

Surrogate Motherhood: Between Reproductive Rights and the Best Interests of the Child

*By Lucia Irinescu**

From a reproductive rights perspective, surrogacy represents a way for individuals and couples who face infertility, same-sex couples, or single people to have biological children. Advocates argue that denying surrogacy infringes upon the right to create a family, a right protected by international human rights norms. Surrogacy can empower individuals who otherwise could not bear children to exercise their reproductive autonomy. Proponents of surrogacy emphasise consent, contractual freedom, and the potential for ethical frameworks that protect all parties involved. On the other hand, the best interests of the child principle raise important concerns about the ethical implications of surrogacy. Children born through surrogacy have a right to identity, family life, and protection from exploitation. Complex questions arise regarding the child's emotional well-being, especially when considering issues of parental abandonment, the separation from the gestational carrier, and the potential for the child to experience identity confusion. Critics argue that surrogacy may commodify children by reducing them to the subject of a contract. The United Nations Convention on the Rights of the Child establishes that children have a right to know their biological and gestational origins, which can be compromised in certain surrogacy arrangements.

Keywords: *Surrogate motherhood; Human rights; The best interests of the child principle; Child welfare*

Introduction

Surrogate motherhood is one of the most controversial and complex aspects of assisted reproductive technology, balancing the reproductive rights of intended parents with the best interests of the child born through surrogacy. This practice, which involves a woman carrying a pregnancy to term for another individual or couple, raises ethical, legal, and social questions that differ significantly across jurisdictions. The debate centres on issues of autonomy, bodily integrity, the commodification of women and children, and the child's right to know their origins.

Legal frameworks for surrogacy vary significantly across the globe. Some countries allow regulated forms of both altruistic and commercial surrogacy, while others, prohibit it entirely. The disparity in legal approaches has led to the rise of "reproductive tourism," where intended parents travel to countries with more permissive surrogacy laws, often resulting in ethical dilemmas and legal complications concerning citizenship, parental rights, and child welfare.

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A critical question is whether surrogacy can be ethically practiced in a way that safeguards the rights of the surrogate mother, the intended parents, and the child. Ethical guidelines and regulations that ensure informed consent, fair compensation, and post-birth responsibilities are necessary to strike this delicate balance. Internationally agreed-upon standards could help minimise exploitation and protect vulnerable parties. Transparency in surrogacy arrangements, access to information about genetic and gestational origins for the child, and comprehensive psychological and legal support are essential components of ethical surrogacy practices.

In conclusion, surrogate motherhood sits at the intersection of reproductive rights and the best interests of the child, presenting a challenging ethical and legal dilemma. Respecting the autonomy of adults seeking surrogacy must be weighed carefully against protecting the welfare and rights of the children born through this practice. A balanced, rights-based approach that incorporates strict regulation, ethical oversight, and protections for all parties involved may offer a viable path forward for countries navigating this contentious issue.

Literature Review

The legal and ethical implications of surrogacy have been widely discussed in academic literature, particularly in relation to the principle of the best interests of the child. A significant body of work focuses on the regulation of surrogacy at national and international levels, with ongoing debates about the legitimacy of commercial vs. altruistic arrangements and the risks of child commodification.

The concept of "best interests of the child" is complex in its content and must be determined on a case-by-case basis. In the vast majority of states, the legislator has not defined the concept of "best interests of the child" because such a definition would be impossible to cover all the aspects to be taken into account when analysing the situation of the child. The best interests of the child "[...] are defined as the right of the child to normal physical and moral development, to social and emotional balance, and to family life."¹ The best interests of the child require an analysis of all factors relevant to the interests of a child in a given situation. Generally speaking, the best interests of the child, is circumscribed by the child's right to normal physical and moral development, social and emotional balance and family life, a right also affirmed by Article 8 of the European Convention on Human Rights. The child has the right to grow up with both parents, who are responsible for his/her upbringing and education.

The concept of "best interests of the child" is recognised in a number of international documents. Thus, Article 2 of the Declaration of the Rights of the Child² provides:

"The child shall enjoy special protection and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally,

¹Art. 2 para. (2) of Law No. 272/2004 on the protection and promotion of children's rights, published in the Official Gazette of Romania no. 159 of 21 June 2004.

²Proclaimed by Resolution 1386 (XIV) of the General Assembly on November 20, 1959.

spiritually, and socially in a healthy and normal manner and in conditions of freedom and dignity. The adoption of laws for this purpose shall be governed by the best interests of the child."

The Convention on the Rights of the Child states in Article 3, paragraph 1, that "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." The second paragraph of the same article provides that "States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures."

In General Comment No. 14 (2013) of the Committee on the Rights of the Child, the best interests of the child are considered to be a three-dimensional concept: a substantive right, a fundamental principle, and a procedural rule³.

In legal doctrine⁴, authors draw attention to the fact that this principle has two components: on the one hand, it concerns a general interest, according to which parents must raise and educate their child in accordance with moral norms and social public order, and on the other hand, it involves a personal and individual interest of the child, which stems from the particular characteristics and needs of each child, taking into account a number of aspects such as their health, physical development, and the professional training that each child needs. With regard to the first part of this principle, it has been considered that it varies according to the socio-economic policy of each country, while the second aspect must relate to the specific situation of the child (age, needs, etc.)⁵.

Some authors argue that the principle is often subordinated to the interests of intended parents or surrogate mothers⁶. In this case, the best interests of the child take on a different meaning. First, we need to figure out if it is in the child's best interests to know the genetic truth. More precisely, the best interests of the child consist in ensuring that he or she grows up in a stable family environment that provides the best conditions for his or her physical, mental, emotional, and intellectual development. In the vast majority of countries, legislation, or more precisely the legislative vacuum in the field of surrogacy, leads to solutions that do not coincide with the best interests of the child. On the contrary, the best interests of the child are most often abandoned.

From the perspective of the child's best interests, surrogacy raises a number of legal issues for which there are no clear and uniform legal solutions. For the child, it is essential that their filiation be established immediately after birth and that they be provided with a stable and loving family environment. Intended parents should have all the legal means at their disposal to establish filiation with the child born to the surrogate mother and to be able to provide them with an environment conducive

³General 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), 29 May 2013.

⁴See Bacaci (2020) at 58-61.

⁵Ghiță & Cercel (2018) at 135.

⁶Crăciunescu (2024) at 114-115.

to their physical and emotional development. At the same time, children have the right to know their origins. Legislation in this area must include provisions on how and when children will be informed about the circumstances of their birth, ensuring that they have access to information about their genetic background, where appropriate.

Methodology

In methodological terms, this study adopts a qualitative, doctrinal legal research methodology, focusing on the principle of the best interests of the child in the context of surrogacy arrangements.

Primary sources include legislation, case law, and legal doctrines, while secondary sources comprise academic literature. Jurisdictions with established or emerging legal frameworks for surrogacy, such as the United Kingdom, the United States, and selected European countries, are used for comparative analysis. The objective is to critically assess how different legal systems interpret and apply the best interests of the child principle in surrogacy cases, particularly in relation to parental recognition, citizenship, and child welfare. The research also considers ethical and human rights dimensions, seeking to identify normative and practical challenges and to propose recommendations for harmonizing legal standards in cross-border surrogacy arrangements.

Reproductive Rights in International and National Law

Conception of children is a process that has undergone rapid evolution, reaching the point where legislation is now overtaken by assisted reproduction technologies, which continue to develop and offer increasingly effective and personalised solutions in this area. In this context, a natural question arises: can we talk about a “right to a child”? What about a “right to reproduction”? And if the answer is yes, to whom can we grant such rights?⁷

In the absence of a legal definition, medically assisted human reproduction has been defined in the literature as “the set of chemical or biological techniques and practices intended for *in vitro* procreation, embryo transfer, artificial insemination, and any other technique having an equivalent effect.”⁸

Most commonly, medically assisted human reproduction is a medical field that couples who are unable to conceive naturally turn to when hormonal, drug, or surgical treatments have proven ineffective. Of these techniques, the most commonly used are artificial insemination and *in vitro* fertilisation.

Medically assisted reproduction with a third party can be achieved either through a third-party donor capable of procreating, who donates reproductive cells for therapeutic purposes, or through a surrogate mother or surrogate motherhood. Endogenous artificial insemination, which involves the use of the genetic material of the recipient couple, does not raise legal issues in terms of establishing filiation.

⁷Irinescu (2019) at 208.

⁸Guţan (2019) at 9.

In the case of exogenous artificial insemination, the genetic material comes from a third party, but no filiation link will be established between the third party and the child born as a result of these medical techniques. Medically assisted reproduction also offers single people the chance to procreate: women can turn to a third-party donor, while men can become parents with the help of a surrogate mother.⁹ More recently, medically assisted reproduction is no longer just a solution for medical infertility problems, but has become a tool used to exercise the right to become a parent.

From a legal perspective, it should be noted that there is currently no uniform regulation on assisted human reproduction at the European Union level. This is and will remain a sensitive issue in the future, as it involves a number of ethical, moral, and religious considerations. As an observation, the countries that have permissive regulations in this area are outside the European Union (Ukraine, Russia, the US). The principle of *mater in iure semper certa est* also applies to assisted human reproduction with a third-party donor in the vast majority of European countries.

At the opposite end of the spectrum are countries that, for economic reasons, have turned the reproductive industry into a valuable source of revenue for the state budget and have adopted very permissive legislation to allow the development of reproductive tourism. The phenomenon of surrogate mothers, which denounces the “commercialisation” of the human body, raises the most ethical and legal controversies arising either from the lack of uniform regulation at the international level or from the total lack of legislation at the national level. Surrogate motherhood has become a “business” for fertility clinics, which promote their services globally via the internet.

Countries where surrogate motherhood is not regulated are classified as having a “zero regulatory regime,” which, in turn, can be a “positive-zero regime” (where surrogacy is known to be practiced despite the absence of any legal regulation, such as in Hungary, Latvia, Lithuania, Slovakia, Slovenia, the Czech Republic, Estonia, and Romania) and a “negative-zero regime” (where it has no legal force, as in Poland). Surrogacy is permitted by law in Armenia, Belarus, Georgia, Kazakhstan, Ukraine, and Russia.

The case law of the European Court of Human Rights has provided some answers to this issue. The right to have children and the right to be a parent are based on Article 8 of the Convention, concerning the right to private and family life. The right to reproduction is a component of the right to private life. The Court also states that filiation falls within the scope of the right to respect for private life, as evidenced by cases in which the Court examined the compatibility with this right of the impossibility of establishing a legal link between a child and a biological parent and emphasised that respect for private life requires that everyone be able to establish the details of their identity as a human being.

In *Evans v. the United Kingdom* case¹⁰ - Judgement of February 10, 2007, where domestic law allowed the applicant's former partner to withdraw his consent to the preservation and use by the applicant of the embryos they had created together, thereby preventing her from ever having a child with whom she would have a genetic link, the Court recognised that we can speak, at most, of a ‘right to respect

⁹Irinescu (2024) at 349.

¹⁰43 ECHR 21, 415 (2006)

for the decision to become a parent or not'. In these circumstances, states have a positive obligation to create a legal framework that allows procreation, while also setting certain limits relating to public order, but also a negative obligation to refrain from interfering in their decision to become parents or not by prohibiting abortions.

In the *Mennesson v. France and Labassee v. France* case¹¹ - Judgement of June 26, 2014, the Strasbourg Court ruled that France's refusal to recognise legal parentage established in the US for children born through surrogacy violated Article 8 of the Convention. In this case, the father in each couple was also the biological parent, which appears to have been decisive in the Court's ruling. In the US, the kids got US citizenship and were recognised as the children of the Mennesson and Labasse couple, but in France, the French authorities refused to recognise this status, saying that the two contracts with the surrogate moms were invalid. The same solution was upheld by the French Court of Cassation. The Strasbourg Court ruled that although the French authorities' refusal fell within the margin of appreciation granted to states in decisions on surrogacy, in these cases the children's identity had been affected. "This margin of appreciation must be limited when filiation is at stake, through one of its essential aspects—the identity of individuals. It is therefore for the Court to verify that the right balance has been struck between the interests of the State and those of the individuals concerned, particularly in the light of the best interests of the child, which must prevail."¹²

In the case of *Paradiso and Campanelli v. Italy* case¹³ - Judgment of January, 24, 2017, the applicants claim in particular that the refusal to transcribe the child's birth certificate issued by the Russian authorities into the Italian civil status registers and the removal of the minor are incompatible with Article 8 of the Convention. The applicants are a married couple. In their application form, they stated that, after unsuccessful attempts at in vitro fertilisation, they decided to resort to assisted reproduction through a surrogate mother in order to become parents. To this end, they contacted a clinic based in Moscow specializing in assisted reproduction techniques and entered into a contract with it for assisted reproduction through a surrogate mother. Although there was no genetic link between the child and either of the intended parents, the applicants were registered as the parents of the newborn. Citing public policy, the Italian authorities did not recognise the registration of births carried out in accordance with Russian law. They accused the prospective parents of attempting to circumvent the provisions governing adoption. The state took the nine-month-old child from the intended parents, placed him in care and entrusted him to an adoptive family, then re-registered the child as having "unknown parents" in the birth register, and the applicants were investigated criminally. Although the Court found a violation of Article 8 of the Convention, it specified that its judgment did not require the Italian State to return the child to the intended parents, as the child had developed emotional ties with the adoptive family with whom he had been living since 2013¹⁴.

¹¹*Mennesson v. France* ECHR 664 (2014) and *Labassee v. France* ECHR 668 (2014).

¹²Chelaru (2021) at 11-21.

¹³*Paradiso & Campanelli v. Italy* ECHR 96 (2017).

¹⁴*Irinescu* (2020) at 125-126.

In Italy, surrogacy is prohibited by Law No. 40/2004 on medically assisted procreation. On October 16, 2024, the Italian Senate definitively approved a bill amending Article 12 of that law, adding a new paragraph stating that Italian citizens who resort to surrogacy abroad will be held liable under Italian law. Italy recently passed a new law prohibiting couples from traveling abroad to have a child through surrogacy. Individuals who travel to countries where surrogacy is legal may face up to two years in prison and fines ranging from €60,000 to €1 million.

In Romania, affiliation to the mother is established by birth, according to the principal *mater in iure semper certa est*.

The relationship with the mother will be proven by the birth certificate and the birth certificate issued on the basis thereof, in which the woman who gave birth to the child will be listed under the heading “mother's name.” In these circumstances, solutions must be found to “transfer” maternity from the woman who gave birth, considered legally to be the child's mother, to the intended mother. Romanian courts are still confused when called upon to rule on situations arising from “womb rental” techniques. In the absence of express regulations, the use of surrogate mothers is a reality, but the practice of the courts is inconsistent. Therefore, in the absence of express regulations on surrogacy and the filiation regime in this case, the national court should resolve the issue of filiation of children born through surrogacy by applying Article 8 of the European Convention on Human Rights and the principle of the best interests of the child, with the solutions being fully in line with the case law of the European Court of Human Rights.

Although there is no express prohibition on surrogacy, it is practically impossible for motherhood to be transferred to the intended mother.

In the case of *Foulon and Bouvet v. France*¹⁵ – Judgment of October 21, 2016, the Court recognised access for single men and homosexual couples to surrogacy; the best interests of the child prevailed over the Court's decision to overturn the law and violate public order. The applicant, Didier Foulon, is an unmarried French citizen who used a surrogate mother in India. The child was conceived using his genetic material. In the other case, the plaintiff, Philippe Bouvet, a 45-year-old French citizen, lives in a registered civil partnership with another man and, like Mr. Foulon, used a surrogate mother in India. In both cases, the plaintiffs are also the biological fathers. The Court's decision, however, opened up the possibility for single persons and persons living in same-sex couples who resort to surrogacy in states where it is legalised to enjoy legal recognition in their country of residence of the filiation established abroad. In doctrine, it has been stated that following this decision by the Court, reproductive tourism has flourished and the phenomenon known as “babies without borders” has begun to develop.¹⁶

Methods of Transferring Parentage in Surrogacy

Since surrogacy is not recognised in a lot of countries, and it's happening on the black market, we were wondering how motherhood can be transferred from the

¹⁵ECHR, *Foulon & Bouvet v. France*, 255 (2016).

¹⁶Tec (2019).

woman who gives birth to the kid, who's legally considered the mom, whether or not she's the biological mom, to the intended mom. In many cases, the woman who gives birth to the child is the one who rents her womb and gives birth to the child, but the genetic parents of the child are the intended parents. Solutions may vary from case to case.

One such solution would be to establish filiation with the biological mother by a court decision. In 2010, in Romania, a court ruled that "regardless of the genetic material that led to conception, filiation to the mother is established in relation to the woman who carried the pregnancy and gave birth, because what is legally important for establishing filiation to the mother is the material fact of birth [...] In this case, the defendant gave birth to the minor, and Romanian law prohibits the dissociation between the 'biological' mother and the 'birth' mother who gives birth to the child." At the same time, it upheld the action to contest paternity, found that the defendant is not the father of the minor, found that the plaintiff is the father of the minor, and agreed that the minor should bear the plaintiff's surname.

The Court of appeal stated that "the appellants have always considered themselves to be the minor's parents and have behaved as such in this regard, with the child being cared for by her biological parents immediately after birth and until the date of the trial, and there is no substantive relationship between the defendant and the minor, nor any legal or de facto element indicating the existence of a close personal relationship. From this perspective, ignoring the biological reality revealed by the evidence is contrary to the best interests of the minor and violates her personal interests, as provided for in Article 8 of the European Convention on Human Rights, as interpreted by the Court's case law.

In 2013, another court ruled in favour of surrogacy in Romanian law, with the effect of changing the filiation of children born in this way, contrary to Romanian positive law. The Romanian court's decision sanctions the Romanian state's failure to regulate such ART methods in Romanian legislation, finding that the state is not taking advantage of scientific advances in the field of medicine and is violating international conventions, even though no international convention obliges states to regulate medically assisted human reproduction methods.

The court of first instance rejected the action, noting that "although medically assisted procreation through the use of a surrogate mother is carried out in Romania, as evidenced by the case in question, it is not legally regulated [...]. From a legal point of view, regardless of the origin of the genetic material from which the child is conceived, the woman who gives birth to the child is considered the mother, and in the case of in vitro fertilisation with a surrogate mother, this woman is the surrogate mother. The filiation to the mother results from the material and obvious fact of birth, which makes the proof of maternity direct and unquestionable."

On appeal, the plaintiffs' claim was only partially upheld, in the sense that it established the plaintiff's paternity of the two children, but upheld the court's decision regarding the children's maternity. On appeal, the court held, *inter alia*, that "the use of another procedure—such as surrogacy—by the parties to the proceedings, although not expressly regulated by law, cannot be considered an illegal procedure, since, in civil matters, what is not prohibited is permitted. [...] the legal impossibility for the minor plaintiffs to have their motherhood recognised in relation to their

biological mother – that is, their true genetic identity – primarily infringes their right to private life, guaranteed by Article 8 of the European Convention on Human Rights. [...] The lack of evidence proving that the agreement between the adult parties was justified by material or other benefits for the surrogate mother (who is the sister of the biological mother and who thus made an altruistic sacrifice) and her husband allows the justified conclusion that, in this respect too, it was in accordance with the rule of law and public morality”.

Another possible solution for transferring maternity would be to conclude a surrogacy agreement between the intended parents (the infertile couple) and the surrogate mother. These are unnamed and atypical legal acts, not regulated by our law and exceeding the provisions on medically assisted human reproduction with a third-party donor. The surrogacy contract may contain several clauses covering various aspects, such as the express renunciation of motherhood and the child; the legal risks of the contract, the psychological and biological risks of the surrogate mother; the medical facility that will provide medical services; the obligations of the mother, termination of the contract; covering the costs related to pregnancy and childbirth; the confidentiality clause; the mediation clause; the clause on dispute management and resolution; the applicable law. These contracts present the risk that if one of the parties fails to fulfil its obligations, the state cannot be called upon to enforce them, and the courts may declare them null and void. When the surrogate mother carries the pregnancy to term, as agreed initially, she will hand over the child to the intended parents after the birth. In this case, maternity will not be transferred as a result of the agreement between the surrogate mother and the intended parents, but the intended parents will subsequently have to establish filiation with the child: the intended father will be able to recognise the child if the surrogate mother is not married at the time of birth, and the intended mother will be able to adopt the child or, if she is also the genetic mother, she will be able to bring legal proceedings to establish filiation¹⁷.

The most common form of maternity transfer in these situations remains adoption. In the vast majority of countries, the law does not recognise the intended parents, donors of genetic material, as having any family relationship with the child born to the surrogate mother. The biological father may recognise the child born to the surrogate mother or may deny paternity established by presumption of paternity towards the surrogate mother's husband, so that, after the action is admitted, he may recognise the child. Subsequently, the biological mother may initiate proceedings for the adoption of the child by her husband. The adoption can only take place if the surrogate mother gives her consent to the adoption and after all legal procedures have been completed. Adoption is a solution that has some drawbacks, such as going through the legal process, the relatively long time frame, combining the qualities of a biological parent with those of an adoptive parent, and the possibility of the adoption application being rejected¹⁸.

Recognition of birth certificates issued abroad in cases of surrogacy could be another way for intended parents to become legal parents in their country of origin. However, several countries refuse to recognise parentage based on these practices.

¹⁷Ungureanu (2019) at 18.

¹⁸Jugastru (2016) at 103.

Recently, countries such as Italy have begun to prohibit their citizens from traveling to countries that allow surrogacy and resorting to these procedures. In such situations, issuing a European certificate of filiation could be a solution¹⁹.

Conclusions

Surrogate motherhood is and will remain a sensitive issue from an ethical, moral, religious, and legal point of view. Debates on surrogate motherhood raise questions to which the vast majority of legislators have no answers. Firstly, from the perspective of recognised rights, the dilemma arises, as in the case of adoption, to what extent and within what limits the child should be recognised as having the right to establish their genetic identity. Obviously, recognizing this right would conflict with the right to confidentiality that the donor exercised at the time of donation.

Also, from a medical point of view, there is concern about the extent to which the pregnant mother can influence the genetics of the child she has given birth to.

Furthermore, when the intended mother is also the genetic mother of the child, and the surrogate mother is a woman who has agreed to carry the pregnancy just for financial reasons, we wonder to what extent the *mater in iure semper certa est* principle coincides with the best interests of the child to be raised in a family where it is wanted. In these cases, the surrogate mother does not want to raise the child, but the law recognises her as the child's mother. Why does the law not allow for a reform in this area that would recognise the genetic mother's legal status as mother?

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¹⁹Aniței & Dornean (2024) at 699-714.

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