



**Surrogate maternity:
Exploitation of Women for Reproductive Purposes
(EWRP)¹**

Exploitation of Women for Reproductive Purposes (EWRP) is understood as an agreement with a woman to become pregnant, her obligation to give away the baby after the birth, and to renounce to any right and responsibility as a mother.

The reasons for these acts include: The lack of uterus of the requestor or the impossibility to become and achieve pregnancy; health reasons such as heart diseases or even cancer and social issues as work agenda, shape of body, labor profile or sexual preferences, among others.

The process can be performed by using gametes from the requestors (homologous) or from third parties (heterologous) when one or both cells belong to a different person, including the situation when sometimes the pregnant woman, sells her own ovule to become pregnant.

In 1976 the lawyer Noel Keane performed the first agreement of “non-profit subrogation” and invented the term of “Surrogate maternity”. Along with Dr. Warren Ringold, they created the agency *Surrogate Family Service* where they carry out artificial insemination (Utian et al., 1985); which contributed to consider this practice as a non-profit activity. Gradually this practice was justified through an economic payment, until the colloquial term “womb for hire” was reached. (López and Aparici, 2012)

In 1980 after waiving her rights as a parent, *Elizabeth Kane* (pseudonym), regretted her decision and became an important spokeswoman in the United States. (Kane, 1988).

The frequent refusal of pregnant women to give up their children at the moment of birth, or refusal of the parents to receive children that do not meet their expectations, have brought the disputes before the courts, and created a great number of legal arguments to justify the prohibition of this practice.

Among the most notorious we find the case of Baby M. In 1987 at New Jersey *William y Elizabeth Stern* hired *Mary Beth Whitehead* to carry a child. After the

¹ This is a brief, authorized by the authors (Bartolini, Marcelo; Pérez, Cándido and Rodríguez, Adrián) from the book “Surrogate maternity: Women Exploitation for Reproductive Purposes” published by the LXII Legislature of the Deputy Chamber (Mexico), Special Commission against human trafficking in collaboration with the Association of Independent Women in November 2014. ISBN: 978-607-9423-04-9 For academic purposes the references cited by the authors in the original text remain intact.

labor she refused to give the baby away and ran to Florida. After being recovered through a private investigator and presented before the court of New Jersey, the Supreme Court declared void the agreement (1988) on the grounds that it was a public political insult because the payment was illegal, almost criminal and degrading to women, but in the resolution it gave the custody of Baby M to the Stern marriage and granted Mary Beth the right of visit.²

In the international forum, the ways to solve legal disputes between pregnant women and requestors are very different from one country to another.

On January 19, 2010 the newspaper *The Times of India* (TNN, 2010, January 19) reported the case of a couple, *Jan Balaz* and *Susan Lohle*, who got twins through EWRP and they could not register them because this practice is forbidden in Germany. According to the source, The General Attorney of India, *Gopal Subramaniam*, declared that the German government should grant a temporary visa so they can return and carry out the adoption in order to avoid the lack of nationality of the children.

The German Embassy issued a communicate explaining that they could not grant the paternity, according to Section 1600, clause 5 of the German Civil Code. A child born to an Indian mother- who is married to an Indian men-, does not have any legal bond with the requestor German couple (TNN, 2010, January 19); therefore the only way recognized and authorized by German law to determinate the paternity of a child born to a different woman from the wife, is trough adoption.

In France, the highest court refused to grant the nationality to the *Menesson* twins, - born in California from an American woman-, even when the requestor couple was French (AP, 2011, April 6). This caused that the twins could not get their identity card or passport. In the resolution *Labasse vs. France*, dated June 26, 2014, the European Court of Human Rights, forced France to recognize a certification of birth of a twins born in the USA from a pregnant woman; aware of the dimension of the problem for the children, the group of work who participated with the Court in the resolution exhorted, according to The Hague Convention, to fight against the abuse of wombs for hire, and performed a study of the European legislation.³

In Spain the practice of substitution pregnancy or through EWRP is expressly prohibited by Article 10 of the Law 14/2006 of May 26, regarding Assisted Human Reproduction Techniques (AHRT).⁴ Nevertheless, the clinics who promote this business found the way to avoid the compliance of Spain laws by performing “connection” procedures in poor countries, such as India, Ukraine or Mexico so

² The case is available at <http://www.lfip.org/laws822/docs/1.htm> The article of the *New York Times* is also helpful and available at <http://www.nytimes.com/2014/03/24/us/baby-m-and-the-question-of-surrogate-motherhood.html?module=Search&mabReward=rekvuas%3A>

³ European Court of Human Rights (*Cour Européenne des Droits de L'Homme*), Cinquième Section. Affaire **LABASSEE c. FRANCE** (Requête no. 65941/11), Arrêt, Strasbourg, 26 juin 2014. *Cet arrêt deviendra définitif dans les conditions définies à l'article 44 §2 de la Convention.*

⁴ It is also applicable the instruction of the Registration Regime of Filiation of the born abroad through “pregnancy for substitution” (October 5, 2010) published in the Official Bulletin of the State on October 7, 2010.

when the children are born abroad they are registered at the Consulate of Spain using the argument of the right to a nationality of the children.

The Ministry of Justice in Spain issued an instruction regarding the Regime for the Registration of Filiations of the children born through surrogacy, that along with the resolution of the Appeal No. 245/2012 of the Supreme Court of Spain on February 6, 2014,⁵ caused several clinics promote the transnational Reproductive Tourism which includes also knowing the local tourism attractions, as well as the EWRP; increasing the exploitation of women in poverty, and creating a “citizenship of census” available only for those who can afford to pay high prices to establish paternal relationships.

In the United States the solution of disputes is more complex due to the diversity of internal regulations for each of every fifty states, the citizens often move from one state to an other in order to avoid their local restrictions.⁶ The three iconic cases are: the before mentioned Baby M, the case Johnson v. Calvert and the case of Helen Beasley.

In the case of Johnson v. Calvert (1990) the California Supreme Court failed in favor of the requestors because the pregnant woman did not give her ovule. It is very important to note the opposite opinion from Judge Joyce Kennard.⁷

In the case of Helen Beasley, very different from the other two cases, the biological maternity is not an argument. Helen was a 26 years-old British woman who signed an agreement with an American couple (Charles Wheeler and Martha Berman) so she got pregnant. When she became pregnant of twins the requestors asked her to abort one of the babies. Helen refused and filed two lawsuits to revoke the parental rights of the requestor couple. Helen recognized she had not parental rights, but

⁵ The authority claims that these are rules to prevent the damage of the dignity of the pregnant women and the children, making business of the pregnancy and filiation, making an object of the pregnant women and the children, allowing third parties to make business with them, and making possible the exploitation of Young women in conditions of poverty.

⁶ The states that allow it and provide a regulation are California, Nevada and Illinois. The states that allow it but do not have regulations are Arkansas, Connecticut, Iowa, North Dakota, New Mexico, Tennessee and West Virginia. Arizona, Indiana, Michigan and Nebraska consider the agreements to be void but they are performed informally at the risk of the parties. New York only admits non-profit cases and others are considered as a crime. In Florida, New Hampshire, Texas, Utah, Virginia and Washington are allowed with some restrictions. In Louisiana, in spite that they are not prohibited, the courts do not recognize the agreements to be claimable and the requestors should adopt the children after they are born. In the rest of the States they do not have an specific regulation, but generally requestors ask for a Pre-Birth Order (PBO) and the court grants the custody of the children before the birth. In Colorado, Georgia, Kansas, Kentucky, Maine, Montana, Oregon, Missouri, Rhode Island and South Dakota, a *PBO* is often granted, while in Hawaii, Idaho, Missouri, Oklahoma, Vermont and Wyoming they are not granted and the adoption is performed afterwards.

⁷ *“I do not agree that the determinative consideration should be the intent to have the child that originated with the woman who contributed *103 the ovum. In my view, the woman who provided the fertilized ovum and the women who gave birth to the child both have substantial claims to legal motherhood. Pregnancy entails a unique commitment, both psychological and emocional, to an unborn child. No less substantial, however, is the contribution of the woman from whose egg the child developed an without whose desire the child would not exist (...) The majority’s resort to “intent” to break the “tie” between the genetic and gestacional mothers in unsupported by statute, and, in absence of aprópiate protections in the law to guard against abuse of surrogacy arrangements, it is ill-advised.” Johnson v. Calvert, Cal., 1993. Supreme Court of California, In Bank. No S023721. May 20, 1993. Pages 18 and 19.*

argued that she didn't want the couple to have the children, because they made clear they did not accepted them. The case was solved when another couple took the babies.⁸

In India EWRP is permitted and it is a lucrative industry.⁹ Its permission caused in 2008 one of the most important cases: the case Manji. In this case, a couple of Japanese doctors transferred embryos created from Ikufumi Yamada's sperm and the ovule of a third woman who was not the pregnant woman, nor Yamada's wife. The requestor couple got divorced and three months later a baby girl was born with three mothers: the requestor mother, the pregnant mother and the genetic mother.

After the birth the requestor mother did not want the baby. She argued that after the divorce, she had no biological, legal or genetic bound with the baby. At the same time, the father and the grandmother of the baby wanted the custody. The child had no nationality and got caught between the legal systems of two countries, which provoked a diplomatic crisis.¹⁰ Finally, civil organizations accused the father of trafficking in minors; the grandmother obtained the custody of the child and took her to Japan.

In India, clinics and requestors sign private agreements with the pregnant women, taking advantage of them because of their ignorance and extreme poverty. The pregnant women are interned into, facilities watched by workers and they cannot abandon the premises until they give away the child to complete satisfaction of the requestors. (Pande 2010)

Trafficking in minors and organized crime also affects countries such as Vietnam, Thailand and Nigeria. On Thursday February 24, 2011, eleven Vietnamese women were rescued in Thailand (AFP, 2011 February 24). They were in a place with 24 hours surveillance by guards who also controlled the entrance of vehicles. The women were hold by a criminal band dedicated to EWRP. The police declared that the company "Baby 101" received orders through e-mail or agents of couples without children. The band obtained clients in Taiwan, (where EWRP is illegal) and operated in offices in Cambodia, Thailand and Vietnam.

"In many cases – affirmed the Ministry of Public Health, *Jurin Laksanawisit*– the women were raped when they were virgins. Thousands of dollars were offered to them but they were kept in houses in Bangkok and their passports were held." During the investigation, they said they had accepted freely the work with a payment of five thousand dollars per baby, but four of them claimed that they were cheated (The Korea Herald, 2011).

⁸ The case was widely covered by the media in the USA. More details are available at: <http://abcnews.go.com/US/story?id=92627> The resolution can be consulted at the website of the Supreme Court of California under the head *Helen Beasley v. Charles Wheeler et. al.* CGC 01 401717.

⁹ The normative reference is the National Guidelines for the approval, supervision and regulation of the clinics of assisted reproduction technology in India, issued by the Indian Counsel of Medical Research (ICMR). For the guidelines see http://icmr.nic.in/art/art_clinics.htm

¹⁰ See POINTS, K. (s.f.) "Institutions in crisis, Commercial surrogacy and fertility tourism in India. The case of Baby Manji". Kenan Institute for the Ethics: University of Duke.

In Nigeria, on June first, 2011, the Nigerian police rescued 32 pregnant girls. The girls were between the ages of 15 and 17 and declared that the payment was offered according to the sex of the baby: it was 190 dollars per baby.

The National Agency to Prevent the Human Trafficking informed that each baby was sold in 6,400 dollars. This makes an important difference in relation with the amount received by the girls who “hired their wombs”. The commissioner of the local police, *Bala Hassan*, declared that the owner of this business faces charges of minor abuse and human trafficking because the sale of babies is illegal in Nigeria and is punished with 14 years of prison.

EWRP is also an issue in Latin America. The circumstances under Subrogation of Women in Latin America is performed, confirm that what lies beneath is economical interest and not altruism. Also Argentina, Guatemala and Peru have solved conflicts relating EWRP.

In Argentina the resolution MJ-JU-M-79552-AR/MJJ79552 (Dated June 18, 2013) was issued because a couple asked to register a child conceived by another person. The 86 Civil National Court of First Stage ordered the registration of the girl as a daughter of the requestors.¹¹

In Colombia the case T-986/9 of December 18 2009 commenced when the requestor failed to pay of the agreed amount since the fifth month of pregnancy. Months after their birth the babies got sick and the requestor (who lived in Florida, USA) moved to Colombia and obtained a resolution that allowed him to remove them from the mother and take them to the US. At the end, and after a long trial, the Second Room of the Constitutional Court reestablished the rights of the children with their mother and promoted their reencounter.¹²

In Guatemala, on October 24 2013, a couple initiated a trial asking for the custody of their child who had been conceived by another woman than his “mother”. The court granted the custody to the grandparents on the father’s side because of the violent environment generated by the parents and ordered the prosecution of the requestors for human trafficking.¹³

In Peru, the resolution issued by the Republic’s Supreme Court of Justice (Appeal *No. 563-2011- Lima*) also settled the dispute of a marriage that asked a woman to become pregnant of a child and give him away for 18,900 US dollars. The requestor father gave his sperm (the pregnant women gave her ovule) and because he was related to the pregnant women it turned out to be great uncle of the baby who was born. After the birth, the pregnant woman and her concubine

¹¹ Even when is a first stage resolution, it is relevant because introduces in the judicial system the figure of “willing to procreate” and declares that this will is the decisive element to stablish filiation and also suggests the difference between genetic, pregnancy and raising motherhood.

¹² The complete resolution can be consulted at the website of the Constitutional Court of Colombia: <http://www.corteconstitucional.gov.vo/relatoria/2009/T-968-09.htm>

¹³ The case was originally solved, after 25 hearings, by the Court for the Children and Adolescence of Chimaltenango, on October 24 2013.

registered the baby (recognition) and the requestors initiated a process of adoption, which the pregnant mother regretted and quitted: Although the pregnant woman quitted the adoption process in two instances, the resolution was declared against her interests. At the end, the Supreme Court gave the reason to the solicitors claiming that the pregnant woman was willing to give up her baby to receive a payment.¹⁴

In Mexico there is no important resolution. Even when calculations show that 17.5% of women in reproductive ages may have fertility problems,¹⁵ very little is known about the legal disputes related to EWRP; a possible explanation is that pregnant women do not have the economical means to litigate against foreign couples, nor to terminate agreements against their interests. Mexico is part of the global industry of EWRP. "Future parents from USA, Australia, New Zeland, United Kingdom, Germany, France, Spain, Canada, Brazil and China, are looking for our expertise as an option of surrogacy in Mexico", declared the director of *Care Surrogacy Center Mexico*. Mexico has considerably lower costs in respect with another better developed countries and this costs are directly negotiated and agreed by the surrogacy clinics, which leads us to the conclusion that the agreed pregnancy is everything but a non -profit activity. The relationship between the requestor of the baby and the one who rents her body to become pregnant is negotiated on economic grounds only, turning human beings into commercial objects.

In Tabasco and Sinaloa, the practiced is regulated by the figure of "Subrogate maternity", an euphemism to cover the fact that the relationship between the pregnant woman and the requestors is unequal and the women who rent their bodies are in vulnerable situation who look to solve their economic problems.¹⁶

In Mexico City it was approved a law that never become in force because of the lack of publication (Known in the parliament world as "pocket veto") The representatives from the PRD party (Party of the Democratic Revolution) made a suggestion for its approval on November 18, 2008, rejected by other parties. On July 20, 2010 a second modified suggestion was approved by the Joint Commissions, and finally on November 30 by the plenary session of the Legislative Assembly of the Federal District. Because the Chief of Government was reticent to publish the law and because of the change of legislature occurred in 2012, the law never became in force.¹⁷

¹⁴ The resolution of december 6, 2011 is the first oneregarding EWRP in Peru.For a further study of the case, see the essay of Claudia Morán de Vicenzy and Maricela González Pérez de Castro (2011) titled "About the first case of Subrgate Maternity solved by the Supreme Court Of Justice of the Republic, Appeal No. No. 563-2011-Lima"; available at: http://udep.edu.pe/derecho/index.php?id_cont=5019

¹⁵ Ministry of Health and Regional Center of Multidiscipline Researchs, UNAM, 2003

¹⁶ Article 92 of the Civil Code of the State of tabasco and articles 283 to297 of the family Code of the State of Sinaloa. Article 491 of the State of Coahuila says that: "The agreement of subrogate maternity does not exist, therefore it has no legal effects." If an impregnate ovule is implanted into a women who has not the same genetic material, the maternity will be granted to this one and not to the one who gave the ovule.

¹⁷ The opposing parties restricted the access to the procedure only to people with fertility problems and married couples.

The national and international experience reveals that the “rent of wombs” brings problems for the State, for the parties in the agreement and for the minors in respect to their identity and filiations. Among the problems for the State is to consider this subject as a public health issue, because it is questionable the existence of a right to have children through third parties or the obligation of the State to provide for them. At least, to give an example, these affirmations cannot be found or inferred by the article 4 of the Mexican Federal Constitution. EWRP does not care for a health issue (and of course not public health) because of its substitutive point of view instead of a therapeutic point of view. A health policy focused on fertility problems involves a previous diagnosis and is conducted to provide adequate measures to restore the health of the patient (which is clearly not achieved by getting pregnant to a patient different from the infertile person).¹⁸ On the other hand, the EWRP represents a regression in the fight to achieve gender equity and the respect for the rights of the women.¹⁹

Among the problems that affect the parties, it stands out the inequity relationships between them. The agreements made by the clinics abuse of the pregnant women. They do not seek solutions to the possible risks or problems during the pregnancy, conditions or sickness of the mothers or the babies and they only try to convince the mother to give up the baby or carry on the pregnancy (bad luck for the requestors). In India, pregnant women can face restrictions to their liberty of movement, and the abandonment or disappearance of the requestors or some illness can cause them to become invalids.

Regarding filiations there are at least three problems: the filiations of the children born through this activity causes legal uncertainty, dissociates the will from the genetic and the biology generates complications and goes against the legal principle that considers as a mother to the woman who gave birth.

Besides the legal disputes triggered in Europe, Asia and America, there are also the effects upon the public health systems and possible medical and psychological effects.

In the area of public health, this matter is associated to in vitro fertilization and intracytoplasmatic injection of sperms, because these practices increase the number (high already) of frozen embryos whose destination is not known. This issue that is present in many countries of the world has not been correctly solved

¹⁸ Articles 32 and 33 of the General Law of Health (Mexico) say that the right to the health is formed by all the services of medical attention provided to the person to protect, promote and restore the health through preventive, curative and rehabilitation activities given by the National System of Health.

¹⁹ The Committee on Women's Rights and Gender Equality of the European Parliament published on September 26, 2013 a *Report of Sexual and Reproductive Health and Rights* where it mentions that subrogate maternity makes objects of the women and children's bodies and threatens the body integrity and human rights of the women. The complete text is available at: *Report of Sexual and Reproductive Health and Rights*, Committee on "Women's Rights and Gender Equality, European Parliament", September 26 2013, Ref. A7-0306/2013, paragraph 9
<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=//EP//TEXT+REPORT+A7-2013-0306+0+DOC+XML+V0//EN>

and there is also illegal traffic of these embryos. For example, in Mexico, there is no limit for the number of embryos transferred to a pregnant woman, which can cause a multiple pregnancy increasing the risk for the health of pregnant women, specially of women who cannot afford medical care or do not obtain good hospital facilities.

EWPR does not protect the pregnant woman against the risks involving the pregnancy and the birth, and because the payment is very low, the pregnant woman cannot afford the illness that could overcome, their families cannot afford the expenses of her death or the medical attention for those illnesses, such as preeclampsia or diabetes, to give some examples.

Besides, the problems for the pregnant woman are not only medical, because there can also be psychological complications.²⁰ These complications reach until the children born through this method²¹ or even the previous children of the pregnant women.²² Because in the last years the scientific development shows that there is a deep bond between a mother and her child. The most cause of concern is that the pregnant woman is not informed about the risks associated to this practice, and many times, her economic, educative and social situation makes this alarm unnoticed.

As has been showed, at least in Europe, there is a clear tendency to restrict EWRP because of the risks and conflicts in its practice. Take in note that the State should provide attention to the people with fertility problems to restore their reproductive health, it is necessary to issue regulations to prevent women and children being used as an instrument and the permission of this activity promotes the human trafficking for reproductive purposes, the States should regulate this practice to be consider as a crime.

²⁰ There is medical evidence that shows that a bond between the mother and the baby is created during pregnancy. When she gets depressed the baby responds by accelerating his vital signs, see López, Natalia, *The mother -baby communication in pregnancy, the bond of attachment*. University of Navarra, Spain, 2008.

²¹ On the other hand, Zeiki, S., en "*The neurobiology of love*", *FEBS Lettes*, 581, 2575, 2579 affirms that "the relationship of the mother with her children finds an specific place of action: The social brain that joints the two structures of the brain hemispheres. This union promotes the brain activity regarding the social relationships incentives. This is, that the experience of a mother with her child creates an specific activity in the social brain by the mother. The neuro image before mentioned has give evidence that when a mother looks at the picture of her child of few months, some areas of the cognitive affective system are activated regarding rewards and those related to negative judges are turned off.

²² Cases and histories related to these are popular in social networks. Children that look for their parents and complain that her mother has give away a brother or a sister can be found in the popular site for young people: <http://anonymousus.org./stories/index.php?cid=3#1372>