

MALE SAME-SEX COUPLES AND SURROGATE MOTHERHOOD:  
AT A CROSSROADS

Parejas masculinas del mismo sexo y maternidad subrogada:  
en una encrucijada

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Abstract

Surrogate motherhood is a practice that is increasingly standing out from the already known forms of reproduction, primarily because of its evolution in such a short period. These fast-paced changes entail a truly complex reality for the practice that requires the attention of bioethics, law, and politics. At present, surrogate motherhood is a valid option for, among others, male same-sex couples who wish to be parents. However, legal and economic barriers that bring about inequity and injustice remain. Therefore, it becomes necessary to analyse and synthesise these topics.

Key words

Male same-sex couples, parenthood, surrogate motherhood.

Resumen

La maternidad subrogada es una práctica que se aparta, cada vez más, de las formas de reproducción ya conocidas, en buena parte, por la evolución que ha experimentado en tan poco tiempo. Estos cambios vertiginosos hacen de ella una realidad muy compleja que requiere la atención de la bioética, el derecho y la política. Hoy la maternidad subrogada se convierte en una opción válida para las parejas masculinas del mismo sexo en la búsqueda de la paternidad. Sin embargo, siguen existiendo barreras legales y económicas que generan situaciones de inequidad e injusticia. Por ello, se hace necesario analizar y sintetizar estos temas.

Palabras clave

Parejas masculinas del mismo sexo, paternidad, maternidad subrogada.

## Introduction

Surrogate motherhood, or ‘third party reproduction,’ is an assisted human reproduction technology (AHRT) that has existed for more than three decades but still generates controversy; hence, it continues to be part of the academic debate. The concept has indeed evolved considerably, which is why we do not face the same issues currently that we did two decades ago. Numerous countries have already passed laws on surrogate motherhood, and there are debates around the need for international regulations. The fact that many countries, at the time of writing, forbid surrogacy, establish restrictions for its practice or simply give free rein to it only shows how difficult, if not impossible, it is to arrive at uniform international legislation.

Many studies favour the primary interest of the child or the rights of surrogate mothers; however, this study aims to assess the rights of those who willingly agree with a woman to undergo a reproductive medical procedure and bear their child until the end. Once the child is

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born, she will also commit to surrender any rights to the child to the people we will call ‘intended parents.’

Undoubtedly, considering the rights of the intended parent(s) within the framework of surrogate motherhood can help the law provide the necessary answers to the new challenges that this globalised world poses. Currently, health problems related to infertility are garnering the attention of healthcare systems in most countries and are becoming relevant among public health policies, plans and programmes. Male same-sex couples do not have infertility problems in the strictest sense; however, surrogate motherhood allows them to become parents by agreeing with someone willing to carry the child. In such agreement, she decides to bear a child and, once said child is born, deliver the child and surrender her motherhood rights to the couple in question.

Male same-sex couples can enter into such an agreement in their own countries or abroad; however, a problem arises within countries that forbid or impose restrictions on surrogate motherhood. Citizens who agree to the practice abroad generally generate severe conflicts when the relevant authorities do not grant them their child’s birth certificate upon returning to their country <sup>1</sup>.

This study proposes an analysis of surrogate motherhood as an option for male same-sex couples based on equity and justice criteria. The analytic-synthetic method is employed herein because such a method first deconstructs the subject of the investigation into parts or components, which, in this case, are the rights of male same-sex couples opting for surrogate motherhood. Subsequently, a synthesis is performed that reveals the relationships between the different elements that compose the phenomena or reality of the subject.

This study also incorporated the feedback received in different academic spaces, particularly from colleagues in interdisciplinary fields such as gender studies. Most of these colleagues come from countries with a civil law tradition, where the rights of surrogate mothers have been gaining prominence, thereby making the practice of surrogate motherhood much more restrictive. The need to ascertain points of comparison among different legal systems was soon identified, even for countries under common law, such as the United States. Such comparison helped us understand the problem from a global perspective and propose the primary supposition that we seek to confirm: It is necessary to have international regulations on surrogate motherhood that meet the demands of equity and justice.

## 1. Surrogacy relationships

First, the involved parties in the ‘surrogacy relationship’, as Stuvøy<sup>2</sup> calls it, must be identified: the woman who agrees to bear a child and the person or couple that wishes to become parents through surrogacy. However, there can also be a third donor. In the first scenario, the woman agrees to bear a child; she can choose whether to donate her genetic material because the possibility of the person or couple in question supplying their genetic material could also exist. In the second scenario, or the third one, if we consider the previous possibility to be the second scenario, a third party donates the egg to be fertilised or the sperm—depending on the case—that will later be implanted in the surrogate mother<sup>3</sup>.

Surrogate motherhood is defined through a surrogacy agreement, where a person or couple who cannot bear a child or merely wishes to avoid the process of pregnancy agrees with a woman who, either gratuitously or in exchange for payment, commits to carrying and delivering a child to them. In this agreement, the woman expressly surrenders all rights over the child so that the person or couple in question can assume legal parenthood. Initially, only two parties agreed: the surrogate mother and the intended parents. Nevertheless, it is possible that the spouse or partner of the surrogate mother also participates. Some legal systems, particularly

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<sup>1</sup> FENTON-GLYNN & SCHERPE (2019), p. 562.

<sup>2</sup> STUVØY (2018), p. 37.

<sup>3</sup> MARINELLI (2020), pp. 36-43; MENIKOFF (2001), p. 96.

those that allow commercial surrogacy and operations by agencies and intermediaries, consider the latter taking part in the execution of the agreement<sup>4</sup>.

The process of surrogate motherhood, while allowing for the proliferation of diverse types of legal relationships, has thus far failed to consider an express regulation for all the possible relationships involved therein. More specifically, the broad extent of the surrogate agreement makes a successful law challenging to implement because such an agreement can be shaped either as a gratuitous contract or as one based on payment. Such agreement may include the surrogate mother, the intended parent(s) alone, and even third parties. It can also consist of an intended parent (a single person) or intended parents (a heterosexual couple, a homosexual couple, or even individuals who do not share a civil relationship).

Moreover, the surrogate agreement involves some issues, such as the unequal relationship between the mother and the parents, in terms of race or socioeconomic status. As Yehezkel Margalit says "the big and "easy" money involved in such an intimate and seductive issue such that it may cause some individuals, especially women, to take on unreasonable contractual obligations that contradict their own interests due to the monetary temptation."<sup>5</sup>

Under those circumstances the women's will could lead to an inability "to fulfill the contractual obligation later on"<sup>6</sup> Being a poor or black woman, for example, gives a truly free will to be part of a surrogate contract? Or what if the woman changes her will? What if it happens multiple times? What if are the intending parents that change their mind? In the surrogate's long-term agreement, those risks must be considered.

One of the solutions to some of the problems mentioned before, was the notion of the private and free will, as Margalit calls it, in which external characteristics are irrelevant to the agreement execution. However, as time passes by, the necessity of a judicial intervention was mandatory in order to reduce the contract's freedom inequality.

For the reasons mentioned above, there is limited legal development in this regard. Several countries have interpreted the absence of regulation and the lack of laws forbidding this practice as a form of permission rather than a legal omission. While in West Europe, countries such as France, Germany, Italy, Portugal (until 2016), Spain and Switzerland, have expressly forbidden surrogacy. The significant legal development has appeared in doctrine and case law, especially in the case-law of state courts, such as in the United States (with *Stern v. Whitehead*<sup>7</sup> and *Johnson v. Calvert*<sup>8</sup>, to mention only two cases surrogacy before courts), and in international courts, such as what happened in the European Court of Human Rights [ECHR] (with decisions made in the following cases: *Labassee v. France*<sup>9</sup>, *Mennesson v. France*<sup>10</sup> and *Paradiso and Campanelli v. Italy*<sup>11</sup>, where ECHR has applied two rules, respectively: The couples Labassee and Mennesson claimed to the French State legal recognition to parent-child relationships that had been legally established in the United States with children born through surrogate motherhood, yet the French State refused to register the birth certificates arguing that the surrogacy agreements entered into by Mr and Mrs Mennesson and Mr and Mrs Labassee were unlawful. The couples unsuccessfully demand to the French courts to have the birth certificates entered into the French register of births. The Court of Cassation denied the request. Finally, the couples Labassee and Mennesson lodged with the ECHR. The ECHR observed that French authorities, despite being aware that the children had been identified in the United States as the children of Mr and Mrs Mennesson and Mr and Mrs Labassee, had nevertheless denied them that status under French law. It considered that this contradiction had undermined the children's identity within French society. The Court further noted that the case-law completely had precluded the

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<sup>4</sup> FENTON-GLYNN & SCHERPE (2019), pp. 558-560.

<sup>5</sup> MARGALIT (2014), p. 430.

<sup>6</sup> MARGALIT (2014), p. 433.

<sup>7</sup> Supreme Court of New Jersey, *Stern v. Whitehead*, February 3, 1988.

<sup>8</sup> Supreme Court of California, *Johnson v. Calvert*, May 20, 1993.

<sup>9</sup> European Court of Human Rights, *Labassee v. France*, June 26, 2014.

<sup>10</sup> European Court of Human Rights, *Mennesson v. France*, June 26, 2014.

<sup>11</sup> European Court of Human Rights, *Paradiso and Campanelli v. Italy*, January 24, 2017.

establishment of a legal relationship between children born as a result of lawful surrogacy agreement abroad and their biological father<sup>12</sup>. Precisely, the existence of a genetic connection between intended parents and children was decisive in recognising the parent-child relationship and allowing children to remain with his family. In the *Paradiso and Campanelli v. Italy* case, because there was no genetic connection between intended parents and child, their relationship was not recognised, and children were separated and taken into custody by the State<sup>13</sup>.

The most recent Advisory Opinion of ECHR provides recommendations on the recognition of legal parent-child relationship between a child born through surrogacy arrangement abroad and the intended mother with no genetic connection to the child but listed on the child's birth certificate. In this case, the couple's male partner must be the child's biological parent and listed on the child's birth certificate as such in order for the parentage to be recognized in front of the mother by registering the birth certificate or adoption<sup>14</sup>. It could also apply to same-sex male couples' cases who engage surrogacy abroad, when one of them is the child's biological parent and both are listed as parents on the child's birth certificate<sup>15</sup>. In this regard, Spain issued years ago a guideline to allow registering births of children born through surrogate motherhood abroad in the Spain register of births. However, it has had many problems for its implementation<sup>16</sup>.

Countries that allow surrogate motherhood don't even have the same legislation to determine the parentage. The English legislation, e.g., allocates parentage in cases of surrogate motherhood based on a post-birth model of recognition: the surrogate mother is regarded as the legal mother at birth and parentage is subsequently transferred to the intended parents; however, even the surrogate mother can refuse to transfer the parentage to the intended parents until the sixth week<sup>17</sup>. In South Africa, the parentage is determined pre-conception. Accordingly, there is no need for a transfer of legal parenthood since intended parents are considered the child's legal parents from the moment of birth<sup>18</sup>, as well as in Greece<sup>19</sup>. In Russia, it is enough that the surrogate mother and the intended parents agree for the latter to appear on the birth certificate as child's legal parents, with no need of transferring legal parenthood<sup>20</sup>.

Regulating surrogate motherhood has not proven to be sufficient in providing legal security for the parent-child relationship to children born through surrogacy and their intended parents, because it does not allow the family bounds to be recognized everywhere. Such legal uncertainty is one of the most critical points.

The family institution is protected by the legal systems in every country. In some countries such as Colombia, this protection is present in the Constitution (National Constitution, Article 42)<sup>21</sup>. In the case of Argentina, it is stated in recent reforms to existing civil codes (Law 26.994/2014, Article 558), which do not distinguish between a family constituted by natural ties, AHRT, or adoption<sup>22</sup>. Nevertheless, in these legal systems, lawmakers can legislate on the civil status of the individuals, relationships, and parentage. Then, a substantial responsibility lies at

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<sup>12</sup> EUROPEAN COURT OF HUMAN RIGHTS (2014).

<sup>13</sup> BRACKEN (2020), pp. 204-210; EMALDI (2018), pp. 75-99; FENTON-GLYNN, (2021), pp. 220-254; MARINELLI (2020), pp. 37-38; FENTON-GLYNN & SCHERPE (2019), pp. 562-563.

<sup>14</sup> European Court of Human Rights, Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, Request no. P16-2018-001, April 10, 2019

<sup>15</sup> BRACKEN (2020), p. 207.

<sup>16</sup> Guideline October 5, 2010.

<sup>17</sup> Act 2008.

<sup>18</sup> Children's Act 38 of 2005.

<sup>19</sup> FENTON-GLYNN & SCHERPE (2019), pp. 552-553.

<sup>20</sup> Family Code of the Russian Federation, art. 51-52.

<sup>21</sup> "Artículo 42. La familia es el núcleo fundamental de la sociedad. Se constituye por vínculos naturales o jurídicos, por la decisión libre de un hombre y una mujer de contraer matrimonio o por la voluntad responsable de conformarla. El Estado y la sociedad garantizan la protección integral de la familia (...)."

<sup>22</sup> "Artículo 558. Fuentes de la filiación. Igualdad de efectos. La filiación puede tener lugar por naturaleza, mediante técnicas de reproducción humana asistida, o por adopción.

La filiación por adopción plena, por naturaleza o por técnicas de reproducción humana asistida, matrimonial y extramatrimonial, surten los mismos efectos, conforme a las disposiciones de este Código".

lawmakers' hands in terms of allowing or preventing the legal recognition of families formed through surrogate motherhood, in addition to providing legal certainty to these families. Undoubtedly, the law must intervene to avoid further discriminatory treatment and injustice.

What are the scope and limits of legal intervention in surrogacy? Undoubtedly, surrogacy has important implications concerning the principle of legality in terms of the compatibility of surrogate motherhood with the domestic public order and legal certainty, which is essential for the legal parent-child relationship that derives from it to acquire durability and assurance in its legal life.

Because it is indispensable that the purpose of surrogacy materialises, in this case, the birth of the child, we found that different rights arise both for the surrogate mother and the intended parent(s). Thus, the law must establish the corresponding limits in pursuit of legal security for all participants. If there is an obligation to transfer rights, the surrogate mother is bound to such a commitment favouring the intended parent(s). However, there are times when the surrogate mother is not the holder of the rights, for example, a right to genetic material. In 'traditional or genetic surrogacy' or 'gestational surrogacy,' the said right might belong to the surrogate mother, the intended parent(s), or a third party, depending on who provided the genetic material<sup>23</sup>. Thus, verifying a transfer of rights is not always required.

### *1.1. Surrogate mothers*

Debates around surrogate mothers have been gaining notoriety for quite some time, and the potential exploitation of women and their bodies for surrogacy has been criticised<sup>24</sup>. From this perspective, surrogate motherhood can become a potential threat when exercising autonomy and decision-making<sup>25</sup> and in terms of the right to life, physical integrity, mental health, and dignity of women<sup>26</sup>. It is not difficult to understand that the rights of surrogate mothers exist before they enter into surrogacy agreements; thus, such an agreement can never be to the detriment of women's rights, namely, in this case, the right to freedom of choice. However, there is a deeper problem of social injustice that should be noted: In countries where entering into surrogacy agreements in return for payment is permitted, which generally tend to be developing countries, the women that sign such contracts are underprivileged women, whose freedom in decision-making can be easily affected by the realities of their extreme vulnerability and dependency. These unequal positions make surrogacy agreements cumbersome when imposing legal obligations and constrictions, turning surrogate mothers into objects of exploitation to serve the interests of intended parents and actors in a growing and emerging market that exposes these women to concerning health risks<sup>27</sup>. However, countries that were previously favourite destinations for reproductive tourism, such as India and Thailand, have shifted from free markets to much stricter legislation in recent years<sup>28</sup>. The current concern is that this market has moved to other places, especially areas with no regulation, spreading the problem to places where it did not exist.

The possibility of exploitation is that one party might take unfair advantage of the other because the costs and benefits are not fairly distributed between the parties<sup>29</sup>. However, exploitation does not always occur; thus, each case must be analysed individually to avoid generalisations, particularly when examining the difference between altruist and commercial surrogate motherhood. Beyond that, it depends on counter-intuitive reasoning because most

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<sup>23</sup> CROCKIN et al. (2020), pp. 908-909.

<sup>24</sup> SHALEV et al. (2016), p. 9.

<sup>25</sup> SHALEV et al. (2016), p. 5.

<sup>26</sup> LAMBA et al. (2018), pp. 646-653; SHALEV et al. (2016), p. 5.

<sup>27</sup> DEL SAVIO & CAVALIERE (2016), p. 88; EMALDI (2018), p. 79; FELDMAN (2018), pp. 13-14; JOSEPH et al. (2018), p. 21; MAMO (2018), pp. 27-28; MARINELLI (2020), p. 36; SALAMA et al. (2018), p. 1284; SHALEV et al. (2016), pp. 5-6.

<sup>28</sup> Act 47 of 2021; Protection of a Child Born by Medically Assisted Reproductive Technology Act, B.E. 2558 (2015).

<sup>29</sup> FRATI et al. (2021), p. 4.

perceptions collected from the research feedback indicated some bias intending to view surrogate mothers as always disadvantaged, even when this was not the case.

## 1.2. Intended parents

The intended parent or parents wish to have a child either because they cannot or simply because they prefer to have a child by means other than the natural one and thus resort to seeking help from a woman who agrees to enter into an agreement. This agreement states that the woman must bear a child and, after giving birth, must give the child to the intended parents, surrendering all her rights over the child in favour of the intended parents. The use of the terminology 'parent or intended parent' is already frequent in academic literature; however, in other languages, such as Spanish, variants can be found, for example, 'contracting party'.

Regarding the rights of the intended parent(s), although procreative or reproductive freedom is recognised in theory, an understanding of the freedom of choice cannot yet be confirmed in terms of whether to have children, the number of children that one can have and in what period of time, in practice<sup>30</sup>. Any of these rights are actually granted regardless of the individuals sexual orientation, either single or living with a partner<sup>31</sup>, since most of the time they are denied.

Surrogate motherhood is a valid option for same-sex couples, whether comprising men or women, although the latter is a less frequent scenario. Surrogate motherhood for couples consisting of two women is beyond the scope of the present research, even for single women, since in such cases, the intended parent(s) only needs to find a sperm donor. For these couples, one intended parent can provide the egg and the other the womb. The current debate surrounding surrogate motherhood is more closely related to male same-sex couples.

Homosexual men, whether single or living with a partner, cannot have biological children without the help of a donor who can provide her eggs and fertilise them via *in vitro* fertilisation (IVF) or a surrogate mother who agrees to bear a child. The literature has used the term 'dysfertile' to refer to couples and single men about people who cannot have a biological child without the help of a third party. Dysfertile people do not have a physical impediment to procreate but, rather, a relationship problem<sup>32</sup>.

If heterosexual couples with fertility problems or female same-sex couples have the option of having a child using assisted reproduction, it is only fair for homosexual men to be allowed the same on their terms<sup>33</sup>; however, this is not prevalent. This differential treatment leads to a legal inequality without an objective, apparent justification. Feminist and queer theories offer various concepts essential to understanding surrogate motherhood as a valid option for homosexual men who wish to have biological children. Some feminists argue that allowing surrogate motherhood means allowing patriarchal control over female bodies<sup>34</sup>. There is no consensus among feminists, insofar as some think that queer kinship may offer alternative models that allow for the expansion of notions of family beyond the patriarchal, heteronormative, and traditional kinship grammars<sup>35</sup>. Among these concepts, we have identified and will now explain the following: 'reproductive awareness', 'procreative freedom', 'reproductive rights' and 'reproductive justice'.

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<sup>30</sup> PIERSANTI et al. (2021), p. 2.

<sup>31</sup> SMJETANA (2018), p. 107.

<sup>32</sup> IKEMOTO (1996), pp. 1007-1061; RUSSELL (2018), p. 136.

<sup>33</sup> RUSSELL (2018), p. 138.

<sup>34</sup> FELDMAN (2018), p. 14; MARKENS (2012), pp. 1746-1747; TYSON (2020), pp. 328-350.

<sup>35</sup> CHENEY (2021), p. 12; GUNNARSSON (2018), pp. 73-74; JACOBSON (2018), pp. 15-16; MAMO (2018), pp. 24-32; SMJETANA (2018), pp. 101-111; SUDENKAARNE (2018), pp. 117-125.

### 1.2.1. Reproductive awareness

Reproductive awareness refers to individuals' self-awareness of being homosexual and simultaneously capable of conceiving a human life. Individuals develop this form of awareness as part of their reproductive decision-making; however, this awareness also occurs at a collective level. The reproductive awareness of homosexual men must be understood within a historical context in which the same individuals have been excluded from biological reproduction and social reproduction. Approximately two decades ago, openly presenting as a homosexual ceased being considered incompatible with the development of reproductive aspirations in a growing number of places. Thus, the concept of reproductive awareness in homosexual men serves to describe the reproductive aspirations of people who were, not so long ago, denied the possibility of having such ambitions. This shift leads to a change in the aspirations and the awareness of both individuals and entire societies and sees the entrance of queer individuals in a reproductive field previously delimited by heteronormativity<sup>36</sup>. The change in the reproductive awareness of homosexual men assumes that these men can, on the one hand, recover their fertility and, on the other hand, recover their social reproduction<sup>37</sup>.

### 1.2.2. Procreative freedom

Russell<sup>38</sup>, paraphrasing Dorothy Roberts<sup>39</sup>, argued that procreative freedom, even more so than biological reproduction, refers to the natural creation of family conformation, affective ties, and parentage, which may or may not be biological.

### 1.2.3. Reproductive rights

Reproductive rights are based on recognising the human rights of all couples and individuals to freely and responsibly decide the number, cadence, and timing of having children, have the education and means to do so and reach the highest level of reproductive health quality<sup>40</sup>.

The first enumeration of reproductive rights appears in Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (United Nations General Assembly, 1979)<sup>41</sup>. Among these rights, the consulted authors have emphasised and interpreted different aspects, which can be classified as follows:

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<sup>36</sup> SMIETANA (2018), p. 103.

<sup>37</sup> PRALAT (2021), p. 290; SMIETANA (2018), p. 109.

<sup>38</sup> RUSSELL (2018), p. 138.

<sup>39</sup> ROBERTS (1999).

<sup>40</sup> STARRS et al. (2018), p. 2645.

<sup>41</sup> "Article 16.

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a) The same right to enter into marriage; (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent; (c) The same rights and responsibilities during marriage and at its dissolution; (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount; (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights; (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount; (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation; (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory".

- a. the right to decide the number and cadence of children freely and responsibly and to have access to information, education, and the means to exercise these rights, including information and advice on family planning<sup>42</sup>;
- b. the right to parenthood<sup>43</sup> or the right to become parents and pursue parenthood<sup>44</sup>;
- c. the right to fertility<sup>45</sup>;
- d. the right to reproduce<sup>46</sup>;
- e. the right to reproductive choice or being able to choose<sup>47</sup> and
- f. the right to sexual and reproductive health and universal access to sexual and reproductive health rights<sup>48</sup>.

Along with these reproductive rights, authors such as Imaz<sup>49</sup>, Mamo<sup>50</sup>, Starrs *et al.*<sup>51</sup>, and Emaldi<sup>52</sup> list other rights that belong, specifically, to same-sex couples and can now be used to contextualise the topic of this study:

- a. the right to get married and start a family and
- b. the right of same-sex couples to adopt.

Emaldi adds the right to procreate, which seems reserved for people who want to have a child with a genetic connection<sup>53</sup>; however, it would exclude those who could not contribute their genetic material to have a child. It should also be noted that Emaldi agrees with the criteria applied by the ECHR in cases related to surrogacy, especially with the requirement of a genetic connection between the intended parents and the child<sup>54</sup>.

#### 1.2.4. Reproductive justice

The fundamental idea of justice is that all individuals are treated the same; from this starting point, it is immoral to treat specific groups unless there are ethically relevant differences between them. The principle of justice must be reconsidered in all discussions regarding healthcare priorities<sup>55</sup>.

Reproductive justice is a frame of reference common to all frameworks on reproductive rights<sup>56</sup>. Reproductive justice as a frame of reference encourages attention towards the right to reproductive choice and endemic social, political, and economic inequalities among different communities that shape the capacities of individuals to have access to a good life<sup>57</sup>. Moreover, reproductive justice, beyond the scope of reproductive rights, focuses on groups or populations that are more vulnerable to the risk of being denied reproductive rights<sup>58</sup>. To be more precise, reproductive justice articulates the fundamental nature of reproductive freedom in favourable political and moral terms as a social justice matter<sup>59</sup>.

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<sup>42</sup> PARKER (2020), p. 5.

<sup>43</sup> IMAZ (2017), p. 7.

<sup>44</sup> IMAZ (2017), p. 11.

<sup>45</sup> KAWWASS *et al.* (2021), pp. 29-42.

<sup>46</sup> MAMO (2018), p. 25.

<sup>47</sup> PARKER, (2020), p. 4.

<sup>48</sup> STARRS *et al.* (2018), pp. 2642-2692.

<sup>49</sup> IMAZ (2017), pp. 5-12.

<sup>50</sup> MAMO (2018), pp. 24-32.

<sup>51</sup> STARRS *et al.* (2018), pp. 2642-2692.

<sup>52</sup> EMALDI (2018), pp. 75-99.

<sup>53</sup> EMALDI (2018), pp. 94-96.

<sup>54</sup> EMALDI (2018), pp. 75-99.

<sup>55</sup> GUNNARSSON (2018), p. 70.

<sup>56</sup> PARKER (2020), p. 4.

<sup>57</sup> STUVØY (2018), pp. 39-40.

<sup>58</sup> PARKER (2020), p. 5.

<sup>59</sup> PARKER (2020), p. 7; JACOBSON (2018), p. 16; STARRS *et al.* (2018), p. 2646.

### 1.3. The child

Scholars such as Joseph, Rafanello, Morris, and Fleming include the child born from surrogate motherhood within the surrogacy relationship, referring to the relationship, not as a dual one, as mentioned earlier, but as a triad<sup>60</sup>.

Concerning this issue, some of the consulted authors refer to the rights of the child born through surrogacy. For example, researchers such as Shalev *et al.* argued that this AHRT casts the child as a commercial product in the market, leaving the child in a vulnerable situation wherein its fundamental rights are left unprotected<sup>61</sup>. Taking potential developments in biomedicine into account, the intended parents could decide on genetic selection and modifying human embryos. This possibility raises serious concerns regarding the moral limits of reproductive markets and the impact of new life technologies on the future of humanity and the nature of humankind itself<sup>62</sup>. In practice, surrogate motherhood does not have a uniform legal framework on a global scale. Then, countries receiving children born via surrogate motherhood abroad, such as member states of the European Union, have a narrow margin of appreciation at a domestic level. Such states have had to recognise the legal parent-child relationship between children and intended parents genetically connected, considering, in any case, the indisputable prevalence of the primary interest of the child above the State's interest<sup>63</sup>.

Regarding recognising the non-genetically connected children, the State may decide to adopt measures other than immediate recognition if rapid and effective<sup>64</sup>. In general, the view of the receiving countries has been guarantee-based and focused on protecting the child's rights in terms of their rights to privacy, family life, and personal identity<sup>65</sup>. Other child rights have also been discussed, such as the right to economic aid in case of the separation of the intended parents, the right to family relationships, including having legally recognised grandparents, and inheritance rights. These legal protections have been included in the legislation of different countries, such as Italy<sup>66</sup>. Regarding the right to know the genetic or biological origins of the person, there is no widespread recognition. Only in England, Israel, Russia, and South Africa, the law expressly states that children born through surrogacy can access their origin when they are 18 years old<sup>67</sup>. In Italy, for example, the right to know the genetic or biological origins is only provided in the case of adoption; there is no legislation regarding children born by assisted reproduction or surrogacy<sup>68</sup>.

It is necessary to determine the rights and obligations of each party in a surrogacy relationship in a detailed manner. To do so, the different legislations must ensure that surrogacy agreements are allowed as a method of avoiding the exploitation of surrogate mothers, particularly in the cases of cross-border surrogate motherhood<sup>69</sup>.

The growing significance of certain extrajudicial elements in the legal system cannot be set aside (that is, those coming from moral and ethical views). In the present research, surrogacy has been primarily positioned within the legal field; however, there are other fields, such as bioethics, which can also be placed. It is worth analysing the same in later studies.

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<sup>60</sup> JOSEPH *et al.* (2018), pp. 21-22.

<sup>61</sup> SHALEV *et al.* (2016), pp. 6-7.

<sup>62</sup> SHALEV *et al.* (2016), p. 7.

<sup>63</sup> BRACKEN (2020), pp. 204-210; FENTON-GLYNN (2021), pp. 227-229; MARINELLI (2020), p. 37; PIERSANTI *et al.* (2021), pp. 10-11; FENTON-GLYNN and SCHERPE (2019), pp. 562-564.

<sup>64</sup> European Court of Human Rights [Grand Chamber], Request no. P16-2018-001, April 10, 2019.

<sup>65</sup> MARINELLI (2020), pp. 38-39; PIERSANTI *et al.* (2021), pp. 10-11; SHALEV *et al.* (2016), p. 7.

<sup>66</sup> Law 184.

<sup>67</sup> FENTON-GLYNN & SCHERPE (2019), pp. 536-537.

<sup>68</sup> BUSATTA & PENASA (2021), pp. 201-208.

<sup>69</sup> SUDENKAARNE (2018), p. 122.

## 2. Parenthood for same-sex couples through assisted reproduction

Generally, same-sex couples prefer IVF and surrogate motherhood over adoption because they wish to raise a child from birth. This choice allows them to have more control over the process, to have a genetically connected child, and avoid a lengthy and arduous adoption process that does not offer a definite outcome. Moreover, many countries still forbid adoption for homosexual individuals, regardless of whether these individuals are single or have a partner<sup>70</sup>.

The first issue concerns male same-sex couples in countries where surrogate motherhood is forbidden rather than restricted. In such countries, these couples have fewer options than heterosexual couples about becoming parents, which poses an inequity or imbalance in terms of the burdens and impositions of the law for such couples. Israel's Supreme Court held that excluding single men and male same-sex couples connected genetically with the newborn from surrogacy agreements was unconstitutional<sup>71</sup>.

From a legal perspective, maternity has historically been determined through pregnancy or adoption. In contrast, paternity has been assumed by marriage to the mother, through the voluntary recognition of paternity by a man, or being proven in some circumstances through legal measures, such as DNA tests. Following the advent of IVF and the donation of gametes or embryos, the three essential elements of parenthood, namely, genetics, pregnancy, and intention, can reside in more than one individual<sup>72</sup>. The existence of a genetic bond with the child in granting recognition to the legal parent-child relationship had previously been assumed; however, this changed when the intended mother (without a genetic connection to the child) and her partner could become parents. Nevertheless, there are still problems when it comes to recognising parenthood for homosexual men. There is a strong consensus among experts in reproductive rights that homosexual men, either single or with a couple, must provide their sperm. Otherwise, they will not have a genetic connection with the child and must undergo a formal adoption process after the child is born<sup>73</sup>. Gay single men and male same-sex couples continue to be second-class citizens before many legal statutes<sup>74</sup>.

## 3. Gender asymmetry between male and female same-sex couples in starting a family

There are laws in countries such as Spain<sup>75</sup>, and court orders in Italy<sup>76</sup> and the United States<sup>77</sup>, allowing men and women, whether single or as a couple (heterosexual or homosexual), access to parenthood, giving all individuals equal formal treatment. However, one inequality remains. Women (alone or as a couple) can easily access artificial insemination or IVF, whereas men (alone or as a couple) have no option but to find an egg donor and a surrogate mother to have a biological child. Men face a legal barrier from the onset, as is the case in Spain or Italy, or a costly process, as is the case in the United States, in countries where surrogacy is allowed, where only a few people can afford this kind of treatment<sup>78</sup>.

Professor Emaldi refers to surrogacy as an option for infertile persons and men who cannot have a child due to their inability to gestate an embryo. It does not refer to surrogacy to female same-sex couples or women without a male partner. Emaldi shows that the problem of access to AHRT, including surrogacy, is primarily for men. Her concern is focused on male same-sex couples and men without a female partner. She regards surrogacy as a valid option for male

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<sup>70</sup> LINDHEIM et al. (2019), p. 2.

<sup>71</sup> Israel's Supreme Court, HC 781/15, February 27, 2020.

<sup>72</sup> CROCKIN et al. (2020), p. 913.

<sup>73</sup> CROCKIN et al. (2020), 914; MARINELLI (2020), pp. 39-41.

<sup>74</sup> FENTON-GLYNN (2021), p. 249.

<sup>75</sup> Law 13/2005.

<sup>76</sup> Ruling 12962/2016.

<sup>77</sup> Supreme Court of Nebraska, *Stewart v. Heineman*, April 7, 2017.

<sup>78</sup> IMAZ (2017), p. 8; LINDHEIM et al. (2019), p. 2; MARINELLI (2020), pp. 39-41.

same-sex couples to start a family, mainly if they are married, because of the amendment to the Spanish Civil Code introduced by Law 13/2005<sup>79</sup> regarding the right of same-sex marriage and other rights<sup>80</sup>.

In South America—excluding Brazil, where some medical guides, such as temporary legislation, have been adopted, and Uruguay, where there is legislation on the matter—Argentina, Bolivia, Chile, Ecuador, Paraguay, Peru, and Venezuela do not yet have regulations regarding surrogate motherhood. Moreover, although Argentina (Law 26.862/2013)<sup>81</sup>, Colombia (Law 1953/2019)<sup>82</sup>, and Peru (Law 26.842/1997, Article 7)<sup>83</sup> have legislation on AHRT, these countries lack legislation on surrogacy. Torres, Shapiro, and Mackey noted that beyond the most difficult challenges of global infertility, the new structures of the family make this topic even more complex. Same-sex marriage is now legal in 31 countries, including six countries in South America, namely, Argentina, Brazil, Chile, Colombia, Ecuador, and Uruguay. These countries, except for Ecuador, offer surrogacy and adoption options to same-sex couples who wish to start a family. This trend will likely impact future legal developments on the regulations of surrogacy in the region.

On the other hand, in countries where surrogate motherhood is allowed, and a thriving cross-border reproductive market has flourished, like the United States, there is a stratification of policies and reproduction services, fostering reproduction in some populations while disabling or discouraging reproduction in others<sup>84</sup>. This stratification can be seen mainly in the recruitment of clients for infertility treatment, where discrimination patterns can be observed from an economic perspective and a racial one in terms of access to certain services<sup>85</sup>. Nonetheless, the costs are still the most significant barriers to accessing infertility support. However, the public health systems' universal coverage of fertility services would eliminate such obstacles for those who need such services, especially those in more vulnerable situations<sup>86</sup>.

#### 4. Male same-sex couples and surrogate motherhood: the need for equity and justice

LGBTQIA+ (lesbians, gays, bisexuals, transgender, queer, intersex, asexual, and others) access to AHRT is a topic that intersects with and takes shape within broader and multifaceted issues related to reproductive rights and justice<sup>87</sup>.

For male same-sex couples, it is impossible to bear a child through traditional reproduction, they cannot gestate the child by themselves, but need the help of a surrogate mother. This inherent limitation constitutes a matter of global health, because no male same-sex couple would be able to procreate their own children except with the help of AHRT. However, this is not all: Male same-sex couples who enjoy greater economic well-being are, in general, those who can access procedures such as surrogacy abroad, meanwhile male same-sex couples with low economic income cannot access this type of procedures due to their high costs. This produces a situation not only of inequality between male same-sex couples, but also a serious reinforcement of social inequity within countries.

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<sup>79</sup> «Artículo único. Modificación del Código Civil en materia de derecho a contraer matrimonio.

El Código Civil se modifica en los siguientes términos:

Uno. Se añade un segundo párrafo al artículo 44, con la siguiente redacción:

“El matrimonio tendrá los mismos requisitos y efectos cuando ambos contrayentes sean del mismo o de diferente sexo” .»

<sup>80</sup> EMALDI (2018), pp. 75-99.

<sup>81</sup> “Artículo 1. Objeto. La presente ley tiene por objeto garantizar el acceso integral a los procedimientos y técnicas médico-asistenciales de reproducción médicamente asistida”.

<sup>82</sup> “Artículo 1. Objeto. La presente ley tiene como objeto establecer los lineamientos para el desarrollo de la política pública de prevención de la infertilidad y su tratamiento dentro de los parámetros de salud reproductiva”.

<sup>83</sup> “Artículo 7. Toda persona tiene derecho a recurrir al tratamiento de su infertilidad, así como a procrear mediante el uso de técnicas de reproducción asistida, siempre que la condición de madre genética y de madre gestante recaiga sobre la misma persona. Para la aplicación de técnicas de reproducción asistida, se requiere del consentimiento previo y por escrito de los padres biológicos”.

<sup>84</sup> JACOBSON (2020), pp. 42-47.

<sup>85</sup> JACOBSON (2018), p. 16; SMIETANA (2018), p. 108.

<sup>86</sup> KAWWASS et al. (2021), p. 40; LINDHEIM et al. (2019), p. 8; SMIETANA (2018), p. 109; STARRS et al. (2018), p. 2679.

<sup>87</sup> JACOBSON (2018), p. 16; SMIETANA (2018), p. 109; STARRS et al. (2018), p. 2643.

The women who offer to help foreign couples as surrogate mothers tend to live in developing countries and have limited resources; surrogate motherhood is a source of income. Consequently, surrogacy inevitably becomes a generator of more significant risks for the life and health of surrogate women and even for the children born through such procedures. Surrogate mothers, on many occasions, must face the pregnancy or its consequences alone, because the intended parents are far away. In these cases, surrogacy becomes a source of substantial injustices in the countries where these women live and can be categorised as a problem concerning health and global justice.

Any bill to regulate surrogate motherhood should be aimed at progressively restricting surrogacy abroad, but first, domestic surrogacy should be legalized, emphasizing the protection of the rights of surrogate mothers and children. International regulation should be left to an international convention. In fact, at the Hague Conference on Private International Law, a draft for an international convention on surrogate motherhood is being discussed. Beyond allowing only altruistic surrogacy or also allowing commercial surrogacy, single people (especially men), couples with fertility problems, and either the same or opposite sex-couples, should be guaranteed access to surrogate motherhood through a public health policy. Regulation is the only way to truly prevent inequity and justice issues that have been raised by inefficient regulation of surrogate motherhood.

There is no doubt that the law can decisively influence the professionals' decisions and indicate the best choice for the prospective parents if a variety of services, treatments, and procedures, including those for surrogacy, are covered by public health plans or programmes. However, this is not enough if the law in itself does not fall within the framework of equity and justice. It must not be forgotten that the reproductive choices of those who resort to surrogacy are based on other people's lives, which can generate or increase structural and interpersonal inequities concerning people and population groups<sup>88</sup>. People, when making choices, must consider not only themselves but also others and attempt to adhere to equity and justice criteria<sup>89</sup>. Then, a justice approach is required, based on reproductive rights, the responsibility of those who choose surrogacy, and the consequences of such a choice for surrogate mothers.

## Conclusions

Harmonising different legal systems is considerably tricky, most explicitly owing to the lack of binding obligations for States. These efforts must be carried out at not only a domestic level in each State but also at a global scale to provide regulation through international treaties and conventions and domestic laws in the States and thus avoid the unfortunate consequences that surrogacy can lead to across the world.

Notably, we face a problem that affects thousands of people on the planet: infertility, regardless of race, wealth, or origin. However, this problem can be mitigated by allowing people to access fertility services through public health programmes. Nevertheless, this is not our only contemporary problem. Owing to the mobility of people to bypass the restrictions in their countries to enter into surrogacy agreements in foreign countries where this practice is allowed or where there is no regulation regarding surrogacy, a growing and increasingly concerning phenomenon has emerged: cross-border surrogacy. Prohibitionist laws in countries where people from said countries travel abroad to enter into surrogacy agreements leave the child vulnerable. At the same time, the legal relationship with the intended parents is defined, even if the primary interest of the child prevails, owing to the long and complicated procedures of recognising the legal parent-child relationship; such cases can result in unpredictable consequences at times. Hence, the prohibitionist direction is not the solution to the problems surrounding surrogacy at present.

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<sup>88</sup> MAMO (2018), pp. 24-32.

<sup>89</sup> MAMO (2018), pp. 24-32; SMIETANA (2018), pp. 101-111.

Cross-border surrogacy has pushed the law to its limits. Although some countries have forbidden surrogacy domestically, they have had to admit surrogacy agreements by their citizens abroad that have resulted in the birth of children precisely to ensure the best interest of minors who arrive in the countries of origin of the intended parents. But cross-border surrogacy has also left deep problems of injustice in its wake, leaving surrogate mothers helpless, many of whom live in poverty in developing countries. The absence of regulations or the flexible and permissive laws found in these countries leaves surrogate mothers and children unprotected. It is necessary to adopt an international convention that, at the same time, guarantees the best interest of the children resulting from surrogacy agreements and protects the rights of surrogate mothers, among others, to give their consent and to revoke it.

Undoubtedly, one of the biggest obstacles that the regulation of surrogacy has encountered has been the legalisation of commercial surrogacy. However, governments have moved towards the regulation of altruistic and compensated surrogacy, requiring intended parents, for example, to take out an insurance policy in favour of the surrogate mother. The intended parents must also take care of medical expenses (before and after birth) and legal expenses for the conclusion of the surrogacy agreement, compensating the surrogate mother for the possible expenses and inconvenience produced during pregnancy and postpartum, without this becoming remuneration.

Finally, recognising and guaranteeing reproductive rights, particularly for vulnerable people, and paying attention to the demands of justice and equity are the first steps towards reducing the structural and interpersonal inequities involved in surrogacy practices. In conclusion, the best solution to considerably influences the complex mechanism through which surrogacy occurs is regulation.

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