



Navigating Surrogacy Contracts: Legal Aspects and Key Elements

Elena Filip

PhD (C.),
Faculty of Law,
University of Tirana,
Tirana, Albania

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Abstract

This paper examines the surrogacy contract as a fundamental element that ensures the integrity of the surrogacy process while minimizing risks of exploitation and mistreatment of surrogate mothers and newborns. The article analyzes the evolving legal perspectives and debates surrounding surrogacy contracts over the years, focusing on the conditions and key elements essential for their legality and enforcement. As a legally binding agreement between the surrogate mother and the intended parents, the surrogacy contract requires a clear definition of the rights and obligations of each party, with the primary goal of safeguarding the more vulnerable party and ensuring the well-being and best interests of the child to come. By studying its regulation from various perspectives, this paper offers insights into best practices and standards, thereby providing valuable guidance for Albanian legal doctrine and lawmakers in understanding the dynamics and challenges of the field. In doing so, the article aims to present a clear model that can best serve Albania, especially at a time when the adoption of a new law on sexual and reproductive health is more crucial and necessary than ever.

Keywords: surrogacy contract, surrogate mother, rights and obligations, intended parents, freedom of contract

1. Introduction

Human nature has witnessed throughout history the success and flourishing of family relationships with the birth of a child. "A home without children is like a night without stars," "A child is the laughter of the home," and "A child is the light of the eyes" are just a few of the popular Albanian expressions (Albanian dictionary, 2006) that reflect the importance of a child's birth in the traditions and culture of our country. While the birth of a child is seen as a blessing, for many couples, despite their desire to become parents, this has been impossible. However, with the fundamental evolution that medical science has undergone through technology, the impossible nowadays seems to have become a reality. Thanks to assisted reproductive techniques (ART), many people today have been given hope and a new opportunity to become parents (Adamson et al., 2023). These innovations have broken biological barriers, by challenging the basic principles of medicine, expanding reproductive options, and introducing entirely new methods of conception and pregnancy (Coleman, 2002).

As a result of these methods, the traditional model, in which the relationship between the child and the biological mother was known as maternity and the relationship between the child and the biological father was known as paternity, no longer serves as an absolute truth. Once, these concepts were taken for granted, but today they must be viewed

considering the dynamics of technological progress, which seem to have completely redefined them (Omari, 2012). In the era we live in, the beginning of human life through the contact of sperm and egg is no longer solely the privilege of nature but also the result of reproductive techniques carried out both inside and outside the woman's body, leading to the birth of a child who may have a biological connection to both, one, or neither of the parents (Zyberaj, 2016).

In the variety of assisted reproductive techniques, this paper will focus exclusively and specifically on surrogacy, as the most debated, opposed, and controversial technique due to all the legal and ethical challenges it presents (Tarlantzis & Milapidou, 2023). In general terms, surrogacy refers to an agreement in which a woman agrees to become pregnant, carry the pregnancy, and give birth to a child, whom she then will hand over to a couple, thereby renouncing all her rights and responsibilities toward the child, including the legal status of being the child's "mother." (Raposo, 2005).

Surrogacy is a highly sensitive issue that still lacks a unified international regulation to guide interstate policies on the matter (Napley, 2013). Different countries around the world have diametrically opposing views on surrogacy (Le Nguyen & Hoai Nguyen, 2021). On one hand, some states reject and prohibit it, considering surrogacy a procedure that violates human dignity, creates opportunities for the exploitation and vulnerability of women, and constitutes a flagrant breach of ethics, faith, and morality (Coutinho, 2019). On the other hand, some states regulate surrogacy in the context of the right to form a family, the right to private life, the right and freedom to make decisions about one's own body, the right to achieve personal autonomy, the right to the free development of human personality, and any other related rights (Coutinho, 2019).

Even though at first glance it seems that every country that either permits or bans surrogacy in any form regulates it (Choudhury, 2016), Albania can be considered part of the group of countries that have not legally regulated this field (Kastrati, 2019), as it has a very confusing and deficient legal framework regarding it (Allmuça, 2024). In the Albanian legal system, the concept of surrogacy and surrogate motherhood appears to have been developed more in legal doctrine rather than having a clear elaboration in a specific law or the Family Code (TLAS, 2015). The absence of such legal framework has contributed to the growth of the "reproductive tourism" phenomenon (Zyberaj, 2014), forcing the Albanian government to recently consider a highly contested surrogacy draft law, as analyzed below.

2. Surrogacy as a Method of Artificial Reproductive Technology (ART)

The legislation regulating family relations in many countries around the world, as well as the Family Code of the Republic of Albania, establishes the ancient Roman principle "*mater semper certa est, etiamsi vulgo conceperit*" as the basic criterion for determining a child's maternity (Mandro, 2018). Although for many years, the determination of motherhood was easily established through the birth of the child, things changed with the development of biomedical science, which challenged traditional theories regarding the *status filiation* of children, through practices such as IVF, surrogacy, FET, etc.

As we already mentioned, surrogacy is an ART method in which one woman carries and gives birth to a baby that she intends to give to others, known as the intended parents, who agree to raise and care for the child, following a pre-conception agreement (Horseý, 2024). Surrogacy agreements can be made between close relatives or between individuals who are not previously known to each other. These agreements can be motivated by pure altruism, such as love, goodwill, or affection, or by purely monetary incentives (Raj et al., 2023). Based on the nature of the compensation and the motivations of the parties involved, surrogacy agreements can be categorized as either "commercial" or "non-commercial" (altruistic) agreements (Horseý, 2024).

Unlike altruistic surrogacy, where the surrogate mother does not expect any compensation from the intended parents (Emaldi Aitziber, 2018), commercial surrogacy involves profit-making entities in the process, such as agencies, brokers, and clinics, which make a profit from arranging, negotiating, facilitating, and/or managing surrogacy arrangements (Horseý, 2024). In commercial surrogacy, also known as compensated surrogacy (Attawet et al., 2023), the surrogate mother is compensated for her services beyond reimbursement for medical expenses (Gonzalez, 2019). However, it is important to note that in both altruistic and commercial surrogacy, the parties involved, the processes, citizenship laws, and parentage rules remain the same (Choudhury, 2016). The key difference lies in the payment for surrogacy services. In a commercial surrogacy arrangement, the surrogate may charge for her services in addition to covering her costs, whereas in altruistic surrogacy, the surrogate may only recoup expenses incurred and provide her services out of philanthropic intent (Choudhury, 2016).

In addition to this classification, depending on whether the surrogate mother agrees to provide both her placenta and her gametes, the doctrine makes another distinction between traditional surrogacy and gestational surrogacy (Bashiri et al., 2024). In traditional surrogacy, the surrogate mother's eggs are used, making her a genetic parent along with the intended father (Soderstrom-Anttila et al., 2015). In contrast, in gestational surrogacy, also called "full" or "host" surrogacy,

a woman agrees to carry a child for intended parents (who may or may not also be the genetic parents) (Pirouz & Mehra, 2011). The child is conceived using the gametes of others, and as a result, the surrogate gives birth to a child with whom she has no genetic connection (Kindregan & McBrien, 2006). In this regard, the two most well-known surrogacy cases are *In re Baby M* and *Johnson v. Calvert*. The first case invalidated a traditional surrogacy agreement, while the latter upheld a gestational surrogacy agreement (Strasser, 2015). In *In re Baby M*, the New Jersey Supreme Court ruled that the surrogacy contract was void because it violated public policy, although it upheld the custody award to the biological father (In Re Baby M, N.J 1988). Just a few years later, in *Johnson v. Calvert*, for the first time, a high state court enforced a surrogacy contract, thereby creating a safe harbor for people to enter and enforce surrogacy agreements (Campbell, 2021).

In addition to these types of surrogacies, although not widely accepted, there are scholars who, depending on the form of contract that governs the surrogacy agreement, distinguish between formal and informal surrogacy (Brazier et al., 1997). According to them, besides the formal contract, which is made according to a specific format, in writing, and adhering to the rules established by the relevant legislation in force, there are also informal surrogacies, typically made between relatives, based on a promise of honor rather than a written agreement (Sampaio, 2015).

2.1 The case of Albania

In Albania, Assisted Reproductive Technologies are regulated in Chapter V of the Law "On Reproductive Health." The law provides a general definition, stating that: "Assisted medical reproduction aims to respond to the request of an individual or a couple to have children. It seeks to address one or more medical conditions of infertility that prevent a couple from achieving pregnancy through natural means." (Law no.8876, 2002) At the same time, the Article 31 of this law states that: "Assisted medical reproduction includes clinical and biological practices that enable *in vitro* conception, embryo transfer, and artificial insemination, as well as all other equivalent techniques that allow reproduction outside the natural process." This provision, along with Article 43, indicates that in the law on reproductive health in Albania, surrogacy is addressed in a blanket provision, and the Ministry of Health is tasked with providing the necessary specifications through sublegal acts, including those related to surrogacy adoption (Zyberaj & Ikononi, 2024).

In this regard, the Ministry of Health, through the Strategic Document and Action Plan for Sexual and Reproductive Health 2017-2021 and the Action Plan for Sexual and Reproductive Health 2022-2030, has confirmed, in the absence of a comprehensive study, that no recorded cases of assisted reproduction techniques exist in Albania, even if they have been reported indirectly (Ministry of Health, 2016).

Through these documents, the Ministry emphasizes that not all infertility treatment centers in Albania are certified according to international standards, leading to uncertainty about the quality of care provided to couples in these centers, as well as a lack of oversight regarding their competence and performance (Ministry of Health, 2023). Additionally, there are no standardized protocols for all clinics concerning these types of treatments, nor are there clear criteria for determining which couples should undergo assisted reproduction techniques (Ministry of Health, 2016).

Although it is known that fertility clinics in Albania also offer surrogacy services, this reality is flourishing in secrecy and has not yet become part of the public debate (Gazeta Shqip, 2019). In addition to the aforementioned documents, this conclusion is also supported by the lack of empirical data from the Institute of Statistics regarding the number of births through ART procedures, the number of couples who have undergone surrogacy treatment, or other relevant statistics (INSTAT, 2023).

By analyzing these provisions and the available information, we can conclude that surrogacy is not prohibited in Albania, but it lacks a proper legal framework and clear data (Allmuça, 2024). Given this context, Albania has been secretly seen for many years as a destination for reproductive tourism, where reproductive technologies are not only offered at lower prices but are also less restricted in terms of the legal criteria required to benefit from their use (Zyberaj & Ikononi, 2024). Along with the financial and ethical aspects that this situation brings, this legal gap has led to serious challenges in determining motherhood and fatherhood, registering the child's status, and applying abortion procedures (Allmuça, 2024).

3. Contractual Agreement in the Case of Surrogacy Procedures

Surrogacy is a complex subject for discussion because it involves numerous ethical, religious, social, technical, and legal dimensions (Pirouz & Mehra, 2011). Often, the completion of the procedure is viewed through the lens of the freedom of contract (Allen, 2018). This is why it is said that one of the most challenging and problematic issues in family law is the

question of the legality and enforceability of surrogacy contracts (Margalit, 2013).

When faced with the dilemma of which field of law should govern surrogacy contracts—family law or contract law—the latter should prevail, based on an economic analysis of surrogacy contracts and the superiority of the contractual paradigm in this area (Carbone, 1988). This trend also suggests that family law itself is transitioning from status-based norms to contractual thinking. This shift indicates that using a contractual framework for surrogacy may not only be more acceptable but also better suited, given its characteristics and legal aspects (Shakargy, 2019).

The surrogacy process often involves contracts between the surrogate mother, surrogacy agency, medical clinics, donors, intended parents, brokers, and attorneys (Campbell, 2021). These contracts may address issues such as payment to the donor, surrogate, and agency; waivers of claims related to medical procedures; responsibilities of the parties involved; parental rights; and other duties concerning the child born through surrogacy (Campbell, 2021). However, it should be noted that, in fact, the contract between the intended parents and the surrogate is the one commonly referred to as the surrogacy agreement, which will be the focus of this paper. In this regard, surrogacy agreements between the intended parents/parent and the surrogate mother are considered valid only if they meet the essential conditions for a valid contract (Pillai, 2021) and adhere to basic contract principles (Pirouz & Mehra, 2011).

These contracts remain at the core of the surrogacy process, providing predictability and security between the parties by defining their rights, responsibilities, and expectations (Campbell, 2021). In every surrogacy arrangement, the process begins with an initial screening of the surrogate. If she is deemed suitable and selected to act as a surrogate, the parties will enter a formal contract. Initially, the surrogate will be artificially inseminated with the genetic material of the intended father or an anonymous donor. If the pregnancy is successful, she is expected to carry the baby to full term, adhering to specific conditions set by the intended parents or the doctor during the 9-month period. (Pillai, 2021) Upon successful delivery, the surrogate must hand the child over to the intended parents and relinquish all her parental rights. In return, the intended parents must fulfill their obligations by covering all medical expenses, providing insurance, and ensuring overall compensation. (Pillai, 2021) A breach of the surrogacy contract can occur at any of the three stages of the arrangement: before artificial insemination or in vitro fertilization, during the 9 months of pregnancy, or after the child is born (Raj et al., 2023). In such cases, depending on the circumstances, either party may seek liquidated damages (Crockin et al., 2020) or other compensation as specified by the contract or the law.

Typically, surrogacy agreements must reflect not only the legal regulations required by the governing state but also certain standard clauses (Campbell, 2021). These clauses usually include: (1) representations or factual promises regarding the present or past; (2) covenants regarding the surrogate's behavior; (3) compensation to the surrogate and agency, including medical expenses and financing; (4) decision-making regarding abortion or reduction of multiples; (5) liability of intended parents in cases of any harm to surrogate; (6) liability of surrogate in case of non-fulfillment of the obligations (Pillai, 2021); (7) breaches and remedies; (8) the consequences in case of separation, death, or divorce of the intended parents; and (9) confidentiality (Campbell, 2021).

Due to the highly personal and sensitive nature of surrogacy contracts, it is crucial for lawmakers and the judiciary to carefully consider the potential public policy implications when determining the legality of surrogacy (Pirouz & Mehra, 2011). This is why the legal treatment of surrogacy agreements varies significantly depending on the country in which the contract is made (Raj et al., 2023). In this context, issues related to gender rights, reproductive rights, and privacy in different countries play a significant role, imposing limitations on contractual arrangements. These concerns intersect with fundamental civil rights and political matters, as well as the regulation of medical providers and oversight of surrogacy-related medical procedures. (Choudhury, 2016)

In Albania, the current law on reproductive health does not include provisions related to surrogacy contracts and their legal terms. In 2024, a draft law on "*Sexual and Reproductive Health*" was proposed for discussion, which generated significant debate and controversy (Pro-family Coalition, 2024). However, it is important to note that, for the first time, the draft law proposed that: Surrogacy pregnancy would be based on a written agreement between the woman who wishes to have a child but is medically unable to do so, and the woman who will carry the fetus and give birth to the child on behalf of the first woman (Draft-law, 2024). Despite this initiative to regulate surrogacy, experts in the field argued that the draft law should have provided a more detailed framework for surrogacy agreements, the conditions for their legal validity, and their evidentiary weight (Zyberaj & Ikononi, 2024).

4. The Discussion Surrounding the Legality and Enforceability of Surrogacy Contracts

The fact that surrogacy contracts involve pregnancy, gestation, and the creation of a child raises many significant issues and dilemmas that bring the enforceability of such agreements into question (Pietrini-Sanchez, 2020). A primary

argument against the legality of surrogacy contracts is the concern that framing and regulating these agreements within the context of the free commercial market may undermine the sensitive process of bringing a child into the world (Margalit, 2013). As noticed, a common objection to commercial surrogacy contracts is the fear to treat children as commodities or objects, rather than as individuals deserving of respect. In other words, many scholars argue that this practice involves putting a price on something—whether it's a child or reproductive labor—that is inherently priceless. (Van Zyl & Walker, 2013)

Based on these concerns, the legality of such contracts was first addressed by U.S. courts in the 1980s, and the issue of whether these agreements constitute lawful contractual undertakings has been the subject of trial in numerous courts since then (Quinlan, 2013). Important studies have concluded that, from the perspective of jurisprudence, surrogacy contracts may violate public order for three main reasons:(Yong & Muñoz, 2012) a) they often serve as instruments for the exploitation of women, particularly those with limited economic resources living in impoverished countries; b) they involve the buying and selling of newborns, transforming them into commodities that can be traded like any other product based on market demand; and c) they undermine the unity of the family as long as a child is the one exchanged for compensation.(Yong & Muñoz, 2012)

This approach was also seen in a recent decision by the Supreme Court of Spain, in which it is stated that: *"the future child, deprived of the right to know their origins, is 'commodified,' as they are conceived as the object of the contract, which the surrogate is obligated to deliver to the commissioning party."* It is evident that *"both the surrogate mother and the child to be carried are treated as mere objects, not as persons endowed with the dignity inherent to their condition as human beings and the fundamental rights that come with that dignity"; "it is severely harmful to the dignity and moral integrity of the child (and can also harm their physical integrity, given the lack of control over the suitability of the commissioning parties) to be regarded as the object of a contract, and it also violates their right to know their biological origin."* (Tribunal Supremo no.28, 2024) This ruling was issued later but, reinforced the same legal reasoning as the famous ruling 277/2022 of the Supreme Court of Spain, which overturned a decision in a case where maternal filiation was established for a person who had contracted a surrogate mother in Mexico (Marrama, 2022).

From this perspective of the Court, we understand that, in addition to the conceptualization of the child as a commodity, another concern with surrogacy contracts is that the surrogate has no parental rights to the child (Shairwal, 2022). Furthermore, the obligations imposed by the contract often infringe on her rights and expose her to significant risks of harm during the pregnancy (Zhao, 2023). This creates the potential for violations of personal freedom, the right to medical self-determination, the right to health, the right to abortion, and even the right to life (Zhao, 2023). This is evident in the fact that the two parties involved in the surrogacy agreement are not on equal footing when it comes to the rights and responsibilities outlined in the contract. These parties differ substantially in terms of status, socioeconomic background, and education. Typically, the surrogate mother comes from poor, marginalized segments of society, often being illiterate, impoverished, unemployed, or earning low wages. (Kusum, 2017)

Finally, the enforcement of the contract may be at risk, in circumstances such as the death of the baby, divorce, loss of legal capacity, the death of the intended parents or the surrogate mother, medical complications (Margalit, 2013), and the prohibition of abortion. Some authors argue that, in this context, the demands of the surrogacy contract may be totally unconscionable and unenforceable (Margalit, 2013).

On the other hand, advocates of the enforceability of surrogacy contracts argue that if these contracts are voluntary agreements, they are binding and can be legally enforced (Pietrini-Sanchez, 2020). These proponents base their arguments on several rights and freedoms, including the individual's freedom to contract, the right to procreation, the right to reproductive choice, the right to self-determination, the right to privacy, the right to gender justice, the right to body autonomy, and labor rights (Sinanaj, 2022). Furthermore, supporters of surrogacy contracts assert that they cannot be invalidated, as the compensation paid to the surrogate mother for carrying the fetus is considered a payment for the service rendered, not a price for the purchase of a newborn (Cohen, 1984). Therefore, a surrogacy contract does not involve the buying and selling of a baby but rather the provision of a service (Yong & Muñoz, 2012).

In fact, the interests of the intended parents clearly lie in selecting a woman who can take care for herself. It is not in their interest to find a woman they can exploit. This beneficial interest in the welfare and health of the surrogate mother helps protect her against various forms of contractual abuse. However, if any abuse does occur, the surrogate mother should have access to all standard legal remedies for fraud and exploitation. (Epstein, 1995)

5. Key Elements and Characteristics of Surrogacy Contract

Under the freedom of reproduction, the practice of surrogacy is legitimized by the liberty of choice and contract (Sinanaj, 2022). This is why, in several states, the primary regulation of surrogacy is carried out through contractual agreements, as it allows the parties to negotiate terms that best reflect their goals and intentions (Choudhury, 2016).

In fact, surrogacy is a multidimensional socio-legal phenomenon that simultaneously establishes legal relationships between surrogate mothers, babies, intended parents, brokers, and medical organizations (Musayeva, 2022). As mentioned at the beginning of this paper, the surrogacy contract takes effect between the intended parents and the prospective surrogate when a suitable candidate is found (Pillai, 2021). This contract can be a formal written agreement or a simple understanding between the parties and generally outlines the rights and obligations of both the surrogate mother and the intended parents, as well as terms regarding her compensation (if any), the welfare of the baby, such as custody, parentage (Pillai, 2021), or other mandatory clauses depending on the national law applicable to the surrogacy agreement (Vettorel, 2021).

When analyzing the essence of a surrogacy contract, it is important to recognize it as an independent type of contract that requires a specific approach to its regulation (Musayeva, 2022). This contract can be defined as an agreement situated between civil and family law, in which the surrogate mother agrees to become pregnant, give birth to a child, and hand the child over to the intended parents for the purpose of infertility treatment (Musayeva, 2022). A key element in this process, as outlined in the contract, is the involvement of a medical organization, without which the surrogacy contract loses its meaning and cannot be practically executed. Typically, clauses related to medical issues include the nature and scope of the medical procedures to which the surrogate mother agrees to undergo. These include subjects such as the number of IVF cycles, the number of embryos to be implanted in each cycle, and whether delivery will occur via Caesarean section or vaginal birth (Shakargy, 2019).

In addition to all these characteristics, two final features of this type of contract are the consideration clause and the aleatory nature. This means that before signing the contract, the parties must ensure that the contract is not prohibited or contrary to public order and good morals (as many surrogacy contracts have been proven to be) (Kasirer, 1985), and that, despite their intentions and the fulfillment of their obligations at the time of its conclusion, there is no guarantee of the birth of a healthy child (or the birth of any child at all) (Musayeva, 2022).

5.1 *The Parties of the Surrogacy Contract.*

Around the world, as we have already stated, the parties to a surrogacy contract typically include the intended parents, the surrogate mother, and, in some cases, the husband of the surrogate mother (Pillai, 2021). However, in contrast to this standard, the draft law on sexual and reproductive health in Albania defines the parties to the surrogacy contract as the surrogate mother and the woman who is unable to have a child (Draft-law, 2024). This is an unusual choice, as the sperm donor, who will be the biological father of the child, is not included in the agreement regarding the child's handover, which can lead to later complications in determining the child's paternity.

Some authors argue that the surrogacy contract is inspired by and formulated based on a business model: both parties are motivated by personal interests to enter into a legally enforceable agreement, whereby the surrogate mother agrees to bear a child for the intended parents in exchange for a fee (Van Zyl & Walker, 2013). For this to happen, a set of medico-legal conditions ensures that both parties are capable and competent to enter the surrogacy contract (Pirouz & Mehra, 2011). Most of these conditions relate to the surrogate mother, who is typically required to undergo medical examinations and refrain from behaviors that could harm the fetus (Van Zyl & Walker, 2013).

5.2 *The Object of the Contract*

Surrogacy contracts should clearly state their particularities. The surrogacy contract is not an agreement for the sale or repair of goods. (Epstein, 1995) It is a binding legal document that governs the entire process for the parties involved (the intended parents and the surrogate), outlining all necessary terms and conditions. (Williams, 2021) It is a contract for the transfer of parental rights and obligations, specifically tailored to address the procedures involved. (Epstein, 1995)

The primary object of such a contract is to prevent disputes between the intended parents and the surrogate mother during the enforcement of the agreement and in the future. Conflicts may arise over issues such as the payment of medical expenses, compensation, parental rights, party liability in the event of harm or non-fulfillment, and the determination of parentage. (Pillai, 2021) Therefore, it is crucial for the contract to include clauses addressing personal

injury; medical care; legal and psychological counseling; reimbursement of medical expenses; payment of medical, legal, and psychological bills; life insurance coverage; and privacy-related matters, such as the surrogate's consent to medical disclosure, delivery of the baby, or abortion. A fair surrogacy contract will remove ambiguities and provide clear resolutions in cases where disputes arise between the parties concerning any aspect of the agreement (Shakargy, 2019).

5.3 *Rights and Obligations of the Parties*

The legal relationship between the parties after signing the contract is demonstrated through the rights and obligations they must respect and adhere to towards one another (Musayeva, 2022). In principle, the rights and obligations outlined in the surrogacy contract are regulated according to the national law applicable to the case (Struycken, 2012). In the absence of an effective binding law that specifically regulates surrogacy agreements, the only regulatory instrument that defines the terms and conditions of the surrogacy agreement — listing all the rights and obligations of the parties, including monetary compensation, covering expenses, and, most importantly, the transfer of parental rights from the surrogate mother to the intended parent — is the contract itself (Kusum, 2017).

Despite the varying surrogacy regulations in each country, there are several essential elements that every surrogacy contract must have. (Shairwal, 2022) These elements include: financial expenses and medical compensation; responsibilities regarding the surrogate's health and safety; risks and liabilities associated with pregnancy; agreements on sensitive issues such as selective reduction and abortion; clarification of parental responsibility after birth; and other relevant considerations. (Shairwal, 2022)

Every surrogacy contract imposes obligations to supervise the surrogate's behavior during pregnancy. (Raj et al., 2023) The main obligations of the surrogate mother are as follows: 1) consenting to artificial insemination with the sperm of the biological father, 2) carrying the fetus in her womb for 9 months until the baby's birth, and 3) surrendering custody rights over the newborn in favor of the biological father and his wife. (Yong & Muñoz, 2012) Furthermore, the surrogate mother may be required to undergo medical and psychological screenings prior to embryo transfer, and in many cases, she may be prohibited from drinking, using drugs, or smoking for the duration of the pregnancy (Raj et al., 2023).

In return, the obligations of the intended parents are: 1) to cover all medical and legal expenses arising from the pregnancy, 2) to assume parenthood of the newborn, and 3) generally, to provide the agreed compensation to the surrogate mother (Yong & Muñoz, 2012). In some countries, the surrogacy agreement may also stipulate that the intended parents are responsible for covering all the surrogate's medical and living expenses, including the cost of prenatal care (Raj et al., 2023).

6. Conclusion

As our society evolves and creates new opportunities for parenthood, it is crucial that the governing laws keep pace, ensuring a balance between the interests and beliefs of various groups involved (Quilan, 2013). Over the years, the debate surrounding surrogacy has highlighted the tension between the freedom of contract and public policies focused on human flourishing. (Allen, 2018) Today, more than ever, individuals have the freedom to enter contracts across borders to achieve their personal goals and dreams, including the decision to pursue parenthood through surrogacy. In the absence of comprehensive legislation or clear public policies, a potential surrogate has the right to enter a contract to carry a child, even if it means relinquishing the companionship, care, and custody of that child (Dolgin, 1990).

However, this situation has sparked a range of concerns, including critiques of surrogacy contracts that highlight the significant imbalance in bargaining power between the parties, as well as the disparities in age, intelligence, education, and economic status (Margalit, 2013). Further criticisms include issues of fraud, the exploitation of women and children (Vettorel, 2021), and the ongoing legal dilemmas surrounding the enforceability of such contracts. As these challenges persist, it appears that the most effective solution may be to allow the judiciary and legislators to evaluate surrogacy cases on an individual basis, considering the unique circumstances of each case/country (Margalit, 2013). This approach ensures that each situation is assessed with the necessary sensitivity, providing a framework where fairness and justice can be maintained.

In Albania, the only legislation currently regulating assisted reproductive technologies dates back 20 years. The conceptual and procedural gaps in this law make it more urgent than ever to update it to reflect the realities of modern society. This is particularly important because, under its broad interpretation, infertility clinics offering surrogacy services operate freely within Albania's economic context, without any guarantees or standards. Neither the judicial nor the executive system has prohibited their activity or further regulated the economic rules under which they must operate.

As part of an effort to implement the 2017-2021 Sexual and Reproductive Health Action Plan, a draft law on sexual and reproductive health was introduced for public consultation for the first time in 2024. This has sparked significant debate within Albanian public opinion, including among important political and religious actors. For the first time, the draft law includes provisions related to surrogacy agreements. However, it does not clarify their legal status, the conditions for contract formation, or the basic rights and obligations of the parties involved, leaving many uncertainties and gaps that could create challenges if implemented in practice.

In the light of these gaps, it is crucial for the Albanian government to address the regulatory deficiencies and establish a comprehensive legal framework that ensures ethical practices, protects the rights of all parties involved, and aligns with international standards in reproductive technology and surrogacy.

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