

SURROGACY

Research Paper

European Christian Political Movement

May 2015



Preface

The first document, *Surrogacy in the spotlight*, is a briefing on what the practice of surrogacy is and what issues surround it.

The *FAQ* document aims to offer a useful tool in understanding the different concepts used in the discussion of surrogacy, as these can sometimes appear complex or confusing.

The final document, *No Maternity Traffic*, is an ECPM resolution condemning the commodification of women's bodies and the conceived children within the practice of surrogacy. The ECPM calls on its members to consider signing this resolution as a strong statement against the legal, ethical and human rights issues brought about by the highly unregulated practice of surrogacy, in particular commercial surrogacy.

Surrogacy in the spotlight

Surrogacy is a phenomenon that reports¹ over the past years have shown to be on the increase, although no statistics showing the exact number exist due to the highly unregulated nature of the practice in many countries. A surrogacy arrangement can be defined as the practice whereby a woman accepts to bear and give birth to a baby for someone else. Surrogacy can take different forms – traditional surrogacy is understood as the situation where the woman carrier is biologically related to the baby, while in gestational surrogacy the woman is implanted with a fertilized egg that has no genetic relation to her. The legal, ethical and human rights implications of this practice are complex.

The ECPM is particularly concerned with the undermining of the health and human dignity of the women carriers involved in the process and, just as importantly, the human rights of the child conceived and born as a result of the arrangement.

In the practice of surrogacy, and in particular commercial surrogacy where a woman receives payment beyond expenses incurred for carrying the baby, the womb of the 'carrier' is being effectively treated as a part distinct from the rest of her, 'rented out' as a commodity. The ECPM believes no human being or any part of him or her should be treated as a commodity as this belittles their worth as a person.

Moreover, the assisted reproduction techniques used in order to ensure conception place the women carrier at risk of a number of health problems,² particularly in the case of gestational

¹ See documents regarding international law issues on the status of children, including international surrogacy arrangements, on the 'Hague Conference on Private International Law':
http://www.hcch.net/index_en.php?act=text.display&tid=178

² See, for example, J.W. Knoche, 'Health concerns and ethical considerations regarding international surrogacy', *Journal of Gynaecology and Obstetrics*, Vol. 125 (2), pg. 183-186, 2014 which argues that the risks of international surrogacy arrangements (due to ethical concerns and health risks to the carrier) outweigh the benefits.

carriers. In the case of the latter situation, where conception is achieved by using the egg of a donor different from the surrogate mother, similarly serious health risks also apply for the egg donor. The ECPM is deeply concerned about the health and social implications for the egg donor and women carriers brought about by the practice of surrogacy and points to the need for further discussion and research on this aspect of the topic.

As commercial surrogacy is illegal or unregulated in most European states, a growing number of couples seek help abroad and engage in surrogacy arrangements abroad in countries such as Ukraine and the U.S.A. Other long popular destinations for international commercial surrogacy arrangements, such as India³ and Thailand⁴ have recently introduced or started enforcing legislation limiting the practice due to evidence of exploitation and abuse. The ECPM would like to draw attention to the risks that this type of fertility tourism poses, particularly in regard to the exploitation of women in disadvantaged positions.

At least an equally if not more concerning issue to do with surrogacy is the clear undermining of the human rights and human dignity of the babies who are born as a result of these arrangements. The Convention on the Rights of the Child expressly states that children have a right to be protected from exploitation and calls on states to act in the best interest of the child. The ECPM finds it evident that surrogacy arrangements undermine this right. Surrogacy robs the baby of his or her claim to their gestational carrier, which research points is harmful⁵ to their development and wellbeing and, particularly in the case of commercial surrogacy, effectively turns the child into a commodity. Moreover, in the case of international surrogacy arrangements, where European couples undergo the arrangement abroad due to it being illegal in their home country, children very often find themselves in a legal limbo and are not able to enjoy full rights as citizens in their country of residence.

³ India tightened its commercial surrogacy regulations by introducing new guidelines banning the arrangement for international couples whose country of origin does not recognize surrogacy, same-sex couples, single individuals, unmarried couples and couples who have been married for less than 2. See brief explanation in press release: <http://www.newindianexpress.com/nation/India-Tightens-Rules-for-Commissioning-Surrogacy/2015/03/18/article2719669.ece> See also earlier Indian government press release on the issue: <http://pib.nic.in/newsite/efeatures.aspx?relid=72127>

⁴ See BBC report on the change in Thailand's legislation banning commercial surrogacy: <http://www.bbc.com/news/world-asia-31546717> . Although commercial surrogacy had been supposedly banned in 1997, it was only the recent plight of the abandoned down syndrome born baby commissioned by an Australian couple that led to the adoption and enforcement of a more comprehensive law.

⁵ See S. Golombok, L. Blake, P. Casey, G. Roman and V. Jadva, 'Children born through reproductive donation: a longitudinal study of psychological development', *The Journal of Child Psychology and Psychiatry*, vol. 54(6), pg. 653-660, 2013. This article reports on research which demonstrates that the absence of a gestational link to the mother in the case of surrogacy arrangements causes difficulties in development and adjustment in children born from these arrangements.

The ECPM and its member parties will continue to monitor legal and practical development of surrogacy and calls on legislators and policymakers to deal with the many legal and ethical issues that currently remain unaddressed.

Surrogacy FAQ

What is surrogacy?

Surrogacy is the practice whereby a woman accepts to become pregnant with and give birth to a child for someone else.

What are the different types of surrogacy?

Traditional surrogacy – where the woman undergoing the pregnancy is biologically related to the baby she is carrying (i.e. the fertilized egg belongs to the pregnant woman). The pregnancy can be achieved either through IVF or sexual intercourse with the biological father.

VS

Gestational surrogacy – where there is no biological relationship between the woman carrying the baby and the baby itself. This type of surrogacy arrangement always involves assisted reproduction techniques that use either the intended mother's eggs or donated eggs.

And:

Altruistic surrogacy – where the woman carrying the baby is not paid anything beyond expenses incurred for carrying the child.

VS

Commercial surrogacy – where remuneration is received by the woman undergoing the pregnancy as part of the surrogacy arrangement.

How common are surrogacy arrangements?

There is no clear estimate to the number of surrogacy arrangements that take place as surrogacy remains to a large extent unregulated in European states. Moreover, where there are cases of traditional surrogacy arrangements and altruistic surrogacy, these often take place as a private arrangement that does not get reported. Commercial surrogacy arrangements are generally better documented but these too often go unreported as they are illegal in most European states.

However, recent reports point to a growing number of surrogacy arrangements.⁶ Moreover, concern over the legal limbo that many children born out of surrogacy arrangements made abroad

⁶ Hague Conference on Private International Law (2012), A Preliminary Report on the Issues Arising from International Surrogacy Arrangements, pp. 6-8

find themselves in gives an indication of the scale of the phenomenon, as do reports of the booming trade of commercial surrogacy in countries such as India.⁷

What kind of legal framework is there for surrogacy in European states?

Some European states have a general prohibition of surrogacy, notably France, Germany and Italy, but also others such as Bulgaria, Portugal and Malta. Other European states, namely Austria and Finland, prohibit merely the practice of gestational surrogacy. There is a very small number of states, namely Russia, Georgia and Ukraine where all forms of surrogacy are deemed legal by the law. Most European states, however, do not specifically regulate the practice of surrogacy.

How does surrogacy affect the children born out of these arrangements?

A longitudinal study reported in the June 2013 issue of the Journal of Child Psychology and Psychiatry shows that children born out of surrogacy arrangements showed higher level of adjustment problems such as aggressive or antisocial behaviour, or emotional problems, such as anxiety or depression than children conceived by gamete (i.e. egg and sperm) donation.⁸

Moreover, many children born from surrogacy arrangements made abroad can face legal difficulties in being registered as the official children of the parents who commissioned the surrogacy in countries where such practices are either illegal or not clearly regulated by the state. This in turn can cause distress and further adjustment problems for the children involved. Although there are difficulties in establishing the exact number of children in these situations, some sources estimate the number to be very high.⁹

What are some of the negative consequences on the surrogate mothers?

The hormonal treatments gestational carriers have to undergo in order to prepare their bodies for and undergo the implantation of the embryo puts them at a number of health risks ranging from headaches, mood swings and depression to increased risk for developing diabetes, heart attack and strokes. Women who donate their eggs for fertilization are exposed to additional health risks such as Ovarian Overstimulation Syndrome and possible long term negative effects on their fertility.¹⁰

⁷ A U.N.-backed study in July 2012 estimated the surrogacy business at more than \$400 million a year, with over 3,000 fertility clinics across India. See <http://www.samawomenshealth.org/downloads/Birthing%20A%20Market.pdf>

⁸ See Journal of Child Psychology and Psychiatry, volume 54, Issue 6, pp. 653-660, June 2013, <http://onlinelibrary.wiley.com/doi/10.1111/jcpp.12015/abstract>

⁹ The UK based Project Group on Assisted Reproduction (PROGAR) (<http://www.basw.co.uk/progar/>) estimates that around 1000 children of surrogate mothers enter the UK each year with uncertain legal status although other sources do not place the number so high.

¹⁰ <http://breeders.cbc-network.org/wp-content/uploads/2013/12/Drugs-Commonly-Used-for-Women-in-Gestational-Surrogacy-Pregnancies.pdf>

While there are various reports indicating that surrogacy does not necessarily have a negative psychological impact on the 'carrier', there are equally reports showing that some women do suffer emotional distress and difficulties giving up the child.

What legal issues arise from the practice of surrogacy?

The legal concerns most cited are (1) those referring to difficulties in establishing parental status of the commissioning parents and (2) the legal limbo the children find themselves in concerning their nationality and citizenship in the case of surrogacy arrangements made abroad.

What ethical issues arise from the practice of surrogacy?

Ethical concerns related to surrogacy regard (1) the undermining of the dignity of the surrogate mothers, (2) the exploitation of women from lower income countries in the case of international surrogacy arrangement and, perhaps most importantly, (3) the disconsideration of the rights of the children born out of the arrangements.

In a surrogacy arrangement the woman commissioned to carry the baby, whether remunerated or not, is subjected to considerable physical and emotional stress in the process. This is of particular concern for commercial surrogacy where effectively a woman's womb is being 'rented out' and in the case of donor eggs they are being bought and sold. This effectively commodifies the reproductive organs and parts of a woman's body and undermines her dignity and worth as a human being.

For women living in developing or lower income countries such as India, Thailand or Ukraine, surrogacy arrangements are often mediated by organizations that make a considerable profit from commissioning the surrogates to carry babies for someone else and therefore are often exploitative.

The rights of children born out of these arrangements are of particular concern. The practice of surrogacy disregards the rights and human dignity of the child by effectively turning the baby in question into a product. Moreover, especially in the case of international commercial surrogacy arrangements, the practice can be insufficiently regularised and thus allow for abuses such as buying of children for exploitative purposes.¹¹

¹¹<http://www.bangkokpost.com/learning/learning-from-news/425502/surrogate-update-thurs-warnings-issued-a-year-ago>

‘No Maternity Traffic’ Resolution

The practice of surrogacy, whereby a woman accepts to undergo a pregnancy and give birth to a baby for someone else, is an infringement on fundamental rights and poses serious questions in terms of biomedical ethics, human rights, and the dignity of human persons. The human dignity of the woman carrier is undermined as her body and its reproductive function are used as a commodity. The human rights of the baby conceived as a result of the arrangement are disregarded as he becomes a product to be bought and sold.

Surrogacy, although strictly forbidden in a number of countries, is a highly encountered practice. The unregulated nature of this practice creates numerous legal issues. The ECPM calls for the legislation and the practice of surrogacy in different countries to be assessed on the basis of existing international human rights treaties.¹²

The practice of surrogacy is incompatible with the provisions of numerous international conventions.¹³ It is also a direct contradiction of the principle of human dignity that makes up the cornerstone of the Charter of Fundamental Rights of the European Union which prohibits ‘making the human body and its parts as such a source of financial gain’. The ECPM, therefore, considers that legitimizing surrogacy contradicts EU and international law and effectively consists in commercializing maternity.

Moreover, the assisted reproduction techniques used within surrogacy pose serious health risk to the women carriers and those donating eggs to be used in these arrangements. The ECPM calls for the health concerns surrounding surrogate motherhood to be seriously considered and openly discussed.

Surrogacy arrangements, in particular commercial surrogacy also commodifies the child born from the arrangement. By relinquishing a child to third party commissioning couple or individual, surrogacy becomes a sort of programmed abandonment causing psychological repercussions for children. A serious and significant problem in many International Surrogacy Arrangement cases is

¹² Such as the ‘Optional Protocol to the Convention on the Rights of the Child on the Sale of Children,’ ‘Child Prostitution and Child Pornography,’ ‘Convention on the Elimination of all Forms of Discrimination Against Women,’ the ‘International Covenant on Civil and Political Rights,’ the ‘European Convention on Human Rights,’ the ‘EU Fundamental Rights Charter,’ and the ‘1926 Convention to Suppress the Slave Trade and Slavery,’ the ‘Conventions of the Rights of the Child,’ on ‘the Elimination of All Form of Discrimination,’ on ‘Adoption,’ ‘Against Slavery,’ on ‘Human Rights and Biomedicine’.

¹³ See international legal instruments such as: the ‘United Nations Slavery Convention’ (Article 1), the ‘CEDAW Convention (Article 6),’ the ‘Convention on the Rights of the Child (Article 7 § 1),’ the ‘International Convention on the Rights of the Child (Article 9 § 1 and 35),’ the ‘Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (Article 2 a) and Article 3),’ the ‘European Convention on the Adoption of Children (Article 5),’ the ‘Council of Europe Convention on Human Rights and Biomedicine (Article 21),’ the principles of the ‘Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.’

also the legal status of the born children. The ECPM highlights the need to evaluate the feasibility of refusing a transcription of birth certificates or recognition of the legal decisions of the birth country.

The ECPM is concerned with the fertility tourism associated with international surrogacy arrangements which often leads to the exploitation of women in disadvantaged positions and a black market of 'baby selling'.

ECPM Members recall that surrogacy is not a fertility treatment to restore a person's deficient ability to procreate and cannot be accepted, therefore, as a remedy for couples who cannot have children.

ECPM Members condemn surrogacy, in particular commercial surrogacy, and strongly encourage the admissibility for countries to adopt laws against this practice. ECPM considers it is therefore urgent to develop an international convention forbidding and criminalizing the practice of surrogacy.