

## **13 Legal control of surrogacy – international perspectives**

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### **13.1 Introduction**

There are two types of infertility: biological and social. The first type arises from a situation in which a couple or individual cannot reproduce due to certain physiological problems. The second type arises from a socially determined inability of certain groups of the population to become parents.

Furthermore, the birth of a child (whether to a couple or to a single parent) creates the vertical family, which is the real basis and structure of any stable society.

Given that infertility has been regarded for centuries as a divine punishment, childless people have traditionally been viewed as deficient. Infertility inevitably leads to moral suffering and a lower social status. The inability to have children is one of the main causes of divorce.

The most efficient method to overcome both biological and social infertility is surrogacy, sometimes implemented in addition to gamete- or embryo-donation programs.

### **13.2 Surrogacy – definition**

Surrogacy can be defined as bearing a child on request for another family or person. A child, in this case, is born not out of the maternal instinct of the surrogate but due to the commissioning couple's or individual's intention to become parents.

There are two types of surrogacy: traditional surrogacy and gestational surrogacy. Traditional surrogacy has been practiced since ancient times and occurs when the surrogate's oocytes are used. Gestational surrogacy was introduced only after the first in vitro child was born. In this practice, there is no genetic link between the surrogate and the baby she carries.

### **13.3 Surrogacy – history**

Surrogacy is as old as human history itself. The first infertile couple in history are Abraham and Sarah and the first known surrogate mother is Hagar, their maid, who bore a child in about 1910 BC (Gen. 16.1–15).

Although Abraham was 86 at the time, he was still able to conceive. Ishmael was the first historically recorded child born as a result of a traditional surrogacy.

The second and the third known surrogacy births occurred in Sumer-Mesopotamia in the middle of the eighteenth century BC in the family of Jacob, Abraham's grandson. In Sumer-Mesopotamia, surrogacy was arranged on legal grounds. The Code of Hammurabi (1780 BC), the first legal document that regulated and controlled surrogacy, was primarily used to advocate producing male offspring.

Surrogacy was quite common in ancient Egypt. Many pharaohs used their concubines to produce male heirs. However, even though the children delivered by these maids

were treated as the pharaoh's children, their rights were somewhat reduced. They could assume the throne only if there were no other nobler and more legitimate contenders. Traditional surrogacy was also common in ancient Greece and Rome.

Although the in vitro fertilization (IVF) surrogacy is a successful treatment (Brinsden 2003), modern society's attitude toward this intervention is contradictory. It is allowed or tolerated in some countries and forbidden in others. The arguments against surrogacy are based on ethical issues – a misconception, as most arguments refer to traditional surrogacy and do not extend to the gestational type.

### 13.4 Legal control of surrogacy – international perspectives

The right to procreate should not depend on gender, family, or sexuality. It is a natural, inalienable right of any person to provide intergenerational continuity and the further evolution of *Homo sapiens*.

One of the main principles of modern bioethics is that the interests and welfare of the individual should have priority over the sole interest of science or society (Universal Declaration on Bioethics and Human Rights 2005). Refusing to allow childless people to become parents (when they can have children through surrogacy) means refusing to treat them equally and is a classic example of selective discrimination. People who desperately want to become parents are excluded from reproduction and deprived of existing reproductive technologies.

This refusal represents both de facto and de jure systems of censorship and an instrument of oppression. It entails the physical destruction of people who would otherwise be able to become parents through surrogacy and represents a sort of genocide.

If something is wrong with surrogate children in their new families (just as in the case of children not born through surrogates), it is the job of society and social services to take care of them. This is not an appropriate reason to deny reproductive rights: "For everyone who asks, receives; and he who seeks, finds; and to him who knocks, it shall be opened" (Luke 11:10).

The legal status of surrogacy in modern times varies greatly from one country to another, with two main types of regulation. In the first one, surrogacy is regulated by legislation. In the second one, it is not mentioned in laws and thus is not regulated.

#### 13.4.1 Prohibition of Surrogacy by legislation

The first group contains two subgroups. In some countries (i.e., Austria, Germany, Italy, Switzerland), surrogacy is prohibited, and severe sanctions are applied for doctors who arrange a surrogacy for their patients or for mediators who help an infertile couple find a surrogate. In Germany (Schreiber 2002), for instance, the restrictive law for the protection of embryos (Embryonenschutzgesetz, 1990) strictly prohibits artificial insemination of a woman who is willing to hand the child over to commissioning parents upon birth in accordance with a surrogacy agreement. Criminal sanctions are applied for noncompliance, ranging from heavy fines to imprisonment.

Surrogacy agreements, mediation in surrogacy, and related commercial and noncommercial advertisement are prohibited by the law concerning adoptions (Adoptionsvermittlungsgesetz 1989). According to German legislators, surrogacy should be prohibited because of the violation of *bonus mores* (morality).

In Italy the Law on Norms in the Area of Medically Assisted Reproduction (Repubblica Italiana 2004) completely bans heterologous (third party) reproduction, including surrogacy. The use of medically assisted procreation techniques is limited to cases of sterility or infertility established and certified through a medical act within officially married heterosexual couples only, banning from the IVF clinic heterosexual couples just living together as well as single women and men who, though fertile, for such or another reason would like to use services of reproductologists to become parents.

The law establishes severe sanctions for those who realize, organize, or publicize gamete or embryo trading or surrogate motherhood. The doctors who break this law could face a jail term from 3 months to 2 years and a fine from 600,000 to 1 million euros. In other countries (e.g., Spain), surrogacy contracts are null and void but surrogacy per se is not prohibited by law and theoretically can be implemented. In this case, no criminal sanctions are set out.

### **13.4.2 Counties – surrogacy no prohibited by law**

In France, surrogacy is not mentioned directly in the law per se, but since 1994, according to Article 16–7 of the Civil Code, “Any convention related to procreation or gestation for another person is null and void.” Furthermore, in terms of criminal penalty, any person participating in a surrogacy program (whether it consists of artificial insemination or a donor’s embryo transfer) commits a crime punishable by a three-year imprisonment. In accordance with a law passed in 1989 about adoption intermediaries, the same measures are implemented for those who arrange contacts with a surrogate mother (Articles 13 and 14b). However, neither the surrogate mother nor the client(s) bear any responsibility.

This approach does not correspond to the basic principles of the 1789 French Declaration of the Rights of Man and the Citizen, which proclaims in Article IV that liberty consists of the freedom to do everything that injures no one else. Thus, the exercise of the natural rights of each person is limited only by the assurance that other members of the society are allowed the enjoyment of these same rights. These limits can only be determined by law. Furthermore, Article V states explicitly that the law can only prohibit such actions as are hurtful to society. Nothing may be prevented that is not forbidden by law, and no one may be forced to do anything not provided for by law.

French couples have been increasingly travelling abroad to become parents through surrogacy. In October 2007, a French court made a landmark decision to allow a French couple, Dominique and Sylvie Mennesson, who had used a surrogate in the United States to register their twin girls born in 2000 as their own children in France. In October 2007, a French appellate court made a landmark decision (Paris Match 2011). The move was supported by the Attorney General’s office who said that it was favorable to the children being added to the French register of births, marriages, and deaths, which is a must to obtain French citizenship (Le Parisien 2011). Nevertheless on April 6, 2011, the High Court of Cassation upheld a lower court’s ruling that the children could not be listed on the Register, saying that to recognize the filiation between the twins and their French parents would run counter to “public order” in France. The couple is to appeal this unjust ruling in the European Court of Human Rights (Associated Press, April 6, 2011).

Proposed changes to the law on bioethics might make a difference. Under the proposed reforms only altruistic, not commercial surrogacy might be allowed, the birth

mother would retain the right of repentance, or the right to change her mind, for up to three days after giving birth, and the intended parents would be unable to return the baby on the grounds of deformity or handicap.

### 13.4.3 Surrogacy in China

In China, surrogacy is a grey area, but a report by the *Southern Metropolis Weekly* estimated that around 25,000 surrogate children have been born in China (Reuters 2009). Prospective surrogate mothers are openly recruited via the Internet and are paid 50,000–100,000 yuan, which is US\$7,657–\$15,314 according to the exchange rate of 6.5 yuan to U.S. dollar (April 2011).

In recent years, officials have largely turned a blind eye to this underground womb-for-rent industry, which defies the country's strict childbirth laws. The authorities are now starting to take stricter measures. In Guangzhou, three young surrogate first-time mothers were discovered by authorities and forced to abort their fetuses (Reuters 2009).

### 13.4.4 Non commercial surrogacy

In other countries (e.g., Australia, Canada, Greece, Israel, South Africa, and the United Kingdom), surrogacy is allowed on a noncommercial basis only.

In the United Kingdom, for instance, only expenses incurred by the surrogate mother can be reimbursed, and it is a criminal offense to advertise that one is willing to enter into a surrogacy arrangement.

Israel legalized surrogate motherhood in 1996 (Siegel-Itzkovich 1996). According to the law, the commissioning father must supply the sperm and the ovum must come from either the commissioning mother or from a donor who is not the surrogate. The surrogate must be an unmarried Israeli resident unless a special committee approves a married surrogate in special cases. The surrogate may change her mind and ask to keep the baby, but only with a court's approval. She can also choose to abort the fetus.

Surrogacy arrangements are supervised by a special committee that approves surrogacy contracts only if persuaded that all the parties have reached the agreement freely and that the health of the mother and the baby are not at risk. The surrogate can be paid only for legal and insurance expenses and compensated for her time, loss of income, and pain.

### 13.4.5 Greece Law

In Greece, Law 3089, enacted in 2002, allows gestational surrogacy via a court order or ruling issued before the embryo transfer provided there is a written agreement that excludes any financial agreement between the involved parties (the prospective parents and the surrogate mother). If the latter is married, the written consent of her husband is required, and she must also provide a medical attestation of her inability to gestate the child. In addition, both the prospective parent and the surrogate mother must reside in Greece (Kriari-Catranis 2003).

Following the regulations of surrogacy, the articles in the Greek Civil Code related to the filiations have been modified. When a child is born to a surrogate, under the provisions of Article 1458 CC, it is presumed that the mother is the person who has

obtained the court's permission. This presumption can be reversed by a legal action contesting the maternity within six months from the birth of the child. The maternity can be contested either by the presumed mother or by the surrogate if evidence is provided that the child was created from the surrogate's ovum (Kriari-Catranis 2003).

### **13.4.6 South Africa**

In South Africa, the Children's Act of 2005 (Act No. 38) defines the surrogate mother as a woman who bears a child on behalf of another woman, either from her own egg fertilized by the other woman's partner or from the implantation in her womb of a fertilized egg from the other woman. According to Chapter 19 of the abovementioned act, a formal written agreement between the surrogate mother and the commissioning parent is required. The surrogate, her husband or partner, and the commissioning parent(s) should be domiciled in the country at the time of entering into the agreement. The agreement must be approved by the High Court of the area where the commissioning parent(s) are domiciled or habitually resident before the treatment starts. Any child born of a surrogate mother in accordance with a valid agreement is for all purposes the child of the commissioning parent or parents from the moment of its birth. Conversely, a child born as a result of an invalid agreement will be deemed to be the child of the woman who gave birth to that child.

No surrogate-motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is not possible due to biological, medical, or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person.

The commissioning parent or parents should not be able to give birth to a child, and the condition is permanent and irreversible and should be in all respects suitable persons to accept the parenthood of the child to be conceived.

The surrogate mother shall have a living child of her own and shall not use surrogacy as a source of income.

The surrogate has the right to terminate the pregnancy, though she incurs no liability to the commissioning parents for exercising this right except for the compensation for any payments made by the commissioning parents when the decision to terminate is taken for any reason other than on medical grounds.

The surrogate mother is obliged to hand the child over to the commissioning parent or parents as soon as reasonably possible after the birth.

A surrogate mother who is also a genetic parent of the child concerned may, at any time prior to the lapse of a period of 60 days after the birth of the child, terminate the surrogate-motherhood agreement by filing a written notice with the court.

## **13.5 Commercial surrogacy**

### **13.5.1 Former Countries of the Soviet Union**

In other areas, such as most of the former countries of the Soviet Union (e.g., Armenia, Belarus, Georgia, Kazakhstan, Kirgizia, the Russian Federation, and Ukraine) and some states in the United States, commercial surrogacy is legal.

### 13.5.2 India

In India, which is one of most popular commercial surrogacy centers in the world, surrogacy is not yet directly mentioned in the law. The Indian Council of Medical Research (ICMR) in 2010 issued a draft of the Assisted Reproductive Technologies Regulation Bill (2010) to regulate the growing industry and protect the rights and interests of all parties concerned, including a surrogate, intended parent(s), and a child to be born. Under the Bill assisted reproductive technologies, including surrogacy, shall be available to married and unmarried couples as well as single persons. Surrogacy agreements would become legally enforceable and a surrogate mother shall relinquish all parental right over the child. The birth certificate issued in respect of a baby born through surrogacy shall bear the name(s) of intended parent(s).

All expenses related to pregnancy shall be borne by the intended parents. A surrogate may also receive additional monetary compensation for bearing a child, so commercial surrogacy becomes explicitly allowed.

Only Indian citizens aged 21–35 could become surrogates. If a potential surrogate is married, her husband's consent would be required. A surrogate will not be allowed to undergo embryo transfer for the same commissioning couple or individual more than three times. No woman shall act as a surrogate for more than five successful live births, including her own children. Under the bill only gestational surrogacy would be allowed; a surrogate shall not donate her oocytes to the intended parent(s). The Bill makes it illegal for Indian women to travel abroad to become surrogates.

The Bill makes it impossible for foreign intended parents from countries where surrogacy is forbidden to arrange for their reproductive program in India. It stipulates that a letter from the embassy or foreign ministry must be provided that clearly and unambiguously states that their respective country permits surrogacy and that the child born through surrogacy in India would be granted entry. Foreigners seeking surrogacy in India must appoint a local guardian responsible for taking care of the surrogate during the pregnancy and after the birth.

A surrogate shall be duty-bound not to engage in any act that would harm the fetus, so the option of fetal reduction or abortion is a decision that can only be made by her doctor or intended parents.

The Bill is awaiting approval from the Law Ministry, after which it will be discussed by the Indian Parliament (Times of India 2011).

### 13.5.3 Surrogacy in USA

The United States is a unique country with a mixed legal landscape concerning surrogacy, resulting in an entirely unregulated surrogacy industry; most relevant activities take place in a few extremely permissive states (Aarons 2007). Seventeen states and Washington, DC, have laws that regulate surrogacy. Ten states (Arkansas, Florida, Illinois, Nevada, New Hampshire, North Dakota, Texas, Utah, Virginia, and Washington) have laws allowing surrogacy under certain circumstances. Six of those states limit the compensation for surrogacy arrangements; the other four require account approval. Three states allow the surrogate to change her mind or challenge the contract, and the other six require prescreening for the surrogates and the prospective parents.

Seven states and Washington, DC, have laws that prohibit, penalize, or void surrogacy contracts. The legislative regulations vary widely, but the states that have no existing laws can still regulate surrogacy via case law and legal precedent. California is one of the most permissive surrogacy states, even though there is no legislation with regard to the practice. New Jersey, on the other hand, is very unfriendly to surrogacy; this being also determined by legal precedent (Perez 2010).

#### 13.5.4 Surrogacy in Russia

Where artificial reproduction is concerned, Russia (Svitnev 2010) is considered as a sort of reproductive paradise, being the country with the most favorable legislation for intended parents, where no specific federal law regulates any aspect of assisted reproduction. The basis for the legal regulation of assisted reproduction (including surrogacy) is Article 35 of the Basic Law of the Russian Federation for Citizens' Health Protection (22.07.1993 No. 5487-I), which states that each adult woman of childbearing age has the right to artificial fertilization and the implantation of an embryo.

In Russia, no specific preliminary permission from any regulatory board or court is required. The legal aspects of surrogate motherhood (registration of children born through surrogacy) are summarized in the current legislation of the Russian Federation: Clause 4, Article 51, Clause 3, Article 52 of the Russian Federation's Family Code and Clause 5, Article 16 of the federal law on civil status records, No. 143-FZ, enacted on November 15, 1997.

According to Order No. 67 of the Russian Ministry for Health, there must be medical indications for surrogacy. No social indications for surrogacy are taken into account. There are no restrictions on the number of embryos, so, therefore, 2–3 embryos are usually transferred. In order to reduce the related risks for the surrogate, single-embryo transfer is sometimes performed.

A surrogate can be found and contacted through special Web sites dedicated to surrogacy or through surrogacy agencies. The prospective surrogate should be 20–35 years old. She must be mentally and physically healthy and have at least one healthy child of her own. Surrogates may not be related to the commissioning parents.

Marital status is irrelevant when arranging a surrogacy in Russia; single women and married women are treated the same. There is no legal concept of a stable relationship in Russia, so this is also irrelevant. There is an ongoing debate in Russia as to whether single women or single men can realize this right through surrogacy, as only spouses married to each other are mentioned in the law. Nevertheless, surrogacy programs for single intended parents are arranged at IVF clinics, though the prospective mothers and fathers sometimes encounter difficulties when registering their children.

On August 5, 2009, a St. Petersburg court resolved a dispute over whether single women could apply for surrogacy. The court obliged the State Registration Authority to register the 35-year-old single woman, Nataliya Gorskaya, as the mother of her surrogate son, and she became the first woman in Russia to defend her right to become a mother through surrogacy through a court procedure. On November 3, 2009, a Moscow district court adopted the same decision on a similar case. After these landmark decisions, authorities have been allowing the registration of surrogate children born to single women without a court ruling.

There is no concept of the right to fatherhood in Russia, but single men applying for surrogacy to become fathers should be treated equally in accordance with several articles of the Russian Constitution. These include Article 7, which says that the public support is ensured to paternity; Article 19, which mentions that the state shall guarantee the equality of the rights and freedom of man and citizen and that regardless of gender and of other circumstances, men and women shall enjoy equal rights and freedoms and have equal possibilities to exercise them; and Article 55, which states that no laws eliminating or derogating human rights or freedoms shall be adopted. Nevertheless, until the present time, some IVF clinics have rejected single men for surrogacy programs.

On August 4, 2010, the Babushkinsky District Court in Moscow ruled that a single man who applied for gestational surrogacy (using donor eggs) could be registered as the only parent of his newborn surrogate child. (The surrogate mother's name was not specified in the birth certificate; the intended father was listed as the only parent.) After that, three more identical decisions concerning single men who became fathers through surrogacy were adopted by different courts in Moscow and St. Petersburg, listing men as the only parents of their "surrogate" children. These landmark decisions confirmed that prospective single parents, regardless of their sex or sexual orientation, can exercise their right to parenthood through surrogacy in Russia.

Donor gametes or embryos can be used in surrogacy programs. There is no requirement for the child to be genetically related to at least one of the commissioning parents, as is the case in the United Kingdom (Human Fertilisation and Embryology Authority 2009) and in the Ukraine (Order No. 771 of the Ukrainian Health Ministry).

A written informed consent of all parties (the prospective parents and the surrogate) participating in the surrogacy program is mandatory.

Commissioning parents are considered the child's legal parents only after obtaining the consent of the surrogate. No adoption is required. The process is regulated by Article 51, Clause 4 of the Russian Federation's Family Code (29.12.1995 No. 223 Federal Law), which states that people married to one another who have given their consent in written form to the implantation of an embryo in another woman for the purpose of bearing can be registered as parents of the child only with the consent of the woman who gave birth to the child (surrogate mother).

Apart from that consent, neither adoption nor a court decision is required. The surrogate's name is never specified in the birth certificate. After the parents' names are entered into the book of birth registrations (normally 3–5 days after the birth, with no need to apply and wait for months for a parental order, as in the United Kingdom), the surrogate irrevocably loses all rights to the child.

Children born to heterosexual couples who are not officially married or to single individuals (both women and men) through gestational surrogacy should be registered in accordance with analogy of *jus* (Article 5 of the Russian Federation's Family Code).

Commercial surrogacy is not prohibited, so the surrogate can be compensated for actual expenses (such as medical expenses, travel, babysitting, and missed work time) and can receive remuneration for her services after the birth. This normally varies from US\$15,000 to US\$30,000, with a top limit to be known of US\$100,000.

A written surrogate-parenting contract between parties is not mandatory, but according to Article 161 of the Russian Federation's Civil Code, this transaction – gestational surrogacy being considered as such – must be concluded in a simple written form (with

no notary certification needed) if the surrogate's compensation exceeds ten times as much as the amount of the minimum monthly wage established by law.

Nevertheless, failure to conform to a simple written form of this transaction shall not render it invalid but would weaken the positions of the parties in the event of a dispute.

The surrogate parenting contract is enforceable for the parties' financial responsibility only. It is distinguished from other contracts for the provision of compensable services. If the surrogate changes her mind and wants to keep the baby, the contract shall be considered unenforceable and cannot be used as evidence to determine custody of the child. The prior consent of the surrogate to give the child to the intended parents is not binding. The surrogate can theoretically abort the pregnancy or keep the child. Nevertheless, no such cases have ever been registered in Russia.

The first surrogacy program in Russia was implemented in 1995 in St. Petersburg. One of the first patients was a young woman whose uterus had been removed because of delivery complications (her child died the day after the cesarean section). The woman, who did not lose hope of having a child, knew about successful surrogacy programs abroad, but at the time it was impossible to find a surrogate in Russia. However, she managed to persuade an unmarried 24-year-old friend who had no children of her own to become the surrogate mother of her child. The pregnancy was achieved on the first attempt, and the ultrasound scanning showed that she was pregnant with twins. The pregnancy was quite difficult; the surrogate mother was taken to the hospital several times to maintain the pregnancy. The surrogate mother was given a three-room apartment in St. Petersburg for her services. In addition, the two women managed to remain on friendly terms, and the surrogate mother sees often the children, who consider her their aunt.

Russia is also one of a very few countries where posthumous surrogacy programs can be arranged. A well-known posthumous surrogacy was conducted in Yekaterinburg. Before undergoing a course of chemotherapy in Israel, 19-year-old Andrei Zakharov left a sample of his sperm for cryoconservation. No instructions had been given for the disposition of his sperm deposit after his death. Eight years later, Andrei died single and childless. His mother, Ekaterina Zakharova, used her late son's cryopreserved sperm to produce a grandson, Georgiy, through a gestational-surrogacy program combined with an anonymous egg donation. When a gestational surrogate and an egg donor were found in July 2004, five months after the young man's death, a surrogacy program was initiated at the local Center of Family Medicine. In November 2005, the surrogate gave birth to a healthy boy, but there was a legal dispute over the baby's origin (Leidig 2006). To avoid further problems, Zakharova applied to be listed as the baby's mother on the birth certificate, along with her late son. Article 49 of the Russian Federation's Family Code, which should have been applied, states that the origin of the child from a specific person (paternity) shall be established in a judicial proceeding based on the statement of a guardian, taking into account any evidence confirming the origin of the child. After that process, Zakharova would have been acknowledged as the grandmother and would have been given custody of her grandson. Zakharova has kept the rest of her late son's sperm in case Georgiy would like to have a sibling. A similar postmortem program with two gestational surrogates has recently been arranged by a St. Petersburg hospital for 42-year-old Natalia Klimova, who lost her son Artiom in October 2009 (Svitnev 2010).

### 13.6 Russian Public Opinion

Liberal legislation makes Russia attractive for reproductive tourists looking for interventions not available in their countries. Prospective parents go to Russia for oocyte donors when they consider surrogacy because of advanced age or marital status (i.e., single women who are prohibited from becoming parents in their own country). Costs for ART are also lower in Russia than in the European Union, and foreigners have the same rights for assisted reproduction as Russian citizens. If delivery in a gestational-surrogacy program takes place in Russia, commissioning parents may obtain a Russian birth certificate with both their names on it. Genetic relation to the child (in the case of donation) is irrelevant.

In other countries where surrogacy is not regulated by law (for instance, in Belgium or the Netherlands), the basic principle “that all that is not prohibited is permitted” can be implemented. The woman who gives birth to the child automatically becomes his or her mother. However, the prospective father can be listed as the father and the prospective mother can later adopt her own genetic child.

### 13.7 Surrogacy in Islamic Countries

In the majority of Sunni Islamic countries, surrogacy is not prohibited by law, but it is not admissible from the point of view of the religious authorities. The only Islamic country where surrogacy is a widespread practice is Iran, a Shiite country (Aramesh 2009).

In the absence of any ratified legislation in Iran, the existing practice is based on fatwas, or religious decrees, issued by learned clerics. Most Sunni scholars regard surrogacy as haram, or forbidden, on the grounds that surrogacy involves introducing the sperm of a man into the uterus of a woman to whom he is not married, thereby contradicting the commands of the Koran. Shiite scholars consider the embryo different from sperm and thus do not regard introducing the embryo into the womb of the surrogate as equivalent to introducing the sperm of a man to whom the surrogate mother is not married. This view is consistent with a basic principle called *isalat-ol-ibaha*, according to which everything should be considered allowed unless it is explicitly forbidden by the Koran or the sunna (Aramesh 2009).

The surrogate in Iran is considered very similar to the milk mother. Most scholars regard surrogacy as permitted for legally married infertile couples, provided that the surrogate mother is not married. Commercial surrogacy is not prohibited, so a surrogate can get remuneration for her services. The name of the woman who gave birth is recorded as the child’s mother in identity documents. Some centers admit the birth mother under the name of the intended mother (Aramesh 2009).

In some places (as in certain states in the United States), same-sex couples and single individuals might use surrogacy to become parents and be listed on the birth certificate, while other regions (such as Ukraine) accept only married heterosexual couples.

The universal tendency in the countries where surrogacy is still prohibited is to decriminalize not-for-profit surrogacy (e.g., the recent polemic in France and in Queensland, Australia).

Many people are excluded from medically assisted reproduction in European countries. Legal restrictions are a major reason for the movement of patients to other

countries (Pennings 2008). As a result, cross-border reproductive care (Pennings 2005) is a growing phenomenon (Ferraretti et al. 2010).

### 13.8 Cross-border Surrogacy

Liberal legislation, low prices, and proximity to Europe make the former Soviet republics, now members of the CIS (Commonwealth of Independent States), attractive for reproductive tourists seeking interventions, such as surrogacy, that are not available in their countries (Svitnev 2010). Of course, there is always a concern that the surrogate might keep the baby, but there are some countries where this is no longer an issue. In some countries (e.g., Armenia, Belarus, Kazakhstan, Kirgizia, and Ukraine), the surrogate's consent is not required to enter the parents' names in the book of births.

Surrogate tourism is on the rise, creating considerable legal issues and conflicts. Once a surrogate child is born in a country where surrogacy is allowed, the legal fact of the child's birth and origin are established by the court (as in the United States and the United Kingdom) or state registration authority (as in Russia and Ukraine). An official birth certificate is issued, either through a court procedure (e.g., the United States and the United Kingdom), upon obtaining the surrogate's consent (e.g., Belarus and Russia), or even without this consent (e.g., Ukraine, where a surrogate child legally belongs to the prospective parents from the moment of conception). An apostille, or additional certification, makes it valid in all countries that signed the Hague Convention (concluded on October 5, 1961) abolishing the requirements of legalization for foreign public documents. Nevertheless, some consulates that suspect surrogacy in every childbirth case abroad refuse to recognize foreign birth certificates and issue national documentation for a newborn rather than helping and protecting their citizens. Thus, the apostille turns the whole issue into paperwork, and the issue then has nothing to do with surrogacy. The point is not whether a surrogacy took place; it is, rather, whether an apostilled foreign birth certificate is valid in the prospective parents' home country. The answer to this question should always be positive (yes, it is valid) if their country signed the convention.

Nevertheless, if the prospective parents lack professional legal support and adequate legal advice, more serious problems might occur.

An American couple, Jeanette Runyon and Michael Woolsey, arranged for their gestational-surrogacy program in 2006 through the best-known IVF clinic in Kiev. After their surrogate daughter was born in October 2007, Runyon was detained in Ukraine on the false accusation that she was involved in baby selling. Although this was not true and all papers were in order, Runyon was detained by Ukrainian police and her newborn daughter Victoria was taken from her and put into the custody of a Ukrainian couple.

On December 22, 2009, Runyon managed to leave for the United States and sent an official appeal to the office of the general prosecutor of Ukraine to restore justice, but the situation has not changed.

"Surrogate" children from time to time are detained when crossing the border. The last known case (March 2011) was of twins born to a French family, L. A criminal investigation is on the way. The father and son L. could face from three to seven years in prison. The parents acted out of despair after the French government refused to issue

the daughters passports because it does not recognize children born to surrogate mothers. A top French court upheld that stance in a ruling on April 6, 2011. They appealed for a sympathetic country recognizing surrogacy to grant their daughters citizenship (Associated Press, April 7, 2011).

In February 2011 a “surrogate” boy, Samuel, born to a Ukrainian surrogate was finally returned to his parents, a Belgian gay couple Laurent Ghilain and Peter Meurrens. It took them more than two years (the boy was born in November 2008) of criminal investigations and legal battles to get proper documentation to reunite the family. For lack of professional legal advice, neither Belgian nor Ukrainian passports were available for Samuel, so in March 2010 some friends tried to “smuggle” him out of the country, but failed. The boy was “confiscated” by Ukrainian authorities and put into an orphanage.

There is no specific legal bar to anyone using a surrogate mother abroad and bringing the child back to Belgium. But bureaucratic hurdles kept the baby from being issued a Belgian passport. The Belgian Foreign Ministry, following a court decision in the couple’s favor, finally issued Samuel a passport in February 2011 (Melvin 2011). Belgian Foreign Minister Steven Vanackere said that a “gap in the law” made it problematic for the country to recognize the use by Belgians of surrogate mothers in other countries. He asked for new regulations on surrogate mothers to explicitly prevent all forms of “commercial exploitation” (Melvin 2011).

To avoid any further scandals when foreign citizens who become parents through surrogacy in Ukraine and are unable to leave the country with their newborn children, a bill stipulating a total ban on medically assisted reproduction techniques for all foreigners was sent to the Verkhovna Rada (Parliament of Ukraine) on March 23, 2011. The bill, No. 8282 “On Amendments to Legal Acts of Ukraine Concerning Limitations on Use of Assisted Reproduction Technologies” (Ukraine 2011), was introduced by Ekaterina Lukyanova, member of the parliamentary group Nasha Ukraina. The deputy is also known for her initiative to limit access for ART in Ukraine to heterosexual couples only. If passed by the Parliament, access to IVF in this Eastern European nation would be permitted only to Ukrainian citizens over 21 years old with proven infertility. People who are not infertile but nevertheless wish to use assisted reproduction techniques to become parents will be denied access to the IVF clinics in Ukraine. Resolving legal conflicts concerning children born abroad through surrogacy requires professional legal help. Normally, these conflicts can be resolved and the parents can safely return home with their newborns.

Even in the worst known case, twins born to a Bavarian couple by an Indian surrogate mother finally received (in 2010) the proper documentation to return to Germany after more than two years in legal limbo.

Any delays in issuing travel documents for newborn children is contrary to both the child’s best interests and major international conventions protecting human rights. It is a discrimination against children’s rights that should not be tolerated. Children should not suffer from imperfect laws or from the incompetence of consular officers; they should not be allowed to be caught in limbo. Prospective parents should be informed about their rights, international conventions, and existing practices of law.

Rather than following the regulations of the United Nations Convention on the Rights of the Child of November 11, 1989 (which stipulates, “In all actions concerning children, the best interests of the child shall be a primary consideration”), and the United

Nations Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children (adopted by the UN General Assembly's Resolution 41/85 of December 3, 1986), some consular officers prevent surrogate children from returning home with their parents. Urgent harmonization of national legislations is needed to allow childless couples and individuals to become parents through surrogacy and to avoid the suffering of parents and children.

### 13.9 Conclusions

The right to reproduce is a fundamental and an innate human right. Surrogacy is the only way to overcome both biological and social infertility. It provides medically infertile couples as well as socially infertile individuals who are not willing to get married with a chance to have a child of their own. Blocking every way for minority members to obtain the treatment they desire would be dangerous, as it could increase feelings of frustration, suppression, and indignation (Pennings 2004). Unjust and illogical bans deny people this right and lead to reproductive surrogate tourism.

Legalization of gestational surrogacy aims to defend the surrogate's interests as well as those of the intended parents and the baby born after the surrogacy. "Whenever you have an underground industry, you're going to have problems because there's no guarantee that they're going to follow standards of safety or follow standard medical or ethical practice," says Robert Klitzman, a bioethicist at the Columbia University Medical Center. "There's a lack of transparency" (Reuters 2009).

Without any doubt, gestational surrogacy should be allowed as the last option in medically assisted procreation if and when the interests and rights of all parties involved – the intended parent(s), the surrogate, and the child – are taken into account and are protected by law.

Traditional surrogacy, despite its simplicity and low cost, creates many moral and ethical problems, making it an ethical minefield.

In most cases in the United States, courts are defending traditional surrogate mothers in the event of a dispute with the commissioning parents. This tactic inflicts huge moral harm to the intended parents, to say nothing of the financial losses. Traditional surrogacy programs should be implemented on a noncommercial basis, as they are in the United Kingdom. The contract should not be enforceable in this case.

It is now recognized that "over time, professional opinion has shifted to a position where surrogacy is recognized as an appropriate response to infertility in some circumstances" (van den Akker 2007).

There is still an urgent need for harmonization of the legislation concerning ART regulation, making it more liberal and more permissive. The welfare of the child in medically assisted reproduction is crucial.

Surrogacy is already a social and legal reality. It is also an urgent issue that needs to be addressed by legislation.

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