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INTERNATIONAL SURROGACY AND CHILDREN'S RIGHTS

EDITORIAL

The international resort to surrogacy: A new challenge to be addressed urgently

The resort to surrogate mothers at international level has experienced rapid growth, beyond any regulations, and already affects thousands of children, mothers and parents each year. Today, it has become urgent for the international community to address this issue.

'Sarai, Abram's wife, bore him no children. She had a servant, an Egyptian, whose name was Hagar. Sarai said to Abram, 'See now, the Lord has restrained me from bearing. Please go in to my servant. It may be that I will obtain children by her.' Abram listened to the voice of Sarai. Sarai took Hagar the Egyptian, her servant, and gave her to Abram her husband. He went in to Hagar, and she conceived. [Genesis 16]'. The concept of 'surrogate mother' does therefore not date back to yesterday, given that the story of Sarai and Abram already mentions a surrogate mother, who may offer Abram the children that Sarai has not been able to bear for him. It is worth mentioning, in addition, that Hagar is a servant and Egyptian, thus, that she is a foreigner and of a lower social status than the 'intending couple'.

Medical developments over the past 30 years have deeply changed this particular means of parentage (*filiation*), and now makes it possible to have several schemes of genetic material between the father, the intending mother and the surrogate mother. As for globalisation, it has added an international dimension, as the intending parents have the possibility to resort to a surrogate mother, who lives in a country that allows surrogacy, even when their country of residence does not enable them to do so. The resort to surrogate mothers has therefore expanded to developing countries and to some European countries, where foreign intending parents go to in increasingly larger numbers. Agencies have also been created to offer a personalised service to couples wishing to conceive a child via this means.

In its note *Private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements* (see p. 4), the Permanent Bureau of the Hague Conference emphasises that '[a] brief Internet search of "international surrogacy" and, in today's world, one is a click away from hundreds of websites promising to solve the problems of infertility through in-vitro fertilisation techniques and surrogacy: for a price. It is now a simple fact that surrogacy is a booming, global business'. According to the sources, the Permanent Bureau underlines that the reproductive market represents USD 400 million a year in India only. This development generates various types of abuse, as shown by the article on this country (see p. 8).

A risky legal gap

The international resort to a surrogate mother generates legal and ethical imbroglios that are already complex, to which those issues affecting the child are to be added. The latter risks, for example, to remain without a legal identity, even stateless, given that the establishment of parentage raises a major problem in the 'receiving' countries that prohibit this practice. Cases of rejection of the child by the intending parents have already been reported, either when he suffers from a pathology, or when the parents separate. The financial character of the transaction also risks leading to numerous abuses, as several reports have already informed on the exploitation of surrogate mothers, attracted by an unexpected remuneration given their living conditions, the constraints they suffer and the total absence of security to protect them. Furthermore, to lead a pregnancy to term in these conditions surely is not without consequences on the development of the child to be born, even though at this stage, these remain unknown. The articles by Dr Cohen-Herlem, Psychotherapist Rizzo and Dr Shearer explore these issues. Thereafter, the child's access to his origins – only explored to a limited extent to date – will also arise, as presented by legal expert Mathieu and Dr Jadvá (see pp. 10-15).

It is just as urgent to examine the potential regulations of any agency that may intervene in the process of international surrogacy. Currently, the regulation by the State of the establishment of such agencies varies considerably, as numerous agencies act not only in the process of 'contact' (between the intending parents and the surrogate mother), but also in the medical treatment, which they undertake themselves. Even though, in some States, these agencies are only authorised if they are not-for-profit, in others, they achieve important financial gains.

A new Hague convention?

A potential model of regulation would be to follow the process that led to the 1993 Hague Convention, with the establishment of Central Authorities, of a system of recognition of the decisions made, of procedural guarantees and the 'accreditation' of bodies delivering services. The article on page 4 outlines the work that is already being undertaken by the Permanent Bureau of the Conference.

One must, however, exclude the application, by analogy, of the rules relating to adoption: the latter is, above all, a measure of child protection for children deprived of their family environment, which is very different from the 'organised' conception of a child. Let us remember that the Conclusions and Recommendations issued by the 2010 Special Commission 'viewed as inappropriate the use of the Convention in cases of international surrogacy'.

In conclusion, surrogacy may be absolutely admissible within the same State (intending parents and surrogate mother being resident in that country), when this State has decided to establish a legal system, which provides a framework for this practice. However, it is clear that the international component is likely to introduce a completely unbalanced relationship between the surrogate mother, the intermediary agency, the intending parents and, finally, the child. The resort to surrogate mothers at international level constitutes therefore a new field of research, which requires important study, advocacy and fundraising work – a process, which ISS is already involved in, as reflected in our position statement below.

The ISS/IRC team
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