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ISBN 978-65-5387-524-1

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TRATADO SOBRE A ANÁLISE DO CENÁRIO PENAL DO DIREITO DE FAMÍLIA
TRATADO DEL ANÁLISIS DEL ESCENARIO PENAL DEL DERECHO DE FAMILIA
TREATISE ON THE ANALYSIS OF THE CRIMINAL FRAMEWORK OF FAMILY LAW

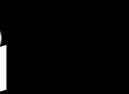
**Tratado sobre a análise do cenário Penal do Direito de Família****Tratado del Análisis del escenario Penal del Derecho de Familia****Treatise on the analysis of the Criminal framework of family law**

**Deilton Ribeiro Brasil
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Presidencia de la Dirección Científica**

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Belo Horizonte
2026

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Impresso no Brasil | Printed in Brazil

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Conhecimento
www.conhecimentolivraria.com.br

Editores: Marcos Almeida e Waneska Diniz

Revisão: Responsabilidade dos autores

Diagramação: Lucila Pangracio Azevedo

Capa: Waneska Diniz

Imagen capa: Favor_of_God

Conselho Editorial:

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Conhecimento Livraria e Distribuidora

Tel.: (31) 3273-2340

WhatsApp: (31) 98309-7688

Vendas: comercial@conhecimentolivraria.com.br

Editorial: conhecimentojuridica@gmail.com

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342.16 Tratado sobre a análise do cenário penal
T776 do direito de família = Tratado del
2026 análisis del escenario penal del derecho de
familia = Treatise on the analysis of the
criminal framework of family law /
[Organizado por] Deilton Ribeiro Brasil ;
prólogo Jorge Isaac Torres Manrique. - Belo
Horizonte: Conhecimento Editora, 2026.
462p. ; 24cm

ISBN: 978-65-5387-524-1
Vários autores.

1. Direito. 2. Direito de família. 3.
Feminicídio. 4. Violência familiar. 5.
Violência de gênero. 6. Inteligência
artificial. 7. Lei Maria da Penha. 8.
Eutanásia. I. Brasil, Deilton Ribeiro
(Org.). II. Manrique, Jorge Isaac Torres
(Pról.). III. Título.

CDDir - 342.16
CDD(23.ed.)- 346.015

Elaboração: Fátima Falci - CRB/6-nº700

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PRÓLOGO

El análisis del escenario penal en el derecho de familia es un tema complejo y multifacético que requiere una comprensión profunda de las leyes y regulaciones que rigen las relaciones familiares. En este contexto, es fundamental examinar cómo las normativas penales afectan a las cuestiones relacionadas con el ámbito familiar y cómo se aplican en la práctica.

Para comenzar, es importante destacar que el derecho penal en el contexto del derecho de familia abarca una serie de situaciones delicadas, como la violencia doméstica, el abuso infantil, la negligencia de los deberes familiares y otros comportamientos que afectan las relaciones entre los miembros de una familia. Estos casos suelen ser tratados con especial atención debido a la naturaleza de las relaciones involucradas y las posibles repercusiones a largo plazo.

En el ámbito de la violencia doméstica, por ejemplo, las leyes penales suelen tener disposiciones específicas para proteger a las víctimas y castigar a los agresores. La intervención del sistema legal es fundamental para garantizar la seguridad y el bienestar de quienes se encuentran en situaciones de vulnerabilidad dentro del ámbito familiar.

Asimismo, el análisis del escenario penal en el derecho de familia también abarca aspectos como la custodia de los hijos en casos de divorcio, la violación de órdenes de protección, la omisión de asistencia familiar y otros temas que pueden tener implicaciones legales y penales.

En este sentido, es crucial examinar cómo las leyes penales se entrelazan con las normativas de derecho de familia para proporcionar un marco legal integral que proteja los derechos de todos los involucrados. La correcta aplicación de las disposiciones legales en estos casos es esencial para garantizar la justicia y la equidad en las decisiones judiciales.

En resumen, el análisis del escenario penal en el derecho de familia es un aspecto fundamental para comprender cómo se abordan las cuestiones legales dentro de las relaciones familiares. La intersección entre el derecho penal y el derecho de familia destaca la importancia de una visión integral y sensible a las necesidades de todos los miembros de la familia en el sistema legal.

Los capítulos que contienen la presente obra: “Tratado del análisis del escenario penal del derecho de familia”, comportan realidades de derecho penal familiar del orbe. Lo que permite apreciar el sinnúmero de aristas y extremos de la referida temática.

Esta obra, representa un paso mas adelante en el análisis e investigación de lo delictivo familiar, en base a su singularidad y pionera en su propuesta, en tanto, que actualmente no se registra en sede global un libro de igual o similar naturaleza. Constituyéndose la misma, en un aporte de carácter invaluable.

Agradezco muy de sobremanera a los prestigiosos profesores de la Dirección Científica, por haber tenido la gentileza de invitarme a elaborar las presentes líneas a modo de prólogo.

Arequipa, janeiro de 2026

JORGE ISAAC TORRES MANRIQUE

Presidente de la Escuela Interdisciplinaria de Derechos Fundamentales Praeeminentia Iustitia (Perú). Decano de la Wisdom University (Nigeria).

Doctorados en Derecho y Administración por la Universidad Nacional Federico Villarreal (Perú). Autor, coautor y codirector de más de 140 libros y tratados sobre derechos fundamentales.

LÍNEAS INTRODUCTORIAS

La otra cara del derecho penal familiar se adentra en aspectos menos explorados, pero, igualmente relevantes dentro del ámbito legal y social. En contraste con las situaciones más visibles de violencia doméstica y abuso, esta perspectiva aborda cuestiones como la prevención, la rehabilitación y la reconciliación en el contexto de conflictos familiares que involucran aspectos penales.

En primer lugar, es crucial considerar la importancia de la prevención en el derecho penal familiar. La intervención temprana y la educación sobre la resolución pacífica de conflictos pueden desempeñar un papel fundamental en la reducción de situaciones que puedan derivar en conductas delictivas dentro de la familia. Promover un entorno seguro y respetuoso desde una perspectiva preventiva puede ayudar a evitar la escalada de problemas legales en el ámbito familiar.

Además, la rehabilitación de los infractores dentro del contexto del derecho penal familiar es un aspecto fundamental que a menudo se pasa por alto. Brindar programas de apoyo, asesoramiento y seguimiento a aquellos que han cometido delitos dentro de la familia puede contribuir a su reintegración en la sociedad y a la prevención de futuras transgresiones. La rehabilitación se centra en abordar las causas subyacentes de los comportamientos delictivos y en fomentar un cambio positivo en el individuo.

Por otro lado, la reconciliación en el derecho penal familiar también merece atención. En algunos casos, es posible buscar soluciones que promuevan la armonía y la restauración de las relaciones familiares después de un incidente penal. La mediación y la negociación pueden ser herramientas efectivas para facilitar el diálogo y la resolución de conflictos de manera pacífica, evitando así la escalada de problemas legales y preservando los lazos familiares.

En síntesis, la otra cara del derecho penal familiar destaca la importancia de enfoques proactivos y restaurativos en la gestión de conflictos y delitos dentro de la familia. La prevención, la rehabilitación y la reconciliación son pilares fundamentales que complementan las medidas punitivas y contribuyen a la construcción de entornos familiares más seguros, saludables y respetuosos en el marco legal.

En ese sentido, a efectos de llevar a cabo el desarrollo que desentrañe las diversas figuras jurídicas en sede penal, así como las aristas y extremos en los diversos ordenamientos del orbe; para la presente entrega hemos convocado a los profesores más importantes y representativos.

Agredecemos enormemente la muy valiosa participación del reconocido jurista y amigo peruano, Dr. Jorge Isaac Torres Manrique, por haber tenido a bien elaborar el importante, agudo y generoso prólogo.

Igualmente, expresamos nuestro indelebre agradecimiento a la prestigiosa firma brasileña Conhecimento Editora, por la confianza, pues, sin su decidida participación, la presente entrega no hubiera podido salir a la luz.

Finalmente, y al igual que nuestras anteriores propuestas esperamos que la presente obra colectiva: “Tratado del análisis del escenario penal del derecho de familia”, sea de gran acogida e interés por parte de la comunidad jurídica y no jurídica.

La Dirección Científica

CAPÍTULO 15

POTENTIAL CRIMES OF AN INTERNATIONAL NATURE IN THE LEGAL FRAMEWORK GOVERNING SURROGACY

Elena Evgenyevna Gulyaeva¹

1. GENERAL PROVISIONS

Surrogacy in the 21st century allows many people to start a full-fledged family when they are physically unable to give birth to a child on their own. The barriers to motherhood can be quite diverse: if we talk about traditional marriage, not every woman is healthy enough and has all the necessary biological and physical resources to bear a child; if we consider same-sex marriage, it becomes obvious that, for example, neither spouse in a two-male homosexual marriage can give birth; women in same-sex marriages can also turn to surrogacy. Surrogacy is very firmly entrenched in the global community. Ms. Maud de Boer-Buquicchio, as Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse content, sees surrogacy as a specific type of reproductive practice involving three parties (parents and surrogate mother); the surrogate mother, in her agreement with the parents, conceives, carries and bears the child².

The legal regulation of surrogacy primarily depends on national legislation. In Germany and France, it is completely prohibited, in New Zealand³ and Greece altruistic surrogacy is allowed in certain cases and in Thailand and India

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² Report A/HRC/37/60 of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and the production of other child sexual abuse material. URL: <https://www.ohchr.org/en/special-procedures/sr-sale-of-children/surrogacy> (accessed: 10.01.2023).

³ URL: <https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC-Report146-Review-of-Surrogacy.pdf>; (accessed: 10.01.2023) URL: https://www.ohchr.org/sites/default/files/Documents/Issues/Children/SR/Surrogacy/AcademicInstitutions/SoniaAllanOAM_CF_DeakinUniversity_Annex2.pdf (accessed: 10.01.2023).

commercial surrogacy is also legal. The President of the Russian Federation signed a law⁴ banning the provision of surrogacy services to foreigners. The accompanying documents to the law note that at present one of the most important factors in the high degree of latency of crimes against children in this area is that children born in Russia by a surrogate mother do not acquire Russian citizenship if both persons who are genetic parents child and recorded by the parents in the birth certificate are not citizens of the Russian Federation.

The law proposes to introduce mandatory acquisition of Russian citizenship by these children if they were born or were nurtured by a surrogate mother on the day the ban on surrogacy for foreign citizens and stateless persons comes into force. This applies to cases where potential parents or a single woman, for whom the bearing and birth of a child is impossible for medical reasons, are foreign citizens or stateless persons. It also provides that the child will receive Russian citizenship if the potential parents or a single woman lost their citizenship of the Russian Federation on the day of state registration of birth.

These innovations will not prevent the child from leaving with their parents in their countries of residence, but are aimed only at creating additional mechanisms for protecting the rights of underage citizens of the Russian Federation, including victims of crimes outside of Russia. The introduction of mandatory acquisition of Russian citizenship by these children will allow the Russian competent authorities to exercise the necessary control over the further fate of the expelled children.

Single men with Russian citizenship will also not be able to use the institution of surrogate motherhood. At the same time, if a foreigner is married to a Russian woman, then the ban on surrogacy services will not apply to him. If the spouses entered into an agreement on surrogate motherhood, but their marriage was dissolved after that, then they can be registered as the child's parents with the consent of the woman who gave birth and if the court does not establish that their marriage was concluded only in order to use the services of surrogate motherhood.

According to article 3 of the Federal Law № 538-FZ article 7 of the Federal Law of May 31, 2002 № 62-FZ "On citizenship of the Russian Federation" (Collection of Legislation of the Russian Federation, 2002, N 22, Art. 2031; 2003, № 46, Art. 4447) shall be supplemented as follows: «3. Unless otherwise provided by an international treaty of the Russian Federation, protection of the rights and legitimate interests of children outside the territory the Russian Federation is

⁴ The document was published on the official Internet portal of legal information, provides that only a citizen of the Russian Federation can be a surrogate mother. The ban will not apply to cases where a citizen of the Russian Federation and a foreign citizen are in a registered marriage, «in order to prevent discrimination of the rights of a Russian citizen, based on the citizenship of the spouse». Federal Law № 538-FZ of December 19, 2022 «On amending certain legislative acts of the Russian Federation». URL: <https://www.garant.ru/hotlaw/federal/1591683/> (accessed: 10.01.2023).

carried out within the limits allowed by the norms of international law, consular offices of the Russian Federation, in which these children are registered until they reach the age of majority. The procedure for registering these children with consular institutions of the Russian Federation is determined by the Government of the Russian Federation».

The services of surrogate mothers can only be used by married couples in which at least one of the spouses is Russian, or a single Russian woman, for whom the bearing and birth of a child is impossible for medical reasons. Only a Russian woman can also be a surrogate mother.

Moreover, according to the Concept of the Humanitarian Policy of the Russian Federation Abroad⁵, the national interests of the Russian Federation in the humanitarian sphere abroad are: «the protection of traditional Russian spiritual and moral values; familiarization of the world community with the historical and cultural heritage of the multinational people of the Russian Federation and its achievements; mutual enrichment of the cultures of the peoples of the Russian Federation and foreign states, including increasing accessibility Russian and world cultural heritage; development of international humanitarian cooperation on a fair, mutual, open and non-discriminatory basis».

There are several forms and types of surrogacy. First of all, the financial aspect is taken into consideration: if the surrogate mother receives remuneration for carrying and birth of the child (namely, monetary compensation), then we are talking about commercial surrogacy. If parents only pay for surrogate mother's medical services, compensate her for the time she spent not being able to work and support herself, and perform other financial support, then this type of surrogacy is regarded as altruistic (it is characterized by the surrogate mother's desire to help those people whose physical abilities do not allow them to have children for free). It is not uncommon to substitute commercial surrogacy for altruistic surrogacy by means of disproportionately high payments for providing medical care to the surrogate mother, or by concealing the payments that are not directly related to the health and life of the surrogate mother, (this happens in those countries where altruistic surrogacy is exclusively permitted by law).

Moreover, surrogacy can be both traditional and gestational. In traditional surrogacy, the surrogate mother has a direct genetic bond with the child, since her ovum fertilized with the material of either the future father or a donor is used during pregnancy. In the gestational type, the surrogate mother has no direct genetic bond with the child, since the ovum either from the expectant mother or a

⁵ Presidential Decree «On the Approval of the Concept of the Humanitarian Policy of the Russian Federation Abroad» of 5 September 2022. URL: <http://kremlin.ru/acts/bank/48280> (accessed: 10.01.2023).

donor is fertilized through IVF and implanted into the surrogate mother's uterus to bear and subsequently give birth to the child.

For the scope of this study, transnational surrogacy itself is of particular importance, as well as those possible aspects of it that may have a criminal nature. Surrogacy may be associated with both human trafficking (specifically, child trafficking) and child trafficking for the purpose of organ transplantation. The task of the executive and legislative branches in the states, as well as of international organizations in general, is to suppress cases of surrogacy related to child trafficking and organ and tissue trafficking.

At the moment, since there is no international convention or other international instrument which fully regulates surrogacy, its legal specifications vary from country to country. Nevertheless, there is a certain number of international instruments relevant to both the legal status of the surrogate mother and the legal status of the child.

2. LEGAL FRAMEWORK OF CHILD ADOPTION AND PLACEMENT UNDER SURROGACY

The Convention on the Rights of the Child (1989)⁶, Article 35, commits the States Parties to take all reasonable and necessary national and international measures to protect children from abduction and trafficking, as well as to protect children from being trafficked for any purpose or form. This article may also apply to children born as a result of surrogate motherhood, since there may be cases where such children are born not for the purpose of creating a family, but with the intention of selling such a child and its further exploitative use, or the transplantation of its organs. The task of both individual states within their national law enforcement agencies and international law enforcement agencies is to detect and suppress such crimes.

Surrogacy can be one of the ways to carry out organ trafficking. For example, parents whose child needs an organ donor may resort to surrogacy. When a child is born through surrogacy, the parents can then extract an organ from that child to help their other child⁷.

⁶ Convention on the Rights of the Child adopted on 20 November 1989 by General Assembly Resolution 44/25. URL: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child> (accessed: 10.01.2023).

⁷ Combating trafficking and exploitation: human rights, social justice and the rule of law. 2013 Annual Report of the Special Representative and Co-coordinator for Combating Trafficking in Human Beings presented to the Permanent Council of 19 December 2013. 45 p. [electronic resource] URL: <https://www.osce.org/files/f/documents/e/9/109731.pdf> (accessed: 10.01.2023).

A somewhat controversial point directly related to surrogacy is the moment of the baby's transfer (both from a physical and legal point of view). Pursuant to Article 2 of the 2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography⁸, the act or transaction in under which one person or group of persons transfers a child to another person or group of persons in exchange for remuneration or other compensation shall be deemed to be child trafficking. In treating the process of transferring a child from a surrogate mother to parents, some states consider the financial remuneration received by a surrogate mother for carrying and giving birth to a child to be part of the **corpus delicti**. Under Article 3 of the aforementioned Protocol, child trafficking may be conducted for the purpose of sexual exploitation, the removal of organs for remuneration, or their use in forced labor.

The surrogate mother may not have any parental rights or obligations with respect to the child, depending on national legislation and the surrogacy agreement, or, legally, the genetic parents may be the child's parents in all relevant documents, in which case there is no point in claiming that the child may be transferred from the surrogate mother for monetary compensation⁹. Now let's consider the existing standpoints on the gestational surrogacy and the transfer of parental rights.

In case of gestational surrogacy¹⁰, the moment of parental rights and obligations occurrence is the moment of child birth, and genetic parents may officially assume these rights and obligations in the following case: for example, according to the provisions of domestic legislation, surrogate mother shall agree in writing to registration of genetic parents as parents in the child birth certificate¹¹. In other words, the people who gave their biological material for the initiation of the pregnancy to the surrogate mother may officially receive parental rights only if the surrogate mother agrees to it, having renounced her parental rights to the child in question.

⁸ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography adopted on 25 May 2000 by Resolution A/RES/54/263 at the fifty-fourth session of the General Assembly of the United Nations. URL: <https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-child-sale-children-child> (accessed: 10.01.2023).

⁹ Human rights implications of global surrogacy. A report by The International Human Rights Clinic of the University of Chicago Law School, submitted to the UN Office of the High Commissioner for Human Rights in order to contribute to on-going work on human rights and global surrogacy. 2019. P. 17. URL: <https://chicagounbound.uchicago.edu/ihrc/10/>

¹⁰ Shigonina L. A., Salyukova E. V. Moment vozniknoveniya roditel'skikh prav i obyazannostei po otnosheniyu k rebenku, rozhdennomu ot surrogatnoi materi / L. A. Shigonina, E. V. Salyukova // Colloquium-journal. – 2019. – №2-6 (26). URL: <https://cyberleninka.ru/article/n/moment-vozniknoveniya-roditelskikh-prav-i-obyazannostei-po-otnosheniyu-k-rebenku-rozhdennomu-ot-surrogatnoi-materi> (accessed: 10.01.2023).

¹¹ Semeiniy kodeks Rossiiskoi Federatsii: [feder. zakon: prinят Gos. Dumoi 8 дек. 1995 г.: по sostoyaniyu na 2 марта 2021 г.] – Moskva: Omega-L, 2021. – P. 15

Proponents of the causation theory¹² of occurrence of parental rights under surrogacy adhere to the position according to which the child's parents are the persons whose activity and actions were the reason and cause of the child's birth.

In Great Britain¹³, South Africa, Bulgaria and Spain legislators assume that the mother of the child is the gestational mother; the Council of Europe takes the following position: "motherhood is determined by the fact of birth, not by the genetic bond"; the Warnock Committee report¹⁴ contains the following provision: when a surrogate mother gives birth, she should in any case be legally considered the mother of the child, and the egg donor cannot have any rights or obligations in relation to the child. The rights of fathers, as opposed to those of mothers, are "oblique" or "indirect" in nature. The most commonly accepted position is that the father of the child is the husband of the gestational mother¹⁵.

International law is meant to protect, first and foremost, the rights of the child in adoption proceedings. International standards are aimed at the welfare of the adopted child and his or her biological family. At the same time, adoption is not compatible with any financial gain, clearly irrelevant, for example, to the fees of lawyers and interpreters involved in the processing of adoption documents.

Article 1 of the 1993 Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption¹⁶ states that inter-country adoption should be carried out exclusively in the interests of creating a family and with the rights of the adopted child in the first place, which categorically contradicts the adoption of a child for the purpose of exploitation in any form, as well as the sale of his vital organs. Thus, in surrogacy, if in a particular case it includes the process of adoption, the international community must monitor such actions in order to protect the rights of the adopted child. Article 32 specifically emphasizes the prohibition of improper material gain by anyone from activities aimed at inter-country adoption.

Article 20 of the Declaration on Social and Legal Principles Concerning the Protection and Welfare of Children, Especially in Fostering and Adoption at the National and International Levels of 1986¹⁷ regulates surrogate adoption in

¹² Bayne T., Kolers A. Toward a Pluralist Account of Parenthood // Bioethics. 2003. Vol. 17. No. 3. P. 221 - 242; p. 223 [Electronic resource] URL: https://www.researchgate.net/publication/9058897_Toward_a_Pluralist_Account_of_Parenthood (accessed: 10.01.2023).

¹³ United Kingdom Department of Health and Social Security. Legislation on Human Infertility Services and Embryo Research: A Consultation Paper. London: H.M. Stationery Office, 1986. P. 224.

¹⁴ Warnock M. A Question of Life: The Warnock Report on Human Fertilisation and Embryology. // New York. Basil Blackwell. 1985. P.37

¹⁵ Cohen B. Surrogate Mothers: Whose Baby IS it? American Journal of Law and Medicine, 1984. Pp. 243-285.

¹⁶ URL: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=69> (accessed: 10.01.2023).

¹⁷ Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally Adopted by General Assembly resolution 41/85 of 3 December 1986. <http://www.cidh.oas.org/Ninez/pdf%20files/Declaration%20on%20>

view of protecting the rights and interests of the adopted child. According to this article, adoption cannot be compatible with any financial gain for either party. This article is also directed against child trafficking, including surrogacy.

Article 17 of the European Convention on the Adoption of Children¹⁸ is also intended to protect the rights of the child. Under this article, no one may receive any financial or other benefit as a result of the adoption of a child. In essence, this article is aimed at combating child trafficking. In the same Convention of 1967, in Article 15, consideration was also given to the conditions of adoption, but the wording was different: it was supposed to adopt appropriate prohibitive rules in the national legislation in order to prevent the implementation of adoption involving financial gain.

Thus, the international community is concerned about the problem of adoption in general and some of its aspects in surrogate motherhood. Obviously, surrogacy associated with the adoption of a child born by a surrogate mother should not violate the fundamental rights and interests of the child in any way. In addition, the parties involved in the adoption should not be focused on achieving financial goals. Incidents in which the adoption is "paid for" or the "purchase" of a child in a legal procedure for adoption may be considered a violation of international law.

3. INFRINGEMENT OF BASIC HUMAN RIGHTS: VIOLATION OF THE RIGHTS OF THE CHILD AND THE RIGHTS OF THE SURROGATE MOTHER

The victim of surrogacy may be not only the child, but also the surrogate mother. Thus, poorly educated women from low-income groups, as well as other vulnerable women (e.g., minors) may be forced into surrogacy, namely, either to carry a surrogate child or to donate their ovum.

Exploitation of the surrogate mother is one of the most common features of surrogacy when it is international in nature, according to published data. While in the U.S., for surrogacy procedures costing \$40,000-\$150,000, a surrogate receives between \$20,000 and \$30,000, in India a surrogate is paid no more than \$10,000¹⁹.

For example, in 2009, in Romania, Israeli doctors were accused of trafficking the eggs of underage girls²⁰. One of these girls was left by doctors without proper

¹⁸ Social%20and%20Legal%20principles%20relating%20to%20the%20protection%20and%20Welfare%20of%20 Children.pdf (accessed: 10.01.2023).

¹⁹ European Convention on the Adoption of Children. URL: <https://rm.coe.int/1680084823> (accessed: 10.01.2023).

²⁰ Bailey A. Reconceiving surrogacy: toward a reproductive justice account of Indian surrogacy. Hypatia. Special FEAST Issue, Diane T. Meyers, ed., Vol. 26, No. 4, Fall 2011 P. 4. URL: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1518026 (accessed: 10.01.2023).

²⁰ Chatterjee P. Human Trafficking and Commercialization of Surrogacy in India. European Researcher, 2014. Vol. (85). № 10-12. 1839 p.

medical care in a serious condition after an oocyte retrieval procedure. In 2001, 13 Vietnamese girls were rescued in Thailand, where they had been transported for use in transnational surrogacy against their will. Some of the girls were raped (with the rapists thus trying to conceive children to sell them).

Another case of trafficking in minors occurred in 2011 in Nigeria, where an illegal “baby factory”²¹ was found in Nigeria in 2011 where girls (aged 15-17) were induced to become surrogates or were forcibly inseminated and the babies born were sold for further exploitation (including sexual exploitation) and adoption. The sales could also take place in Europe. Moreover, this case is directly related to surrogacy, since some girls were promised medical assistance (which can be seen as a reward for carrying and giving birth to a child). This case is directly linked to Art. 35 of the 1989 Convention on the Rights of the Child (under which States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction, sale or trafficking of children), Art. 3 of the 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, and the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

These examples demonstrate cases in which not only children, but also surrogate mothers, are victims. Another example of illegal actions committed by both surrogate mothers and “customers of services” is a case that occurred in Europe in 1995²². Several Polish citizens came to Holland under the “au pairs” program, cohabiting with a couple who wanted to conceive a child. The girls had sexual intercourse with the man with the intention to become pregnant and after the child was born, they left the child to the couple for a financial reward and returned to Poland (there is no legal procedure in Holland that could regulate the transfer of parental rights from a surrogate mother to her parents).

In surrogacy, the surrogate mother herself is also in danger, even if the actions of all parties to the surrogacy contract are legitimate. Obviously, the surrogate mother is at risk because of the surrogacy itself, as she goes through a series of medical interventions. But sometimes parents treat the surrogate’s health and rights with obvious disregard. For example, surrogate mothers often have to face a cesarean section, even if there are no direct medical indications for it²³. This happens when parents want to choose a certain date for the birth of their child; in

²¹ Nigeria ‘baby factory’ raided in Lagos. URL: <https://www.bbc.com/news/world-africa-43905606> (accessed: 10.01.2023).

²² Poles hired as surrogate mums in illegal trade // The Independent. URL: <http://www.independent.co.uk/news/world/polands-hired-as-surrogate-mums-in-illegal-trade-1584960.html#>> (accessed: 10.01.2023)

²³ Karen Smith Rotabi, Nicole F. Bromfield. The Decline in Intercountry Adoption and New Practice of Global Surrogacy: Global Exploitation and Human Rights Concerns. 2012. 27 Affilia: Journal of Women and Social Work 27(2) 129-141. P. 133.

addition, this procedure plays into the hands of medical institutions that charge extra room for this procedure. Note that a recent study found that the risk of death for a woman in labor undergoing a cesarean section is more than 3 times higher compared to the risks faced by a woman in natural childbirth, and the risk of contracting a postpartum infection in a cesarean section compared to a normal birth is almost 3 times higher²⁴.

When surrogacy services are provided by a couple in a foreign country, the child is usually issued a birth certificate, which is then used to process necessary documents in the country of citizenship of the parents who have applied for the aforementioned services. In some countries, however, state authorities refuse to recognize such birth certificates, with the result that the child, who essentially has not yet obtained either the citizenship of the respective country or a "legally formalized" family relationship, suffers first and foremost. In order to avoid such situations, the European Court of Human Rights in the cases reviewed concluded that the refusal to recognize the validity of birth certificates for children born to surrogate mothers in foreign states and, accordingly, issued in such states, is a violation of the child's fundamental right to private and family life. Potential mistakes and crimes that can be committed by surrogacy agencies and clinics deserve special attention. For example, when signing a gestational surrogacy contract, a surrogate may be implanted with a fertilized egg that has no genetic connection to the parents (this can happen either as a result of a mistake or as a direct intent). For example, in 2011, a scandal broke out with the Ukrainian clinic BioTexCom. An Italian couple, having returned to their home country with a child, decided to register it with the state authorities. As part of these procedures, a DNA examination revealed that the child had no genetic connection to the Italian couple (which completely contradicted both the surrogacy agreement and the laws of Ukraine, which provided for mandatory parentage at least to the father; in addition, foreigners were prohibited from using surrogacy services in Ukraine until 2013). As a result, the child was given to an orphanage in Italy, the Italian couple was detained, and criminal proceedings were initiated against the clinic management. Thus, the clinic employees neglected their obligation to use the genetic material of the Italian couple. As a result, we can say that surrogacy was substituted by a crime described in article 149 (human trafficking) under the Criminal Code of Ukraine. The clinic has also been implicated in other unlawful cases in which surrogate mothers were given embryos not from the biological materials that a particular couple could have given, but from the remaining biological materials of others.

²⁴ Mascarello K.C., Horta B.L., Silveira M.F. Maternal complications and cesarean section without indication: systematic review and meta-analysis. Rev. Saude Publica, 2017. URL: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5697917/> (accessed: 10.01.2023).

In the case involving the Italian couple, both the terms of the surrogacy agreement and the national laws of the two countries were violated. As we can see, the embryo of the person, conceived by the Italian couple as a result of the use of auxiliary reproductive technologies, should have been given to the surrogate mother, and in this case according to p. 2 of Article 123 of the Family Code of Ukraine²⁵ the couple would have been considered as the parents of the child. But since the genetic connection was not confirmed, neither the surrogate mother nor the Italian couple had parental rights with respect to this child. As far as Italian law is concerned, in this jurisdiction a person cannot be registered as the parent of a child if the child born by the surrogate mother abroad has no genetic connection to the parent in question. Parenthood for such a child can be established by adoption only. It appears that neither the surrogate mother, nor the Italian couple have parental rights and obligations with regard to the child. Therefore, these acts fall under the description of the sale of children as reflected in Article 2 of the 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

A child may also be affected if the state of citizenship of the surrogate mothers refuses to recognize their parental rights and obligations with respect to the child: he or she may end up as a stateless orphan. It is worth mentioning that the courts in Belgium and Holland have come to the conclusion that in case of an illegal surrogacy contract, such a contract may not be more important than the basic interests of the child in the family and nationality.

It can be inferred that the victims of surrogacy may be:

- Prospective parents who have sought the services of a surrogate (if it is not their bio-material that is used, if this is an essential provision of the surrogacy contract);
- Surrogate mothers (if they are coerced into surrogacy, and if their health is neglected during pregnancy and delivery)
- A child (if left without parents and without citizenship).

Surrogate trafficking can affect both the surrogate mother herself (if she is forced to provide the service) and the child (if the child born is subsequently sold). Selling the child and providing surrogacy services are often substitutes for each other.

²⁵ Family Code of Ukraine of 2002. URL: <https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5d667af64#:~:text=The%20Family%20Code%20of%20Ukraine%20governs%20family%20personal%20non%2Dproperty,her%20education%2C%20development%20and%20maintenance.> (accessed: 10.01.2023).

Special Rapporteur Maud de Boer-Buquicchio addresses the problem of defining the line between trafficking in children and trafficking in services²⁶. Some argue that surrogacy is based precisely on the surrogate selling her services of carrying and giving birth to a child, which in principle cannot serve as a sufficiently strong argument, since often one of the essential provisions of a surrogacy contract is a provision for the direct transfer of the child, which can be interpreted as the sale of a child. Moreover, even if the parties in the contract substitute “sale of the child” and “transfer of the child” for “payment for services rendered by the surrogate mother”, the objective actions performed with the child should still be considered child trafficking. The Special Rapporteur makes a number of recommendations in the context of this problem. In our opinion, the following recommendations are of a basic nature: in surrogate motherhood, both at national and international levels, special attention should be paid first and foremost to the rights of the child and its protection, as well as the rights of the surrogate mother and the future parents; to control and prevent human trafficking, commercial surrogacy should be clearly regulated, under which the surrogate mother would retain parental rights and obligations at childbirth, while payment for her services would be irrevocable.

The surrogate's services could not be paid either reasonably or sufficiently. Thus, it is argued that the surrogate mother's financial benefit cannot in principle be measured due to the fact that in this case it is precisely child trafficking²⁷. The main argument is that, according to physiological data, surrogate mothers from developing countries suffer so much from the surrogacy experience that, in any case, there is no amount of money that could restore their well-being before rendering this “service”.

The phenomenon of surrogacy from the perspective of international law is difficult to regulate due to the fact that there is no specific act affecting surrogacy, and those international legal instruments, which refer to the protection of child and woman rights, are valid only when they are reflected in the national legislation of states, whose citizens are involved in a particular case of child trafficking or exploitation of women²⁸.

Due to the many indirect regulatory sources of surrogacy, the European Court of Human Rights, in the case of *E. B. v. France* Article 8 (Right to respect for private and family life) of the Convention for the Protection of Human Rights

²⁶ Report A/HRC/37/60 of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and the production of other child sexual abuse material of 2018. P. 18. URL: <https://undocs.org/pdf?symbol=ru/A/HRC/37/60> (accessed: 10.01.2023).

²⁷ Wilkinson S. Exploitation in International Paid Surrogacy Arrangements. *Journal of Applied Philosophy*. Vol. 33. No. 2. 2016. P. 131 URL: <https://onlinelibrary.wiley.com/doi/pdf/10.1111/japp.12138> (accessed: 10.01.2023).

²⁸ Zajac D. International criminal law aspects of surrogate motherhood. Fundamental legal problems of surrogate motherhood. Global perspective Publisher: Instytut Wymiaru Sprawiedliwości, Warsaw, 2019. P. 973.

and Fundamental Freedoms has established the position that all judicial decisions concerning adoption should focus primarily on the protection of family biological ties originating from birth, rather than on guaranteeing the hypothetical possibility of future adoption²⁹.

Cases in which a surrogate mother gives birth to a physically handicapped child deserve special attention. There are several known cases when parents refused to accept a child and pay for the surrogate's services if the child was born with a disability. For example, in the case of Baby Gammy, an Australian couple refused to take one of the two twins born to a surrogate mother in Thailand because the boy suffered from Down syndrome. In this case, in the absence of a genetic bond between the surrogate mother and the child, the surrogate mother decided to keep the child and raise it as her own. However, there are no clear standards governing such situations, namely the abandonment of the child born by the surrogacy service customer. If both the surrogate mother and the "customers" of surrogacy services give up the child, the child will be orphaned.

A surrogate mother may face violations of her reproductive rights and freedoms during pregnancy and childbirth. For example, in *Cook v. Harding*, the parties were a surrogate mother and a single father-to-be. At the initiation of the pregnancy, the surrogate mother was implanted with several embryos, resulting in a triplet pregnancy, and the father-to-be refused to pay for the surrogate and medical doctors, citing the fact that a triplet pregnancy was expensive and risky. The man insisted on terminating the pregnancy, to which the surrogate mother did not dare. As a result, the party representing the interests of the surrogate mother considered her actions to be in violation of the main provisions of the surrogacy contract, since according to the contract the right to reduce the number of embryos by performing an abortion was reserved for the future father³⁰. Thus, the surrogate mother is exploited, since she is knowingly implanted with more embryos than necessary, and after the pregnancy she wants to have an abortion to reduce the number of fetuses. There is an obvious consumerist attitude toward the woman's body, as well as a disregard for both her physical and mental health. Essentially, due to the contractual relationship that has arisen between the future father and the surrogate mother, there has been a unilateral restriction of the surrogate mother's basic reproductive rights.

At the Beijing Conference in 1995, the Beijing Platform for Action and the Beijing Declaration were adopted, noting that "explicit recognition and affirmation

²⁹ ECHR; CASE OF E.B. v. France; App. NO. 43546/02; Judgment; Court (First Section); 22/01/2008. URL: (<https://hudoc.echr.coe.int/fre#%22itemid%22:%22002-2311%22%22>)

³⁰ Report A/HRC/37/60 of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and the production of other child sexual abuse material of 2018. P. 18. URL: <https://undocs.org/pdf?symbol=ru/A/HRC/37/60> (accessed: 10.01.2023).

of the right of all women to control all aspects of their health, especially childbirth, is essential to their empowerment”³¹ (paragraph 17). In addition, paragraph 97 of the Beijing Platform points out that “an important basis for the enjoyment of other rights is the ability of women to control their own fertility”³². A surrogate mother, regardless of any surrogacy contract, must have basic human rights, including the right to regulate her own fertility. A surrogate mother should have basic human rights, including the right to regulate her own fertility, regardless of any contract for surrogacy services. The surrogate mother should have the final word on abortions and other medical interventions, for human rights should be neither restricted nor violated.

In the aforesaid case the future father has accused the surrogate mother of violating the provisions of the concluded agreement and therefore his lawyer has insisted on unlawfulness of the surrogate mother’s actions which grounded her to pay the future father financial compensation as well as to pay for medical services for the child born as a result³³.

So, we can speak about the conflict between the reproductive rights of a surrogate mother and the terms of the agreement between the intended parents, the surrogate mother and other parties. Can the provisions of the contract be considered legal and in fact limit the woman’s reproductive rights?

4. CONCLUSIONS

Surrogate motherhood is not regulated by any specific international agreement, and therefore, the provisions of national laws as well as those international legal instruments, which are only indirectly related to this sphere, may govern it. The difficulty in regulating surrogacy is that surrogacy services are directly dependent on private legal relations, as reflected in the relevant civil contract. Nevertheless, one cannot deny the possibility of interference of public authority in the case of violation of the basic values protected by the same public authority. Public interests in this case may include the protection of reproductive rights, human rights to health, and other fundamental human rights and freedoms.

Violation of these rights due to non-legal regulations of the civil law surrogacy contract, violation of the relevant civil law contract, criminal negligence are often criminal offenses, for the resolution of which one should take into account not

³¹ Beijing Declaration of 04 September 1995 // International conventions and declarations on the rights of women and children. M., 1997.

³² Resolution 1 Beijing Declaration and Platform for Action of 1995. URL: <https://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf> (accessed: 10.01.2023).

³³ Fox D., Reproductive Negligence (August 1, 2016). 117 Columbia Law Review 149 (2017), San Diego Legal Studies Paper No. 17-289. URL: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2758208

only the national but also international law, especially if a foreign element is present in a particular situation.

It must not be denied that national regulation of surrogacy varies from country to country. In addition, even a relatively deep elaboration of this sphere in the legislation is not a panacea. As can be seen from the described examples, criminal actions may occur in the following instances:

- involvement of individuals whose activities in surrogacy are illegal (for example, the involvement of minors);
- fraudulent actions on the part of clients of the services, as well as medical personnel (in case of non-payment or inadequate payment of the surrogate mother's financial support, or poor provision of medical services to the surrogate mother);
- gross violation of basic human rights in human trafficking (when a surrogate mother, child or eggs are trafficked, or when reproductive rights are violated);
- negligence of medical personnel in using inappropriate biological material.

It can be assumed that suppression of criminal acts of surrogacy is possible with the following changes:

- additional, more thorough tracking by the customs service and other inspections whose authority includes identifying the causes and purposes of interstate movement of individuals;
- elaboration of an international agreement devoted entirely and solely to the regulation of surrogacy, including in the presence of a foreign element, which would allow to rely on specific direct legal sources to regulate the relevant social legal relations.

As you can see, at the moment the legal regulation of surrogacy is very limited precisely due to the lack of a universal international act, which would just help unify the national legislation of many countries in this area, indicate specific cases and conditions of surrogacy, which are dangerous to the public interest, as well as reduce gaps in the legal field.