

Surrogacy is incompatible with international law

The Parliamentary Assembly of the Council of Europe (PACE) is being seized of a proposal a Resolution (Doc. 13562) concerning “Human rights and ethical questions related to surrogacy”. The Committee on Social Affairs, Health and Sustainable Development will vote on a draft resolution and report this coming March 15.

That is why we have established this note to clarify the issues and make a contribution with a practical background.

Foreword

Conflict of interest to clarify

In addition to fundamental questions, this report raises the issue of a serious disrespect of the regulations of the Parliamentary Assembly of the Council of Europe. The existence of a conflict of interest already affects the credibility of this report: the rapporteur Petra de Sutter, head of the Department of Reproductive Medicine in Gent, Belgium, practices surrogacy. Moreover, it has been revealed that the rapporteur has ties with an Indian firm, Seeds of Innocence, engaged in Gestational surrogacy as a business practice.

Introduction

Surrogacy is a contract for providing conception, pregnancy, abandonment and delivery of a child by a woman to one or more intended parents in exchange of money.

Whether performed for profit, or as an arrangement between individuals, this practice implies serious consequences for the “surrogate” mother and tramples the most basic rights of the child, considering the serious ethical and legal problems which it raises.

I – Surrogacy exploits women’s bodies in an unprecedented manner

Surrogacy restricts women’s freedom: it involves an inhuman alienation. To ensure that the child will meet all the given standards, **the mother is closely monitored during her pregnancy**. This can be done by various means and in some cases in a coercive manner. In the United States for example, clauses in the contract explain in a detailed manner what the mother is permitted to do or eat during pregnancy and what she is not permitted to do or eat, to a point that can become very restrictive. In many countries, the intermediary agency regularly monitors the mother, sometimes with daily visits and even the psychological support can become a means of surveillance.

Surrogacy **endangers the mother**. Maternal mortality remains high in some countries, especially in India. Two cases were published in 2012: in May, a woman died after giving birth to a child for an American couple. The same year, another woman died after giving birth to twins for a Norwegian couple, due to contracting hepatitis during her pregnancy. (Time of India, May 17, 2012 ; The Guardian, June 5, 2012).

Surrogacy exploits women’s bodies. Women, especially the poorest, are merely used for their reproductive capacity. They **rent their uterus for the benefit of rich intended parents**, and submit to conditions and strict monitoring. These young women are required to carry the child and then to

abandon it at birth in exchange of money. Following delivery, they will disappear from the child's parentage. An Indian NGO has recently reported that girls as young as 13 years-old have been exploited as surrogate mothers.

Surrogacy gives rise to inextricable legal disputes. Among the causes of dispute are: when **the surrogate mother changes her mind**, when the intended parents separate during the pregnancy, or when the child is born with a handicap. Numerous questions also arise **if a disability is detected** by ultrasound and if the intended parents decided to force the surrogate mother to have an abortion, or conversely, if she wishes to abort because of a risk to her own health. Another cause of dispute may be the death of the child prior to or following delivery which could influence fulfillment of the surrogacy contract.

II – Surrogacy violates the rights of the child

Surrogacy breaks the parentage link with the child. The parentage of the child is deliberately split between gamete providers, the surrogate mother and the intended parent(s). Thus **a child could have up to six parents**: the genetic mother (oocyte donor), the genetic father (sperm donor), the surrogate mother, her husband (presumption of paternity) and finally the intended parents. This is contrary to a child's right to know and live with his or her mother and father. (Art. 7, Convention on the Rights of the Child).

Surrogacy is dehumanizing for the surrogate mother and the child. The surrogate mother is merely considered as the carrier of the child, which she must abandon at birth to deliver him or her to the intended parent(s). This is contrary to all studies conducted over several decades demonstrating the importance of physiological and emotional bonds created between the mother and child during pregnancy, as well as the influence of pregnancy on both the mother and on the child. The experience with adoption shows that **separating a child from the one who carried him is as much of a hardship for the child as it is for the mother who has to relinquish her child**. To deliberately provoke such a separation is a serious attack on the identity of the woman and the child.

Surrogacy transforms the **child into an object** to be sold or exchanged. The child is the object of a contract. Prices vary between \$25,000 to more than \$100,000. The contracting parties **claim ownership rights over the child**. These types of "mafia" networks involved in the sale of children are not only reserved for developing countries. In the United States, in 2011, a network involving the sale of children was dismantled. It had been organized by lawyers who claimed that the children involved had been conceived for intended parents who subsequently changed their minds. These children were sold for \$100,000. Even if there were no financial gains at issue, the individuals suffer inevitable consequences, notably psychological ones. Neither can one ignore the consequences of such transactions on the other children of the surrogate mother.

III- « Ethical » Surrogacy does not exist

The example in the United Kingdom is significant: gestational surrogacy has been legalized since 1985, without financial compensation. This has absolutely not prevented **numerous transgressions from happening**. The difficulty to find women who accept to carry a child for someone else without financial compensation, but only reimbursed for expenses, can lead to emotional pressure between families or friends. Having recourse to a family member for gestational surrogacy is widespread: sisters, sisters-in-law, cousins... This recourse to family members is explained because there is a legal ban against advertising surrogacy. In 2014, a 46-year-old woman accepted to carry the child of her own unmarried 27 year-old son, and this was accepted by the British court. This affair was very controversial by the fact that a mother could accept to give birth to a child for her own son. The very

prohibition of incest is thus being called into question. An investigation conducted in 2011 and published by the Sunday Telegraph in 2012 revealed that 100 practices of surrogacy were performed in the UK in 2011, and in the same year 1000 practices of surrogacy were commissioned in India by British clients, which represented half of the number of surrogacy practices performed in that country. In other words, “ethical” surrogacy gives credit to the idea that surrogacy could be acceptable and raises even more appeals for commercial surrogacy, since there was insufficient availability of non-commercial surrogacy practices.

A simple glance on internet proves that **surrogacy is a booming market segment**: hundreds of clinics, agencies and young women propose their services for this practice. The annual turnover for the reproductive market in India was estimated at \$ 400 million in 2011, and is now **\$2 billion, and \$6.5 billion in the United States**.

Surrogacy is **contrary to human rights** and international law.

The 1926 Convention against Slavery states: *“Slavery is the status or condition of an individual over whom any or all powers attributing ownership rights are exercised”*. In the Convention on the Rights of the Child, Article 35 prohibits *“the sale of or the trafficking of children for any purpose or in any form”*. According to the Hague Convention, Article 1 has the particular purpose *“to establish safeguards to ensure that international adoptions are carried out for the best interest of the child (...)and thereby prevent child abduction, the sale or the trafficking of children”*. Surrogacy is also incompatible with The Convention on the Elimination of All Forms of Discrimination against Women, adopted on December 18, 1979, which became operative on September 3, 1981. Article 6 requires that *“State Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women”*. Article 11f adds that States must ensure, *“the right to health protection and to safety in working conditions, including the safeguarding of the function of reproduction”*. This applies perfectly to the exploitation of the reproductive function of surrogate mothers.

Conclusion: Surrogacy must be fought against as any other form of trafficking of human beings

Surrogate motherhood does not only pose numerous problems relating to the development and commodification of children, to the health of the mother and her potential exploitation, but it is also incompatible with international law.

In December 2015, the European Parliament voted by a strong majority to forbid all practices of Surrogacy without exception, by a large majority.

In its Annual Report on Human Rights and Democracy in the World and the European Union’s policy on the matter, the position of the European Parliament is very explicit: it *« condemns the practice of surrogacy, which undermines the human dignity of the woman since her body and its’ reproductive functions are used as a commodity; considers that the practice of gestational surrogacy which involves reproductive exploitation and use of the human body namely of vulnerable women in developing countries, for financial or other gain, should be prohibited and treated as a matter of urgency in human rights instruments”*.

The only solution is to ban surrogate motherhood on an international level, just as the sale of children is forbidden, and to plan for criminal sanctions for offenders, especially the intermediaries. It is eminently the responsibility of the Council of Europe to guarantee instruments for defending Human Rights, as requested by the European Parliament.

Concerning the children born as a result of this illegal practice, the child's interest should be privileged on a case-by-case basis. Each State has to resolve individual cases arising from the illegal practice of surrogacy, in the best interest of the child, ensuring they do not encourage this practice.

Giving legal value to the consequences of surrogate motherhood, especially with regard to parentage, would amount to admitting that the practice is acceptable with regard to human dignity and validate the institutionalization of a real "reproductive proletariat".

- This would endorse the trafficking of children and the exploiting of women's material or psychological poverty.
- This would contribute to the development of additional violence against women.
- This would mean deliberately ignoring the serious violations of children's rights, as if nothing had happened.
- This would encourage fraud in States which do not accept surrogacy, by means of a *fait accompli*.

A legal contract, the object of which is a human being, in this case a child, whose abandonment by the mother is scheduled, and therefore whose parentage is wilfully disguised, cannot produce any recognized legal effect by States who claim to respect human dignity.

States should not only be capable of punishing infringements on women's and children's rights, but also of deciding whether or not to transcribe foreign birth certificates for surrogacy cases, even if from a practical point of view there are recognizable impacts. For the States, this is the most effective manner to dissuade their citizens from resorting to surrogacy abroad and thus contributing to the exploitation of women and the merchandising of children. Analysing the child's interest on a case-by-case basis must be of paramount importance, especially if deciding to place the child with social services for adoption or to relinquish him to his intended parent(s), at least granting "parental power" and related civil rights. In the absence of parentage, nationality should be established using conditions of residence and education (for example refer to French Civil Code, Article 21-12 whereby French citizenship is granted after five years to each child reared in France by French citizens or by using the 1954 and 1961 conventions on Statelessness).

Nomaternitytraffic is an initiative launched by the "International Union for the Abolition of Surrogacy" on November 20, 2014, the International Day of Rights of the Child.

The initiative calls on the authorities at the Council of Europe to commit to abolishing and actively prohibiting surrogacy practices.

The International Union for the Abolition of Surrogacy uses all legal means to obtain the international prohibition of the commodification of the human body, especially by surrogacy. This Union was founded at the initiative of national and European associations acting for the respect of childhood, women, dignity and human rights, notably the European Center for Law & Justice ("Special Consultative Status" with the United Nations), l'Appel des professionnels de l'enfance, Alliance VITA (member of the EU Fundamental Rights Platform), FAFCE (participatory status in the Council of Europe), *La Manif Pour Tous*, *l'Agence Européenne des Adoptés*, Care for Europe, European Dignity Watch, Fondazione Novae Terrae...

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