

CROSS-BORDER SURROGATE MOTHERHOOD FROM A CRIMINAL LAW PERSPECTIVE

*Rahime ERBAŞ**

Abstract

The role of state in an economic model and its consequence in genealogy fuse with the sovereignty of the state, coined as bio-politics and bio-power by Michel Foucault, as a power over life and death. To illustrate, punishing abortion or allowing new productive technologies could be regarded as issues lying on the sovereignty of the state. Surrogate motherhood appears as one of the challenges of the 21th century due to these two concepts. As opposed to earlier times, the current more advanced stage of scientific, technological, communication and traveling possibilities plays an essential role. Furthermore, the legal perception of surrogacy in a global perspective lies on the grey area. In other words, whether it is legal or prohibited varies from country to country, which creates a legal loophole. Here is the way in which the advent of surrogate motherhood defies the state's sovereignty on its bio-politics and bio-power.

Cross-border surrogate motherhood cases in law comes first at the legal recognition of the child by the country of the requesting people. As a matter of fact, its legal consequences appear firstly at civil law, inter alia, family law. Criminal law, with its subsidiary character, rises up by basing on the concepts, the definitions and the presumptions of civil law. Seeing these developments, to ensure individual human rights and prevent them from being victims or perpetrators of any crimes due to the cross border practiced surrogate motherhood cases, the question on where criminal law is supposed to stand rises, with which this study aims to explore. To be more precise, it mainly explores surrogacy as a possible criminal law issue. Additionally, the necessity on creating international legal documents in any form will be questioned.

Key Words: *Surrogacy, cross border, surrogate motherhood, bio-politics, bio-power, criminal law.*

JEL Classification: [K14, K32]

1. Introduction

A remarkable case before the ECHR, the Grand Chamber, *Paradiso and Campanelli v. Italy 2017*¹, evidently displays the criminal law dimensions of surrogate motherhood's cross border practice. Because in Italy, surrogacy is stipulated as a crime, thus that the child born through surrogacy is put up for adoption for an irrelevant couple may be theoretically read like a confiscation of a human being as a criminal asset (!). This is exactly where the surrogacy explicitly touches on the criminal law, but is not limited with these, i.e., some other significant consequences exist in criminal law regardless of surrogacy finds its place in the form of a prohibition, e.g., a crime or of permission in the regulation, which this study aims to address and examine.

* Dr. iur., works as a research assistant at the University of Istanbul, Faculty of Law, The Chair of Criminal Law & Criminal Procedure Law, Turkey. Contact: rerbass@istanbul.edu.tr.

¹ ECHR 2017, *Paradiso and Campanelli v. Italy* [GC], no. 25358/12.

In that case, an Italian couple, after having previously tried the unsuccessful ended medically assisted reproduction techniques and child adoption procedure, become involved in a surrogacy in Russia. According to the couple's claim, the wife travelled to Moscow to submit her husband's seminal fluid. After a successful in vitro fertilization, two embryos were implanted in the womb of the surrogate mother. When the child was born, he was registered as the son of the Italian couple with the written consent of the surrogate mother, in exchange of the payment of almost 50,000 euros by the couple. Having received the Russian birth certificate, she applied to the Italian Consulate in Moscow for the document enabling the child to leave for Italy with her. As soon as she arrived with the child in Italy, the Italian Consulate in Moscow informed the relevant Italian authorities that the document regarding the child's birth was based on false information. A criminal investigation against the couple for the charges of "misrepresentation of civil status", "use of falsified documents" and the other crime in the Adoption Act was initiated. DNA tests were carried out, but the results showed that no genetic link between the couple and the child existed. Subsequently, the child was removed from the couple and placed in a children's home by the court order. All contact between the couple and the child was prohibited and the child was put up for adoption². Ultimately the Grand Chamber held no violation of art. 8, right to respect private and family life³.

This is a surrogacy case from Italian criminal procedural law, whose approach is coherent with its civil law. In fact, surrogate motherhood is an issue whose legal consequences appear firstly at civil law, *inter alia*, family law. Criminal law, with its subsidiary character, rises up by basing on the concepts, the definitions and the presumptions of civil law. As a matter of fact, it begins with the question of how to define motherhood in civil code. In Roman law-oriented countries, just as Italy, Turkey or Germany etc., "*mater semper certa es*", the Latin expression for "*motherhood is always certain*" (Klock & Lindheim 2018), continues to prevail (Council of Europe, Committee on Bioethics 2018, p.43-44; Metin 2012, p.42). What brings out as a problem in this approach is the paternity, due to the fact that the woman who gives birth is naturally considered the legal mother of the child. This is the traditional approach of the motherhood on which a woman uniquely entails all the different roles of motherhood which include biological, gestational (carrying the baby in her uterus), and social (childrearing) by her own. The question on the traditional definition of motherhood arises where these roles are divided and shared by the multiple women, thanks to advances in the current scientific, technological and communication as well as traveling possibilities, which renders motherhood comparable to fatherhood in the determination of filiation (Engel 2014, p.1-2). In this context, to Firestone, "*pregnancy is barbaric*" (Firestone 1972, p.198) that indicates biological inequality between woman and man could be

² ECHR 2017, *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, para. 9-50.

³ *Idem*, para. 216.

diminished by the surrogacy thanks to high- tech procedures (Purdy 1996, p.183), because a woman can deliver the burden of pregnancy (gestation) to another woman (Purdy 1996, p.184). As a matter of fact, *Firestone* articulates that “*artificial reproduction is not inherently dehumanizing. At very least, development of an option should make possible an honest reexamination of the ancient value motherhood*” (Firestone 1972, p.199).

These possibilities are, on the one side, a challenge to laws and ethics, but on the other they bring chances for individuals to reach their reproductive rights and freedoms. It is even possible to argue that the advent of surrogate motherhood defies the state’s sovereignty exercised on the administration of life, coined as bio-politics and bio-power by *Michel Foucault* (Foucault 1978). Because whether surrogacy is legal or prohibited varies from one country to another, a legal loophole exists for those who resort to surrogacy. From the legal point, globally practiced surrogacy functions as a weakening factor on the national legal norms, however. Furthermore, since it may be linked to prostitution, forced pregnancy, human trafficking and exploitation and other types of crimes (Profesionales por la Ética 2015), it concerns criminal law.

Seeing these developments, to ensure individual human rights and prevent them from being victims or perpetrators of any crimes due to the cross border practiced surrogate motherhood cases, the question on where criminal law is supposed to stand rises, with which this study firstly aims to deal. To this end, this study begins with describing what surrogacy is indeed and how it is carried out in a cross border way. Then it explores surrogacy as a possible criminal law issue. Doing so, it firstly questions whether it can be considered as a crime against humanity by virtue of distortion of the new generations on their genome. Then the concerns on which a woman’s body at the disposal to satisfy a desire and child for sale will be analyzed. Secondly, regardless of its prohibition and permissions varying from country to country, the probable criminal law reactions that occur from seeking legal recognition and the protection of the life and health of the mother and her child. Finally, the necessity of creating international legal documents in any form will be questioned.

2. The phenomena of “surrogate motherhood” and the number of people involved

“...A woman who carries a child for another person and has agreed before pregnancy that the child should be handed over after birth to that person” refers to surrogate mother pursuant to Council of Europe (Texts of the Council of Europe on bioethical matters 2014, p.105). This is a simple definition based on how it is exercised in real life.

Surrogacy is, however, a highly controversial issue on which moral, ethical and legal debates exist. Therefore, it has a variety of definitions depending on whether the author stands for or against it. To illustrate this, from a counter-view,

it is similar to offering “*wombs to hire, sell or rent*” and “*a method of exploitation*”, and even a form of “*abuse and human trafficking*” (Profesionales por la Ética 2015). However, from other side, it is a merely physical mothering, i.e., having pregnancy for others (Purdy 1996, p.184). From a simple neutral view, it could be formulated as “*to create children for the purpose of transferring them*” (Tomlinson *et. al* 1984, p.43). From a legal point of view, it is briefly a “*contracted pregnancy*” (Purdy 1996, p.184-185) that costs a considerable amount of money from almost 30,000 euros to more than 100,00 euros (Profesionales por la Ética 2015, p.3). To put it in a more conceptualized manner, it is defined as a “*social arrangement*” (Purdy 1996, p.183) “*whereby a woman agrees to carry a fetus for another individual or individuals and deliver it after birth*” (Margalit 2016, p.44). It is mainly presented as a type of medically assisted reproduction (Profesionales por la Ética 2015, p.1). Nonetheless, pursuant to Council of Europe, Principle 15, “*any contract or agreement between surrogate mother and the person or couple for whom she carried the child shall be unenforceable*” (Texts of the Council of Europe on bioethical matters 2014, p.107).

The reasons why individuals desire to resort to the surrogacy vary. It may be due to biological reasons such as infertility, or legal reasons such as long-drawn-out procedures for an adoption. It could also be for psychological reasons. For example, while some women enjoy their pregnancy, others do not (Purdy 1996, p.185). In addition, surrogacy may serve the creation of a traditional family such as same-sex couples or single people (Purdy 1996, p.185). One of the main reasons for the surrogate mother to go through this process is generally to gain financial rewards, i.e., to earn money (Profesionales por la Ética 2015, p.2: Salama *et al.*, 2018, p.1284). For instance, a Thai surrogate mother utters that “*my husband agreed because we didn't have money to pay our debt and I didn't need to have sex with another man*” (Murdoch 2014).

Surrogacy is indeed an outcome of the advent of scientific, technological, communication and traveling possibilities that render possible the division of the different roles of motherhood such as biological, gestational (carrying the baby in the uterus), and social (childrearing), which is traditionally carried out by a woman on her own (Engel 2014, p.1-2). Therefore, depending on how much components of motherhood is provided by the surrogate mother, it is mainly divided into two types as *traditional surrogacy* and *gestational surrogacy*. While in the traditional surrogacy she provides two components of motherhood which include the genetic material of the ovum and the gestational contribution, in the gestational surrogacy she makes only the gestational contribution (Ladomato 2012, p.247; Margalit 2013, p.426).

At the outset what is of importance according to the law is how much, at least genetically, the surrogate mother contributes in bringing a child to the world. In other words, *gestational surrogacy* where the child does not carry any genetic relation with the surrogate mother includes more legal challenges. And secondly,

and most importantly, it is impossible to prevent *de facto* application of surrogacy due to surrogacy’s cross border practice that owes the divergences among jurisdiction on the recognition of child, e.g., foreign birth certificate or court decision. That being the case, the responsibility of law- makers, is to regulate surrogacy in detail by the codes, not executive actions, and to ensure that the rights of the child and all parties are respected (Hakeri 2018, p.600; Ünver 2015, p.336).

From the standpoint of the rights and duties of individuals who are becoming part and outcome of surrogacy, some crime types may come to the surface. These individuals read as below, e.g., “child”, “surrogate woman”, “the family of the surrogate mother”, “requesting people” and “healthcare professionals”. Besides, depending on whether the ones of the requesting individuals are not used, “egg and sperm donor” can be added to this table. Furthermore, in some cases, the woman may be dragged into surrogacy by an individual or within a criminal organization.

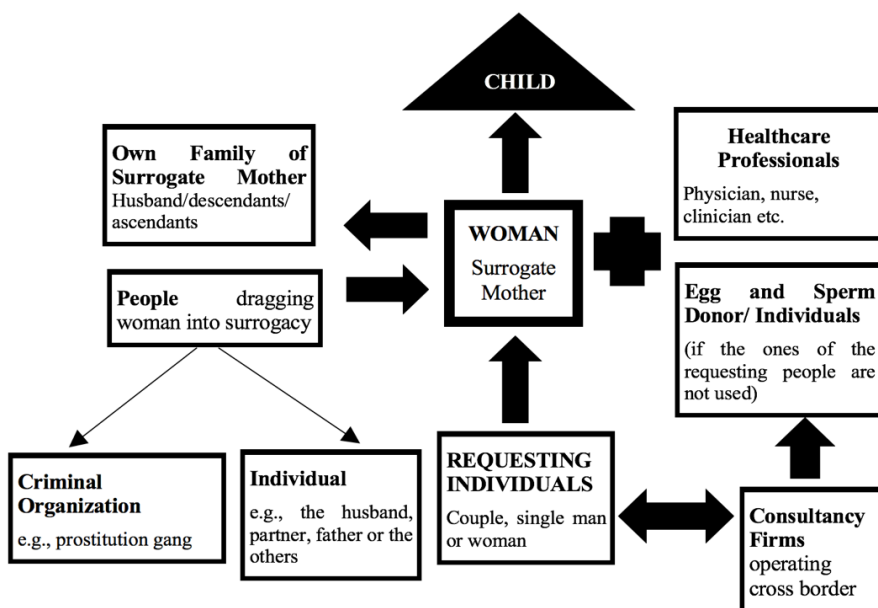


Table 1: The schema of the possible actors, contributors and those affected of surrogacy practice

It is the law-maker’s choice and policy to decide who will be punished or protected by means of criminal law among the individuals above. For instance, in Turkey’s surrogacy legislation (art. 15 of the Organ and Tissue Transplantation Code), surrogate mother and the requesting people do not face criminal sanctions, whereas healthcare professions, egg and sperm donor do face.

3. Cross- border commercial surrogacy practice

Commercial surrogacy is listed among the cross border reproductive care, shortly referred as CBRC or fertility tourism have been gaining a widespread practice as “*fertility treatments have become more global*” (Salama *et al.* 2018, p.1277-1278). To illustrate this, an Australian couple goes to Thailand (Murdoch 2014); an Italian couple goes to Russia⁴; a German couple visits the USA⁵; a Turkish couple goes to Georgia (Hakeri 2018, p.588- 589) to undergo a surrogacy procedure. As a matter of fact, surrogacy, to a large extent, is prone to global practice. Firstly, because in many countries it is partially or wholly prohibited, whereas in others it is partly or wholly tolerated or even expressly permitted. For example, it is allowed in Albania, Georgia, Greece, Netherlands, the UK, Ukraine and Russia, whereas it is expressly prohibited in Germany, Austria, Spain, Italy, Switzerland, France and Turkey etc. (Profesionales por la Ética 2015, p.8; Salama *et al.* 2018, p.1282; Council of Europe, Committee On Bioethics 2018, pp.5-11). As for the major global market in commercial surrogacy, it consists of the USA, India and Russia (Salama *et al.*, 2018, p.1282).

In addition, there are also diverse opinions regarding the legal recognition of the child in the country of the requesting individuals, which may legally recognize the child even surrogacy is prohibited. For example, although Germany explicitly prohibits surrogacy, which is considered a crime, the German High Court recognizes that the child belongs to the surrogate requesting German couple by considering the best interest of child and examining whether recognizing the other country’s decision may violate *ordre public* in Germany. Pursuant to the Court, in examining whether the decision violates *ordre public*, the rights guaranteed by the European Convention on Human Rights is to be taken into account⁶. In 2014 case in which a homosexual couple applied to a surrogate mother in the USA by using the sperm of one of the individuals and anonymously donated eggs, the German Federal Supreme Court (BGH) approved the decision of the California Superior Court, by stating that the requesting couple was to be considered legal parents of the child born through surrogacy⁷.

In another case, a German married couple that could not conceive a child got involved in a surrogacy agreement in the USA in 2011. The surrogate mother was implanted with embryos produced using anonymously donated oocytes and sperm cells of the requesting man after having agreed on basic and additional payments by taking into account the case of twin pregnancies. Immediately after birth, the District Court, County of Boulder, issued a decision that the applicants are parents of the children, with all rights and obligations of children born. The German couple traveled back with the children to Germany. The children have been living with

⁴ See ECHR, *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, 2017.

⁵ BGH 2018, no. XII ZB 224/17.

⁶ BGH 2014, no. XII ZB 463/13, p.479.

⁷ *Idem*, p.484.

them since. They applied for recognition of the foreign judgment in Germany. The paternity of the man was “practically proven” with a plausibility level of 99.99%. In the first instance the Court rejected the demand, but the German Federal Supreme Court recognized it by arguing that “*a foreign decision granting the parents of a surrogate mother the parent status does not infringe the ordre public, as long as the child is genetically related to one of the requesting couple*”⁸

4. Surrogacy as an issue of criminal law at large?

Surrogacy appears to be as controversial as incest among consenting adults or prostitution, and can be considered either as a crime or as legal, depending on a particular country’s decision. For example, Germany punishes surrogacy as a form of misuse of medically assisted reproduction (art.1 of the Federal Embryo Protection Act) and Turkey does punish the practice in the form of organ and tissue transfer, thus in art. 15 of the Organ and Tissue Transplantation Code, whereas Greece permits the practice of surrogacy by the civil code in art. 1458.

In Germany, surrogacy is stipulated as a crime in art.1 of Embryonenschutzgesetz [Federal Embryo Protection Act 1990] which states that “*Anyone who undertakes to perform an artificial insemination or to transfer a human embryo to a woman who is prepared to leave her child permanently to a third party after the birth (surrogate mother) will be punished with imprisonment up to three years or a fine*”⁹. Another significant example of the criminal status of surrogacy is from Italian law which states under Article 12 (6) of Law no. 40 of 2004, that “*Whoever, in any form, produces, arranges or advertises the sale of gametes or embryos or surrogate motherhood is punished with imprisonment from three months to two years and a fine ranging from 600,000 to one million euros*” (Council of Europe, Committee On Bioethics 2018, pp.6-7).

In Turkey, surrogacy is not separately regulated as a crime, i.e., within the crime against the integrity and health of the lineage since 2018. It reads as “*anyone who donates, vaccinates, retains, uses, stores, and transfers embryos and reproductive cells in a way of contrary to this code, and also regarding embryos and reproductive cells, those who buys, sells, mediates for buys and sells, acts as a broker or motivates, leads, gives announcement and advertisement shall be punished with imprisonment for a term of three to five years and a fine of one thousand to two thousand days unless it does not constitute criminal acts that require a heavier penalty*”¹⁰.

⁸ BGH 2018, no. XII ZB 224/17, p.54.

⁹ Das Bundesamt für Justiz, *Embryonenschutzgesetz [Federal Embryo Protection Act 1990]*, viewed 16 March 2019 from <https://www.gesetze-im-internet.de/eschg/BJNR027460990.html>.

¹⁰ Art. 15 of the Law no. 7151 published in the Official Gazette of Turkey no. 30616/05.12.2018, viewed 22 August 2019 from <http://www.resmigazete.gov.tr/eskiler/2018/12/20181205-8.htm>.

Several ways indeed exist from the aspects of the law to either prohibit or allow the practice of surrogacy. The regulations remain silent, or expressly permitted by putting its conditions. Either it could be explicitly forbidden by the law, but without any sort of sanction, or it can be stipulated in a form of crime. What is certain is that surrogacy contains uncertainties. Even these uncertainties merely capture the interest of criminal law. Hence, the main question is whether criminal law is to intervene in this issue or not. In the practice of surrogacy, of course, various types of crime such as coercion and human trafficking, prostitution or neglecting the child may occur. Apart from this, the question arises whether any legal reason to prohibit or punish surrogacy exists or not.

4.1. Distortion of new generations on their genome in a particular society or around the globe

A child who is born through surrogacy may have more than 6 parents. The egg owning woman, the sperm owning man, the surrogate mother, the husband of the surrogate mother and the woman or man who raises the child or indeed a totally different legal mother and father. This may ruin “*the bases of social order*” (European Institute of Bioethics 2011, p.2). As a matter of fact, for example, in the future, the sperm donor may be get married with whom carries his sperm in her genetic. This could be a genetic unforeseeable consequence of the surrogacy. The same consequence applies to the case of incest in which it is considered a crime in certain countries, such as in Germany, where it is not only a sexual crime, but also poses a threat to the new generation of German society (art. 173 of German Penal Code¹¹). However, the acts of incest between consenting adults is not regarded as a crime in Turkey. On the other hand, the same applies to all type of the sperm or egg donation, even if they were only at disposal of the married couples. Therefore, in Turkey, surrogacy is not separately regulated as a crime, but, within the crime against the integrity and health of the lineage that includes donation of egg and sperm.

Even if surrogacy could be accepted as a cause for the distortion of a genome, this is not listed as a crime against humanity by the art. 7 of Rome Statute of the International Criminal Court, in art. 7¹² that sets forth the crimes against humanity which include murder, extermination, enslavement and torture etc. Hence, solely cross border surrogacy practice does not refer to a crime against humanity. However cross border surrogacy would be regarded as a crime against humanity if it were applied through sexual slavery, enforced prostitution, forced pregnancy, or any other form of sexual violence of comparable gravity, stipulated in art. 7/1- (g).

¹¹ Das Bundesamt für Justiz, *Strafgesetzbuch (StGB) [Penal Code]*, viewed 22 August 2019 from <https://www.gesetze-im-internet.de/stgb/BJNR001270871.html>.

¹² International Criminal Court, *Rome Statute of the International Criminal Court*, 2011 viewed 22 August 2019 from <https://www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf>.

4.2. *The woman's body as a means to satisfy a desire*

"The human body and its parts shall not, as such, give rise to financial gain" reads art. 21, as *"prohibition of financial gain"*, of Convention on Human Rights and Biomedicine by Council of Europe. In this regard, surrogacy explicitly breaches this prohibition since the human body is used for commercial gains. However, the phrase *"turns women into baby-making machines"* (BBC 2015) in terms of surrogacy is objected by referring the right to self-determination as well as reproductive rights (Ünver 2015, p.334). Furthermore, arguing that rather than resorting to surrogacy, an adoption possibility exists is not a sufficient argument. In that regard, it is highly noticeable that there is a significant difference between adoption and surrogacy in terms of their orientation end. While in the purpose of an adoption is to *"give a family to a child"*, surrogacy aims to *"give a child to a family"* (European Institute of Bioethics 2011, p.2). Therefore, resorting to surrogacy may be directed to satisfy their desire in child such as having certain physical characters or carrying their genetic information even if it is partially (Metin 2012, p.10). This is explicitly contradicting to what the German philosopher Immanuel Kant wrote *"humanity itself is a dignity; for a human being cannot be used merely as a means by any human being (either by others or even by himself) but must always be used at the same time as an end"* (Kant 2005, p. 173). By doing so, the body of a woman serves to satisfy another person's desire to have a child (Profesionales por la Ética 2015, p. 12).

The question lies on whether a woman can give her consent for this. The same applies to the case of a prostitution which is not considered crime in Turkey as long as it is practiced by a consenting individual. In the case of prostitution, individuals offer their bodies, in particular their sexual organs, to satisfy the desires of others, mostly in exchange for money, albeit for a shorter period than in surrogacy. For this reason, in many countries, women who choose to be a surrogate mothers are also prostitutes (Profesionales por la Ética 2015, p. 1). Therefore, if there is an agreement based upon a consent, merely offering or resorting to a woman's body is not a crime. In other words, it is not possible to argue that commercializing a woman's body, with her consent, should be formulated as a criminal activity. However, this brings us to another issue concerning surrogacy: the child who is not eligible to decide, even though she or he is the unique aim of the surrogacy.

5. The probable criminal law reactions where surrogacy is not allowed

5.1. Seeking Legal Recognition at Home

5.1.1. Fraud on paternity and filiation

Every legal system has its' own understanding of paternity and filiation. For example, in Roman law- oriented countries which includes the majority of countries in Europe, filiation for motherhood is built by basing on who gives birth. In Turkish law, for example, the father of the child is the husband of the woman giving birth. Unless he does not reject the paternity, the biological father cannot recognize the

child (art.295 of the Turkish Civil Code¹³). Within this understanding, a baby who is registered to a woman other than the one who gave birth constitutes fraud on paternity and filiation. Even if the legal mother is registered as a surrogate mother but the legal father is registered as the requesting individual, this may constitute a crime, if the surrogate mother is married. Therefore, if a surrogate mother is not married, the requesting man can recognize the child simply by notifying the judicial authorities. It would be crime in case the sperm does not belong to the requesting man, however.

Why is criminal law involved in protecting the accuracy of paternity and filiation which is defined by the civil code? Especially seeing that there are many types of paternity and filiation such as biological, social or judicial, e.g., adoption cases in which social filiation is present (Çakmut 2008, p.20) surrogacy cases can be considered under one of them as well. Therefore, a legal loophole exists to some extent. To illustrate, the case in which a married woman conceives a boy from her lover and has him registered as the son of her husband is not identical to the case in which the requesting man is registered as the father of the child to whom the surrogate mother has given birth. There is a difference in terms of gravity of unjust acts. Hence what the civil law establishes and recognizes plays a determinative role also in criminal law. It is noticeable that the current form of the crime, called as fraud on paternity and filiation, primarily protects the family order, but the interest of child comes secondarily. For instance, in the former Turkish Penal Code, applied between 1926 and 2005, which was codified from *Codice di Zanardelli*, this type of crime was regulated under the section titled as crimes against public morality and family order. When the civil code regulates family order in another way, the content and scope of this crime would change. Therefore, by merely relying upon surrogacy, it is not possible to argue that surrogacy itself implies fraud on paternity and filiation.

5.1.2. Fraudulent misrepresentation and forgery of documents

The automatic consequence of cross border surrogacy is to register the child in order to have the legal right to bring the child to one's own country. After receiving the child from the surrogate mother, the requesting couple resorts to the competent authorities to get legal documents by presenting them as if the requesting woman had given birth herself or if the requesting man was the husband of the surrogate mother, or in some cases if he had had a sperm provider. As the case of *Paradiso and Campanelli v. Italy*¹⁴ shows that requesting couples applied to their own consulates abroad.

¹³ Law no. 4721 published in the Official Gazette of Turkey no. 24607/ 08.12.2001, viewed 22 August 2019 from <http://www.resmigazete.gov.tr/eskiler/2001/12/20011208.htm#1>.

¹⁴ ECHR 2017, *Paradiso and Campanelli v. Italy* [GC], no. 25358/12.

5.1.3. Breaching mandatory reporting statutes

It is obligatory to *give notification of birth and death* to the state authorities. In surrogacy cases, the parties of a surrogacy arrangement may avoid the notification of the birth of a child or a stillborn child. More importantly, there are mandatory reporting statutes especially for healthcare providers, for instance, physicians, nurses or midwives whose breach constitutes a crime, when they come across the clues showing that a crime is committed and do not inform of the judicial authorities (art. 279 and 280 of Turkish Penal Code¹⁵). The similar regulation exists in German Penal Code, but depending on unfulfilled some conditions (art. 139), healthcare providers are only obliged to inform about crimes that are planned (art.138). Therefore, where the surrogacy is considered a crime, healthcare providers may face these sort reporting duties.

5.2. The breach of legal duties to protect the child

In criminal law there are many provisions where the breach of the legal duties of parents or guardians of a child are stipulated as a crime. The main one is neglecting the child. By doing so, the child may be injured or even die, which is coined as a crime of commission. The other significant example is *exposition infantum*, or child abandonment. The children who were born in the arrangement of surrogacy are more likely to be under threat of the breach of these legal duties than those born in a traditional way, because the role of motherhood is divided among more than two people. By doing so, not everyone may have a strong enough adherence to fulfilling their legal duties. Besides, the legal duties are not regulated or even not recognized by the civil code for every participant of these surrogacy arrangements, at least not like as it were *de facto* applied. As the child is seen as a commercial product in an arrangement set up by spending considerable amount of money (Profesionales por la Ética 2015, p.1,3), if the requesting couple is not satisfied, for various reasons including undesired gender or a disability, the child may face abandonment. In this case who will be held as responsible in the case of death or injury of the child? Would it be the surrogate mother, the requesting couple, the egg owner, the sperm owner, the physician who performed the in vitro fertilization, or the physician who was involved in the delivery of the child?

5.2.1. Healthy and desired newborn

At first glance, it would seem unproblematic when the child was born healthy and desired in a surrogacy arrangement. The surrogate mother gives the child to the requesting couple in exchange for money and they all are satisfied. However, the fundamental challenges appear in not only definition of the law, e.g., motherhood, parental filiation etc., but also in presumptions of law such as expecting that mother

¹⁵ Law no. 5237 published in the Official Gazette of Turkey no. 25611/ 12.10.2004, in force 01.06.2005, viewed 22 August 2019 from <http://www.resmigazete.gov.tr/eskiler/2004/10/20041012.htm>.

giving a birth also cares for that child. This expectation receives its root on the natural gestational period, which is described as “*the psychology of becoming parent*” (Tomlinson *et. al* 1984, p.43). In other words, “*when a child is conceived within a marriage, the law presumes that the biological parents are able and willing to look after its welfare, and we grant them the right to do so*” (Tomlinson *et. al* 1984, p.42). To develop maternal instincts for the surrogate mother is not allowed. This implies particularly to the fatherhood, because biological father stands in a natural situation in which he can develop the necessary commitments by the time his child is born (Tomlinson *et. al* 1984, p.42).

This brings us to a challenge in terms of an ancient crime, which originated with Christianity, called *expositio infantum*, or child abandonment, which is a crime naturally bound to the woman who gave birth. To illustrate, at least in Turkish criminal law, in the case where a woman abandons her newborn, she will be punished, but it is not sought to determine whether her partner should be criminally liable or not as long as they do not live together or her partner was not present at time of the abandonment.

Assume these two hypothetical following cases: in the first one, because the requesting couple changed their mind, the newborn is abandoned by the mother who gave birth but who does not have any genetic relation to the baby. In the second one, the requesting couple receives the child from the surrogate mother, however, they later lose interest in the child. Who will be criminally liable if the child’s health is damaged or if it died? These cases may be considered as harming or killing through omission, failure to act, the crimes called commission by omission, when the abandonment occurred with *intention* or at least with *dolus eventualis*. In this regard, the question on who holds the legal duty to act arises. The duty to act serves as a normative component of these crimes, but is determined by the civil code. When the civil code does not recognize this parental shift in reality, the criminal code would be satisfied with formal truth, and would not seek the material one which is the main aim of criminal law. Otherwise, in order to reach material truth, the criminal law would be liberalized from the other branches of law, e.g., the civil code.

5.2.2. *Unhealthy and undesired newborn*

The probability of abandonment or failure to act to care and protect the child is more likely to happen where the child is born handicapped, and the object of the contract will not satisfy the requesting couple (European Institute of Bioethics 2011, p.2). Because people spend a considerable amount of money and the children turns out to be a commercial product and hence subject to a quality control (Profesionales por la Ética 2015, p.1, 3), does the surrogate mother have a right to abort? (European Institute of Bioethics 2011, p.2).

A woman in Thailand struggling with debts was offered to be a surrogate mother for an Australian couple. After the injection of a fertilized egg into her

uterus, she surprisingly become pregnant with twins. However, during the routine control it was discovered that one of them had down syndrome. The surrogate mother was told to have an abortion, but she refused due to her religious beliefs. After the birth, the Australian couple took the healthy girl and left her the boy with down syndrome. Nevertheless, the surrogate mother, under the threat of not being paid, lied to the Australian embassy in Bangkok that made it possible for the Australian couple to travel with the healthy newborn. The unhealthy one was left to the impoverished Thai surrogate mother. This is a case from 2014, reported as “*Australian couple leaves Down syndrome baby with Thai surrogate*” (Murdoch 2014). This is actually the point where the traditional criminal law approaches do not entirely capture the reality behind the formal accomplished facades. Therefore, in Thailand, law-maker pushed for a new legislation as “*Protection of Children Born through Assisted Reproductive Technologies Act*” (Hongladarom 2018, p.1).

5.3. *The risks to life and health of the surrogate mother*

Having a child is the unique aim in a surrogacy. The health of the surrogate mother is important only when it affects the child's health, i.e., during pregnancy. If a baby is born handicapped or if the gender is undesired, the surrogate mother may be forced to have an abortion. In other words, involuntary abortions may be performed, which constitutes a crime in every modern and democratic jurisdiction. Additionally, although many jurisdictions have a time limit of 10 to 12 weeks for the performance of voluntary abortion, these limits may be exceeded in surrogacy cases, which may expose threats to the surrogate mother. Besides, the woman may face health risks during pregnancy, while giving birth and even after the birth. As the child is a desired outcome, after the birth the surrogate mother must deal with health problems caused by the pregnancy on her own.

6. **The necessity on creating international legal documents**

Surrogacy, due to its cross border practice, has already captured attention of international, i.e., interregional organizations, Council of Europe. In 1989, in its Report On Human Artificial Procreation, in principle 15, titled as *surrogate motherhood*, it is prohibited by enabling exceptions under two conditions. The relevant provision follows as;

“However, states may, in exceptional cases fixed by their national law, provide, while duly respecting paragraph 2 of this principle, that a physician or an establishment may proceed to the fertilisation of a surrogate mother by artificial procreation techniques, provided that:

- a. the surrogate mother obtains no material benefit from the operation;*
- b. the surrogate mother has the choice at birth of keeping the child”* (Texts of the Council of Europe on bioethical matters 2014, p.107).

As for cross border application of surrogacy falls directly to the scope of Convention on Human Rights and Biomedicine by Council of Europe is of

importance, as it aims to “*protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine*” (Art. 1). With this purposes it includes provision on the consent, human genome, scientific research, particularly the research on embryos in vitro and organ transplantations, but not any medically assisted reproduction, inter alia, surrogacy as it is mainly practiced cross-border. What is more significant, is that it prohibits financial gain through the use of the human body and organs by stipulating that “*the human body and its parts shall not, as such, give rise to financial gain*” in art. 21. Therefore, this Convention, as opposed to the Medicrime Convention¹⁶, and is the most appropriate platform to deal with cross border surrogate motherhood as it primarily concerns civil law and ethics. This, by rendering its scope precise, would serve the compliance to the prohibition of financial gain through the use of the human body.

Conclusive Remarks

The legal goods protected by criminal law may be impaired in the application of surrogacy such as the right to life and health of the surrogate mother and the planned child, even if surrogate motherhood firstly appears as an issue, legal consequences related to civil law, *inter alia*, family law and criminal law entails a subsidiary character. Apart from applying surrogacy through forced pregnancy or human trafficking, cases in which surrogacy is applied with consent may fulfill the elements of several crimes, such as fraud on paternity and filiation, forgery of documents, or child abnonnement etc. Due to surrogacy’s cross border practice that owes the divergences among jurisdiction on the recognition of child, e.g., foreign birth certificate or court decision, it is impossible to prevent *de facto* application of surrogacy. Therefore, on a national level, in order to protect the child and all parties involved, the surrogacy practice should not remain unregulated. As a matter of fact, the law- maker is to precisely regulate surrogacy by the parliamentary acts and not to leaves that issue to the executive power. By doing so, all negative consequences of surrogacy cannot be prevented, however, a large part could be. Further, such a regulation may facilitate an international cooperation in surrogacy’s widespread cross border practice. In any case it is better than turning a blind eye to the practice either within the country or abroad. Indeed, the application of criminal law tools may create immoral or unethical situations, e.g., the taking baby who was born in surrogacy from the requested people may be read as confiscation of a human being as a crime profit which itself surrogacy brings out.

¹⁶ Council of Europe, *Convention on the counterfeiting of medical products and similar crimes involving threats to public health*, Moscow, 28.10.2011 viewed 22 August 2019 from <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008482f>.

Bibliography

Books, articles

1. Çakmut, Ö.Y., 2008, *Soybağının Belirlenmesi ve Ceza Hukukunda Çocuğun Soybağını Değiştirme Suçu [Determination of Familial Link and Fraud on Paternity and Filiation as a Crime in Criminal Law]*, İstanbul: Beta.
2. Engel, M., 2014, “Cross-border surrogacy: Time for a convention?”, in K. Boele- Woelki, N. Dethloff, & W. Gephert (eds.), *Family law and culture in Europe: Developments, challenges, and opportunities, European family law*, Vol. 35, pp. 199–216, Cambridge, UK: Intersentia Ltd, viewed 14 March 2019 from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2348270.
3. Firestone, S., 1972, *The Dialectic of Sex. The Case for Feminist Revolution, The Dialectic of Sex. The Case for Feminist Revolution*, 8th ed., New York: Bantam Books, William Morrow and Company, Inc.
4. Foucault, M., 1978, *The History of Sexuality*, transl. Robert Hurley, New York: Pantheon Books.
5. Hakeri, H., 2018, *Tip Hukuku [Medical Law]*, 13th ed., Ankara: Seçkin.
6. Hongladarom, S., 2018, “Surrogacy Law in Thailand”, viewed 22 April 2019 from <https://www.researchgate.net/publication/322286708>, pp.1-7.
7. Kant, I., 2005, *Groundwork of the Metaphysics of Morals*, transl. Thomas K. Abbatt (with revision Lara Denis), edn. Lara Denis, Toronto: Broadview Editions.
8. Klock, S. & Lindheim, S. R., 2018, ‘Mater semper certa est: motherhood is always certain’, *Fertility and Sterility* 110 (7), pp. 1185-1186, doi: 10.1016/j.fertnstert.2018.09.006.
9. Ladomato, D., 2012, “Protecting Traditional Surrogacy Contracting Through Fee Payment Regulation”, *Hastings Women’s Law Journal* 23 (2), pp.245-274.
10. Margalit, Y., 2016, “From Baby M to Baby M (anji): Regulating International Surrogacy Agreements”, *Brooklyn Journal of Law and Policy* 24 (1), pp. 41-92.
11. Margalit, Y., 2014, “In Defense of Surrogacy Agreements: A Modern Contract Law Perspective”, *William & Mary Journal of Women and the Law* 20 (2), pp.423- 468.
12. Metin, S., 2012, “Yörüngesinden Çıkan Tabiat: Etik, Sosyal, Psikolojik ve Hukuki Görünümleriyle Taşıyıcı Annelik [*Nature Out of its Orbit: Ethics, Social, Psychological and Legal Aspects of Surrogate Motherhood*]”, in *Sağlık Hukuku Makaleleri II [Articles on Medical Law II]*, pp.7-53, İstanbul: İstanbul Barosu Yayınları.
13. Purdy, L.M., 1996, “Surrogate Mothering: Exploitation or Empowerment?”, reprinted in *Reproducing persons: issues in feminist bioethics*, Cornell University Press, Ithaca, London, viewed 15 March 2019 from https://www.researchgate.net/publication/229520637_Surrogate_Mothering_Exploitation_Or_Empowerment, pp.182-197.
14. Salama, M., Isachenko, V., Isachenko, E., Rahimi, G., Mallmann, P., Westphal, L.M., Inhorn, M.C. & Patrizio, P., 2018, ‘Cross border reproductive care (CBRC): a growing global phenomenon with multidimensional implications (a systematic and critical review)’, *Journal of Assisted Reproduction and Genetics* 35(7), pp. 1277-1288, doi: 10.1007/s10815-018-1181-x.
15. Tomlinson, T., Goodman, M. F., Mahowald, M. B., Robertson, J. & Krimmel H., 1984, “Correspondence, Surrogate Mothers and Parental Rights”, *The Hasting Center Report* 14 (3), pp.42-44, doi: 10.2307/3561189.
16. Ünver, Y., 2015, “Ceza Hukuku Açısından Taşıyıcı Annelik [Surrogate Motherhood from Criminal Law Perspective]”, *Tip Hukuku Dergisi [Journal of Medical Law]* 8 (4), pp.291-341.

Cases

1. BGH 2014, no. XII ZB 463/13, *Neue Juristische Wochenschrift*, 68 (7), pp.479-485, viewed 16 March 2019 from <https://beck-online.beck.de/Dokument?vpath=bibdata%2Fzeits%2Ffnjw%2F2015%2Fcont%2Ffnjw.2015.479.1.htm&pos=3&hlwords=on>.
2. BGH 2018, no. XII ZB 224/17, *Deutsche Notar- Zeitschrift*, 118 (1), pp.54-58, viewed 16 March 2019 from <https://beck-online.beck.de/?vpath=bibdata%2fzeits%2fDNOTZ%2f2019%2fcont%2fDNOTZ%2e2019%2e54%2e1%2ehtm>.
3. ECHR 2017, *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, viewed 22 August 2019 from [https://hudoc.echr.coe.int/eng#{\"itemid\":\[\"001-170359\"\]}](https://hudoc.echr.coe.int/eng#{\).

Legislation

1. Council of Europe, Committee on Bioethics, 2018, *Surrogacy: Addendum to the Replies to questionnaire on access to medically assisted procreation (MAP), on right to know about their origin for children born after MAP*, DH-BIO/INF (2016) 4 Addendum, viewed 22 August 2019, from <https://rm.coe.int/inf-2016-4-addendum-e/1680939b6f>.
2. Council of Europe, *Convention on the counterfeiting of medical products and similar crimes involving threats to public health*, Moscow, 28.10.2011 viewed 22 August 2019 from <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008482f>.
3. Council of Europe, Texts of the Council of Europe on bioethical matters, 2014, *Part C, Report on Human Artificial Procreation 1989*, in Volume II, DH-BIO/INF (2014) 5, viewed 22 August 2019, from [https://www.coe.int/t/dg3/healthbioethic/Texts_and_documents/INF_2014_5_vol_II_textes_%20CoE_%20bioéthique_E%20\(2\).pdf](https://www.coe.int/t/dg3/healthbioethic/Texts_and_documents/INF_2014_5_vol_II_textes_%20CoE_%20bioéthique_E%20(2).pdf).
4. Das Bundesamt für Justiz, *Embryonenschutzgesetz [Federal Embryo Protection Act 1990]*, viewed 16 March 2019 from <https://www.gesetze-im-internet.de/eschg/BJNR027460990.html>.
5. Das Bundesamt für Justiz, *Strafgesetzbuch (StGB) [Penal Code]*, viewed 22 August 2019 from <https://www.gesetze-im-internet.de/stgb/BJNR001270871.html>.
6. Law no. 4721 published in the Official Gazette of Turkey no. 24607/ 08.12.2001, viewed 22 August 2019 from <http://www.resmigazete.gov.tr/eskiler/2001/12/20011208.htm#1>.
7. Law no. 5237 published in the Official Gazette of Turkey no. 25611/ 12.10.2004, in force 01.06.2005, viewed 22 August 2019 from <http://www.resmigazete.gov.tr/eskiler/2004/10/20041012.htm>.
8. Law no. 7151 published in the Official Gazette of Turkey no. 30616/ 05.12.2018, viewed 22 August 2019 from <http://www.resmigazete.gov.tr/eskiler/2018/12/20181205-8.htm>.
9. *Online Newspaper*
10. BBC, 2015, “Iran birth drive ‘turns women into baby-making machines’”, viewed 22 August 2019 from <https://www.bbc.com/news/world-middle-east-31828123>.
11. Murdoch, L., 2014, “Australian couple leaves Down syndrome baby with Thai surrogate”, *The Sydney Morning Herald*, 1 August, viewed 13 March 2019 from <https://www.smh.com.au/national/australian-couple-leaves-down-syndrome-baby-with-thai-surrogate-20140731-zz3xp.html>.
12. *The other resources*
13. European Institute of Bioethics, 2011, “Surrogate Motherhood”, Teaching card: No.1, pp.1-2, viewed 22 August 2019 from <https://www.ieb-eib.org/docs/pdf/2019-04/doc-1554801351-13.pdf>.
14. Profesionales por la Ética, 2015, *Surrogate Motherhood, Wombs for hire, A new way of exploiting women and human trafficking*, brochure, Mujer, Madre y Profesional, Madrid, viewed

14 March 2019 from <https://www.womenworldplatform.com/files/20150703003756-surrogate-web.pdf>.