

The armed conflict in Ukraine and the risks of inter-country surrogacy: the unsolved dilemma

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Abstract. Commercial surrogacy in Ukraine has been legal since 2002, and although no official figures are released, estimates point to several thousand births occurring yearly. The country has long been regarded as one of the surrogacy capitals of the world, due to relatively affordable costs and effective targeted legislation making the surrogacy contracts enforceable. Would-be parents come from countries where surrogacy is banned or heavily restricted to start a family despite their infertility, a practice known as inter-country surrogacy. When a child is born through surrogacy, the surrogate mother forfeits her rights over the child, thus allowing the so-called “intended” or “commissioning” parents to be recognized as such on the Ukrainian birth certificate. Inter-country surrogacy has long been a highly controversial practice from an ethical and legal perspective, but the brutally destructive armed conflict erupted in the country over three months ago has laid bare all the pitfalls and deep flaws of such a system. Children born through surrogacy cannot be handed over to their intended parents, and surrogates risk legal issues and see their rights jeopardized by their choices even in a war setting, for instance if they decide to seek refuge abroad. The horrors of war thus risk victimizing the most vulnerable to an irreparable degree. An international effort is now more urgent than ever to seek a tenable balance between the desires of couples to achieve parenthood and the rights and freedom of often vulnerable women who risk exploitation and abuse and their children.

Key Words:

Inter-country surrogacy, Ukraine war, Liability, Child status, Ethics.

Introduction

Surrogacy, or surrogate motherhood, entails a woman undergoing medically assisted procreation (MAP) procedures, thus becoming pregnant and giving birth to a child on behalf of the

“intended parents” who commissioned the pregnancy, and will then rightfully become the social parents of the child for life. Surrogacy presents a set of unique peculiarities that make it considerably hard to regulate. The surrogate can bring the commissioned pregnancy to term without being genetically related to the child. Both the gametes needed to create the embryo can come from donors, or from the intended parent(s). The embryo will then be implanted into the surrogate, hence the rather pejorative phrase “rented uterus” used by surrogacy opponents. In such circumstances, the child will have no biological ties with the surrogate mother. Commercial surrogacy, i.e., an agreement between a woman and intended parents involving financial gain for the former, is legal in relatively few countries, such as Russia and Ukraine, where it has been legal since 2002. In particular, Ukraine has been growing as a surrogacy destination for couples from all over the world, by virtue of its clean-cut and effective legislation and lower prices compared to other countries, such as the United States (only few U.S. states have legalized surrogacy, most notably California). The cost of the procedure in Ukraine ranges from 40,000 to 65,000 euros, which is substantially lower than what the price is in the United States (130,000 to 160,000 dollars), although there the procedure is open to same-sex couples and unmarried people¹. Ukrainian surrogates are only paid about 13,000 euros, most of which is paid only after the child is given to the intended parents. The number of children born *via* surrogacy in the country is reported to be between 2,000 and 4,000². Such a growth has likely been further accelerated by the ban on commercial surrogacy passed by India, Thailand and Nepal in 2018³. Clause 123 of the Family Code of Ukraine governs commercial surrogacy in Ukraine. Such a set of norms articulates the parental relationship of

children born through surrogacy by stating that “if an ovum conceived by a [married couple] is implanted to another woman, the [married couple] shall be the parents of the child”. Such embryos can of course be produced *via* MAP procedures using donor gametes, if the intended parents have infertility issues. The clause therefore makes the surrogacy contract enforceable, although it restricts access to married heterosexual couples: the legal registration of the child reflects the surrogacy agreement signed by the intended parents and the consent in writing by the surrogate.

The Complexities in Surrogacy Further Compounded in the War Scenario

Such a system however entails legal and ethical challenges of considerable magnitude. The risk of exploitation and abuse should not be underestimated, and it is what led the Indian Parliament to outlaw commercial surrogacy. The mistreatment and poor living conditions of surrogate mothers, often destitute women who sometimes even failed to receive the money of the intended parents from the agency, could no longer be ignored. Other major hurdles that intended parents often face have to do with the legal recognition/registration of the children in countries where surrogacy is illegal in any form, such as Italy, and have engendered a climate of legal uncertainty^{4,5}. The ethical quandaries which MAP techniques entail, particularly heterologous fertilization, are amplified with surrogacy⁶⁻⁸, since some countries, such as the UK, recognize as the mother only the woman who gave birth, although a 2020 Supreme Court ruling has concluded that paid inter-country surrogacy does not violate public policy⁹.

As the tragic war in Ukraine unfolds in all its inhuman and destructive power, many of the pitfalls of commercial surrogacy are dramatically surfacing. As Russia’s invasion was unleashed and spread at the end of February, the cross-border surrogacy industry has been hurled into a panic and the conflicting interests of surrogate mothers, the intended parents and the agencies that connect them were exposed. Should surrogate mothers be allowed to decide what to do and where to seek shelter as the military operations draw out in all their brutal and deadly potential? Some contracts in fact greatly restrict the surrogate’s rights to travel, among other activities. Surrogates are therefore extremely vulnerable, since the needs of the clients, i.e., the intended parents, seem to almost outweigh, or at least substantially

influence, the women’s rights. Moreover, the decision to flee to other countries, such as Poland, which has a very different legislation, would cause the child to be legally considered the child of the surrogate, not of the intended parents. The surrogate could therefore incur breach of contract liability and even end up with a child whom she had not planned to keep. Worse still, as the conflict rages on, the inability to travel means that babies born in areas where fighting persists may end up trapped, with the unsolved question of their citizenship and legal status, and their very lives at risk. Many couples who had entered into surrogacy contracts have also been left in a limbo, with no idea whether their children will ever have the chance to unite with them, or even survive as the war intensifies and spreads. In addition, there are allegedly over 3,000 couples from all over the world who have chosen to store embryos in Ukraine. As many as 6,000 embryos are stored in Kyiv by BioTexCom, Ukraine’s most important surrogacy company.

What the war has taught us concerning the dramatic flaws of inter-country surrogacy is that the interests of the surrogate do not necessarily match the intended parents¹⁰. Even more importantly, children could suffer major repercussions as well. Surrogate babies born during this war who will be eventually taken over by the intended parents will also face the potentially severe trauma of losing their birth mothers after establishing a uniquely close relationship under extremely adverse conditions, such as those experienced in the war setting. War has made that ugly reality even more conspicuously glaring and impossible to discount or ignore. Surrogacy in Ukraine, a low-income country, can be a very well-paid job for women who often live in poverty. Nonetheless, in such circumstances the surrogate’s freedom is gravely constrained, since such a “job” cannot be put on hold; resignation is not an option either. The pandemic (which had itself adversely impacted fertility treatments¹¹⁻¹³) and the war in Ukraine have given rise to uncertainty and chaos which have drawn attention to the disparities, in terms of decision-making power, between intended parents and surrogates, in addition to the inadequacy of oversight, and the high risk of commodification of women’s bodies. Such risks are rife in the surrogacy industry all over the world, and well before the war and the pandemic, numerous reports pointed to mistreatment of surrogates in Ukraine and elsewhere, with unreasonable restrictions and threats^{14,15}.

Vulnerabilities Amplified in Emergency Circumstances

Under emergency circumstances, the most vulnerable people can suffer life-changing consequences. Such hazardous dynamics had already come to the fore at the height of the COVID-19 pandemic. With global traveling suspended, newborn babies born through surrogacy became stranded because their adoptive parents were not allowed to enter the country^{16,17}. That is the reason why we feel that the time has come for inter-country surrogacy to be regulated through a common set of norms, at least among countries such as European Union members, who share common core values, according to principles intended to uphold the child's best interest, which we believe coincides with the right to family life, as enunciated in the European Convention of Human Rights, Article 8. That being said, it would be remiss to disregard the value which surrogacy can have for countless women suffering from absolute uterine factor infertility (AUI), either iatrogenic or arising from conditions such as cancer (a late diagnosis of malignancies, for instance, may not be solvable through fertility-sparing treatments¹⁸, and may require hysterectomy or gonadotoxic treatments impairing fertility¹⁹). To such patients, surrogacy may be the only option to exercise their reproductive rights outside of adoption. After all, reproductive freedom and rights are deemed an integral part of the broad notion of health (including psychological and mental well-being, which can be compromised by a diagnosis of untreatable infertility²⁰), as outlined by the World Health Organization²¹, the United Nations Committee on Economic, Social and Cultural Rights (CESCR)²² and the Committee on the Elimination of Discrimination against Women (CEDAW)²³, under the auspices of the Office of the High Commissioner for Human Rights²⁴. All such international bodies have in fact stressed that women's right to health includes their sexual and reproductive health. Still, a balance needs to be attained between such fundamental rights and a tenable ethical framework meant to uphold the rights of all parties involved, including healthcare providers who may choose to refuse on grounds of conscience (as it often happens with other morally polarizing practices such as abortion²⁵ and emergency contraception²⁶). It is unacceptable for citizens of countries where surrogacy is banned to be allowed to travel to countries where no guarantees exist as to the treatment of surrogates and the medical and social safeguards are dubi-

ous. Reports pointing to human rights violations in many countries that are popular surrogacy destinations are just too numerous to ignore^{27,28}. Turning a blind eye on such grey areas would be legally and ethically despicable, in addition to incentivizing potentially criminal dynamics and exploitation. A worldwide ban on surrogacy is not realistic, and it would probably fail to solve the underlying socioeconomic issues, particularly in low-income countries. A surrogacy ban across the board would play into the hands of the underground market, which could negatively affect and compromise the interests and rights of destitute women who may turn to illegal and disguised surrogacy for economic gain²⁹. Research findings have also pointed out that if we were to rely on altruistic surrogacy as the only legal option, that may result in a total deregulation of surrogacy, which would not contribute to countering the exploitation of surrogate mothers^{30,31}. The enactment of labor regulatory frameworks in order to enforce and uphold the rights of women who freely decide to become surrogates could be an option worth discussing, even an effective way to address and punish exploitation and abuse. Such a scenario would require a legal version of commercial surrogacy, hinging on clearly defined and straightforward norms designed to guarantee the dignified treatment of surrogates so that their autonomy is never jeopardized through any phase of the process. Accessible legal counseling, in addition to medical and psychological support need to be guaranteed at all times. It is worth noting in that regard that extensive surrogacy research stresses the altruistic element as an important factor in such arrangements³¹⁻³³, hence it would be reasonable to assume that a tightly regulated and supervised system may be effective at tackling reproductive trafficking and criminal exploitation. The way in which EU countries decide to recognize (or not recognize) the status of surrogacy children needs to be harmonized. The legislative void cannot be filled by the judiciary, as it has often happened in Italy and elsewhere in an uneven fashion. The Council on General Affairs and Policy (CGAP) of the Intergovernmental body Hague Conference on Private International Law has acknowledged the need to rely on internationally shared and legally sound standards, in order for national governments to acknowledge the legal status and parenthood of children born abroad through surrogacy³⁴. Albeit there is no silver bullet, given the complexity of the dynamics at play, efforts such as that may be the first step

on a path towards ensuring that the rights of children, surrogates and couples are properly upheld in as balanced a way as possible, even in emergency circumstances, such as the horrific armed conflict currently bordering the European Union.

Conclusions

As armed conflict amplifies the vulnerabilities of those at risk of exploitation, any practice that might lead to the illicit use or trafficking of human gametes and embryos need to be criminally prosecuted, as does the coercion and duress against women in inter-country MAP and surrogacy procedures³⁵. Over time, the development of innovative assisted reproductive technologies could make surrogacy ever more obsolete, e.g., women suffering from AUIF relying on uterine transplant³⁶⁻³⁸ to enable them to achieve pregnancy (an innovative and still experimental technique itself not devoid of major ethical and legal complexities^{39,40}). The founding principles on which basic inalienable human rights rest, such as equity, justice, and respect for human dignity regardless of the victim's alleged "consent", must be upheld and preserved all over the world. Punishing those who willingly become involved in such heinous acts is a priority, irrespective of jurisdiction, not unlike sex-tourism perpetrators who victimize minors in poor countries.

Conflict of Interests

The Authors declare that they have no conflict of interests.

References

- 1) Reznik OM, Yakushchenko YM. Legal considerations surrounding surrogacy in Ukraine. *Wiad Lek* 2020; 73: 1048-1052.
- 2) Golańska-Bault A. Surrogacy industry still operating in Ukraine despite war. *Visegrád Post*. Issued on 22nd April 2022. Available online at: <https://visegradpost.com/en/2022/04/22/surrogacy-industry-still-operating-in-ukraine-despite-war/> (Accessed on 1 June 2022).
- 3) Saran J, Padubidri JR. New laws ban commercial surrogacy in India. *Med Leg J* 2020; 88: 148-150.
- 4) Zaami S, Del Rio A, Negro F, Varone MC, Marinelli S, Montanari Vergallo G. The March 2021 Italian constitutional court ruling on surrogacy: a prelude to common European legislation for the sake of reproductive health? *Eur J Contracept Reprod Health Care* 2022; 27: 61-66.
- 5) Kuchynska OP, Kashyntseva OY, Shchyhol OV. Current issues of legal regulation of surrogate maternity and enforcement of rights of surrogate mothers. *Wiad Lek* 2020; 73: 2871-2876.
- 6) Montanari Vergallo G, Marinelli E, di Luca NM, Zaami S. Gamete Donation: Are Children Entitled to Know Their Genetic Origins? A Comparison of Opposing Views. *The Italian State of Affairs. Eur J Health Law* 2018; 25: 322-337.
- 7) Borysova VI, Ivanova KY, Krasytka LV. Problems of assisted reproductive technology's application. *Wiad Lek* 2019; 72: 2524-2530.
- 8) Zaami S. Assisted heterologous fertilization and the right of donorconceived children to know their biological origins. *Clin Ter* 2018; 169: e39-e43.
- 9) Dickens BM. Paid surrogacy abroad does not violate public policy: UK Supreme Court. *Int J Gynaecol Obstet* 2020; 150: 129-133.
- 10) Kuchynska O, Kashyntseva O, Tsyganyuk Y. International cooperation in criminal proceedings involving assisted reproductive technologies. *Wiad Lek* 2019; 72: 2531-2535.
- 11) Rallo G, Negro F, Consalvo F, Piersanti V, Marinelli S. Medically assisted procreation in times of COVID-19: what impact on health care system organization and the reproductive rights of couples? *Acta Biomed* 2021; 92: e2021275.
- 12) Anifandis G, Tempest HG, Oliva R, Swanson GM, Simopoulou M, Easley CA, Primig M, Messini CI, Turek PJ, Sutovsky P, Ory SJ, Krawetz SA. COVID-19 and human reproduction: A pandemic that packs a serious punch. *Syst Biol Reprod Med* 2021; 67: 3-23.
- 13) Negro F, Napoletano G, Votino R, Banchelli I, Giorgi L. The issue of infertility in times of COVID-19: what do we know about it? *Clin Ter* 2021; 172: 517-519.
- 14) Roache M. Ukraine's 'baby factories': The human cost of surrogacy. *Al Jazeera*. Issued on 13th September 2018. Available online at: <https://www.aljazeera.com/features/2018/9/13/ukraines-baby-factories-the-human-cost-of-surrogacy> (Accessed on 1 June 2022).
- 15) Motluk A. Ukraine's Surrogacy Industry Has Put Women in Impossible Positions. *The Atlantic*. Issued on 1st March 2022. Available online at: <https://www.theatlantic.com/health/archive/2022/03/russia-invasion-ukraine-surrogate-family/6233> (Accessed on 1 June 2022).
- 16) Berend Z, Guerzoni CS. Reshaping Relatedness? The case of US Surrogacy. *Antropologia* 2019; 6: 83-100.
- 17) Lawrence S. Dozens of newborn babies are stranded in Kyiv due to coronavirus lockdown. *Euronews*. Issued on 16th May 2020. Available online: <https://www.euronews.com/2020/05/16/dozens-of-newborn-babies-are-stranded-in-kyiv-due-to-coronavirus-lockdown> (Accessed on 2 June 2022).
- 18) Gullo G, Etrusco A, Cucinella G, Perino A, Chiantera V, Laganà AS, Tomaiuolo R, Vitagliano A, Giampaolino P, Noventa M, Andrisani A, Buzzaccarini G. Fertility-Sparing Approach in Women Affected by Stage I and Low-Grade Endometrial Carcinoma: An Updated Overview. *Int J Mol Sci* 2021; 22: 11825.

- 19) Cavaliere AF, Perelli F, Zaami S, D'Indinosante M, Turrini I, Giusti M, Gullo G, Vizzielli G, Mattei A, Scambia G, Vidiri A, Signore F. Fertility Sparing Treatments in Endometrial Cancer Patients: The Potential Role of the New Molecular Classification. *Int J Mol Sci* 2021; 22: 12248.
- 20) Burgio S, Polizzi C, Buzzaccarini G, Laganà AS, Gullo G, Perricone G, Perino A, Cucinella G, Alesi M. Psychological variables in medically assisted reproduction: a systematic review. *Prz Menopauzalny* 2022; 21: 47-63.
- 21) World Health Organization's first global strategy on reproductive health. Adopted by the 57th World Health Assembly (WHA) in May 2004. Available Online: https://apps.who.int/iris/bitstream/handle/10665/68754/WHO_RHR_04.8.pdf?sequence=1 (Accessed on 19 July 2022).
- 22) Committee on Economic, Social and Cultural Rights (CESCR). General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights). Issued on 2nd May 2016. Available online: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/089/32/PDF/G1608932.pdf?OpenElement> (Accessed on 19 July 2022).
- 23) Committee on the Elimination of Discrimination against Women (CEDAW). General recommendations adopted by the Committee On The Elimination Of Discrimination Against Women Twentieth session (1999). General recommendation No. 24: Article 12 of the Convention (women and health). Available Online at: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_4738_E.pdf. (Accessed on 19 July 2022).
- 24) United Nations. Office of the High Commissioner for Human Rights (OHCHR). Sexual and reproductive health and rights. OHCHR and women's human rights and gender equality. Available Online: <https://www.ohchr.org/en/node/3447/sexual-and-reproductive-health-and-rights> (Accessed on 19 July 2022).
- 25) Harris LF, Halpern J, Prata N, Chavkin W, Gerdtz C. Conscientious objection to abortion provision: Why context matters. *Glob Public Health* 2018; 13: 556-566.
- 26) Montanari Vergallo G, Zaami S, Di Luca NM, Marinelli E. The conscientious objection: debate on emergency contraception. *Clin Ter* 2017; 168: e113-e119.
- 27) Torres G, Shapiro A, Mackey TK. A review of surrogate motherhood regulation in south American countries: pointing to a need for an international legal framework. *BMC Pregnancy Childbirth* 2019; 19: 46.
- 28) Mahajan T. (Mis)regulation--the case of commercial surrogacy. *Indian J Med Ethics* 2015; 12: 38-41.
- 29) Rudrappa S. Reproducing Dystopia: The Politics of Transnational Surrogacy in India, 2002-2015. *Critical Sociology* 2018; 44: 1087-1101.
- 30) Stuvøy I. Troublesome reproduction: surrogacy under scrutiny. *Reprod Biomed Soc Online* 2018; 7: 33-43.
- 31) Rudrappa S. Discounted Life: The Price of Global Surrogacy in India. NYU Press; New York, NY, USA: 2015. Introduction: Markets in Life; pp. 1-20
- 32) Piersanti V, Consalvo F, Signore F, Del Rio A, Zaami S. Surrogacy and "Procreative Tourism". What Does the Future Hold from the Ethical and Legal Perspectives? *Medicina (Kaunas)* 2021; 57: 47.
- 33) Yeshua-Katz D, Khvorostianov N. "Only My Husband and My Doctor Know. And You, Girls": Online Discussions of Stigma Coping Strategies for Russian Surrogate Mothers. *Int J Environ Res Public Health* 2021; 18: 11325.
- 34) Hague Conference on Private International Law. Conference de La Haye de droit international prive. Conventions, Protocols and Principles. HCCH. 1951–2021. Available online at: <https://www.hcch.net/en/instruments/conventions> (Accessed on 21 May 2022).
- 35) Zaami S, Driul L, Sansone M, Scatena E, Anderson KL, Marinelli E. ART Innovations: Fostering Women's Psychophysical Health between Bioethics Precepts and Human Rights. *Healthcare (Basel)* 2021; 9: 1486.
- 36) Bruno B, Arora KS. Uterus Transplantation: The Ethics of Using Deceased Versus Living Donors. *Am J Bioeth* 2018; 18: 6-15.
- 37) Zaami S, Marinelli E, di Luca NM, Montanari Vergallo G. Ethical and medico-legal remarks on uterus transplantation: may it solve uterine factor infertility? *Eur Rev Med Pharmacol Sci* 2017; 21: 5290-5296.
- 38) Brännström M, Belfort MA, Ayoubi JM. Uterus transplantation worldwide: clinical activities and outcomes. *Curr Opin Organ Transplant* 2021; 26: 616-626.
- 39) Del Rio A, Negro F, Piersanti V, Tini A. Uterus transplant update: innovative fertility solutions and the widening horizons of bioengineering. *Eur Rev Med Pharmacol Sci* 2021; 25: 3405-3410.
- 40) Zaami S. Comment on the article by Del Rio et al. Uterus transplant update: innovative fertility solutions and the widening horizons of bioengineering. *Eur Rev Med Pharmacol Sci* 2021; 25: 3405-3410. *Eur Rev Med Pharmacol Sci* 2021; 25: 6149-6153.