation and Embryology Act (HFEA), Chapter 22. Available in: <https://www.legislation.gov.uk/ukpga/2008/22/contents> .

²⁹ See Surrogacy Arrangements Act, Section 2.

³⁰ See HFEA, Section 33(1) and Section 35.

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One person of the commissioning parents or the single person who resorts to surrogacy has to be genetically related to the child, so the embryo has to be formed with the gametes of one of them (HFEA, Section 54(1)(b) and Section 54A(1) no. b)). In that sense, when the intended parents are not genetically related to the child, they cannot apply for a parental order, the only option to become the child's legal parents is to adopt, according to the Adoption and Children Act of 2002.

Additionally, for the parental order to be conceived, at least one of the applicants needs to have a permanent domicile in the United Kingdom, and the child has to be already living with the candidate(s) (HFEA, Section 54(4) and Section 54A(3)).

Greece

Another example is Greece³¹ which allows surrogacy and regulates it through the Civil Code³² (Articles 1455-1460), Law 3089/2002³³ on kinship and inheritance, and Law 3305/2005³⁴ on the enforcement of medically assisted reproduction techniques. Law 4272/2014³⁵ expanded the regime to allow temporary residents to participate in surrogacy arrangements, as previously only permanent residents were permitted.³⁶

According to Greek legislation, surrogacy is only viable when medical reasons prevent the couple or the mother from having a child or when a serious illness may be susceptible to transmission during pregnancy. The intended parents and the surrogate have to achieve a written agreement in which they define and outline all the terms, and only gestational surrogacy is allowed. If the gestational mother is married or has a legal partner, he has to give his consent.³⁷ Additionally, only heterosexual couples or single women can carry out these arrangements because the government believes surrogacy should only be a source for couples or mothers who cannot have a "natural" pregnancy.³⁸

³¹ Unfortunately, there is no official translation of the Greek law into an English version, so I had to use secondary sources to supplement my research.

³² Greece (1984). Presidential Decree 456/1984, Greek Civil Code (GCC), *State Journal (FEK)*.

³³ Greece (2002). Medical assistance on human assisted procreation, Law 3089/2002, *State Journal (FEK)* No 327.

³⁴ Greece (2005). Application of medically assisted procreation, Law 3305/2005, *State Journal (FEK)* No 17.

³⁵ Greece. (2014) Law 4272/2014, *State Journal (FEK)* No 145.

³⁶ Zervogianni, E. (2019). Surrogacy in Greece. In J. Scherpe, C. Fenton-Glynn, & T. Kaan (Eds.), *Eastern and Western Perspectives on Surrogacy*. Intersentia. 147-164.

³⁷ Zervogianni, E. (2019). Lessons drawn from the regulation of surrogacy in Greece, Cyprus, and Portugal, or a Plea for the regulation of commercial gestational surrogacy. *International Journal of Law, Policy and the Family*, 33(2), 160-180.

³⁸ *Ibid.*

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The surrogacy arrangement is a special type of contract, it is considered binding and gratuitous, and all parties can drop from the contract until the transfer of the embryo. In fact, only altruistic surrogacy is lawful. However, commissioning parents are allowed to support all expenses related to pregnancy, labour, and postpartum. Additionally, the surrogate might be entitled to compensation related to the lost profits due to the pregnancy.³⁹

For any woman to be eligible to become a surrogate, she has to hold medical proof stating that she has the physical and psychological conditions to do it. In addition, she needs to be between 25-45 years old, has already had a child of her own at least, and may not have had more than two caesarean sections.⁴⁰

On the intended parent's side, Greek law establishes an age limit until natural pregnancy would be possible, so an intended mother can resort to surrogacy during her reproductive age, so no longer than 50 years old.⁴¹ This provision was created to serve the best interests of the child, and, also, for the same reasons, both intended parents have to be subjected to a medical checkup before the court authorisation.⁴²

Regarding the gametes used, Greek law does not request a genetic link to the baby (as the UK, for example, requires). If, for medical reasons, the commissioning parents cannot give their genetic material, they can use donors (and their anonymity is preserved), although the ovum of the pregnant woman is excluded.⁴³

Moreover, it is mandatory to have a Court ruling for the surrogacy agreement to be authorised. At the time of birth, and since the Court has already approved the arrangement, the legal maternity title already belongs to the intended mother, without any mention of the gestational mother in the baby's birth certificate. This can, nevertheless, be contested if it is proved that the egg that formed the embryo is from the surrogate.⁴⁴

Paternity will be established through the presumption of paternity if the intended parents are married or in a civil partnership. If they are a couple who wishes to have their parenthood recognised, even if they do not have the aforementioned marital status, the consent given by the partner for the use of ART is enough. All the above presumptions are *iure et de*

³⁹ *Ibid.*

⁴⁰ See *supra* Zervogianni (2019) (note 36).

⁴¹ Παβδάς, Π. (2017). Surrogate motherhood in Greece: statistical data derived from court decisions. *Bioethica*, 3(2), 39-58.

⁴² *Ibid.*

⁴³ See *supra* Zervogianni (2019) (note 36).

⁴⁴ Davaki, K. (2017). Surrogacy arrangements in austerity Greece: policy considerations in a permissive regime. *Babies for sale: transnational surrogacy, human rights and the politics of reproduction*. London: Zed Books, 142-159.

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iure presumptions — they cannot be challenged. In the case of a single mother resorting to surrogacy, no legal father will be registered in the birth certificate.⁴⁵

After the labour, the surrogate is obliged to deliver the child to the intended parent(s) and does not have the right to contact the child.⁴⁶

The Netherlands

In the Netherlands,⁴⁷ surrogacy is also legal, depending on the contours, although it is not yet regulated.⁴⁸ In this sense, a new proposal could be approved, defining its legal limits and contours, if the Senate and the House of Representatives approve the law.⁴⁹

Since there is no regulation on the subject, contracts are not enforceable, so after birth, the surrogate is the legal mother. Only after the Dutch court decides on the recognition and adoption of the child do the intended parents become the legal parents.⁵⁰

The current legislative proposal aims to forbid and punish commercial surrogacy and regulate the outlines of the altruistic option.⁵¹ It also will make the intended parents the legal parents after birth, and the child will have access to the agreement achieved between the surrogate and her/his parents. Additionally, the draft allows the advertisement of the search for a possible surrogate by the commissioning parents and for women to openly affirm they are willing to carry another person's child — which, so far, is still illegal to do.⁵²

Belgium

⁴⁵ See *supra* Zervogianni (2019) (note 36).

⁴⁶ See *supra* Trimmings (2013) (note 1).

⁴⁷ Unfortunately, there is no official translation of the Netherlands law into an English version, so secondary sources were used to supplement the research.

⁴⁸ The Dutch law only forbids the promotion of commercial law in its Criminal Code. See Government of the Netherlands (n.d.). Legal and Illegal aspects of surrogacy. *Government of the Netherlands*. Retrieved from: <https://www.government.nl/topics/surrogate-mothers/surrogacy-legal-aspects>.

⁴⁹ Overheid.nl (n.d.). Wet kind, draagmoeder en afstamming. *Overheid.nl*. — *De wegwijzer naar informatie en diensten van alle overheden*. Retrieved from: <https://wetgevingskalender.overheid.nl/Regeling/WGK010948#other-sites>.

⁵⁰ Committee on Bioethics of the Council of Europe. (2021, June 14). Surrogacy — Addendum to the Replies to questionnaire on access to medically assisted procreation (MAP), on right to know about their origin for children born after MAP). Retrieved from: <https://rm.coe.int/inf-2016-4-addendum-update-june-2021-e/1680a3229f>.

⁵¹ Government of the Netherlands. (2023, June 30). Legislative surrogacy regulations. *Government of the Netherlands*. Retrieved from: <https://www.government.nl/topics/surrogate-mothers/news/2023/06/30/legislative-surrogacy-regulations>.

⁵² DutchNews. (2023, June 30). Legal basis for surrogacy hailed as breakthrough by campaigners. *DutchNews*. Retrieved from: <https://www.dutchnews.nl/2023/06/legal-basis-for-surrogacy-hailed-as-breakthrough-by-campaigners/>.

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Another example is Belgium, which, even though it has legislation to address ART since 2007 (*Loi du 06 juillet 2007*⁵³), it does not have, however, a specific surrogacy-related regulation, and the contract, under Belgian law, is void. Nevertheless, given that there is no prohibition, agreements are acceptable, and the procedures are practised, but without clear legal protection for the parties.⁵⁴

With that said each hospital or clinic with access to ART can define its requirements for surrogacy agreements if the intended parents fulfil the ART requirements. Therefore, they can decide if they allow partial surrogacy (traditional) or full surrogacy (gestational); they can decide whom to accept as intended parents, either single persons, married, legal partner, or same-sex couples; they can establish that the pregnant woman must have a close relationship or even be a relative of the commissioning parents; they can decide that the pregnant woman must have been a mother before; additionally, they can also define an age-limit for surrogates; etc.⁵⁵

Commercial surrogacy is not acceptable under some provisions of the Belgium civil and criminal code that consider that the human body cannot be commercialised.⁵⁶

As regards the recognition of parenthood, the situation in Belgium is similar to that in the Netherlands — the legal mother will be the woman who gives birth to the child, and the father will be either the surrogate's spouse by presumption or, if she is not married, the intended father, but only if he has applied for recognition of paternity. For the commissioning parents to become legal parents, they have to resort to adoption.⁵⁷

Portugal

In Portugal, Law no 90/2021⁵⁸ brought significant changes to Law no 32/2006,⁵⁹ which regulates medically assisted reproduction, even though surrogacy has been legal since 2016.⁶⁰

⁵³ Belgique. Loi du 6 juillet 2007 relative à la procréation médicalement assistée et à la destination des embryons surnuméraires et des gamètes, *Moniteur belge (Journal officiel)*, p. 38575, 2007.

⁵⁴ See *supra* Committee on Bioethics of the Council of Europe (2021) (note 50).

⁵⁵ Sosson, J. (2019). Art And Surrogacy In Belgium. *Access to Assisted Reproductive Technologies: The Case of France and Belgium*. Berghahn Books, New York, 30-51.

⁵⁶ *Ibid.*

⁵⁷ Pluym, L., & Pennings, G. (2016). Surrogate motherhood in Belgium. In E. Sills (Ed.), *Handbook of gestational surrogacy: international clinical practice and policy issues* (pp. 116–122).

⁵⁸ República Portuguesa (2021). Lei no 90/2021 de 16 de Dezembro 16, Diário da República n.º 242/2021, Série I de 2021-12-16, páginas 13 – 16. Available in: <https://diariodarepublica.pt/dr/detalhe/lei/90-2021-175983728>.

⁵⁹ República Portuguesa (2006). Lei no 32/2006 de 26 de julho, Diário da República n.º 143/2006, Série I de 2006-07-26, páginas 5245 – 5250. Available in: <https://diariodarepublica.pt/dr/detalhe/lei/32-2006-539239>.

⁶⁰ República Portuguesa (2016). Lei no 25/2016, de 22 de Agosto, Diário da República n.º 160/2016, Série I de 2016-02-22, páginas 2775 – 2777. Available in: <https://diariodarepublica.pt/dr/detalhe/lei/25-2016-75177806>.

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In 2018, however, the Constitutional Court declared the law unconstitutional with general binding force, because the surrogate could not revoke her consent at any time, infringing her right to dignity. Due to this decision, the 2006 law was reestablished, meaning that surrogacy was again prohibited and also criminalised.⁶¹

This brought the desire for a new law that would mitigate the flaws of the previous law. The 2021 revised law was enacted to regulate surrogacy motherhood, thereby making Portugal a permissive State. Although this law should be applicable since 2022, the Portuguese Health Ministry has missed different deadlines to present the regulation. Therefore, it is still null and void to celebrate a surrogacy agreement in Portugal.

Nonetheless, under that law, we can read that Portugal will allow this regime to Portuguese citizens and residents, according to Article 2. This legislation is only applicable to women who can make proof of their impossibility of having children.⁶² Furthermore, surrogacy can only be used as a subsidiary regime, and in an altruistic way (Article 8, no 2). Additionally, the law gives preference to surrogate mothers who have already been mothers before (Article 8, no 3).

In accordance with no 4 of Article 8, only gestational surrogacy is authorised and the gametes of one of the intended parents must be used to form the foetus. Since altruistic surrogacy is the only accepted form, commissioning parents are forbidden to make any kind of payment or donation of any goods or money to the surrogate mother, except for expenses related to the pregnancy, including transportation (as outlined in Article 8, no 7). Furthermore, it is prohibited to celebrate a surrogacy arrangement when a relationship of economic subordination is in place between the parties (as provided for in Article 8, no 8).

The consent of the surrogate mother is revokable until the child's registry (Article 8, no 10), and the breeder holds the right to have psychological counselling before, during and after the pregnancy (Article 13-A, no 1, d)).

As mentioned earlier, while some countries have legislation on the topic, others do not regulate the matter, and the way they protect the parties involved is completely different from

⁶¹ Pires, A. S. C. (2023). *GESTACÃO DE SUBSTITUIÇÃO: O CAMINHO PERCORRIDO ATÉ À LEI N.º 90/2021, DE 16 DE DEZEMBRO* (Master's thesis). Repositório da Faculdade de Direito da Universidade de Coimbra. Retrieved from: <https://estudogeral.uc.pt/handle/10316/107062>.

⁶² Either because they do not have a uterus, have an injury or disease in the same organ, or face other clinical situations that prevents them from becoming pregnant (Article 8, no 2).

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each other since this is a topic directly intertwined with domestic family law. An appropriate legislative solution has not yet been found to reconcile all the potentially conflicting rights, and it is far way from being achieved at present.

To summarise, there is a wide spectrum of legal stances, ranging from complete prohibition (like Austria, Croatia, France, Germany, or Sweden) to varying degrees of acceptance and regulation (like the UK or Greece). Furthermore, even the countries that consider it legal do not put the woman in the centre of the debate, focusing more on the intention of the parents and, especially, on the best interests of the child, forgetting the instrumental character that the surrogate carries.

In this sense, the rights and well-being of surrogate women should be carefully thought of in all different legal frameworks, not only during the treatment or the pregnancy but also after the birth.

3. Human Rights and Surrogacy

Surrogacy is not addressed explicitly and directly in any international human rights instrument.⁶³ As a unique phenomenon involving multiple parties and intersecting with diverse areas such as health and family laws, surrogacy raises a range of intricate issues within the realm of international human rights law.

Despite the differences in individual States' positions on surrogacy, it is incumbent upon all States to uphold their responsibility in safeguarding the international human rights of all parties involved, with particular attention to the most vulnerable among them — the child and the surrogate. This entails the establishment and enforcement of appropriate legal and regulatory frameworks at the national level to protect and advance their rights, protected to an international level.

This Chapter aims to present different human rights that might be invoked to legitimise the use of this method, as well as present human rights that may be violated during the process. Therefore, by using mostly international Conventions, the aim is to understand whether surrogacy aligns or diverges from internationally recognised human rights norms and to provide insight into the complexities this figure can raise from an ethical and legal perspective. To complement this research, relevant case law from the European Court of Human Rights (ECtHR) can be found throughout this Chapter.

Since the next Chapter will be entirely devoted to the carriers, this Chapter will focus on explaining the human rights involved in just two parts of the agreement — the intended parents and the child conceived after this agreement — and leave this human rights assessment when addressing the challenges of pregnant women.

Regarding the rights of the commissioning parents, it will be discussed the right to found a family, and the right to respect private and family life. Concerning the child, it will be considered if it can be argued that surrogacy represents the sale of a baby, the right to identity and the best interest of the child. The purpose of this chapter is to acknowledge the content of each right and understand what their implications are.

⁶³ University of Chicago Law School - Global Human Rights Clinic. (2019). Human Rights Implications of Global Surrogacy. *Global Human Rights Clinic*. 10. P. 15.

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a. Rights of the commissioning parents

Surrogacy agreements usually involve two parties — the commissioning parents and the surrogate. Both of them and the child have rights that must be addressed. Regarding the intended parents, three different rights are usually mentioned: the right to found a family, the right to respect for privacy and family life, and the right to reproductive health.

It is to be noted that the right to reproductive health, recognised in Article 12 of the International Covenant on Economic, Social and Cultural Rights, will not be the object of analysis in this section because the scope of that right is more related to women and their healthy sexual life, including sexual information, healthy relationships, and reproductive health, ensuring the empowerment of women in that sense.⁶⁴

Through the appreciation of international law, especially the provisions of the European Convention on Human Rights (ECHR) and the case law of the ECtHR, we can examine what the rights of the intended parents are when they try to claim the recognition of the parent-child relationship and how international human rights steer the landscape of ART and, particularly, surrogacy agreements.

i. Right to found a family

Reproductive rights incorporate the freedom to make reproductive choices, including the use of assisted reproductive technologies through a positive intervention from governments. Their aim is to ensure that all people have access to information about all their options and affordable and safe methods of assisted reproduction in cases where individuals are unable to have children.⁶⁵

The right to found a family is recognized under international law in several international human rights treaties, including in Article 23 of the International Covenant on Civil and Political Rights⁶⁶ (hereinafter, ICCPR) and Article 16.1 of the Universal Declaration of Human

⁶⁴ Tobin, J. (2014). TO PROHIBIT OR PERMIT: WHAT IS THE (HUMAN) RIGHTS RESPONSE TO THE PRACTICE OF INTERNATIONAL COMMERCIAL SURROGACY? *International & Comparative Law Quarterly*, 63(2), 317-352.

⁶⁵ United Nations Population Fund (UNFPA). (2015). Handbook on the Protection of National Human Rights Institutions. UNFPA. Retrieved from <https://www.ohchr.org/sites/default/files/Documents/Publications/NHRIHandbook.pdf> .

⁶⁶ United Nations General Assembly. (1966, December 16). International Covenant on Civil and Political Rights (A/RES/2200A(XXI)). Retrieved from: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> .

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Rights⁶⁷ (UDHR). At the European level, Article 9 of the EU Charter of Fundamental Rights⁶⁸ and Article 12 of the European Convention on Human Rights⁶⁹ (ECHR) also protects this right.

Family Planning also becomes part of the human rights framework according to the Final Act of the International Conference on Human Rights in 1968, where it can be read that “Parents have a basic human right to determine freely and responsibly the number and the spacing of their children.”⁷⁰ This right is already included in a universal treaty — Article 16(1)(e) of the Convention on the Elimination of All Forms of Discrimination against Women⁷¹. Although this right has the purpose of eliminating discrimination against women,⁷² it is directly connected with the right to decide to have a child, together with the right to found and establish a family.⁷³

Article 16 of the UDHR, urged in the Convention as a negative right, does not require any active intervention by States — forced sterilisation or prohibition of any contraceptives⁷⁴ — since it was written after the Second World War.⁷⁵ However, the evolution of science and the easier and more accessible options for people who want to have children but for multiple reasons cannot, and the breakdown of the traditional nuclear family, have brought into the debate the right to procreate and have a child through these new techniques.

This right is understood to empower couples to make informed decisions about their family planning, including the choice of having children, the timing of parenthood, and all the associated decisions and implications that may arise.⁷⁶

⁶⁷ United Nations General Assembly. (1948, December 10). Universal Declaration of Human Rights (A/RES/217(III)). Retrieved from: [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_217\(III\).pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_217(III).pdf).

⁶⁸ European Union. Charter of Fundamental Rights of the European Union. Official Journal of the European Communities. Retrieved from: https://www.europarl.europa.eu/charter/pdf/text_en.pdf

⁶⁹ Council of Europe. European Convention on Human Rights. Retrieved from: https://www.echr.coe.int/documents/d/echr/convention_eng

⁷⁰ United Nations. (1968, April 22 to May 13). Final Act of the Internal Conference on Human Rights (A/CONF.32/41). Retrieved from: https://legal.un.org/avl/pdf/ha/fatchr/Final_Act_of_TehranConf.pdf.

⁷¹ United Nations General Assembly. (1979, December 18). Convention on the Elimination of All Forms of Discrimination against Women (A/RES/34/180). Retrieved from: <https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/cedaw.pdf>.

⁷² Eriksson, M. K. (2021). *Reproductive freedom: In the context of international human rights and humanitarian law* (Vol. 60). BRILL., pp. 181-188.

⁷³ *Ibid.*

⁷⁴ Eijkholt, M. (2010). The right to found a family as a stillborn right to procreate?. *Medical law review*, 18(2), 127-151.

⁷⁵ Office of the United Nations High Commissioner for Human Rights (OHCHR). (2018, November 25). Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles – Article 16. OHCHR. Retrieved from: <https://www.ohchr.org/en/press-releases/2018/11/universal-declaration-human-rights-70-30-articles-30-articles-article-16>.

⁷⁶ See *supra* UNFPA (2015) (note 65).

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However, the ECtHR indicated explicitly that “the right to found a family does not as such create a right to procreate...”⁷⁷ In *Šijakova and Others v. the Former Yugoslav Republic of Macedonia* case,⁷⁸ the applicants’ children joined the monastic order of the Macedonian Orthodox Church and left their house living for and according to the Church’s rules. In addition to other complaints, they believed that they were “victims of a violation of Article 12 of the Convention because they cannot found a larger family and have grandchildren, as their children in holy orders have taken a vow of celibacy.”⁷⁹ The Court made it clear that “the right to have grandchildren or the right to procreation is not covered by Article 12 or any other Article of the Convention.”⁸⁰

Furthermore, there is another case, *S.H. and Others v. Austria*,⁸¹ where two couples were not allowed to resort to ART because the Austrian Artificial Procreation Act did not allow them to do fertility treatments with donor gametes since, in one of the couples, the man was infertile and, on the other, the woman could not produce any ova. The ECtHR, again, did not accept the interpretation that there is a direct correlation between the right to found a family and the right to procreate.

Therefore, according to the ECtHR, it is not legitimate to base the right to procreate and, in turn, to resort to surrogacy on Article 12. This Article only secures couples the right to create a family but does not guarantee that all couples must have that opportunity all the time, meaning that the use of surrogacy cannot be justified under the right to found a family.

ii. Right to respect for private and family life

Article 8 of the ECHR has a very broad scope; it encompasses four different dimensions — privacy, family life, home, and correspondence. Therefore, for it to be applicable, one of the four interests has to be at stake. The ECtHR first evaluates if the case is under the scope of the articles and which dimension was violated. After, it evaluates if there was interference made by a Member State (MS). However, the court will assess not only if the MS interfered with the

⁷⁷ European Court of Human Rights. (n.d.) Guide on Article 12 of the European Convention on Human Rights. Retrieved from: https://www.echr.coe.int/Documents/Guide_Art_12_ENG.pdf.

⁷⁸ *Šijakova and Others v. the Former Yugoslav Republic of Macedonia* (Application No 67914/01 ECtHR of 6 March 2003).

⁷⁹ *Ibid*, para. 4.

⁸⁰ *Ibid*, para. 3.

⁸¹ *S.H. and Others v. Austria* (Application No. 57813/00 ECtHR of 15 November 2007).

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applicant's interest (not complying with its negative obligation), but also if the MS failed to protect that interest (its positive obligation).⁸²

Even though this Article was created with the intention of protecting individuals from the interference of States in those different spheres, it also covers State obligations to safeguard them. Thus, when the Strasbourg court is dealing with a case of State interference, it will analyse if the interference is in accordance with paragraph 2 of Article 8, in pursuit of a legitimate aim. On the other hand, when the ECtHR is dealing with a case of State obligation, it examines whether the significance and importance of the interests involved (if they touch upon "fundamental values") justify imposing the obligation requested by the applicant. In both cases, the MS enjoy a certain margin of appreciation.⁸³

While not discounting the importance of the other elements, family life and privacy will be assessed only to the extent appropriate to the case study of this thesis.

As mentioned in Chapter 2, many European countries do not allow commercial or altruistic surrogacy, which leads many couples to seek countries that do, such as the United States of America (depending on the State), Ukraine, or India. When the child is born, after parentage has been recognised in the country where the surrogacy agreement took place, these couples return to their country and want the kinship to be recognised. The argument used by these couples for the legal relationship to be recognised is the "best interests of the child" (see Article 3 § 1 of the International Convention on the Rights of the Child⁸⁴). Without prejudice to a more extensive explanation in section 3.b.iii., the best interests of the child aim to prioritize the child's welfare in cases involving a child, taking into account the specific circumstances of the situation and deciding based on what is in the child's best interest.⁸⁵

In this regard, applicants have used Article 8 of the ECHR before the Strasbourg Court to defend the recognition of filiation after performing surrogacy agreements and having the child in countries that allow it, considering that States are violating the respect for the right to family life and privacy. This Article aims to guarantee the non-intervention of a State in those spheres. Therefore, for the applicants, the conduct of the State leads to a violation of this Article

⁸² European Court of Human Rights. (n.d.) Guide on Article 8 of the European Convention on Human Rights. Retrieved from: https://www.echr.coe.int/documents/d/echr/guide_art_8_eng.

⁸³ *Ibid.*

⁸⁴ United Nations General Assembly. (1989, 20 November). Convention on the Rights of the Child (Resolution 44/25). Retrieved from <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child>.

⁸⁵ United National Committee on the Rights of the Child. (2013). General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)* (CRC/C/GC/14). Retrieved from: https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf.

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since the non-recognition of the child in the respective country can create negative consequences in those life areas.⁸⁶

Some relevant cases will be introduced, such as *Mennesson v. France*⁸⁷ and *Paradise and Campanelli v. Italy*,⁸⁸ to present how the ECtHR addresses the cross-border legal recognition of parenthood in the EU in cases of surrogacy arrangements. As the analysis unfolds, it is clear that there is no consensus between Member States of the Council of Europe. Those countries that want to block the access because they consider the practice illegal, tend to create measures to prevent it on the grounds of public policy.⁸⁹ On the other hand, we have couples or singles who really want to have a child and put their personal desires first.

The case *Mennesson v. France*⁹⁰ reached the ECtHR after the French government denied the recognition of kinship between a French couple and twins that an American surrogate mother gave birth to. This heterosexual couple had tried ART before, but without success, as the wife was infertile. Hence, they decided to use the husband's sperm and a donated ovum to form an embryo and implant it in the woman who agreed to carry their babies. The couple also argued that the woman had a better income than them, so the agreement was not a commercial exchange, but rather an act of solidarity from her.

Before the babies were born, the Supreme Court of California had already decided that the children's biological father and legal mother would be the commissioning parents. Thus, their birth certificate had no mention of the surrogate. However, the French court considered the details in that judgement were against international public policy and that the registration of those birth certificates should be annulled since surrogacy agreements are illegal for reasons of public policy in France.

The commissioning parents of the twins considered, on top of other claims, that this was a violation of their family life under Article 8 of the ECHR, as the non-recognition of the kinship affects their family life directly on “practical issues” and bureaucracies, the travels constraints of the twins to go outside of France, and the fact that it leads to a lack of protection of the relationship between the intended parents and the twins if something happens to one of the parents, or if they decide to divorce.⁹¹

⁸⁶ Ní Shúilleabháin, M. (2019). Surrogacy, system shopping, and article 8 of the European convention on human rights. *International Journal of Law, Policy and The Family*, 33(1), 104-122.

⁸⁷ *Mennesson v. France* (Application No. 65192/11 ECtHR of 26 June 2014).

⁸⁸ *Paradiso and Campanelli v. Italy* (Application No. 25358/12 ECtHR of 24 January 2017).

⁸⁹ See *supra* European Parliament, DG Citizens' Rights and Constitutional Affairs and DG for Internal Policies of the Union (note 24).

⁹⁰ See *supra* *Mennesson v. France* (note 87).

⁹¹ *Ibid*, paras. 25 and 26.

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According to the ECtHR, it is necessary to consider to what extent the applicants' family life has been violated and what practical obstacles this family had experienced as a result of not having their relationship recognised. The conclusions reached by the Court were that, although they had not succeeded in obtaining the parents-children relationship, the French Government had not prevented them from maintaining a family life on national territory since they were living in conditions similar to those of other couples with children. Hence, in this case, the practical consequences of non-recognition were not as serious to be considered a violation of respect for family life.⁹²

The parents also argued for the existence of a violation of the sphere of privacy under Article 8 of the ECHR. According to the ECtHR, this has some legal implications due to grounding the fact that the French government was restricting access to these family relationships blocked the possibility of the individuals having an identity. Furthermore, even though it was a status recognized previously by the Supreme Court of California, the French court did not want to acknowledge it, denying the children's identity.⁹³ The Court also addressed the question of nationality and the absence of national identity and brought inheritance rights up for debate, as these could be at risk if kinship relationships were not formalised.⁹⁴

For the reasons mentioned above, the Strasbourg Court agreed on the substantial violation of the private life of the twins, as they have the right to have an identity and to see established legal parenthood with the father, with whom they are genetically linked⁹⁵. Not having it acknowledged by the French government affected the children's best interests, especially because the father is biologically related to them, and was an overstep from the French authorities.⁹⁶ Respecting the intended mother, who does not have blood ties, the ECtHR later, in its Advisory Opinion,⁹⁷ prioritised the best interests of the child and recognised that the non-recognition of kinship can lead to numerous difficulties. However, the way to implement this recognition has to be sorted by each Member State (so, for example, adoption can be the institute used to achieve that end).⁹⁸

⁹² *Ibid* paras. 92-94.

⁹³ *Ibid* para. 96.

⁹⁴ *Ibid* paras. 97 and 98.

⁹⁵ *Ibid* paras. 101 and 102.

⁹⁶ *Ibid*, paras. 97 and 100.

⁹⁷ Advisory Opinion Concerning the Recognition in Domestic Law of Legal Parent-Child Relationship Between a Child Born Through a Gestational Surrogacy Arrangement Abroad and the Intended Mother (Request No. P16-2018-001 by the French Court of Cassation, ECtHR of 10 April 2019).

⁹⁸ *Ibid* para. 52.

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Another important case for cross-border surrogacy agreements is *Paradiso and Campanelli v. Italy*,⁹⁹ in which an Italian couple travelled to Russia to conclude a commercial and gestational agreement. The intended mother carried the intended father's sperm to Russia, duly conserved, in order to be used for the formation of the foetus. After issuing the documents for the surrogate mother and the baby to return to Italy, the Italian Consulate in Moscow informed the Italian authorities that the birth certificate contained false information. The child did not share the same genetic material with any of the intended parents, therefore, the Italian authorities believed they breached different laws, including laws regarding the adoption procedure. This couple kept the child for eight months until the newborn was moved to a children's house under the care of social services.

Regarding the violation of family life, the Court questioned whether an actual family relation exists as there is no biological link. In that regard, an evaluation of the role played by the applicants and the bonds created throughout the eight months was carried out. It concluded that that period would not be sufficient for the creation of actual family bonds, especially because no *de facto* family ties existed.¹⁰⁰

Concerning the applicants' private lives, the choice of having a child through ART¹⁰¹ is inside of this layer, and the fact that the child was taken by the commissioning parents for social services because there was no biological link between them, affected the child's identity and relationship with the intended parents.¹⁰²

However, since there was no blood connection between the intended parents and the child, under the Italian law the intended parents were suspects of violating different types of laws, from falsification of documents, to misrepresentation of civil status, and breach of the Adoption Act.¹⁰³ Overall, the Italian Court considered the child a foreign minor, with an unknown nationality and parents, fruit of an unlawful surrogacy contract, being considered in a state of abandonment, deprived of his biological parents and abandoned by his birth mother.

Since there were no genetic ties, the Strasbourg Court considered the decision valid and according to Italian domestic law the fact that the child was taken and given for adoption.¹⁰⁴

⁹⁹ See *supra* *Paradiso and Campanelli v. Italy* (note 88).

¹⁰⁰ *Ibid*, paras. 142-158.

¹⁰¹ In the case *S.H. and Others v. Austria*, paras. 81 and 82 "The Court considers that the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose is also protected by Article 8."

¹⁰² See *supra* *Paradiso and Campanelli v. Italy* (note 88), paras. 161-164.

¹⁰³ *Ibid*, para. 21.

¹⁰⁴ *Ibid*, paras. 168-174.

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Apparently, for the ECtHR, the biological link is part of the answer to decide if a State overstepped when managing its wide range of appreciation. In this case, it was accepted that Italy's conduct was a way of "preventing disorder," as the parents resorted to an agreement that they knew it was illegal in their country and their behaviour was against the Adoption Act — they should have followed the procedures of a standard international adoption.¹⁰⁵

After carefully going through the proportionality principle, even though it calls into question an individual's identity and the personal development of relationships between the applicants and the child,¹⁰⁶ the Court decided that the public order would weigh more. The child's best interests would be secured since eight months was not enough to create a proper bond, and the conduct of these two individuals was illegal in Italy — allowing them to adopt the child would set a precedent for other couples or singles.¹⁰⁷

It is important to make clear that what the Court assesses is the actions of a State and tries to decide whether the measures have caused a violation of the applicants' family and/or private life by not allowing them to recognise their parentage and the consequences thereof — tries to balance both interests and to provide a fair resolution to these ethical and legal cases.

Both case studies presented demonstrated how Article 8 is used before ECtHR by applicants to try to see the parents-child relationship recognised after carrying out illegal agreements according to their domestic laws. As previously mentioned, this is a matter that can be discussed as a violation of private and family life, always trying to safeguard the child's best interests.

b. Rights of the child

The rights of the child are protected mainly by the UN Convention on the Rights of the Child (CRC), but other international and regional human rights instruments also develop them. Surrogacy agreements can raise complex challenges for the child born through these arrangements, making it essential to highlight the child's view and safeguard her/his best

¹⁰⁵ *Ibid*, paras. 175-178 and 198-199.

¹⁰⁶ According to the case *S.H. and Others v. Austria* para. 80 "the notion of "private life" within the meaning of Article 8 of the Convention is a broad concept which encompasses, *inter alia*, the right to establish and develop relationships with other human beings (...), the right to "personal development" (...) or the right to self-determination as such."

¹⁰⁷ See *supra* *Paradiso and Campanelli v. Italy* (note 88), paras. 200-216.

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interests. Questions regarding the sale of children, their right to identity, and above all, to guarantee the children's best interests are the main topics of this subchapter.

There is in fact a broad debate about commercial surrogacy and whether it could be seen as child selling. Defenders of surrogacy see this as a service contract, where the surrogacy gives her services to carry a child for the commissioning parents who cannot conceive on their own.¹⁰⁸ On the other hand, opponents of these arrangements mention the commodification of the child and the effective exchange of money for the child at the end of the deal.¹⁰⁹ It is important to mention that there is no direct mention at the international level that defines commercial surrogacy as the sale of children.

International surrogacy agreements raise more questions since they involve different jurisdictions with different family laws. Some couples and singles resort to surrogacy outside of their country of origin or residence, either because their country does not allow it or they do not fulfil its requirements. However, this can raise questions about the child's nationality, the recognition of legal parenthood, and access to origins, especially genetic and gestational parents, and it can lead to difficulties in recording and preserving relevant identity information or cases of stateless children.

The idea of the "best interests of the child" established in Article 3 of the CRC, is not only a right but a rule of procedure and a principle. This entails that the child's best interests are the primary consideration in cases involving children, and it intends to guarantee and safeguard the well-being of the youngsters.¹¹⁰ As surrogacy agreements can have implications for the child's life, it is crucial to strike a balance between the interests of all parties, principally protecting the newborn.

To sum up, surrogacy is a sensitive topic that raises undeniable ethical and legal questions and can bring different consequences to the newborn. In this sense, it is important that all States involved consider the interests of the parties, but primarily ensure the well-being and development of the child, and protect international children's rights.

¹⁰⁸ Ergas, Y. (2013). Babies without borders: human rights, human dignity, and the regulation of international commercial surrogacy. *Emory International Law Review*, 27(1), 117-188. Pp 139-143.

¹⁰⁹ Smolin, D. M. (2016). Surrogacy as the sale of children: applying lessons learned from adoption to the regulation of the surrogacy industry's global marketing of children. *Pepperdine Law Review*, 43(2), 265-344.

¹¹⁰ United Nations Committee on the Rights of the Child. (2013, July 2). Concluding Observations on the Second Periodic Report of the United States of America Submitted Under Article 12 of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography (CRC/C/OPSC/USA/CO/2). Retrieved from: <https://digitallibrary.un.org/record/756282> .

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i. Sale of a child?

As mentioned in the previous paragraphs, European countries tend not to accept commercial surrogacy in their domestic law. Even in countries where it is accepted the existence of those agreements, they usually are altruistic like in the United Kingdom. People seeking to have a child and not being able to do it, especially in abolitionist States, resort to surrogacy-friendly countries to access it. However, these countries are usually the ones accepting money in exchange for the woman to carry a child in her womb for them — like India, the United States, or Ukraine (prior to the war).

There is an ongoing debate about the sale of children and whether it applies to commercial surrogacy agreements. The focus of this debate is the sale of children under the CRC and the Optional Protocol on the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography¹¹¹. Nevertheless, the voices pro-surrogacy do not see these arrangements as baby-selling, as they consider them as it was a contract signed prior to the birth of the child, and it is a service that the woman is giving.

Article 35 of the Convention on the Rights of the Child asserts that “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.” Additionally, Article 2(a) of the Optional Protocol states that “Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.”

According to that definition, *a priori*, we can include surrogacy agreements as a way of selling children: the surrogate will give birth to a child, and she/he will be transferred by the surrogate to the commissioning parents in exchange for money (in this sense, we are only considering commercial surrogacy). Nonetheless, this is not enough for a strong argument; it is necessary to dig into this definition and understand if the intention or purpose of the sale is relevant if a child is actually transferred, if it matters who are the commissioning parents and if it changes in cases where there is a biological link.

It seems that Article 3 of the Option Protocol delimits the notion of selling a child to specific cases only:

¹¹¹ United Nations General Assembly. (2000, May 25). Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (Resolution A/RES/54/263). Retrieved from <https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-child-sale-children-child>.

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Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether such offences are committed domestically or transnationally or on an individual or organized basis: (a) In the context of sale of children as defined in article 2: (i) Offering, delivering or accepting, by whatever means, a child for the purpose of: a. Sexual exploitation of the child; b. Transfer of organs of the child for profit; c. Engagement of the child in forced labour; (ii) Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption (...).¹¹²

However, Article 3 is not exhaustive, meaning that other conducts can be included under the sale of children, and States should address and prevent it. Furthermore, the definition of the sale of children mentioned above refers to “any act or transaction whereby a child is transferred” — it seems that we can include surrogacy agreements in this definition.¹¹³

Additionally, the Committee on the Rights of the Child¹¹⁴ responded to a report issued by the United States of America¹¹⁵ and raised its concerns on the sale of children, where it included a mention of surrogacy practices under the context of international adoption. On this observation, under the title “Adoption”, we can read:

29. (...) Furthermore, the Committee is particularly concerned that: (...) (b) The absence of federal legislation with regard to surrogacy, which if not clearly regulated, amounts to sale of children (...)” and “30. The Committee strongly recommends that the State party: (...) (b) Define, regulate, monitor and criminalize the sale of children at federal level and in all states in accordance with the Optional Protocol, and in particular the sale of children for the purpose of illegal adoption, in conformity with article 3, paragraphs 1 (a) (ii) and 5, of the Protocol; including issues such as surrogacy and payments before birth and the definition of what amounts to “reasonable costs”(…).¹¹⁶

¹¹² *Ibid.*

¹¹³ See *supra* Tobin (2014) (note 62).

¹¹⁴ It is composed of a group of 18 experts and its function is to supervise the implementation of the CRC by the signatory States and the implementation of the Convention Optional Protocols. See Office of the High Commissioner for Human Rights. Introduction to the Committee. *United Nations*. Retrieved from: <https://www.ohchr.org/en/treaty-bodies/crc/introduction-committee> .

¹¹⁵ See *supra* UN Committee on the Rights of the Child (2013) (note 108).

¹¹⁶ *Ibid*, pp. 8 and 9.

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Therefore, it seems evident that this Committee includes surrogacy as a form of selling children, and these mothers should not transfer a newborn and the custodial rights in exchange for a sum of money.¹¹⁷

Moreover, according to the definition of the sale of children in international law, “a child is transferred by any person,” which means that no one, with or without genetic ties to the child, is entitled to exchange a child for money. It is irrelevant if the child shares the same DNA with the person giving away the child.¹¹⁸

On the opposite, the pro-surrogacy authors defend that the contract was signed before the child was born, so it is a service that the woman is predisposed to provide — the treatments, the gestation during the period of pregnancy and childbirth — and the outcome is the birth of a healthy child. They argue that the actual transfer in these arrangements is the gametes and the rights of the child that the woman will carry. Further, after the transfer, the embryo already belongs to the intended parents.¹¹⁹

As argued by these authors, the product of the donors’ gametes — the embryo, the foetus, and the newborn — is not the surrogate’s property, it is something separated from the identity of the carrier, being assumed as property of the commissioning parents, and so they state that she cannot have a maternal interest in the baby.¹²⁰ Moreover, depending on the national regulation in place, if the commissioning parents are considered the parents of the child right after birth, they cannot be considered guilty of buying their own child.¹²¹

Following the views of these authors, surrogacy agreements are not, in principle, a source of exploitation. Generally speaking, those are people who intend to build a family but who, for various reasons, decide to use a bearer to carry their child for nine months, implying that they will provide care and support for the child. Therefore, it does not seem to be included in the scope of Article 3 of the Optional Protocol, where sexual exploitation, transfer of organs, or child labour are included.¹²²

Finally, these commentators believe that the woman disposes of her own body, so she can, if that is her willingness and desire, sign a contract where she consents to undergo treatments aimed at the development of a foetus so that, after birth, the child is delivered to the

¹¹⁷ See *supra* Smolin (2016) (note 107).

¹¹⁸ See *supra* Tobin (2014) (note 62).

¹¹⁹ See *supra* Ergas (2013) (note 106).

¹²⁰ *Ibid.*

¹²¹ Hill J. L. (1991). What does it mean to be a "parent"? The claims of biology as the basis for parental rights. *New York University law review* (1950), 66(2), 353–420.

¹²² See *supra* Tobin (2014) (note 62).

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intended parents. This argument stands for the contractual autonomy of the signatory parties and the freedom of contracts.¹²³

In conclusion, this is far from being a consensual approach on the matter. On the one hand, we have the definition of “sale of children” that seems to include surrogacy agreements, even though it is not directly addressed in the Convention nor the Optional Protocol; on the other hand, we have pro-surrogacy authors who believe that these are service contracts and the foetus is not the property of the surrogate mother, since she is not genetically related to the baby. In addition, the intention of these arrangements is also under debate, as well as the regulation and the contractual autonomy of the parties. In contrast, there are key questions about the exploitation and commodification of the child that could be raised.

ii. Right to identity

The right to identity is an international human right enshrined in the CRC in Articles 7 and 8 and in ICCPR in Article 24(2) and (3), and it encompasses birth registration, nationality, name, and family relations. The purpose of the right to identity is for everyone to know about their origins in order to protect the person’s psychosocial and medical life since the lack of information could have numerous implications.¹²⁴

According to the Committee on the Rights of the Child, family is defined as “a variety of arrangements that can provide for young children’s care, nurturance and development, including the nuclear family, the extended family, and other traditional and modern community-based arrangements, provided these are consistent with children’s rights and best interests.”¹²⁵ This definition includes not only the nuclear family but also other important elements that may arise from agreements made, keeping in mind the child’s best interests and the protection of her/his rights, including the right to identity.

Notwithstanding this definition, according to Article 7 of the CRC, the child has “as far as possible, the right to know and be cared for by his or her parents”, since that definition can embrace many different subjects and it would be impossible for all of them to take care of the child. Therefore, in the context of surrogacy, the surrogate mother and the donors of

¹²³ See *supra* Ergas (2013) (note 106), pp. 139-143.

¹²⁴ Dambach, M., & Cantwell, N. (2023). Child’s right to identity in surrogacy. In K. Trimmings, S. Shakargy, & C. Achmad (Eds.), *Research Handbook on Surrogacy*. Edward Elgar Publishing Ltd.

¹²⁵ United Nations Committee on the Rights of the Children. (2006, September 20). *General comment No. 7 (2005): Implementing Child Rights in Early Childhood* (CRC/C/GC/7/Rev.1). Retrieved from: <https://digitallibrary.un.org/record/570528> . Para 15.

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gametes, also biological parents, might not be able to take care of the child based on the agreement made, and it does not represent a violation of Article 7.¹²⁶

Given the multiple people who can be involved in one surrogacy agreement, it can be challenging to keep a record of all of them, especially because some of these arrangements are made in cross-borders. However, it is a State obligation to make sure that all relevant information is safe and available, and “Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.” (Article 8 (2) of the CRC). In this context, the constitutive elements of the child’s identity may include the social, genetic, and gestational parents.¹²⁷

In 2022, a briefing note from the United Nations International Children's Emergency Fund (UNICEF) and Child Identity Protection was published, raising concerns about the child’s identity not being preserved in surrogacy cases.¹²⁸ It can be read:

Decisions about whether to preserve information relevant to a child’s identity can have a lifetime impact on the child, and future generations, in several ways. Knowing one’s origins is fundamental to the child’s physical, psychological, cultural and spiritual development. Having one’s own identity is also a gateway to the enjoyment of the child’s other fundamental rights, such as those related to protection, health, education, and the maintenance of family ties.¹²⁹

For this reason, children’s access to their origins and identity can jeopardise the fulfilment of other rights, and it is imperative to safeguard this right. Surrogacy agreements can make the recognition of a child’s identity a tough task in cases where the donor(s) and/or the surrogate want to be kept anonymous or when civil registration systems are not prepared for the registry of a surrogacy-born child, also because they do not communicate cross-borders. Moreover, the child can be put in a stateless situation when the country where she/he was born does not recognise her/him as a national, nor does the State where the parents have their nationality or where they reside since they come from an abolitionist country.¹³⁰

¹²⁶ See *supra* Tobin (2014) (note 62).

¹²⁷ United Nations Human Rights Council. (2016). *Report of the Special Rapporteur on the sale of children, child prostitution and child pornography – Note by the Secretariat* (A/HRC/34/55). Retrieved from: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/440/24/PDF/G1644024.pdf?OpenElement> . Para. 32.

¹²⁸ UNICEF and Child Identity Protection. (2022). *Key considerations: Children’s Rights & Surrogacy Briefing Note*. Retrieved from: <https://www.unicef.org/media/115331/file> .

¹²⁹ *Ibid*, p. 2

¹³⁰ *Ibid*.

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In fact, the right to identity also encompasses the right to a nationality after birth. However, certain international surrogacy agreements have the potential to result in statelessness for the child, particularly when the country where the surrogacy arrangement took place, and the country of residence or nationality of the commissioning parents fail to recognise their parental status.¹³¹ This happens when singles or couples resort to surrogacy outside their State, as it does not allow it. The State of the surrogate denies the nationality because the surrogacy was done according to the law, so for that State, the parents of the child are the commissioning parents. In addition, the country of the intended parents does not recognise parenthood and her/his nationality, as the surrogacy agreement is against public policy.¹³²

The legal way of dealing with these cases should always bear in mind as a primary consideration Article 3 of the CRC, the best interests of the child. Although national courts would want to uphold the rule of law and public policy, safeguarding the child's well-being is crucial to avoid statelessness, even if her/his parents violated the law.¹³³ An example of this is the *Mennesson v. France* case (explained in Section ii. *Right to respect for private and family life*), in which, even though the ECtHR recognised that the intended parents engaged in a prohibited arrangement according to French law, the identity of the child was being denied, and his best interests were taken into consideration in the moment of the Court's decision.

Due to the difference in legislation throughout EU countries that may threaten the recognition of cross-border parentage, the European Commission issued a proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions, and acceptance of authentic instruments in matters of parenthood and the creation of a European Certificate of Parenthood.¹³⁴ Since there is no European consensus on the recognition of parenthood, and EU countries have full competence over national family law issues, the European Commission believes there is a need to standardise Private International Law in this matter, ensuring the rights of children are protected and guaranteeing more certainty to citizens on this matter.¹³⁵

Even though family law is a matter of national competence, when it has cross-border implications, it may fall within the competence of the EU, according to Article 81(3) of the

¹³¹ Rajan, S. (2017). International surrogacy arrangements and statelessness. *The World's Stateless Children*, 374-384.

¹³² *Ibid.*

¹³³ See *supra* Rajan (2017) (note 129).

¹³⁴ European Commission. (2022, December 7). Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (COM/2022/695 final). Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52022PC0695>.

¹³⁵ *Ibid.*

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TFEU. This proposal aims to set standard rules to decide which Member State has jurisdiction, to determine the applicable law, a common recognition of a parentage established in another Member State, and to create a European Certificate of Parenthood to prove this filiation in other Member States.¹³⁶

While the proposal from the European Commission appears compelling, its applicability is limited to EU countries, requiring Member States to recognize parenthood established in other EU Member States. Nonetheless, in cases where singles and couples resort to commercial surrogacy, mostly performed outside the EU, recognition of parenthood will “remain subject to the national law of each Member State.”¹³⁷ The cases where legal parenthood was established in a third State will not be protected under this Regulation since they are outside this territorial scope.¹³⁸

In short, the child’s identity should be protected at the time the surrogacy contract is drawn up, taking into account all the elements that compose it — from the surrogate to the intended parents, and also the data of the donors of gametes — whether there is a genetic link or not, as all of these elements were part of the conception of the child.¹³⁹ Despite this, there are a variety of ways of registering the newborn in countries that allow surrogacy arrangements. For example, in Greece, the intended mother is automatically recognised as the mother without any record of the surrogate and gametes’ donors (only in the Court’s ruling).¹⁴⁰

Concerning the donors of gametes, and because they are also included in the concept of “family relations” as mentioned above, their information is relevant for the child to have full access to her/his identity. The Parliamentary Assembly of the Council of Europe adopted Recommendation No. 2156,¹⁴¹ which states that the anonymity of egg and sperm donors should be prohibited, and the child would have access to this information either on her/his 16 or 18 years old. The disclosure of the information should not have any effects with regard to the attribution of parentage.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ See *supra* European Parliament, DG Citizens’ Rights and Constitutional Affairs and DG for Internal Policies of the Union (2023) (note 24).

¹³⁹ “From the child’s perspective, genetics, gestation and the exercise of parental responsibility are all a part of the constitutive elements of identity.” In United Nations General Assembly. (2019). Sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material — Note by the Secretary-General (A/74/162). Retrieved from: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/216/49/PDF/N1921649.pdf?OpenElement> .

¹⁴⁰ See *supra* Davaki (2017) (note 44).

¹⁴¹ Parliamentary Assembly of the Council of Europe. (2019). Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children (Recommendation 2156). Retrieved from: <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=27680> .

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Countries like Switzerland have already addressed this issue by determining that all sperm donors will have their information registered in the *Office fédéral de l'état civil*, ensuring the right to identity to all children born through ART.¹⁴² Similarly, in France, *Decree* No. 2022-1187 of August 25, 2022,¹⁴³ imposes that, from the 1st of September, all sperm and egg donors will have to consent to the communication of their data before proceeding with the donation. Children will have access to this information when they achieve the age of majority. Whereas, in countries such as Belgium, anonymous donation of sperm and oocytes is legal¹⁴⁴.

Surrogacy arrangements may lead to a transfer of legal parenthood from the surrogate mother to the intended parents, so it is important to preserve all relevant details. This transfer can be done through other institutes, such as adoption. The ECtHR, in its case law, has already accepted that adoption is a valid method to change the established parenthood (as mentioned above in ii. Right to respect for private and family life).

In summary, a child's identity is essential; it is a way to understand her/his origins, form a sense of self, and their gateway to other basic rights, such as education, healthcare, and freedom from exploitation. Protecting children's right to identity is a fundamental human rights issue enshrined in the CRC and ICCPR. It is crucial to ensure that all children have the opportunity to reach their full potential, and it should be protected by all States among countries.

Surrogacy agreements present many challenges to this right, especially considering international surrogacy agreements. From the non-recognition of parenthood in the intended parents' country of origin or residence, to the risk of the possibility of statelessness, or the non-availability of all information regarding the child's birth procedure, these are all challenges that these agreements can face regarding the child's right to identity. All States should protect this right and the fundamental right of the best interests of the child to guarantee that every child can fully enjoy their human rights and reach their fullest potential.

¹⁴² Office federal de la justice. (2023, March 8), Registre des donneurs de sperme. *Confédération suisse*. Retrieved from: <https://www.bj.admin.ch/bj/fr/home/gesellschaft/zivilstand/spenderdatenregister.html>.

¹⁴³ République Française. (2022, August 27). Décret No 2022-1187 du 25 août 2022 relatif à l'accès aux données non identifiantes et à l'identité du tiers donneur pris en application de l'article 5 de la loi no 2021-1017 du 2 août 2021 relative à la bioéthique et portant modification des dispositions relatives à l'assistance médicale à la procréation. *Journal officiel électronique authentifié* n.º 0198. Retrieved from: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000046221018>.

¹⁴⁴ See Article 57 of the Loi du 6 juillet 2007 relative à la procréation médicalement assistée et à la destination des embryons surnuméraires et des gamètes. Retrieved from: https://igvm-iefh.belgium.be/sites/default/files/downloads/6_juillet_2007.pdf.

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iii. Best interests of the child

As mentioned in the previous sections, the best interests of the child are protected under international human rights law, and it is enshrined in Article 3 of the CRC. This Article states that the child's best interests shall be a primary consideration when any action relating to a child is at stake. The purpose of this principle is to make sure that the well-being of a child is safeguarded and placed first.

Prior to the CRC, this principle was already protected in the 1959 Declaration of the Rights of the Child¹⁴⁵ and national laws.¹⁴⁶ The Convention puts the child at the centre of decision-making processes, and it mentions this principle throughout its document in other different Articles (see Articles 9, 18, 20, 21, 37, and 40).

Even though the CRC did not give a proper definition of what is in the best interests of the child, it requires that any type of choices should be made with the children's welfare, safety, and development in mind. In its General Comment No. 14, the CRC Committee explains this concept as a threefold conception: a substantive right, a fundamental, interpretative legal principle, and a rule of procedure.¹⁴⁷ As a substantive right, it means that when different interests are at stake, this right has to be fulfilled in the decision; as a principle, if different interpretations of a provision exist, the one carried out has to ensure the best interests of the child; finally, as a rule of procedure, when a decision regarding at least one child has to be taken, all the different ways of impacting the child and relevant circumstances must be considered, and the final decision, based on these reflections, has to respect the child's best interests.¹⁴⁸

The notion "child's best interests" is a complex concept since it can contain different conditions, depending on a case-by-case assessment, based on all the relevant circumstances. In order to guarantee its fulfilment, it is necessary to take into consideration different individual characteristics of the child or children, to be able to balance all the elements and decide for their best interests. Additionally, the best interests of the child is not a single principle/right; on the contrary, it highlights and complements other international human rights and puts them into perspective.¹⁴⁹

¹⁴⁵ United Nations General Assembly. (1959, November 20). Declaration of the Rights of the Child (A/RES/1386(XIV)). Retrieved from: <https://digitallibrary.un.org/record/195831> . Principle 2.

¹⁴⁶ Gerber, P., & O'Byrne, K. (2016). Souls in the house of tomorrow: the rights of children born via surrogacy. In *Surrogacy, law and human rights*. Routledge. 81-112. Pp. 88-90.

¹⁴⁷ See supra UN Committee on the Rights of the Child (2013) (note 108).

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

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According to the General Comment No. 14 elaborated by the Committee on the Rights of the Children, some elements can be determined to ensure the child's best interests, such as: the child's view, identity, preservation of the family environment and maintaining relations, care, protection and safety of the child, situation of vulnerability, the child's right to health and education.¹⁵⁰

Surrogacy agreements can create different implications in the child's life, putting into question the child's best interests, especially when these arrangements are international. The child's best interests must be taken into consideration "in all actions concerning children" (Article 3(1) of the CRC). Therefore, considerations should start even before the child is born, whether the child should be conceived, if the parents are suitable to care for the child, if the child will have an identity and nationality if the legal recognition of parenthood will be provided, etc.¹⁵¹ All individuals involved in the surrogacy process must preserve the best interests of the child even before conception — the intended parents, the agency (intermediary), and the surrogate.

In the event that the intended parents resort to a surrogacy arrangement, the agency assigns them a carrier, and she conceives a child; if, after birth, the child is subject to a legal proceedings, the best interest of the child will have to be provided by the competent authorities to do so.¹⁵² This is an obligation stated in Article 3 (1) of the CRC: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

As mentioned earlier, in ECtHR jurisprudence, the principle of the best interests of the child is what are sought in the final decision of the Court, based on the violation of other human rights of the child. In *Mennesson v. France* (explained in ii. Right to respect for private and family life), even though the Strasbourg Court recognised the illegality of the contract established between the intended parents and the surrogate, the Court prioritised preserving the child's best interest.

Another example of the protection of the child's best interest under the ruling of the ECtHR is the case *D.B. and Others v. Switzerland*.¹⁵³ A same-sex couple resorted to surrogacy in the United States, and the Swiss Government only allowed the parenthood recognition of

¹⁵⁰ *Ibid*, paras. 52-79.

¹⁵¹ See *supra* Gerber (2016) (note 144), pp. 88-90.

¹⁵² *Ibid*.

¹⁵³ *D.B. and Others v. Switzerland* (Application Nos. 58815/15 and 58252/15 ECtHR of 22 November 2022).

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the genetic father and did not give any other option to the other intended father. Until 2018, in Switzerland, only married couples could adopt, so even though they were registered partners, the proponent could not adopt the child and see his kinship recognised for seven years. The Court's rule mentioned that, although the couple violated Swiss law, the fact that the Swiss authorities did not provide any option for the intended father and the child to see their filiation recognised — making it a general impossibility and for a considerable period of time — was against the child's best interest and the right of private life of the intended father.¹⁵⁴

In summary, the child's best interest, protected under international and national laws, intends to put children at the centre of decision-making and aims to ensure their well-being. Although the Committee of the Rights of the Child did not provide a concrete definition of a child's best interest, it explained that this is a right, a principle and also a rule and clarified some elements that need to be taken into account. This must be assessed case-by-case, being attentive to all relevant details and circumstances. In the context of cross-border surrogacy, this can be even more difficult and challenging, since it encompasses so many different subjects and legal complications.

¹⁵⁴ *Ibid*, para 89.

4. Challenges in Ensuring Surrogate Women's Rights

The surrogate woman is a crucial piece of this agreement. However, her rights and well-being are a big concern throughout this journey. As surrogacy continues to expand and a lot of singles or couples want to see their dream family come true, it is crucial to address the socio-economic, ethical, and legal challenges that women are often facing. This Chapter intends to delve into different issues that create an imbalance of power, where women are the vulnerable party of the agreement.

In States that embrace surrogacy, there is a need for policymakers and lawmakers to consider the potential exploitation and commodification of women, either in commercial or altruistic surrogacy. The woman's uterus has been used as a commodity for real reproductive markets, and women with less income have been exploited by other people who seek to fulfil their dreams, or by intermediaries whose only concern is profit.¹⁵⁵ Surrogacy itself can be a very complex agreement that can have a negative impact on a lot of women's lives for multiple and different reasons. Thus, an ecosystem where the rights and dignity of surrogate women is what we seek to establish.

On top of that, it is also essential to create limits on the contract and its clauses and define its (un)enforceability, especially when it violates the surrogate's autonomy, self-determination, dignity and privacy. Women need guarantees and legal protection in an agreement in which they might have less power, striving to create equity in the power balance.

Regarding who decides for abortion or selective reduction, it represents a clash between reproductive rights, autonomy, and contractual obligations. However, while the interests of the intended parents are important, they cannot outweigh the fundamental rights and autonomy of the surrogate.

Furthermore, the right of the surrogate to repent and decide to not relinquish the child must be addressed, considering the emotional, legal, and ethical dimensions involved. Her consent can be at risk and the hormonal, physical and emotional changes and the bond created between her and the baby might endanger the entire agreement.¹⁵⁶ Therefore, surrogates deserve comprehensive and supportive frameworks to cover these aspects.

¹⁵⁵ Palattiyil, G., Blyth, E., Sidhva, D., & Balakrishnan, G. (2010). Globalization and cross-border reproductive services: Ethical implications of surrogacy in India for social work. *International social work*, 53(5), 686-700.

¹⁵⁶ Brinig, M. F. (1995). A Maternalistic Approach to Surrogacy: Comment on Richard Epstein's Surrogacy: The Case for Full Contractual Enforcement. *Virginia Law Review*, 2377-2399.

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By diving deeper into these challenges, we can identify several legal and ethical issues that are in need of legal protection. Therefore, it becomes crucial for countries to have strict and clear frameworks concerning surrogacy and the surrogate herself, safeguarding her fundamental rights and well-being.

a. Exploitation and commodification of women's bodies in surrogacy contracts?

Surrogacy itself brings various topics to debate involving different people in the agreement. One ongoing discussion refers to the exploitation of women's bodies in these contracts, as they use their wombs to conceive a child that they will have to surrender to the other contractual part. The contract may involve compensation to the carrier, depending on the country's legal acceptance of commercial, or just altruistic surrogacy.

On this topic, different visions will be presented, from the proponents to the opponents' vision of surrogacy, and its arguments. A more liberal approach would say that women are free to use their bodies and to decide if they want to bear another person's child.¹⁵⁷ On the other hand, questions regarding a patriarchal society, the fact that a human body is being used as a commodification for reproductive labour, and paid consent are all arguments of opponents who strive for women's rights and protection.¹⁵⁸ In between those two approaches, many others exist, for example, commentators who defend that only altruistic surrogacy is according to human rights and women's dignity.¹⁵⁹

There is no doubt that the concern around women's exploitation is legitimate in certain cases, especially when countries allow, but do not regulate enough, leaving the most vulnerable parties — the surrogate — at risk.¹⁶⁰ The case of India is a very good example, women were agreeing to surrogacy agreements, because their income was very high compared to the women's salary standards in India, and even higher than their husbands regular income. Naturally, this consent was biased and quite questionable if women were doing it because they

¹⁵⁷ Andrews, L. B. (1988). Surrogate motherhood: the challenge for feminists. *Law, Medicine and Health Care*, 16 (Issues 1-2), 72-80.

¹⁵⁸ Ekman, K. E. (2013). *Being and being bought: Prostitution, Surrogacy and the Split Self*. Spinifex Press. P. 139.

¹⁵⁹ Mac Crorie, B. (2017). O Princípio da Dignidade da Pessoa Humana, in *Debatendo a Procriação Medicamente Assistida*. Projeto FCT UID 443_CIJE, Porto e FDUP. 55-62.

¹⁶⁰ "Surrogacy, if not regulated, will prove to be an avenue of exploitation and subjugation of women." In Sharma, R. (2007). An International, Moral & Legal Perspective: The Call for Legalization of Surrogacy in India. *National Law University Jodhpur (NLUJ)*. Retrieved from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=997923.

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were fully consenting, or just due to economic pressures and difficulties. These women would minimise the risks involved in surrogacy and would be encouraged by the sum of money.¹⁶¹ Additionally, even though there is not much data available, there are reports of women with poorer backgrounds not knowing their rights, especially regarding health and well-being.¹⁶²

Since 2015 reproductive tourism around India has been banned. The government of India has passed a law banning surrogacy arrangements involving foreigners and only allowing heterosexual Indian couples who have been married for at least five years to resort to this method.¹⁶³ Later, in December 2018, the same Government prohibited commercial surrogacy authorising it only to Indian infertile women in a heterosexual marriage for, at least five years.¹⁶⁴

Some perspectives advocate for surrogacy as a legitimate method, thus it is important to consider the arguments put forth by proponents. Supporters of surrogacy underline that this method is providing an option for couples and singles with infertility difficulties granting them access to parenthood with a biological link. A more liberal point of view sees these deals as a way of auto-determination and autonomy of women to decide what to do with their bodies, including carrying out a pregnancy with the aim of giving the newborn away after childbirth.¹⁶⁵

Indeed, women have a right to reproductive choice — women should be able to decide if they want to carry an abortion if they want to have children, how many children they want, and the temporal space between them.¹⁶⁶ According to this approach, surrogacy is also a reproductive choice and a representation of freedom to contract and autonomy by women. Furthermore, they believe that protecting women from their own decisions made through voluntary informed consent can be a very “paternalistic” argument and it should not be a decision made by governments.¹⁶⁷

The proponents of this understanding believe that surrogacy can represent a liberation from traditional roles and that women can be separated from the motherhood role. As they

¹⁶¹ Smerdon, U. (2008). Crossing bodies, crossing borders: international surrogacy between the united states and india. *Cumberland Law Review*, 39(1), 15-86. Pp. 51-56.

¹⁶² See *supra* Palattiyil (2010) (note 155).

¹⁶³ Saran, J. S. R. G., & Padubidri, J. R. (2020). New laws ban commercial surrogacy in India. *Medico-Legal Journal*, 88(3), 148-150.

¹⁶⁴ *Ibid.*

¹⁶⁵ See *supra* Andrews (1988) (note 157).

¹⁶⁶ Office of the High Commissioner for Human Rights. (2022, September 23). Women's and girls' reproductive choices must be respected, UN experts say. *OHCHR*. Retrieved from: <https://www.ohchr.org/en/statements/2022/09/womens-and-girls-reproductive-choices-must-be-respected-un-experts-say-0>.

¹⁶⁷ Sistare, C. T. (2018). Reproductive freedom and women's freedom: Surrogacy and autonomy. In *Living with contradictions*. Routledge, 395-402.

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argue, patriarchal society has always placed women as being the ones designed to procreate and care, but surrogacy breaks this principle because it demonstrates that we can procreate without intending to care for the child, since it is not inherent to this role or motherhood, contrary to what society has instilled.¹⁶⁸ Moreover, besides representing the protection of women's privacy, these views argue that surrogacy also guarantees economic autonomy, as women are being paid for something that was always seen as unpaid work.¹⁶⁹ According to these views, these agreements should be seen as "an improvement on the opportunities presently available to many women."¹⁷⁰

Since opponents raise questions about consent, supporters of surrogacy believe that surrogacy arrangements have all the risks pregnancy can have set out in the contract, making them even more informed than women carrying a pregnancy in traditional families. On top of that, as supporters of this view indicate, consent is something people give in advance, regrets of decisions will always come after every life decision. Thus, it is true that women can regret the arrangement they made after the newborn's birth, however knowing how we will feel after taking an informed decision cannot be a requirement to make any choice. In consequence, women should not be seen as incapable of making decisions based on their possible parental feelings, they should be treated as autonomous individuals.¹⁷¹

For these authors, surrogacy should be legal and create conditions for women to bear a child without losing control over their bodies. Thus, these surrogacy agreements should guarantee legal protection for the women to have the power of medical decisions throughout pregnancy. Additionally, ensuring good conditions in the contract, and giving them fair payment and treatment prevents the chances of exploitation.¹⁷²

On the other hand, opponents of this practice consider it an exploitation of women's bodies, mostly women in less favourable economic conditions, who accept submitting to this process, not out of solidarity, but for the economic benefits it will bring them. According to a study made by P J Parker, in 1983, between 125 surrogates, "89% of women who said a fee was a necessary condition",¹⁷³ which proves that, even if there is an altruistic purpose behind it, money is the ultimate interest. Surrogates may be forced into the practice by poverty or other

¹⁶⁸ See *supra* Andrews (1988) (note 157).

¹⁶⁹ See *supra* Ekman (2013) (note 158).

¹⁷⁰ See *supra* Sistare (2018) (note 168).

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

¹⁷³ Stuhmcke, A. (1995). For love or money: the legal regulation of surrogate motherhood. *Murdoch University electronic journal of law*, 2(3), E4.

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less favourable circumstances and may not fully understand the risks and responsibilities involved. They may also be mistreated or neglected during the pregnancy or have to deal with emotional fallout after birth.¹⁷⁴

It seems that countries that allow the payment for surrogacy are admitting the economic exploitation of the surrogate mother, putting into question informed consent. Paid consent refers to the payment or compensation given to a surrogate mother in exchange for her agreement to carry and deliver a child for the intended parents and it can take the form of money, benefits, or other forms of compensation.

As argued by opponents, paid consent is a controversial issue in the context of surrogacy, as it raises ethical and legal concerns about the exploitation and commodification of women's bodies and reproductive labour and questions how free they were when they decided to enter into such agreements – it is important to mention that Article 3 of the EU Charter of Fundamental Rights demands a “free and informed consent of the person concerned”. It is argued that it is exploitative for surrogates to be paid for their services, as it might reinforce patriarchal norms and power dynamics. By paying surrogates for their services, this would perpetuate the idea that women's bodies are available for hire or rent and that their reproductive labour is a commodity to be bought and sold. This is directly connected with the systemic devaluation of women's work and reinforces gender inequality.¹⁷⁵

Additionally, these authors believe that the power dynamics between both parties can be seen as unequal, with intended parents having more power and resources to dictate the terms of the surrogacy agreement, while surrogates may feel pressured to accept those terms due to financial need.

Opponents state that it is possible that paying for surrogacy might create a reproductive market where reproductive processes are treated as property to use as business transactions where individuals produce reproductive materials or services in exchange for financial compensation. Human reproduction, which was always considered personal, is transformed into commodities that can be bought or rented. Making it a market, market forces will come with it, such as profit, competition on pricing, negotiations, and requirements from the intended parents — then again, women are just diminished to a commodity.¹⁷⁶

¹⁷⁴ Watson, C. (2016). Womb Rentals and Baby-Selling: does surrogacy undermine the human dignity and rights of the surrogate mother and child?. *The New Bioethics*, 22(3), 212-228.

¹⁷⁵ *Ibid.*

¹⁷⁶ Davis, J. S. (2017). Regulating Surrogacy Agencies through Value-Based Compliance. *J. Corp. L.*, 43, 663-679.

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Admitting this practice is using the woman's body as a commodity, proponents of surrogacy usually mention that every job requires us to use our bodies as property.¹⁷⁷ However, this is a dangerous and arguable argument when comparing surrogates with other occupations. Individuals indeed use their bodies as part of their work, but it is also true that surrogacy is the use of a woman's womb, a very intrusive and invasive practice that does not happen in other jobs. The physical involvement in these arrangements and other jobs cannot be compared, as it involves a very personal and intimate aspect of a woman's body. Then again, it compares the reproductive process to a professional service, commodifying the woman's body and diminishing her dignity (dignity that is protected under the Charter of Fundamental Rights of the European Union, or on the Preamble of the ECHR). Furthermore, it imposes significant restrictions on women's behaviour to ensure a healthy pregnancy. The ongoing physical demands and the stringent lifestyle adjustments without breaks or days off clearly distinguish surrogacy from other labour scenarios.¹⁷⁸

Additionally, women are also exploited and used as a commodity when agencies or intermediaries just replace them for the next surrogate during the preparation process for multiple reasons such as "abnormal thickness of the endometrium, too much blood flow during preparation of the surrogate and non-synchronization of the fertility cycle between the surrogate and the egg donor are the usual medical causes calling for a replacement candidate before impregnation takes place."¹⁷⁹

Among the authors who are against commercial surrogacy, some are also against altruistic surrogacy, and others are more open to this last procedure, seeing it as a valid option. A gratuitous contract is one more guarantee that the pregnant woman's actions are truly free and, as such, an expression of her autonomy. The non-onerosity of surrogate pregnancy guarantees the altruism and solidarity of the gestating mother towards the infertile woman — seen as a voluntary action driven by empathy and desire to help those with infertile problems.¹⁸⁰

Altruistic surrogacy might avoid exploitation, as there is no monetary profit, the consent is not controversial, balancing power dynamics between the intended parents and the surrogate, and commissioning parents are not paying for the reproductive system of the gestational

¹⁷⁷ See *supra* Andrews (1988) (note 157).

¹⁷⁸ Van Niekerk, A., & Van Zyl, L. (1995). The ethics of surrogacy: women's reproductive labour. *Journal of medical ethics*, 21(6), 345-349.

¹⁷⁹ See *supra* Davaki (2017) (note 44).

¹⁸⁰ See *supra* Mac Crorie (2017) (note 159).

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mother. Thus, it protects the commercialisation and commodification of women's reproduction, and it might prevent situations where women were forced or persuaded.¹⁸¹

For others, however, any type of surrogacy should not be considered as acceptable. Ekman believes they are equally exploited "What happens is the same in both: the woman is reduced to a container. Altruistic surrogacy *functionalizes* motherhood, even when it doesn't *commercialize* it. Instead of being an existential and spiritual experience for the woman, pregnancy is made into a *function* to serve others."¹⁸² Ekman additionally compares prostitution with surrogacy, where people, often men, pay to use women's bodies for their own benefits.¹⁸³ She claims that altruistic is not so altruistic, either because women were forced to do such a thing by their relatives, or because in altruistic agreement, women are still paid in other forms to bear another person's child.¹⁸⁴ For example, in Greece surrogate mothers do not need to have Greek nationality, they can just live there, thus some reports show that surrogates are usually Eastern European women who can earn from €20.000 to €40.000, even though according to law compensation can never achieve €10.000.¹⁸⁵

Arguments against this practice raise concerns about women's health and the risks associated with pregnancy and childbirth. Moreover, emotional, and psychological distress during and after the labour can affect the mental health and well-being of the surrogate, especially after relinquishing the baby. Surrogacy is not something that women can take some time off, it is a process of nine months without any breaks, where all the feelings, thoughts, hormones, kicks, and heartbeats are felt only by the gestational mother, and from one day to the other, after the labour, the newborn disappears, is taken away.¹⁸⁶

In addition, it can be argued that the surrogate is seen as a "breeder machine", as her body is used as property, a means to an end, ignoring and undermining the woman's inherent dignity. Against what proponents mentioned about surrogacy separating traditional roles, it reinforces it, strengthening this patriarchal idea that women's only role is to reproduce.¹⁸⁷

To conclude, the discussion around the exploitation of women in surrogacy agreements does not have an obvious answer and authors' opinion varies based on their perspectives.

¹⁸¹ Sinanaj, N. (2021). The Right to Dignity of the Surrogate Mother. *U. Bologna L. Rev.*, 6, 261.

¹⁸² See *supra* Ekman (2013) (note 158), p. 162.

¹⁸³ *Ibid*, p. 141.

¹⁸⁴ *Ibid*, pp. 160-162.

¹⁸⁵ See *supra* Zervogianni (2019) (note 36), p. 152.

¹⁸⁶ Tashi, S., Mehran, N., Eskandari, N., & Tehrani, T. D. (2014). Emotional experiences in surrogate mothers: A qualitative study. *Iranian journal of reproductive medicine*, 12(7), 471.

¹⁸⁷ Holmstrom-Smith, A. (2021). Free market feminism: Re-reconsidering surrogacy. *U. Pa. JL & Soc. Change*, 24, 443-484. Pp. 481-483.

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Proponents see it as a safe path to parenthood for infertile individuals, and a reproductive choice that a woman can make based on her freedom to contract and autonomy. On the other hand, opponents recall the economic exploitation and commodification of women's bodies, the imbalances of the power dynamics in these arrangements, the risks of paid consent, the dangers of a reproductive market and the reinforcement of the patriarchal ideal that women's role is to reproduce.

Altruistic surrogacy is presented as a more thoughtful alternative, where women do not have the economic incentive, so their actions are motivated only by compassion and altruism. Nevertheless, this procedure is also questioned since it still commodifies the woman's womb and some authors argue that they still get paid through other means. In other cases, women are just pressured by their families and/or friends to help them build a family and end up in a situation they never wished for.

Finally, the question of whether any form of surrogacy is a symbol of women's exploitation should be carefully addressed. It is true that commercial surrogacy should be deeply questioned since it includes women's wombs in a reproductive market as if they were objects that intended parents can choose, make impositions, and haggle the price. Additionally, arguments that highlight the fact that women in less favourable economic conditions can use their bodies to improve that situation come from a privileged position that ignores the stratification of society, the failure of the welfare state, and all the medical risks that these women can suffer, including death (emphasis added). In this sense, it is valid and legitimate to consider that the consent accepted by these women is biased and ignores relevant aspects of the contract that could have enormous repercussions.

Regarding altruistic surrogacy, women are still using their wombs to carry another person's child, using it as a commodity. The idea that some women really enjoy the gestational period and would love to help build other people's dream families is not being rejected. However, this is not the norm, and, therefore, countries that legalise altruistic surrogacy must guarantee the altruistic character of the contract (no economic subordination can exist between the surrogate and the commissioning parents), not allow compensation in order to avoid a deviated consent and guarantee that the woman has medical care and access to treatments, not only during the pregnancy but also after.

b. Role of intermediary agencies in the surrogacy process

Some surrogacy agreements are celebrated between two parties that knew each other before that. The surrogate, as a friend or family, volunteers to be the gestational mother of the baby that that couple or single wishes to have. However, intended parents are not always lucky enough to meet someone who volunteers to do so and therefore turn to surrogacy agencies to find someone who is willing to do so.

Agencies are the third party that connects surrogates and intended parents, they often serve as matchmakers and help facilitate the process, especially for the commissioning parents. Furthermore, they usually deal with administrative and legal proceedings, providing expertise on the topic and ensuring that everything is according to the law. Since surrogacy involves a lot of logistics between medical appointments, procedures, and legal requirements, these intermediaries are the ones in charge of managing it.¹⁸⁸ Usually, these intermediaries are composed of fertility clinics, recruiters, lawyers, and people related to travel and tourism.¹⁸⁹

Agencies without profit exist and are operational, for example, in the UK, where commercial agencies are forbidden. In their case, domestic arrangements are made allowing a closer relationship between both parties and, sometimes, non-profit agencies intervene.¹⁹⁰ However, this subchapter is only focused on profitable commercial surrogacy agencies, mostly ground in the agencies of the different States of the United States of America and India, as these are examples of countries where commercial surrogacy agencies are in place.

Agencies, composed of experts in this field, intend to ensure the whole process is as smooth and well-organised as possible. Depending on the applicable law of the State in question, agencies might psychologically investigate both parties, and secure a physical evaluation of the pregnant woman, and they usually are the ones deciding whom they will accept as surrogates. In general, agencies tend to choose women based on their age, who have

¹⁸⁸ Berk, H. L. (2013). *The Legalization of Emotion: Risk, Gender, and the Management of Feeling in Contracts for Surrogate Labor*. University of California, Berkeley. Pp. 38-47.

¹⁸⁹ Chatterjee, A., & Whelan, S. (2017). Frequently unasked questions: understanding and responding to gaps in public knowledge of international surrogacy practices worldwide. *Babies for Sale?: Transnational Surrogacy, Human Rights and the Politics of Reproduction*, 221-244.

¹⁹⁰ Crawshaw, M., Fronek, P., Blyth, E., & Elvin, A. (2017). What are children's 'best interests' in international surrogacy? A social work perspective from the UK. *Babies for sale? Transnational surrogacy, human rights and the politics of reproduction*, 163-184.

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a clean medical record, who have already given birth before, to guarantee that they understand the emotional and physical burdens of pregnancy, etc.¹⁹¹

This third party is always present in the contracts and perfects its performance based on previous cases. They help formulate the contracts and provide independent representation, they have knowledge of the legal landscape in different jurisdictions, and they know how to safeguard the rights of all parties involved. By providing this assistance, agencies intend to remove all these burdens from the intended parents and the surrogate, so they are only concerned with the gestation process.¹⁹²

Indeed, these agencies are more than used to do all the different procedures and are experts in the field. In addition, they usually offer support in all or almost all the procedures required for a successful surrogacy agreement, so it is appealing for intended parents to contract directly with the agency. Even people who want to perform altruistic surrogacy sometimes hire an agency just to deal with all these bureaucracies. However, surrogacy agencies are not always as bright and protective as they were described previously, especially when they operate with little regulation.¹⁹³

Agencies bring more certainty to this process and guarantee psychological review to both parties, physical check-ups to the surrogate, facilitate legal and administrative procedures and ensure medical care throughout the pregnancy. Nevertheless, these valuable services are not always perceived, when financial gain is the priority, raising concerns of potential human rights abuses of the parties involved, especially the surrogate. As emphasised by Jordan Stirling Davis, “For some individuals in the surrogacy industry, the aspect missing that "goodness" may be the urge to cut corners and make more money, or to cater entirely to the needs of the intended parents and neglect the needs of the surrogate and potential child. [...] Instead of focusing on producing children for money, surrogacy agencies should focus on money as the ends to creating new families through the potential of producing a child.”¹⁹⁴

In India, women in poor villages were recruited by agents, usually previous surrogates, to first become egg donors, and to accustomed to medication and treatments. After they would opt to become surrogates, they had to sign contracts in English — the language they do not dominate —, with just fewer parts translated by facilitators in the local language. They were

¹⁹¹ Carbone, J., & Madeira, J. L. (2015). The Role of Agency: Compensated Surrogacy and the Institutionalization of Assisted Reproduction Practices. *Wash. L. Rev. Online*, 90, 7.

¹⁹² *Ibid.*

¹⁹³ See *supra* University of Chicago Law School - Global Human Rights Clinic (2019) (note 63), pp 66-68.

¹⁹⁴ See *supra* Davis (2017) (note 176), p. 676.

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told that they were not genetically linked to the child, thus they had no claim to the baby, the doctors did not have any responsibility for deaths, and they would proceed with payment.¹⁹⁵ Some surrogacy agencies created institutions for them to spend the period of pregnancy there, to avoid dishonour looks within their communities, and to be able to monitor and control them and restrict their movements. When they stay at home, regular check-ups are done by these facilitators to see their living conditions, hygiene, etc.¹⁹⁶ Psychological influence is used to convince them to follow their rules and to carry the process until the end, including altruistic arguments and religious beliefs.¹⁹⁷ Involving previous surrogates and paying them to recruit others creates a cycle of dependence.¹⁹⁸

As mentioned before, India was a much-desired country as a destination for surrogacy since the procedure was less expensive than in other states. This was only possible because “India’s advanced – but inexpensive – medical facilities and fertility services, weak regulatory oversight, along with poor social and economic mobility among women who serve as ‘surrogates’, make the country an attractive hub and, for the global community, a cautionary tale.”¹⁹⁹

This constitutes proof that reproductive tourism in India was a source of exploitation and profit motive — the lead focus was on financial gains, ignoring the exploitative conditions and the inadequate support where women found themselves. In addition, a clear lack of autonomy and informed consent can be invoked, since agents were influencing women in less favourable conditions for a sum of money that looks quite enticing, without even considering the risks, or being informed of them. The fact that the signed contract is not even in their own spoken language is evidence they do not fully understand the terms of the contract, thus they are not fully capable of making an informed decision. Moreover, women's physical and psychological health is put at risk in this type of environment, and it contributes to complications and emotional distress.

Furthermore, this exacerbates the power dynamics between the surrogate and the agency or the intended parents and their requests. In these types of situations, impoverished

¹⁹⁵ Gupta, A., & Prasad, S. (2019). ‘Outsourced pregnancy’: Surrogate narratives from Hyderabad. *Contributions to Indian Sociology*, 53(2), 299-327. 310-213.

¹⁹⁶ Nadimpally, S., & Majumdar, A. (2017). Recruiting to give birth: Agent-facilitators and the commercial surrogacy arrangement in India. *Babies for Sale: Transnational Surrogacy, Human Rights and the Politics of Reproduction*. London, UK: Zed Books, 65-81.

¹⁹⁷ Fronek, P. (2018). Current perspectives on the ethics of selling international surrogacy support services. *Medicolegal and Bioethics*, 11-20.

¹⁹⁸ See *supra* Davis (2017) (note 176).

¹⁹⁹ See *supra* Chatterjee (2017) (note 189), p. 222.

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women do not have the power to negotiate clauses in the contract, they were just recruited by other women on the net (paid for each person they convince) telling them how easy their experience was, and with little information, influenced by others, they are dragged into these contracts without any knowledge of the potential risks deluded by the compensation.²⁰⁰

Since these agencies focus only on the profit and prioritising the interests of the intended parents — as the clients who pay for their services —, they guarantee low or even no independent legal representation to surrogates. This raises many health concerns, which most fertility clinics and agents undervalue or ignore, regarding emotional and psychological support during and after the pregnancy and the fact that they ignore the postpartum follow-up, being only focused on getting the child and then forgetting the surrogate.²⁰¹

Developing countries are not the only nations where agencies take advantage of surrogates at different levels. As another example, this time in the United States of America, Susan Ince²⁰² pretended to have an interest in being a surrogate²⁰³ so she could identify the flaws of the surrogacy system. For that, she undertakes an investigation offering herself to be a surrogate through a surrogacy agency.

Discrepancies of what is described by the agencies are multiple, so first, they tend to prefer women with children and married, Ince was being considered, even though she was single and without children. Second, in her psychologist appointment, not many relevant questions were asked to evaluate her actual mental health as she explained: “Because I was ‘obviously bright’, there would be no IQ testing. I was never asked whether I had been pregnant before, whether I was under medical or psychiatric treatment, or how I would feel about giving up the baby.”²⁰⁴

After all these processes, she was supposed to see an independent company lawyer, however, the director of the agency was also present and kept a record of all the questions asked. She was surprised with the contract because it contained behaviour-controlling clauses for the pregnant woman, making the surrogate responsible for any act that may harm the baby²⁰⁵ and she would have to answer in court against the intended parents if she aborts or refuses to relinquish the child, the father could sue her for the amount of money he paid (\$25,000).

²⁰⁰ See *supra* Gupta (2019) (note 195).

²⁰¹ See *supra* Chatterjee (2017) (note 189).

²⁰² Ince, S. (1994). Inside the surrogate industry. *Living with Contradictions: Controversies in Feminist Social Ethics*, 387-394.

²⁰³ The author does not identify in which year she pretended to have interest in being a surrogate, however, she mentions “The job was for the key position in one of the ‘growth industries’ of the 1980s[...]”, p. 387.

²⁰⁴ See Ince (1994) (note 202), p. 389.

²⁰⁵ *Ibid*, p. 390.

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However, if the parents changed their mind the surrogate could sue them only with the amount of money she was supposed to receive (\$10.000) plus the costs of child support. Moreover, if the pregnant woman needs to start a lawsuit against the intended parents, the agency has no responsibility and will not pay for legal expenses to help her.²⁰⁶ They use altruistic arguments to convince the surrogates they are not there for the money but for the people, so if they ask too many questions, they are not obedient enough.²⁰⁷ Additionally, women would have to be always available for appointments and consultations whenever they decide, even if she has a job or other occupations and, if the woman has a miscarriage or cannot conceive, she does not receive any compensation.²⁰⁸

This case proves that commercial agencies when only focused on profit, could act in a way that might neglect the parties' fundamental rights. These rights, including privacy, dignity, and freedom of the surrogate seem to be dismissed during the process. Evidence of this is the fact she was only compensated if she gave birth, but if she carried an abortion or failed to conceive, she would be just put aside, and they would move on to the next woman. Furthermore, the lack of responsibility from the American agency in any circumstances and the lack of legal aid if she would need to file a lawsuit against the commissioning parents, the control over her appointments, procedures, and other actions, etc. are a confirmation of the troubling dynamics at play and a clear disregard for the surrogate.

In conclusion, if a country would accept commercial agencies, it should provide protection for the surrogates' rights and their well-being. State intervention must exist to guarantee that medical risks are reduced, and women have the proper and equitable treatment. It is crucial to fill this regulation void in countries where commercial agencies are allowed, requiring careful State regulation and intervention to counterbalance the influence of private intermediaries with economic incentives, and the proper counselling and full information to possible surrogates. Consider the prohibition of payment to third parties, as it happens in the UK, forcing agencies to be licensed, and stringent regulation to avoid exploitation of the most vulnerable parties are all suggestions to counterbalance the overpower of intermediaries.²⁰⁹ Moreover, independent ethics committees or other State regulatory bodies could act as

²⁰⁶ *Ibid*, p.391.

²⁰⁷ *Ibid*, p. 392.

²⁰⁸ *Ibid*, p. 388.

²⁰⁹ Ainsworth, S. L. (2014). Bearing children, bearing risks: feminist leadership for progressive regulation of compensated surrogacy in the United States. *Wash. L. Rev.*, 89, 1077-1124.

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intermediaries reviewing and authorising these arrangements individually and supporting all parties.

c. Contractual clauses restricting the conduct of the pregnant woman

A surrogacy agreement involves a woman who willingly undertakes the responsibility of carrying a child for the intended parents. These intended parents want to make sure this woman takes really good care of the foetus during pregnancy as if it was hers. For this reason, with the intention of ensuring the utmost well-being of the unborn child, the intended parents often incorporate contractual clauses that regulate the surrogate's conduct throughout the pregnancy journey. While these agreements commonly include stipulations aimed at guiding the surrogate's behaviour, the pivotal concern arises in delineating the permissible boundaries of these clauses. It becomes imperative to discern the extent to which such clauses can be enforced without infringing upon the surrogate's personal freedom and autonomy.

Throughout this section will not consider clauses regarding abortion, nor clauses about regretting, as they will be mentioned in the following sections. Because the law is usually ambiguous on this topic, this section will focus on clauses that attempt to monitor and control the pregnant woman's conduct for the whole period of pregnancy. Given the limited research available on this subject, the content of this section is mostly based on research, studies and articles grounded in the United States legislation, and the diverse legal frameworks of the various States.

The contract has generally four different parts: the first is about preliminary matters; the second part deals with the beginning of the surrogacy process; the third part is about the pregnancy itself; and, lastly, the fourth part concerns the birth and afterwards.²¹⁰

Hillary Berk conducted a research between 2011-2013 across the United States, where she collected data on thirty different surrogacy contracts and came to the conclusion that all of them contained rules or restrictions regarding the carrier's lifestyle. Some of these rules are usual standard practices when we think about pregnancy and the precautions to take, either based on scientific studies or common knowledge. The consumption of alcohol or drugs while

²¹⁰ Morrissey, J. F. (2014). Surrogacy: the process, the law, and the contracts. *Willamette L. Rev.*, 51, 459-558. P. 516.

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pregnant is something that is often included in these, which is something that can seriously affect the child (the consumption of drugs can inclusively be an illegal practice). Additionally, clauses that require to follow the doctors' instructions or to have a healthy lifestyle are very vague, but also obvious throughout the gestational period.²¹¹

However, some surrogacy agreements can have higher levels of demand when it comes to deciding about her choices and behaviours. These provisions can vary on the degree and specificity of the requirements, especially because there are a lot of non-consensus activities that pregnant women can or cannot do, thus it can differ depending on the intended parents' point of view — for example, to do or not to do physical activity (besides they can enumerate the activities allowed and not allowed).²¹²

The extent of these rules has no limits. Regarding her diet, it can go from restricting coffee and sodas to prohibiting raw fish, fast food, fish with high mercury levels, etc. Concerning her daily life, she might be forbidden to use some beauty products like hairspray, essential oils, and hair dye, to perform cosmetic surgery, do manicures, go to a beauty salon or do a tattoo, use cleaning products, be exposed to cat litter, use a microwave, drive... Some clauses go even further and request home surveillance or to reside with the commissioning parents to entirely control the surrogate's moves.²¹³

Then again, some of these clauses are just impositions of the intended parents in an attempt to overcontrol the carrier's pregnancy. This is a grey area of contracts²¹⁴ that must be addressed in permissive States since it can go beyond limits.

Further in her study, Berk mentions the prohibition on sexual intercourse between the surrogate and her husband or, if single, possible partners.²¹⁵ The surrogate should indeed abstain from having sex during fertility treatments and the insemination process. Otherwise, she might get pregnant, but not with the gametes they have agreed on, completely breaching the contract and rendering the contract ineffective. Despite those clauses, some go even further and restrain the surrogate from having sex after pregnancy is verified or force the use of condoms in all sexual interactions to prevent sexually transmitted diseases that can be transmitted to the baby. Moreover, even the surrogate's husband or partner can be part of the contract, undertaking not to have sex with her throughout the period defined in the contract,

²¹¹ See *supra* Berk (2013) (note 188), pp. 70-80 and 109.

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ Donaldson, T. (2017). Whole Foods for the Whole Pregnancy: Regulating Surrogate Mother Behavior During Pregnancy. *Wm. & Mary J. Women & L.*, 23, 367-395. P. 387.

²¹⁵ See *supra* Berk (2013) (note 188), pp. 82 and 114.

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and to not have sexual relations outside the love relationship he shares with the carrier. He can likewise be submitted to a test for sexually transmitted diseases.²¹⁶

Even though these clauses are very common in the United States surrogacy agreements regarding the surrogate, in an attempt to protect the unborn child, Berk realized that only 33% of her sample requested also the intended parents to be checked or to make proof they were not infected. It is extremely important, however, to examine the donors too, as the surrogate can become infected through donor insemination.²¹⁷ This can possibly represent the unequal power dynamics in these agreements, where the surrogate is subjected to all the requirements of the commissioning parents, without equivalent obligations placed on them.

Clearly, some surrogacy agreements incorporate clauses that exhibit a heightened level of control over the surrogate's personal choices and behaviours. The extent of these clauses knows virtually no bounds. The inclusion of overly restrictive clauses calls into question the surrogate's autonomy and personal freedom. These clauses essentially dictate various aspects of her life, from her diet and daily activities to her personal relationships. Such limitations undermine her ability to make independent choices and decisions, particularly in matters that pertain to her own well-being.

Furthermore, this proves that contracts might violate the surrogate's right to privacy, as they overstep into her personal life, choices, sexual intercourse, medical procedures, and personal relationships. The expectations and nervousness of the commissioning parents cannot be an excuse for a transcendent intrusion into the carrier's life. This intrusion endangers her freedom of choice and autonomy, subjecting her to oversight and control that may go beyond reasonable boundaries.

These contracts often include contractual clauses that intend to distance the carrier from the baby regarding nursing, breastfeeding or contact at birth or even after, for her to not be emotionally attached to the child and to create a bond. As the purpose of surrogacy agreements is for the gestational mother to relinquish the baby after birth, strategic rules are introduced to manage her attachment and avoid the possibility of her jeopardising it. Typically, there is a clause that forbids nursing, but breastfeeding is not prohibited in all Berk's case studies.²¹⁸ About contact at birth and after with the baby, provisions vary but tend to transfer all

²¹⁶ *Ibid*, pp. 80-83.

²¹⁷ *Ibid*, p. 82.

²¹⁸ *Ibid*, p.85-88.

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responsibilities to the intended parents right upon birth and, often ban the contact with the child after or only authorizing it after the consent of the commissioning parents.²¹⁹

Life support clauses can be also found in these contracts, where the surrogate accepts to be kept in life support equipment until the 25 weeks of pregnancy to protect the foetus, in the eventuality she has a tragic accident or a serious disease.²²⁰

Some of these provisions only make proof that the surrogate is being used as a commodity, or as an incubator, without realising it is a person behind the agreement. The inclusion of all the restrictive conduct clauses reduces the surrogate to a mere breeder, as a means to an end, as a commodity, ignoring her own judgment and capacity to make decisions. The lack of clear boundaries in these clauses opens the door to potential exploitation, where the surrogate's vulnerability is exploited in the pursuit of the intended parents' desires. Additionally, a few of these clauses can jeopardise her own well-being and health, especially mental health.

It is comprehensible the commissioning parents intend to make all the efforts to see their dreams come true, as they created a lot of expectations around this deal. Moreover, it is a situation outside of their control, therefore, they tend to make lots of requirements and demands to manage their stress and anxiety.²²¹ However, there should be a line that separates what is and what is not admissible in these contracts, to prevent an overstepping from the intended parents' side and a clear imbalance of power. In Greece, for example, only the general standards are demanded from the surrogate. Restrictive clauses are considered void because they are immoral.²²²

Ultimately, to properly address the issue of acceptable and unacceptable clauses, the principle of proportionality could be a good option as an answer. By addressing each clause through the lens of its impact on the surrogate's autonomy, privacy, well-being, and overall fundamental rights, a framework that guides the development of more equitable and respectful surrogacy agreements can be created.

The principle of proportionality "prescribes that all statutes that affect human rights should be proportionate" and it is composed of three sub-principles: "adequacy, necessity, and proportionality *stricto sensu*."²²³ The adequacy, as the name indicates, intends to see if what is

²¹⁹ *Ibid.*

²²⁰ *Ibid.*, p. 99.

²²¹ *Ibid.*

²²² See *supra* Zervogianni (2019) (note 36), p. 150.

²²³ Cianciardo, J. (2010). The principle of proportionality: the challenges of human rights. *Journal of Civil Law Studies*, 3(1), 177-186.

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affecting a human right is adequate to achieve the intended purpose. The necessity evaluates the means chosen to achieve the end — if it is the one option that least interferes with the person's human rights. Finally, the norm has to be reasonable *stricto sensu*, to balance the applicable measure and do an analysis of its advantages and disadvantages, or costs and benefits.²²⁴

Therefore, clauses that are directly related to the health and well-being of the foetus and the surrogate can be deemed acceptable if they are reasonable, evidence-based, and consistent enough when balanced with the other parties' rights. However, clauses that unnecessarily invade the surrogate's personal life just to satisfy the excessive demands of the intended parents, compromise her autonomy, and disproportionately restrict her rights should be subjected to scrutiny and considered unacceptable and unenforceable. For example, restricting the surrogate from having sexual intercourse during the insemination process is adequate, necessary, and proportional for the agreement to succeed. Yet, a prohibition of sexual relations after the confirmation of pregnancy might violate her right to intimacy, privacy and autonomy and it is excessive for her in relation to the objective sought.

Additionally, it is important to bear in mind that, even if this is not a rule, usually the surrogate went through a pregnancy before, and the intended parents are the ones who did not have the opportunity to pass through it. Thus, the surrogate might be better informed and aware of all the precautions to take, the products to avoid, and the activities she can or cannot do.

In conclusion, the incorporation of contractual clauses that regulate the conduct of the carrier during pregnancy can raise complex ethical and legal concerns. Although intended parents invested their time (and potentially money) and are full of expectations of a healthy and safe child, the inclusion of such clauses can potentially infringe upon the surrogate's personal freedom, self-determination, human dignity and autonomy.

Understandably, some clauses are added as a way of ensuring the well-being of the unborn child, for example, to follow the doctor's instructions or the prohibition of consuming drugs. These are reasonable clauses that are adequate not only for the future baby but also for the gestational mother herself (even if she is already fully aware of these things). However, concerns are raised when these clauses extend beyond established medical norms and start dictating the daily activities of the surrogate's life. Such clauses can possibly infringe upon her autonomy, privacy, and her right to make decisions about her own body.

²²⁴ *Ibid.*

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Additionally, this exacerbates the potential unequal power between both parties, with intended parents stipulating demands for the surrogate's behaviour and the fact that she is being used as a means to an end, as an incubator, ignoring her rights, feelings, and personal autonomy.

For this reason, a line should be drawn in the intended parents' attitude towards restricting the surrogate's conduct. Ultimately, if permissive States do not draw a line themselves, the principle of proportionality should be called into the equation to solve this big issue. Clauses that pertain directly to the health and safety of the foetus and surrogate can be deemed acceptable if they are evidence-based, medically justified, aligned with established best practices, and, of course, not excessive.

These clauses must be approached with sensitivity and caution. Balancing these interests requires a proportional evaluation of each clause, informed consent, and ethical framework that upholds the dignity of surrogate women throughout the surrogacy process. Even in a world that permits a reproductive market between private individuals, this must be regulated, and not left in a grey area, where the surrogate might be the explored and diminished person for economic reasons.

d. Who has the right to decide on abortion or selective reduction?

Voluntary interruption of pregnancy (or induced abortion) is when a woman decides to put an end to her pregnancy before the foetus can survive outside the womb, and it can be done through medication or a medical procedure.²²⁵ Unfortunately, there is no internationally protected right to abortion *per se*, however, the Committee on the Elimination of Discrimination against Women (CEDAW) already pronounced itself in favour of “all States parties to end criminalising abortion and allow legal abortion at least in cases of rape, incest, threats to life or health of the pregnant woman and girl, and severe foetal impairment.”²²⁶

²²⁵ Niță, A. M., & Goga, C. I. (2020). A research on abortion: ethics, legislation and socio-medical outcomes. Case study: Romania. *Romanian Journal of Morphology and Embryology*, 61(1), 283-294.

²²⁶ Office of the High Commissioner for Human Rights. (2022, July 1). Access to safe and legal abortion: Urgent call for United States to adhere to women's rights convention, UN committee. *United Nations*. Retrieved from: <https://www.ohchr.org/en/statements/2022/07/access-safe-and-legal-abortion-urgent-call-united-states-adhere-womens-rights> .

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In fact, the General Recommendation adopted by the CEDAW about Article 12²²⁷ of the Convention on the Elimination of All Forms of Discrimination against Women²²⁸ has mentioned the need to decriminalise abortion in order not to punish women who resort to illegal abortions²²⁹. Additionally, Article 16 (e) of the same Convention introduces the right to decide freely on the number of children and the spacing between them. In this sense, the legality of abortion reduces maternal mortality rates and guarantees the body's autonomy and the women's freedom of reproductive choice.²³⁰

However, not all nations accept this as a fundamental reproductive right, some regions and countries accept it fully, while others restrict it or even prohibit it.²³¹ For example, in 2020, Poland restricted access to abortion, allowing it only to women who got pregnant due to criminal acts or if it is affecting the women's health.²³² This already led to maternal deaths as a consequence of a deprivation of safe options.²³³ The access to voluntary interruption of pregnancy is intimately connected with women's autonomy, privacy, body integrity, and health.²³⁴

In surrogacy arrangements, the intention of the surrogate to interrupt the pregnancy can collide with the expectations and interests of the intended parents, especially because it might be at stake contractual obligations and financial and emotional interests. Vice versa can also happen if a diagnosis confirms a disease or disability of the foetus and the commissioning parents want to proceed with an abortion, but the surrogate wants to carry on the pregnancy.

²²⁷ United Nations Committee on the Elimination of Discrimination against Women. (1999). CEDAW General recommendation No. 24: Article 12 of the Convention (women and health) (A/54/38/Rev.1, chap. I). Retrieved from:

https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=INT/CEDAW/GEC/4738&Lang=en.

²²⁸ See *supra* UN General Assembly (1979) (note 71).

²²⁹ See *supra* UN Committee on the Elimination of Discrimination against Women (1999) (note 227) para. 31(c).

²³⁰ United Nations Working Group on the issue of discrimination against women in law and in practice. (2017, October). Women's Autonomy, Equality and Reproductive Health in International Human Rights: Between Recognition, Backlash and Regressive Trends. Retrieved from: <https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/WomensAutonomyEqualityReproductiveHealth.pdf>.

²³¹ For more information see Women and Foreign Policy Program Staff. (2022, June 24). Abortion Law: Global Comparisons. *Council on Foreign Relations*. Retrieved from: <https://www.cfr.org/article/abortion-law-global-comparisons>.

²³² Pronczuk, M. (2020, October 22). Poland Court Ruling Effectively Bans Legal Abortions. *In The New York Times*. Retrieved from: <https://www.nytimes.com/2020/10/22/world/europe/poland-tribunal-abortion.html>.

²³³ Biedroń, R. (2022, December 31). 'Not one more' woman can fall victim to Poland's abortion law. *In Politico*. Retrieved from: <https://www.politico.eu/article/women-victim-poland-abortion-laws/>.

²³⁴ See *supra* UN Working Group on the issue of discrimination against women in law and in practice (2017) (note 230).

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IVF procedures carry a risk of multiple births since multiple embryos are implanted to raise the expectations of success. For that reason, surrogacy contracts tend to have selective reduction and abortion (in case of abnormal foetus) clauses, giving the commissioning parents authority to decide.²³⁵ This will not be a problem if all parties agree on the future of the foetus, the problems emerge if there is a disagreement regarding foetal decisions.

Many reported cases of intended parents demanding selective reduction are famous worldwide. A couple in Australia, for example, contracted with a Thai surrogate woman to bear a baby for them. However, throughout pregnancy, she found that she had twins and one of them had Down's syndrome. After reporting to the commissioning parents, they requested the abortion of the baby with a disease, *Baby Gammy*, nevertheless, the surrogate did not do it and gave birth to twins. The Australian couple took the girl with them to Australia, and the boy stayed in Thailand with the surrogate mother.²³⁶ After that mediatic case, Thailand banned commercial surrogacy.²³⁷

According to a feminist approach, intended parents should not have the power to decide over the gestational mother's body. Moreover, no contract should deny access to a voluntary interruption of pregnancy until the foetus is viable. Women have their right to bodily autonomy, they should not be deprived of control of their own body.²³⁸

Some jurisdictions may call into question the surrogate's right to decide about her own body when the legal framework surrounding surrogacy is not clearly regulated. In the United States of America, there is no federal regulation about surrogacy, therefore, some States allow surrogacy arrangements, others clearly prohibited it, and others never addressed this issue before.²³⁹ Consequently, several surrogacy contracts have termination clauses that mention the transfer of the decision to abort to the intended parents if the foetus has an abnormality, except in cases where the health of the surrogate woman is at risk. Additionally, contracts usually do not even clarify the concept of "abnormal", leaving room for interpretation.²⁴⁰

²³⁵ London, C. (2011). Advancing a surrogate-focused model of gestational surrogacy contracts. *Cardozo Journal of Law & Gender*, 18, 391-422. P. 420.

²³⁶ Whiteman, H. (2014, August 6). Australian couple defends decision to leave Down's baby with Thai surrogate. *CNN*. Retrieved from: <https://edition.cnn.com/2014/08/06/world/asia/australia-thailand-surrogacy-gammy/index.html>.

²³⁷ Australian Associated Press. (2015, February 20) Thailand bans commercial surrogacy. *The Guardian*. Retrieved from: <https://www.theguardian.com/world/2015/feb/20/thailand-bans-commercial-surrogacy>.

²³⁸ See *supra* Andrews (1988) (note 157).

²³⁹ Cummings, E. (2018). The (Un) Enforceability of Abortion and Selective Reduction Provisions in Surrogacy Agreements. *Cumb. L. Rev.*, 49, 85-123.

²⁴⁰ Bijma, H. H., van der Heide, A., & Wildschut, H. I. (2008). Decision-making after ultrasound diagnosis of fetal abnormality. *Reproductive health matters*, 16(sup31), 82-89.

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If these clauses are enforceable in a contract, that would mean that if a surrogate decides to do an abortion because she repents her decision to accept being a carrier, she will be forced to pay damages for breaching the contract. While some authors argue that abortion is part of her reproductive rights and privacy,²⁴¹ others think that the right to abortion is alienated when the woman voluntarily signs the contract.²⁴² However, the question of enforceability of clauses restricting or controlling the right to voluntary interruption of pregnancy was never addressed directly by any court in the United States of America.²⁴³ Beyond that, even the right to abortion has been jeopardised after the turnover of *Roe v. Wade*²⁴⁴ case, allowing States to ban abortion again.²⁴⁵

Ultimately, this could be considered a conflict between two different rights, the right to abortion and the right to procreate. Even though the right to abortion is not internationally protected in any convention, it is regionally and nationally accepted,²⁴⁶ and it is mentioned by international organisations. The same cannot be said regarding the right to procreate, according to the approach of the ECtHR²⁴⁷ (see Section 3.a.i. *Right to found a family*). Albeit the existence of family planning as part of human rights, where people can choose to have children and the spacing between them, there is no such thing as a right to procreate or a right to be a parent. In this sense, even after a surrogacy contract where the surrogate signed voluntarily, her right to bodily autonomy should always come first.

The right to abortion and to decide about their own body and reproductive choices should be guaranteed to all women, even women who are part of a surrogacy contract as surrogates. Regardless of the intended parents' expectations, the woman's autonomy is already significantly restricted by these arrangements. However, denying her access to decide whether to perform an abortion or not (especially when it is a legal technical matter), due to fear of legal

²⁴¹ Horner, C. (2017). My Child, Your Womb, Our Contract: The Failure of Contract Law to Protect Parties in Gestational Surrogacy. In *Reproductive Ethics: New Challenges and Conversations*. Springer International Publishing. 137-149.

²⁴² Forman, D. L. (2015). Abortion Clauses in Surrogacy Contracts: Insights from a Case Study. *Family Law Quarterly*, 49(1), 29–53.

²⁴³ See *supra* Cummings (2018) (note 239).

²⁴⁴ *Roe v. Wade*, 410 U.S. 113 (1973).

²⁴⁵ For more information see Hurley, L. & Chung, A. (2022, June 27). U.S. Supreme Court overturns *Roe v. Wade*, ends constitutional right to abortion. *Reuters*. Retrieved from: <https://www.reuters.com/world/us/us-supreme-court-overturns-abortion-rights-landmark-2022-06-24/>.

²⁴⁶ For more information see Center for Reproductive Rights. (n.d.). The World's Abortion Laws. *Center for Reproductive Rights*. Retrieved from: <https://reproductiverights.org/maps/worlds-abortion-laws/>.

²⁴⁷ It is important to clarify that the United States of America are not a Member State of the Council of Europe. They have an observer status, which means they are not bound by the decisions of the Strasbourg Court. See Committee of Ministers of the Council of Europe. (1995, December 7). Resolution (95) 37 on Observer Status for the United States of America with the Council of Europe. Retrieved from: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804c8c35.

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repercussions, further exacerbates this restriction. Furthermore, it is important to bear in mind that even if the intended parents demand something, the surrogate is the one attached by the umbilical cord to the foetus — it would be a tremendous abuse of power and a breach of bodily autonomy to force her to do something with her body that she does not agree with.

e. Surrogate's right to repent — relinquishing the child

To repent is a consequence that can happen in any contract, from all the parties involved, since every contract has a level of uncertainty.²⁴⁸ In a surrogacy agreement, the intended parents can go through an unexpected divorce or can suffer an accident and die, among many other life complications that can make them change their minds. In addition, the surrogate can also change her mind regarding this agreement, especially because the woman is exposed to a complex and emotionally demanding process.

In a surrogacy arrangement, all the parties have to give their informed consent as a precondition for embryo conception. The carrier must always be informed and clarified of the conditions for entering this contract, the risks and benefits of the therapeutic process, and her rights and duties, among other clauses provided contractually.²⁴⁹ However, many authors argue that the surrogate is not able to fully understand and consent to the agreement since she is submitted to a diverse set of acts, including hormonal changes, that reduce her physical and psychological freedom and liberties.²⁵⁰ The emotional and psychological impact of a pregnancy and giving birth can be very heavy and lead to the formation of a bond between the surrogate and the baby, that would make her change her mind.²⁵¹

Baby M (previously explained in Subchapter 2.b. *History and development of surrogacy*) is a good example of a surrogate's change of mind about relinquishing the baby. The Court, while analysing if the contract was enforceable, understood that “she (surrogate mother) never makes a totally voluntary, informed decision, for quite clearly any decision prior to the baby's birth is, in the most important sense, uninformed, and any decision after that,

²⁴⁸ Margalit, Y. (2013). In defense of surrogacy agreements: A modern contract law perspective. *William & Mary Journal of Women and the Law*, 20, 423-468.

²⁴⁹ Coutinho, D. S. A. (2022). *As problemáticas e os desafios contemporâneos em torno da gestação de substituição*. Edições Almedina. Pp. 660-687.

²⁵⁰ See *supra* Brinig (1995) (note 156).

²⁵¹ See *supra* Cummings (2018) (note 239).

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compelled by a pre-existing contractual commitment, the threat of a lawsuit, and the inducement of a \$10,000 payment, is less than totally voluntary.”²⁵²

In some countries that allow surrogacy motherhood, the legal framework does not explicitly address the issue of the surrogate mother’s right to repent. However, in other jurisdictions, the law stipulates that the surrogate mother must give her informed consent to the surrogacy arrangement and this consent can be withdrawn, or for this consent to be valid, a defined period must pass. In the United Kingdom, for example, one of the requirements to have a Parental Order (transfer of the parenthood, explained in Subchapter 2.c. *Overview of surrogacy regimes in European countries*) is that “the woman who carried the child (...) have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order” (Section 54(6) of the Human Fertilisation and Embryology Act 2008). Australia has a similar system, the surrogate is the legal mother after birth, and only after applying to the Court for a Parentage Order the parenthood is transferred.²⁵³ In Greece, on the other hand, the gestational mother can only contest parenthood if it is proven that it was her egg that was fertilised, and she has six months after birth to do it. If the surrogate does not relinquish the child after birth, she will be compelled to do so.²⁵⁴

In a way of contradicting the interpretation that women cannot give full consent to surrogacy agreements, some authors believe that this is a paternalistic way of protecting women from their own decisions, as they are not fully capable of doing them freely, and exacerbates the idea that women are defined by their reproductive capabilities.²⁵⁵ This approach considers that it amplifies a “male-dominated socioeconomic political order”, questions all reproductive choices that women have access to nowadays and compares the difference of treatment in surrogacy and in sperm donation.²⁵⁶

Lori Andrews adds that biological grounds should not be used to justify a difference in treatment between men and women. She believes that this argument of protecting women because they might regret their choices, is erroneous and puts in danger women’s autonomy, as all decisions can be regretted later. As she explains, “The legal doctrine of informed consent presupposes that people will predict in advance of the experience whether a particular course

²⁵² Munyon, J. H. (2003). Protection and freedom of contract: the erosion of female autonomy in surrogacy decisions. *Suffolk University Law Review*, 36(3), 717-744. P. 719.

²⁵³ Dale, M. & Macdonald, T. (2015, April 17). Regulating Surrogacy in Australia. *Human Rights Law Centre*. Retrieved from: <https://www.hrlc.org.au/bulletin-content/regulating-surrogacy-in-australia> .

²⁵⁴ See *supra* Zervogianni (2019) (note 36) pp. 152 and 153.

²⁵⁵ See *supra* Munyon (2003) (note 252), pp. 738-739.

²⁵⁶ *Ibid.*

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will be beneficial to them.”²⁵⁷ In her line of thought, hormonal changes should not be an excuse to relieve women of their responsibilities. Additionally, she states that the contracts have explicitly all the medical risks and procedures of pregnancy enumerated, and with the mediatic Baby M case, all potential surrogates cannot affirm they are not well informed or unaware of the possibility of changing their minds.²⁵⁸

The commentators in favour of women’s consent not being valid until the child is born defend the existence of a bond between the baby and the gestational mother, even if she is not genetically related to her/him. The fact that women are subjected to numerous medical procedures and changing of hormones, can lead to a different decision than the one they signed for. They also worry about the surrogate’s children who might develop traumas or insecurities while seeing their mum relinquish a baby to other people, as they might not understand the content of the agreement. Margaret Brining accepts that this might be a paternalistic way of seeing things, but it is a necessary measure to safeguard women’s well-being.²⁵⁹

In addition, even though adoption and surrogacy are not comparable situations, women cannot give for adoption a child that is not born yet (see Article 4(4) of the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption²⁶⁰). When the women signed the surrogacy arrangement the child was not even conceived yet and the reasons for giving the baby away were totally different, however, the principle is the same as in adoption: women can only guarantee their full consent after the child is born.²⁶¹

Some previous surrogate women came out to talk about their stories and feelings after relinquishing the child.²⁶² They describe the emotional grief and feeling of emptiness inside of them that led to deep depression and years of treatment. Several women report a very close relationship throughout the process with the commissioning parents that just evaporates right after the umbilical cord is cut. Other women keep on asking for pictures of the baby because they cannot conceive the idea of forgetting the child and accepting that it no longer belongs to them.²⁶³

²⁵⁷ See *supra* Andrews (1988) (note 157), p. 75.

²⁵⁸ *Ibid.*, pp. 72 and 74-76.

²⁵⁹ See *supra* Brining (1995) (note 156), pp. 2383-2385.

²⁶⁰ Hague Conference on Private International Law. (1993, May 29). Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. Retrieved from: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=69>.

²⁶¹ Stein, J. G. (2001). Call to end baby selling: why the Hague convention on intercountry adoption should be modified to include the consent provisions of the uniform adoption act. *Thomas Jefferson Law Review*, 24(1), 39-82. P. 56 note 139.

²⁶² See *supra* Ekman (2013) (note 158), pp. 184-188.

²⁶³ *Ibid.*

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Overall, it is true that women, as men, should have recognised their autonomy to make decisions, and to take responsibility for their actions. However, it is also true that women go through substantial emotional, physical, and psychological changes, and it might put into question the women's fully informed consent, especially if a bond was created between the surrogate and the baby. Unfortunately, there are not many studies that reveal a real number of surrogates that regret, however, some authors mention that "such evidence we have been able to obtain suggests that only in a handful of cases (perhaps 4-5% of surrogacy arrangements) does the surrogate refuse to hand over the child."²⁶⁴

The right of a pregnant woman to repent should be seen as an aspect of her autonomy and self-determination. Therefore, and because the surrogate is a crucial participant in the agreement, it is important to take her interests and well-being into account, and not undervalue this pain. For this reason, counselling for a mental health follow-up before entering the agreement, during and after the pregnancy, should be a requisite according to the law. Some frameworks also require surrogates to have previous children, so they can be aware of the process' emotional burden. Furthermore, giving the surrogate a period to reflect before officially relinquishing the child, can ensure that her decision was taken without external pressure.

²⁶⁴ Edelman, R. J. (2004). Surrogacy: the psychological issues. *Journal of reproductive and infant psychology*, 22(2), 123-136. P. 130.

5. Conclusion

Surrogacy motherhood is a process where a woman accepts to carry another person's child, after birth, she will relinquish the baby and all the rights and duties that come with that. It can be a commercial or altruistic agreement and the gestational carrier can provide her own oocyte (traditional surrogacy) or receive it either from a donor or from the intended mother (gestational surrogacy).

The arrangement involves a minimum of two parties, the intended parents and the surrogate, and from that agreement, a third person will be born — the baby the surrogate will be carrying. In this sense, it is necessary to overview all the parties' rights. Even though surrogacy is not directly mentioned in any international human rights framework, it raises ethical and legal concerns regarding the different individuals involved.

At the European level, the diverse legal approaches of States underscore the challenges of harmonising surrogacy regulation. Countries are either prohibiting it, not mentioning it, or permitting it, but only in an altruistic way. Altruistic surrogacy emerges as a more ethically aligned approach compared to commercial surrogacy, acknowledging the potential for exploitation inherent in profit-driven arrangements. However, even altruistic surrogacy demands careful consideration of the surrogate's autonomy and well-being.

At an international level, different countries have allowed commercial surrogacy before, for example, in the United States of America (the topic varies from State to State), Ukraine was a famous destination for commercial surrogacy before the war,²⁶⁵ and India had a real industry around reproduction.²⁶⁶

Regarding the intended parents, the right to found a family is mentioned as a way to justify the use of surrogacy as an ART to have a child. The scope of this right is directly connected with family planning, to make informed decisions regarding the familiar context and to decide whether to have children and the spacing between them.²⁶⁷ Nevertheless, this right is not a direct synonym for a right to procreate or a right to have children, according to the ECtHR. Therefore, because no right to procreate or right to have children is protected under any

²⁶⁵ Moore, C. (2022, March 19). Ukraine, a leading surrogacy destination, is caught amid war: What to know. *Fox Business*. Retrieved from: <https://www.foxbusiness.com/lifestyle/ukraine-surrogacy-destination-war> .

²⁶⁶ Doval, N. (2014, October 30). Surrogacy industry thrives in India amid regulatory gaps. *Mint*. Retrieved from: <https://www.livemint.com/Politics/1tiGqG9X9ChMt9Tb1pmNpM/Surrogacy-industry-thrives-in-India-amid-regulatory-gaps.html> .

²⁶⁷ See *supra* OHCHR (2018) (note 75).

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international convention, the right to found a family does not give grounds for the use of surrogacy.

Couples or individuals often turn to cross-border surrogacy when their home country prohibits such arrangements. In contravention of their national laws, these individuals engage in surrogacy agreements abroad with the intention of subsequently having their parenthood legally recognised and the established family ties upheld in the country where the surrogacy occurred. To achieve this, they invoke Article 8 of the ECHR, which pertains to the right to respect for private and family life. However, it is essential to reflect on the consequences of these actions taken in defiance of domestic laws. These individuals prioritize their personal aspirations of having a genetically related child and risk compromising the rights of an innocent child.²⁶⁸

Article 8 of the ECHR embodies a negative right, signifying that States are expected not to interfere in matters concerning private and family life.²⁶⁹ Nevertheless, the ECtHR must meticulously assess each distinct case to determine whether a violation of these rights genuinely transpired. The ECtHR generally compels recognition of parenthood when a genetic connection exists between the child and the intended parent. In the instance of *Mennesson v. France*²⁷⁰ the father's legal parenthood was acknowledged. However, since the mother lacked a genetic link to the twins, the responsibility for recognising this parenthood fell upon Member States. Adoption might serve as a viable approach to ensure the child's best interests. Conversely, in the case of *Paradiso and Campanelli v. Italy*,²⁷¹ where no genetic relationship existed between the child and the intended parents, the Court upheld the Italian decision.

In cases of cross-border surrogacy, particularly when the arrangement contravenes the laws of the country of birth, safeguarding the rights of the child is of paramount importance.

In the realm of international law, the characterization of surrogacy as akin to the sale of children is a matter of contention. The surrogate, acting as a conduit, transfers the child to the intended parents in exchange for compensation, which might seemingly align with the concept of selling a child. Advocates of surrogacy, however, contend that it is a service provided by the carrier culminating in a relinquishment of custodial rights. Furthermore, when a genetic

²⁶⁸ "In countries where it is illegal for commissioning parents to engage in ICS, there have been no prosecutions on the basis of the best interests of the child. The essence of what makes these actions distinct from any other offense committed by parents who are not protected from a range of consequences remains undebated." *In supra* Fronek (2018) (note 197), p. 16.

²⁶⁹ See *supra* Ní Shúilleabháin (2019) (note 86).

²⁷⁰ See *supra* *Mennesson v. France* (note 87).

²⁷¹ See *supra* *Paradiso and Campanelli v. Italy* (note 88).

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connection exists between the intended parents and the child, it can be argued that the surrogate is returning something that inherently belongs to the intended parents. Despite these arguments, the question lingers: Does the commodification of the child inadvertently occur within these surrogacy agreements?

With the birth of a child comes the inherent entitlement to an identity, which includes the fundamental capacity to understand one's origins, serving as a crucial safeguard for a myriad of other rights. Nevertheless, achieving this can prove to be a significant hurdle, particularly within the context of international accords. Furthermore, the right to identity encompasses the concept of nationality, which could be jeopardised if the nation in which the intended parents reside or hold citizenship fails to acknowledge the child as legally connected to them.

Finally, the child's best interests, protected under Article 3 of the CRC, shall be the primary consideration when a minor is involved in the conflict. This is not only a right, but also a principle and a rule of procedure, putting the child in the centre of the decision-making. The purpose is to always consider all the options available and make a decision based on the best alternative for the child.

Even though surrogacy presents both opportunities and challenges for individuals and couples seeking to build their families, it is crucial to enumerate the rights and challenges faced by surrogate mothers throughout the surrogacy process. As pointed out in Chapter 4, the surrogate is the key element for the procedure to be possible, however, she is repeatedly confronted with different challenges, like exploitation, commodification or limited legal protection. Thus, to what extent do international and European legal frameworks protect the rights of surrogate women?

The analysis of international human rights instruments has uncovered a nuanced approach to surrogacy, where the rights of surrogate women intersect with broader principles such as autonomy, privacy (Article 12 of the UDHR), and non-discrimination (Article 21 of the EU Charter of Fundamental Rights and Article 14 of the ECHR). Although these instruments do not explicitly address surrogacy, their foundational principles can be extrapolated to advocate for the protection of surrogate women's rights.

Within the European context, the divergent legal approaches among member states underscore the challenges in harmonizing surrogacy regulation. Altruistic surrogacy emerges as a more ethically aligned alternative to commercial surrogacy, acknowledging the potential for exploitation inherent in profit-driven arrangements. Nonetheless, even altruistic surrogacy

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necessitates meticulous attention to the surrogate's autonomy and well-being. Altruistic surrogacy, portrayed as driven by compassion, it is not immune to questions of exploitation and power dynamics, especially when coercion can be the basis of acceptance. Additionally, surrogacy itself is a process that demands significant physical and psychological sacrifices, often without adequate provisions for the surrogate's health and postpartum well-being.

On the contrary, commercial surrogacy presents a host of concerns. The risk of commodification, exploitation, imbalanced power dynamics, and the objectification of surrogate women cannot be dismissed. It seems that allowing commercial surrogacy is a door open to accepting the economic exploitation of human bodies and exacerbates gender inequalities. Women's reproduction should not be considered a market available for commodification, as it was always considered something personal. Additionally, offering remuneration for surrogacy can inadvertently lead to the exploitation of vulnerable women who are persuaded by financial incentives to undertake a significant and demanding role in the process and goes against Article 3 of the EU Charter of Fundamental Rights that demands a "free and informed consent".

Commercial agencies are a good reminder of how profit-focused agencies can disregard fundamental rights, including (again) privacy, dignity, and the autonomy of surrogates. The conditional compensation structure, which hinges solely on successful childbirth, overlooks the physical and emotional complexities involved. Additionally, the lack of agency responsibility across various scenarios, the absence of legal recourse for surrogates, and their limited control over decisions concerning their health further underscore the troubling dynamics within commercial surrogacy.

An examination of contractual clauses within surrogacy agreements emphasises the intricate balance between safeguarding intended parents' concerns and respecting the autonomy of surrogate women. Some clauses analysed in this thesis represent an obvious abuse of power and a clear violation of the surrogate's privacy, autonomy, and bodily autonomy when clauses that are disproportionate are included in the contract. The imposition of restrictive conduct clauses and the intrusion into the surrogate's personal life cannot stay in a grey area for permissive States, in an attempt to protect the carrier's rights.

Additionally, the surrogate should be the person making the decisions about her own body, saving her bodily autonomy and respecting the right to a safe abortion. Domestic frameworks must protect the right to make reproductive choices and leave this choice for the carrier in case of regret or selective reduction, even when contractual obligations are at stake.

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Lastly, surrogacy is a process that involves a huge emotional and physical effort, and it can cause the surrogate to create a sense of loss and emptiness. Emotional bonds can be developed throughout the pregnancy and birth of the baby, even without a genetic link. Therefore, a period for contemplation should be given, so the surrogate can make a considered decision. Furthermore, her mental health and well-being have to be a priority, so therapy even after birth should be considered.

In conclusion, international and European legal frameworks do not protect extensively and directly carriers and it mirrors the complex nature of surrogacy. After all research and extensive reading, it is possible to conclude there is a notorious lack of data in this domain, in order to properly evaluate the impact that these arrangements have on women. Nevertheless, the culmination of this research highlights the pronounced imbalance in power between both parties inherent in surrogacy and underlines the potential violation of women's fundamental rights, such as women's dignity, freedom of choice, autonomy, bodily autonomy and privacy. In this sense, even though proponents might disagree, surrogacy agreements might exacerbate existing gender inequalities and reinforce patriarchal norms.

It is extremely important to find a balance among the rights of all parties involved within the surrogacy agreement. However, equal importance must be given to the potential harm that could be caused to the more vulnerable parties — the surrogate and the child. As we reflect on these dynamics, is the pursuit of these arrangements truly justifiable in light of the potential repercussions?

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