

## DISCUSSION

# CONSTITUTIONAL CONSIDERATIONS OF SURROGACY IN COLOMBIA: AN ANALYSIS OF ITS ELEMENTS AND POSSIBLE ALTERNATIVES

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**Abstract:** *This paper focuses on the constitutional perspective of surrogacy in Colombia and identifies four key elements relevant to its analysis. It analyzes the autonomy of will as the basis of the surrogacy agreement; incorporation of the international principle of the child's best interests in surrogacy; guarantee of the fundamental rights of the participants in the surrogacy agreement, especially sexual and reproductive rights; and impact of surrogacy in the constitutional idea of family. Finally, the paper considers the situations wherein the constitutional elements may come into dispute. The potential legal regulation of surrogate motherhood represents a challenge for the legal system, as it involves various constitutional values, principles, and rights that may contradict each other in the practical development of the concept. This paper reveals what these values, principles, and rights entail and how they are defined within the framework of surrogacy, thereby contributing to the debate on the optimal legal framework of the full validity of these values, principles, and rights.*

**Keywords:** *best interests of the child, families, fundamental rights, personal autonomy, surrogate motherhood*

## INTRODUCTION<sup>1</sup>

Surrogate motherhood poses challenges in various fields of law. This paper analytically presents the concept elements from a constitutional perspective, focusing on Colombia, without giving final answers to its potential problems.

Based on the constitutional review of surrogate motherhood, elements are identified that involve the exercise of individual freedoms and the limits of the State in its regulation; incorporate constitutional values related to the person, children or the family; or materialize fundamental rights.

The constitutional elements identified are as follows:

- The constitutional limits of the autonomy of will.
- The incorporation of the principle of the “best interests of the child.”
- The guarantee of the sexual and reproductive rights of those who request surrogacy, framed in the principle of solidarity, and of the rights of the gestational carrier and the child resulting from the gestation.
- The implications on the constitutional concept of family.

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- The protection of vulnerable subjects, such as women and children.

Each element is analyzed from the doctrine and case-law approach, therefore, a review of jurisprudential material from the Constitutional Court of Colombia is made, in order to respond to the objective proposed by this article.

Although some elements of the doctrine of other countries are identified, it is just intended to illuminate those areas that still remain impenetrable to the analysis of surrogacy in Colombia, rather than to establish a comparative law study.

The possible legal regulation of surrogate motherhood represents a challenge for the legal system, as it involves various values, principles, and constitutional rights that may come into conflict in the practical development of the concept. This paper highlights what these values, principles, and rights entail and how they are defined within the framework of surrogacy, thereby contributing to the debate on the best legal framework of the full validity of these values, principles, and rights.

## I. SURROGACY AND THE LAW

Legally, surrogacy can be understood as an agreement of wills between a person or a couple (applicants) and a person capable of gestation (gestational carrier).<sup>2</sup> The agreement entails that the gestational carrier carries out the gestation of a fertilized egg, usually with the genetic information of one or both applicants. Once the birth has occurred, the gestational carrier delivers the newborn to the applicants for them to exercise parental responsibilities, with the gestational carrier waiving any parental rights over the child. As per practice, the agreement may be onerous or free of charge and involve the covering of medical and fertilization expenses by the applicants.<sup>3</sup>

The concept raises many challenges for the law: regarding filiation, civil and family law, the law of contracts and obligations, on the prerogatives of the contracting parties and the resolution of disputes. The concept also raises challenges regarding administrative family law, the fulfillment of registry duties or the protection of children, on international human rights law and law and gender studies, on the framework of global unequal relations between countries, or criminal law because it is punishable in some countries.

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<sup>2</sup> Surrogacy, according to Cabrera-Caro and Medina Gamero and Regalado Chamorro, is an assisted reproduction technique, but also a legal arrangement, sometimes defined in the law and other times unnamed. In the Spanish legal system, on assisted reproduction techniques, considers surrogacy or “gestation by substitution”, as a contract that is “null and void,” “by which the gestation is agreed, with or without price, to be in charge of a woman who waives the maternal filiation in favor of the contracting party or a third party” (law 14 of 2006). In the current legislative attempt made in Colombia to incorporate a regulation of the concept to the legal system (bill 345 of 2023), it was defined as follows: “Article 3°. Definitions... 6. Uterine surrogacy for gestation: Medically assisted human reproduction procedure by means of which a person, called the gestational carrier, agrees with another person or a couple, called the commissioning party, to gestate an embryo so that the person born will have legal ties of filiation with the commissioning party”. CABRERA-CARO, L. El consentimiento libre: la trampa de la explotación femenina en la maternidad subrogada. *Revista Chilena de Derecho*. 2019, Vol. 46, No. 2, pp. 527–553; MEDINA GAMERO, A. R., REGALADO CHAMORRO, M. E. La maternidad subrogada: ¿una controversia ética? *Atención Primaria Práctica*. 2021, Vol. 3, No. 3, p. 1.

<sup>3</sup> TEMITOPE, A., SÁRVÁRY, A. G. A brief comprehensive overview of surrogacy. *Acta Medicinæ Et Sociologica*. 2023, Vol. 14, No. 36, pp. 178–196; MARTÍNEZ-MUÑOZ, K. X., RODRÍGUEZ-YONG, C. A. La maternidad subrogada: tendencias de regulación en Latinoamérica. *Revista Jurídicas*. 2021, Vol. 18, No. 1, pp. 74–90.

The global regulation of surrogacy is not homogeneous<sup>4</sup> and can be found as follows:

- Prohibition for public order reasons linked to filiation or the exclusion of certain commerce-related matters, as in Spain,<sup>5</sup> Austria, Italy, Germany, and some US states.<sup>6</sup>
- Strict regulation, to give legal certainty to the parties involved, including the newborn child. Admitted only if gratuitous, invoking principles of solidarity, to help people overcome fertility problems, as in the United Kingdom or Canada.<sup>7</sup>
- Explicit authorization, including that without charitable purposes, as in Russia or Greece, or tacit, in the absence of regulation or prohibition, with judges dictating the rules applicable in the event of conflict over the filiation or protection of the child, with the implicit legal uncertainty.<sup>8</sup> In Latin America, Martínez-Muñoz and Rodríguez-Yong characterized the legal situation of surrogacy based on the following elements:
  - Little regulation and failed attempts to regulate in several states.
  - Intervention of judges to arbitrate conflicts arising from the agreement.
  - Diversity in approaches to regulation attempts according to world trends.

Regulatory attempts incorporating broad requirements to enter into the agreement.

Attempts at regulation focused on rules of filiation, custody, or duties and rights of the applicants with respect to the child, as well as on preventing exploitation of the gestational carrier or the child.

In Colombia, surrogacy is not regulated. Therefore, the concept would be implicitly authorized, without any legal certainty for the parties involved and subject to the authorities' discretion in the case of a conflict. However, there have been legislative attempts at regulation since 2000 that have not materialized yet.<sup>9</sup> Some tangential judicial orders have been identified that outline some principles applicable to the concept.

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<sup>4</sup> GARAYOVÁ, L. Surrogate Motherhood – the European Legal Landscape. *Law, Identity and Values*. 2022, Vol. 2, No. 1, pp. 65–83; MOLINA-RICAURTE, C. J., TORRES BUELVAS, J. E. Male Same-sex Couples and Surrogate Motherhood: At a Crossroads. *Ius et Praxis*. 2022, Vol. 28, No. 3, pp. 155–170.

<sup>5</sup> In the case of Spain, law 14 of 2006 states that the gestational contract for surrogacy is null and void.

<sup>6</sup> EMALDI CIRIÓN, A. Ethical and juridical implications relating to surrogate pregnancy. An overview from a European perspective. *Bioethics Act*. 2017, Vol. 23, No. 2, pp. 227–235; LÁZARO PALAU, C. M. The concept of person as a key element of European identity: the case of surrogate motherhood. *European Notebooks of Deusto*. 2019, No. 2, pp. 189–201; VALERO HEREDIA, A. Surrogacy: a matter of fundamental rights. *Theory and Constitutional Reality*. 2019, No. 43, pp. 421–440.

<sup>7</sup> VALERO HEREDIA, A. *Surrogacy: a matter of fundamental rights*. Madrid: UNED-Universidad Nacional de Educación a Distancia, 2019.

<sup>8</sup> VALERO HEREDIA, A. *Surrogacy: a matter of fundamental rights*.

<sup>9</sup> The latest attempt at legislative regulation is a bill, No. 345, filed by the National Government on February 24, in compliance with the Constitutional Court's exhortation in judgment T-275 of 2022, which aims to regulate non-profit uterine surrogacy with compensation, in guarantee of the rights to freedom of personality development and sexual and reproductive rights as an integral part of the fundamental right to health, in accordance with the principles of human dignity, reproductive autonomy and equality and the best interest of the minor, and prohibits the practice of commercial, cross-border or transnational uterine surrogacy and intermediation for commercial purposes. Simultaneously, bill No. 334, filed by H. R. Jorge Alejandro Ocampo Giraldo, on February 1, 2023, which aims to allow gestational surrogacy for altruistic purposes with compensation, ensuring the protection of the rights to human dignity, autonomy, equality, health, protection of women and the unborn child and prohibiting the practice of surrogacy for profit.

Colombian Constitutional Court Judgment T-968 of 2009 granted a protection action (*tutela*)<sup>10</sup> in which the apparent surrogate mother requested the revocation of the suspension of custody of two children born in the framework of an alleged economic agreement with a third party, the petitioning father. A family judge had authorized the father, a US resident, to leave the country with the children, arguing that the surrogate mother had breached the agreement by refusing to waive custody.

The Court found that the surrogate mother was also the genetic mother of the children, and thus, surrogacy was not constituted. However, a dispute between father and mother for the custody of the children occurred. Its argument was therefore directed to the definition of parental rights and obligations and the application of the principle of the child's best interests.

However, the Review Chamber of the Constitutional Court of Colombia made the following considerations regarding surrogacy:

- It is not constituted when the gestational carrier provides the child's genetic material and she waives her filiation rights for money, since this would constitute the crime of human trafficking.
- It is not regulated in Colombian law, but elements such as the constitutional value of assisted reproduction for the conformation of the family are recognized.
- It incorporates legal theory approaches such as the onerous or gratuitous types, the protection of the child's interests, the validity of acts of disposition of one's own body or the mechanisms to resolve disagreements between the parties involved.

Colombian Constitutional Court Judgment SU-696 of 2015 protected the rights of two children, gestated through surrogacy in California (USA), to be registered in Colombia as children of the petitioning parents, a same-sex couple.

The Court did not refer to the figure nor did it recognize it legally, but it analyzed constitutional issues related to its effects: the protection of the rights of children to legal personality and nationality; the protection of the integrity of the different forms of a family; and the validity of the recognition of filiation by foreign authorities.

Finally, the Decision of the Civil Cassation Chamber of the Supreme Court of Justice of Colombia SC6359 of 2017 stated that in cases of assisted reproduction, filiation depends on the expression of will by whoever undertakes parental obligations about the procreated child and not on the biological relationship between them and whoever contributes their genetic material in the procedure.

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<sup>10</sup> *Tutela* is the name given in the Colombian constitutional legal system to the effective judicial remedy for the protection of fundamental rights, known in other Latin American countries as *Amparo*. Decisions made within the framework of *tutela* proceedings have an *inter partes* effect. However, when the decisions are made by the Review Chambers of the Constitutional Court (T Judgments), in exercise of its discretionary jurisdiction to review all *tutela* actions in the country, it is understood that the decisions are the result of the interpretation of the constitutional order by the highest constitutional body, so that, under certain circumstances, they could be cited as judicial precedent to safeguard the fundamental right to equality. In any case, the decision thus made is the result of a precedent principle of the opinion of the Court on a specific case. However, in the case of decisions made by the Plenary Chamber of the Constitutional Court to unify its jurisprudence (SU Judgments), these decisions entail the establishment of the Court's jurisprudence on a specific aspect, which is binding on the authorities and individuals.

This decision would legitimize the parental bond between the petitioning parents and the child born through surrogacy.<sup>11</sup> At the same time, it would not resolve the potential conflict with the parental presumption between the gestational mother and the child born from her womb in civil law.

In Colombia, surrogacy is not regulated and is carried out with legal uncertainty. However, some judicial decisions suggest regulation principles such as the guarantee of fundamental rights of children born through the agreement, constitutionality of families formed through these means, and emergence of a parental relationship for the applicants.

## II. CONSTITUTIONAL ELEMENTS OF SURROGACY: COLOMBIA

The Colombian Constitution, like other constitutions dating from the second half of the twentieth century to the present, is characterized by embracing various fundamental values that serve as the basis of contemporary societies. These values are positivized in rules that, according to the current classification of the general theory of law, correspond to *principles*.<sup>12</sup> These principles are characterized by a high degree of generality and abstraction.<sup>13</sup>

In addition to their indeterminacy, no predetermined hierarchical order is established among them, which makes it difficult to know, in advance, which principle prevails and which must yield in case of conflict. Therefore, it is almost always up to the constitutional judge to resolve these types of conflicts that arise between principles. But, then, the judge must abandon the level of generality and abstraction characterizing the principles, turn, rather, to the singular conditions of the specific case to reach the maximum level of concreteness of the principles, and then make the decision on which of the principles in dispute to weigh over the other.

With regard to surrogate motherhood, several constitutional principles are involved, which enshrine autonomy and the best interests of the minor and sexual and reproductive rights. As observed, they have a great generality and abstraction, for what has been the constitutional judge who has had to ponder one principle or another, according to the case, to settle eventual conflicts that have arisen between them as well as establish limits or rules of application for future cases.<sup>14</sup>

### II.1 Constitutional limits to the autonomy of will in the agreement

One of the main legal features of the definition of surrogacy<sup>15</sup> is that it is materialized through an agreement between the gestational carrier and the applicants to cooperate for the achievement of valid goals, such as procreation or family formation.

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<sup>11</sup> MARTÍNEZ-MUÑOZ, K. X., RODRÍGUEZ-YONG, C.A. La maternidad subrogada: tendencias de regulación en Latinoamérica. *Revista del Centro de Investigaciones Jurídicas, Públicas y Sociales*. 2021, Vol. 18, No. 1.

<sup>12</sup> DWORKIN, R. *Los derechos en serio*. Barcelona: Ariel, 1989, pp. 72–80.

<sup>13</sup> AGUILÓ-REGLA, J. *Teoría general de las fuentes del Derecho (y el orden jurídico)*. Barcelona: Ariel, 2012, pp. 166–175.

<sup>14</sup> ATIENZA, M. *El derecho como argumentación*. Barcelona: Ariel, 2006, pp.168–170.

<sup>15</sup> See footnote 3.

Constitutionally, the autonomy of will raises a debate around the freedom to create contractual relationships<sup>16</sup> and the power of the State to prohibit, regulate, limit, or allow such freedom. Concerning surrogacy, it is a matter of defining the limits to the autonomy of the intervening parties and the scope of state regulation concerning that autonomy.

The Colombian Constitutional Court has adopted a liberal concept of autonomy, such as the power to self-regulate one's own interests and the duty of the State to enforce agreements,<sup>17</sup> as well as its understanding within the framework of the limits of the social rule of law.<sup>18</sup>

The Colombian Constitution recognizes the exercise of autonomy as a fundamental right, derived from the principle of dignity.<sup>19</sup> Through autonomy, people develop their life projects, satisfy their needs, and materialize rights such as the free development of personality or freedom of enterprise and private initiative within the framework of the laws of the market.<sup>20</sup> The recognition of autonomy occurs within the framework of the requirements of the principle of solidarity and material justice, which justify the possibility of state intervention with autonomy.<sup>21</sup> This is because autonomy is not absolute but limited, like any other fundamental right.

The Colombian constitutional system defines the limits of autonomy: human dignity and other fundamental rights;<sup>22</sup> prevalence of the general interest;<sup>23</sup> social role of property;<sup>24</sup> common good and the social role of companies;<sup>25</sup> and power of the State to intervene in the economy.<sup>26</sup>

The ultimate manifestation of autonomy are contracts; thus, private law definitions must be interpreted according to the aforementioned limits. Requirements such as lawful purpose or free consent must be applied in light of constitutional restrictions.

The constitutional treatment of free will in the context of surrogacy would entail at least two discussions in relation to the aforementioned elements of contracts. The first discussion would focus on surrogacy agreements that do not have a purpose under the Political Constitution of Colombia. Such agreements could offend human dignity, fundamental rights, or another constitutional value capable of restricting autonomy. The second discussion would focus on the effective exercise of freedom by the gestational carrier to consent to the surrogacy agreement. Thus, the context in which it occurs is constitutionally significant.

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<sup>16</sup> Article 1602 of the Colombian Civil Code expresses the autonomy of the will in the Colombian legal system as follows: 'Contracts are law for the parties. Every legally executed contract is the law for the contracting parties, and cannot be invalidated except by their mutual consent or by legal grounds.'

<sup>17</sup> Constitutional Court of Colombia, Judgment C-934 of 2013, Nelson Pinilla, in 11. 12. 2013.

<sup>18</sup> Constitutional Court of Colombia, Judgment C-186 de 2011, Humberto Antonio Sierra Porto, in 16. 3. 2011.

<sup>19</sup> Constitutional Court of Colombia, Judgment C-738 de 2002, Marco Gerardo Monroy Cabra, in 11. 9. 2002; Constitutional Court of Colombia, Judgment T-668 de 2003, Marco Gerardo Monroy Cabra, in 6. 8. 2003; Constitutional Court of Colombia, Judgment C-186 de 2011; Constitutional Court of Colombia, Judgment T-407A of 2018, Diana Fajardo Rivera, in 27. 9. 2018.

<sup>20</sup> See articles 16 and 333 of the Political Constitution of Colombia.

<sup>21</sup> Constitutional Court of Colombia, Judgment SU-157 de 1999, Alejandro Martínez Caballero, in 10. 3. 1999.

<sup>22</sup> Articles 1 and 16 of the Political Constitution of Colombia.

<sup>23</sup> Article 1 of the Political Constitution of Colombia.

<sup>24</sup> Article 58 of the Political Constitution of Colombia.

<sup>25</sup> Article 333 of the Political Constitution of Colombia.

<sup>26</sup> Article 334 of the Political Constitution of Colombia.

According to Martínez-Muñoz and Rodríguez-Yong, those who object to surrogacy do so because (i) it is a contract that goes against public order since the reproductive capacity is indisposable, non-transferable, and very personal; (ii) it is a mechanism for women exploitation, especially those who lack education and economic resources; (iii) it goes against the dignity of the pregnant person and the child; (iv) it is contrary to morality; (v) it leads to considering the child as a commercial item; (vi) it turns gestation into an economically profitable activity; (vii) it implies the objectification of the child and the woman; and (viii) it involves significant psychological and emotional difficulties for the pregnant woman.

Those who justify fully banning surrogacy find sufficient ethical concerns to conclude that it has an illicit purpose because it is immoral since the procreative function is sold;<sup>27</sup> it violates the dignity of the pregnant person and the child by objectifying them; or because it is an exploitation of the pregnant persons and/or the child, generating psychological and emotional consequences.

Both positions become relevant at this point, in relation to the specific situation of the pregnant woman.<sup>28</sup> One sees surrogacy as a new form of slavery, due to the usually precarious conditions of surrogate mothers, and because it would constitute a new contract for the use of the female body by the applicants, in this case, for reproduction purposes. On the other hand, as a way of exercising the procreative freedom of the woman, who autonomously and consciously assumes the consequences of her decision.

The constitutional authorization of different acts of freedom of disposition of one's own body, related to surgical interventions, blood transfusions, organ donation, body adornment, use of personal dosage of drugs, fertilization and assisted reproduction techniques, family planning or sterilization methods, euthanasia, abortion, sex reassignment interventions, or practice of extreme sports, must also be considered.

Furthermore, some studies have shown that, usually, the agreement is carried out under conditions of negotiating weakness of the surrogate mother.<sup>29</sup> Muñoz-Gómez demon-

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<sup>27</sup> MEDINA GAMERO, A. R., REGALADO CHAMORRO, M. E. *La maternidad subrogada: ¿una controversia ética?*

<sup>28</sup> MUÑOZ-GÓMEZ, D. S. Barreras comunicacionales en la práctica de la maternidad subrogada. Una crisis en tiempos de pandemia. *Revista Bioética y Derecho*. 2021, No. 52, pp. 61–83.

<sup>29</sup> The Centre for Social Research of India's study on surrogacy is paradigmatic, as it showed that, in the case of India, surrogate women were usually poor and had little say in the making of the arrangement, as it was mediated by fertility agencies, and also because applicants came from well-off backgrounds. Studies by the Indian Center for Social Research on surrogacy, based on surveys and interviews with surrogate women and their families, applicants and surrogacy agencies in some regions of India, conducted in 2012, showed that surrogates are usually women from poor households, with a low level of education and low-paying jobs, which makes them financially vulnerable, leading to the conclusion that the reason for lending their wombs for gestation is purely financial. Similarly, they found that the capacity of surrogates to participate in the agreement is marginal and dominated by the agencies and professionals in charge of processing the surrogacy. On the other hand, the studies also showed that applicants come from well-off backgrounds, are well-educated and have high-paying jobs. It is important to note that, according to Jan, India currently has more protective regulations in place. Precisely, Act 47 of 2021 protects women's reproductive rights. This Act aims to prohibit commercial surrogacy and promote altruistic surrogacy without payment, except for the surrogate mother's medical expenses and insurance coverage. Centre for Social Research. *Surrogate Motherhood: Surrogate Motherhood Ethical or Commercial*. In: *National Commission for Women* [online]. [2023-09-13]. Available at: <<http://ncw.nic.in/content/surrogate-motherhood-ethical-or-commercial>>; JAN, A. Surrogacy: Legal Aspects & Flaws. *BioGecko*. 2023, Vol. 12, No. 2, pp. 2192–2196.

strated that the practice of surrogacy involves communicational barriers against the surrogate mother, such as her economic, social, and educational condition. According to this author, “surrogate mothers refer to low socioeconomic levels and economic need as the reason that leads them to this practice, hence the indications that show the problematization of this reality as it can become a situation of slavery”.<sup>30</sup> Other barriers originate in the intermediation of fertility agencies, which avoid contact between those involved, to reduce the probability of conflict, even between the pregnant person and the newborn child, to avoid emotional attachment.<sup>31</sup>

From a critical perspective, Cabrera Caro considered that the alleged consent of the gestational carrier, as legitimizing the agreement, does not avoid ethical dilemmas, but, on the contrary, validates the exploitation of the female body that underlies it. Their argument is based on specific illiberal contractual provisions, such as those that make it impossible for the pregnant woman to revoke her consent.

It is recalled that in cases of serious inequality between the contractual parties, the Political Constitution of Colombia authorizes state intervention to balance the position of the weaker party.<sup>32</sup>

## II.2 Principle of the “best interests of the child” in surrogacy

Surrogacy involves the fundamental rights of the child born in the framework of the agreement. Constitutionally, the international principle of the “best interests of the child” must be included.<sup>33</sup>

In practice, the agreement is reduced to the definition of the rights and obligations of the parties in relation to the child born in the framework of the agreed gestation. This explains why filiation is one of the recurring points in judicial decisions at the international<sup>34</sup> level or in national regulations or their attempts.<sup>35</sup>

The Colombian legal system grants constitutional hierarchy to the principle,<sup>36</sup> assigning it the status of “central axis of constitutional analysis”<sup>37</sup> and determining element in the

<sup>30</sup> MUÑOZ-GÓMEZ, D. S. *Barreras comunicacionales en la práctica de la maternidad subrogada. Una crisis en tiempos de pandemia*. p. 66.

<sup>31</sup> Muñoz-Gómez identified external and internal obstacles. External communicational obstacles are associated with differences in sex, race, socioeconomic, geographic and cultural context and place pregnant women in a condition of inferiority in relation to applicants, due to differences in language, communication skills and negotiation skills. Internal barriers are those imposed by fertility agencies to avoid any emotional ties as they may generate conflicts. MUÑOZ-GÓMEZ, D. S. *Barreras comunicacionales en la práctica de la maternidad subrogada. Una crisis en tiempos de pandemia*.

<sup>32</sup> Colombian Constitutional Court, Judgment C-248 de 2020.

<sup>33</sup> Article 3.1 of the United Nations “Convention on the Rights of the Child” of November 20, 1989, states that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

<sup>34</sup> LÁZARO PALAU, C. M. *The concept of person as a key element of European identity: the case of surrogate motherhood*.

<sup>35</sup> MARTÍNEZ-MUÑOZ, K. X., RODRÍGUEZ-YONG, C. A. *La maternidad subrogada: tendencias de regulación en Latinoamérica*.

<sup>36</sup> The principle is known in the Colombian legal system as the “best interests of the child.” According to Court’s Judgment C-250 of 2019, the principle is expressly manifested in Article 44 of the Political Constitution of Colombia, which states that “the rights of children prevail over the rights of others.”

<sup>37</sup> Colombian Constitutional Court, Judgment C-193 de 2020, Gloria Stella Ortiz Delgado, in 24. 6. 2020.



resolution of legal and social conflicts regarding the protection of the fundamental rights of children.

Based on international obligations on the protection of children, in Colombia, it must be applied according to the following rules:

- Application according to the specific circumstances of each case.<sup>38</sup>
- Broad level of “discretion” of the authorities in the application of the principle.
- Discretion based on evidence and professional concepts, aimed at the child’s comprehensive development and without unreasonable or disproportionate affectation of his or her rights.
- Guarantee of a suitable family environment that provides the protection and physical and emotional care necessary for the child’s development.
- No excessive intervention in filial relations.

In Colombia, judgments related to surrogacy have been based on compliance with the principle in situations of parental custody disputes, such as when the gestational carrier has refused to recognize the rights of the applicants<sup>39</sup> or when the authorities have denied the civil registration requested by the applicants concerning a child gestated in another country.<sup>40</sup>

A principle similar to that applicable to cases of adoption disputes could be applied to surrogacy, that is to say, tending to favor the situation of the child whose original family does not provide the necessary conditions for his or her physical, psychological, and emotional development, placing him or her in a family nucleus that does.<sup>41</sup>

According to Garibo Peyró, the principle of the best interests of the minor applies to disputes regarding, among others, the rights of filiation, identity, legal personality, or nationality of the child or regarding economic and social benefits and maternity or paternity leave in favor of applicants to care for the child.

### II.3 Sexual and reproductive rights of the applicants and rights of other intervening parties

By incorporating assisted human reproduction techniques, surrogacy can be a means to satisfy the constitutional rights of the applicants to reproduction. In addition, since it involves aspects closely related to the dignity of the participants, guaranteeing their fundamental rights acquires constitutional relevance. However, a difference should be made between a right to reproduction and a right to maternity or paternity, as indicated by Francesca Puigpelat Martí. However, she only referred to the case of surrogate motherhood in Spain,<sup>42</sup> which can be applied to the Colombian case.

The Colombian constitutional system recognizes sexual and reproductive rights as fundamental rights that can be effectively guaranteed through the adoption of state measures aimed at their realization.<sup>43</sup>

<sup>38</sup> Colombian Constitutional Court, Judgment T-033 de 2020, José Fernando Reyes Cuartas, in 30. 1. 2020.

<sup>39</sup> Colombian Constitutional Court, Judgment T-968 de 2009, María Victoria Calle Correa, in 18. 12. 2009.

<sup>40</sup> Colombian Constitutional Court, Judgment SU-695 de 2015, Jorge Ignacio Pretelt Chaljub, in 12. 11. 2015.

<sup>41</sup> Corte Constitucional de Colombia, Judgment C-104 de 2016, Luis Guillermo Guerrero Pérez, in 2. 3. 2016.

<sup>42</sup> PUIGPELAT MARTÍ, F. Bioethics, Constitution and assisted reproduction techniques. In: María Casado (ed.). *Bioética, Derecho y Sociedad*. Madrid: Trotta, 2015, pp. 31–46.

<sup>43</sup> Constitutional Court of Colombia, Judgment SU-096 de 2018, José Fernando Reyes Cuartas, in 17. 10. 2018.

These rights manifest the principle of equality and gender equity,<sup>44</sup> personal intimacy,<sup>45</sup> the free development of personality,<sup>46</sup> freedom of consciousness,<sup>47</sup> the right to social security,<sup>48</sup> the right to health,<sup>49</sup> and the right to education.<sup>50</sup> Colombian Constitutional Court has considered that these rights give rise to other rights, such as “reproductive self-determination” and “access to reproductive health services”.<sup>51</sup>

Law 1953 of 2019 established guidelines for a policy of access with public resources to infertility treatments through assisted reproductive techniques or therapies, and these tools are incorporated into the practice of surrogacy. However, through regulations, the Colombian Ministry of Health excluded some of these techniques.<sup>52</sup>

Should surrogacy be understood as a tool to ensure the “reproductive self-determination”<sup>53</sup> of applicants? Is there a state obligation to provide adequate access and development of surrogacy, for example, through state assisted fertilization services to the gestational carrier?

The Colombian Constitutional Court unified its case-law in relation to the necessary assumptions for the state obligation to provide assisted reproduction services,<sup>54</sup> which could well apply to surrogacy:

- Treatments should protect sexual and reproductive rights.
- Access to such treatments should be progressively guaranteed to those who cannot benefit from them.

The following conditions for access should be met:

- i) circumstances that seriously threaten the rights of individuals and couples with infertility;
- ii) lack of economic resources of applicants to pay for the services; and
- iii) exhaustion of other available treatments to achieve pregnancy.

Molina Ricaurte suggested extending sexual and reproductive rights to homosexual people and same-sex couples to guarantee their access to assisted human reproduction techniques and thus allow them to form a family.

<sup>44</sup> Article 1 of the Constitutional Court of Colombia.

<sup>45</sup> Article 15 of the Constitutional Court of Colombia.

<sup>46</sup> Article 16 of the Constitutional Court of Colombia.

<sup>47</sup> Article 18 of the Constitutional Court of Colombia.

<sup>48</sup> Article 48 of the Constitutional Court of Colombia.

<sup>49</sup> Article 49 of the Constitutional Court of Colombia.

<sup>50</sup> Article 67 of the Constitutional Court of Colombia.

<sup>51</sup> Constitutional Court of Colombia, Judgment T-274 de 2015, Jorge Iván Palacio, in 12. 5. 2015.

<sup>52</sup> Possibly, contrary to Law 1953 of 2019, the Colombian Ministry of Health and Social Protection, through Resolution 2273 of 2021 excluded in vitro fertilization (IVF) with intracytoplasmic sperm injection (ICSI), to treat unspecified female infertility, as well as artificial insemination, to treat the same cause or male infertility, from the list of techniques and procedures financed with resources of the health system.

<sup>53</sup> As per Judgment T-732 of 2009 of the Colombian Constitutional Court, “Reproductive self-determination recognizes, respects and guarantees the right of individuals to decide freely whether or not, when and how often to procreate. This is enshrined in Article 42 of the Constitution which sets forth that “couples have the right to decide freely and responsibly the number of their children” and in Article 16, ordinal e) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which recognizes the right of women and men to decide freely on the number of their children and the interval between births.” Also see Judgment T-274 of 2015 of the Constitutional Court, already cited.

<sup>54</sup> Constitutional Court of Colombia, Judgment SU-074 of 2020, Gloria Stella Ortiz Delgado, on 2. 2. 2020.

Surrogacy as a guarantee of people's rights implies justifying it with the principle of social solidarity,<sup>55</sup> in which different players, including the State, cooperate to ensure the well-being of inhabitants. The Constitutional Court defines solidarity as the duty of people to help each other to make their rights effective.<sup>56</sup>

Constitutionally, surrogacy requires the incorporation of the fundamental rights of the other intervening parties.<sup>57</sup>

Thus, the Colombian Constitution enshrines the principle of the general interest of the child. In addition, it establishes that pregnant women enjoy special constitutional protection,<sup>58</sup> so the State shall guarantee them care and assistance during pregnancy and after childbirth, including the possibility of receiving food subsidies, regardless of whether the surrogacy agreement has established some financial aid in favor of the surrogate, to cover medical and living expenses during pregnancy.

Finally, it must be stated that in Colombia, there is still no distinction between the right to reproduction and the right to maternity or paternity, which ends up having severe ethical implications, since, while the former, in the words of Puigpelat Martí, can serve as a basis for reproductive cloning, the latter cannot. Precisely, reproductive cloning ceases to be necessary to satisfy the right to maternity or paternity if more assisted reproduction techniques are available.<sup>59</sup> This can also be verified in the legal systems of other countries of the region, and a situation very similar to that of Colombia<sup>60</sup> occurs, so it is necessary to delve more deeply into the issue of assisted reproductive techniques, including surrogacy.

#### II.4 Constitutional treatment of the institution of the family

Surrogacy adds to other realities that give rise to constitutional discussions on the concept of family recognized and protected by legal systems.

The Colombian Constitution establishes a comprehensive legal system regarding the family and its protection by the State, which is consistent with international law on protecting children's rights and the fight against discrimination against women. Article 42 defines the family as the nucleus of society, formed by natural or legal ties and established the protection of the integrity of the family, the autonomy of individuals to form and manage it, respect for dignity, honor and family privacy, and the exclusion of any form of discrimination or violence within the family. The Colombian Constitutional Court considers

<sup>55</sup> Article 1 of the Political Constitution states that the social rule of law is founded "on respect for human dignity, work and solidarity of persons."

<sup>56</sup> Constitutional Court of Colombia, Judgment C-767 of 2014, Jorge Ignacio Pretel Chaljub, at 16. 10. 2014.

<sup>57</sup> According to Valero Heredia, surrogacy incorporates fundamental rights such as the right to life, physical and moral integrity, autonomy, dignity and free development of the personality of the surrogate mother or the interest of the minor. VALERO HEREDIA, A. *Surrogacy: a matter of fundamental rights*.

<sup>58</sup> Article 43 of the Political Constitution of Colombia sets forth as follows: "Women and men have equal rights and opportunities. Women may not be subject to any kind of discrimination. *During pregnancy and after childbirth, they shall enjoy special assistance and protection from the State, and shall receive a food subsidy from the State if they are then unemployed or unprotected.* The State shall give special support to women who are heads of households" (emphasis in italics).

<sup>59</sup> PUIGPELAT MARTÍ, F. Bioethics, Constitution and assisted reproduction techniques.

<sup>60</sup> TORRES, G., SHAPIRO, A., MACKEY, T. K. A review of surrogate motherhood regulation in south American countries: pointing to a need for an international legal framework. *BMC Pregnancy and Childbirth*. 2019, Vol. 19, No. 46, pp. 1–12.

that family is neither rigid nor static but incorporates the principles of pluralism and diversity,<sup>61</sup> as well as the dynamic nature of social relations.<sup>62</sup> Therefore, non-traditional family ties are protected, arising from cohabitation and bonds of affective, emotional, physical, psychological, or economic protection.

The Court also recognizes the state's duty to preserve any form of family and the exceptional nature of intrusive state measures involving family separation.<sup>63</sup>

In the case of surrogacy, it should be mentioned that its impact on the concept of family is related to the rules of filiation, which is at the heart of the surrogacy debate in most European<sup>64</sup> and Latin American countries.<sup>65</sup>

Judgment SC6359 of 2017, entered by the Colombian Supreme Court of Justice, recognized filial ties based on the declaration of will, while Judgment SU-696 of 2015, entered by the Colombian Constitutional Court, guaranteed the conformation of the family, through filiation relationships created from surrogacy in other countries, based on the fundamental rights of minors and the protection of diverse family forms.

### III. DISCUSSION: CONSTITUTIONAL ELEMENTS OF SURROGACY IN DISPUTE

From a constitutional perspective, surrogacy transcends ethical dilemmas and involves legal principles related to the elements of contracts, best interests of the child, and the fundamental rights of the parties involved and the concept of family. These principles are not isolated from each other; nevertheless, there may be possible contradictions between them.

In Colombia, when the analyzed elements operate adequately, surrogacy would not pose a constitutional problem. This would be the case, for example, when (i) the gestational carrier freely decides to cooperate, in solidarity and not onerously, with the applicants to carry out the surrogacy so that the free exercise of the autonomy of the will is guaranteed. This does not exceed the constitutional limits relating to the dignity of the gestational carrier or of the child resulting from the gestation; (ii) compliance with the agreement is the best way to guarantee the best interests of the minor; or (iii) the petitioners do not have any other way to guarantee their reproductive rights and validly form a family, and the fundamental rights of the pregnant woman are adequately guaranteed, such as her rights to health and to the minimum conditions of existence during pregnancy and childbirth.

However, questions arise outside this ideal, especially in contexts lacking regulation, such as Colombia. Thus, if any constitutional guarantees are breached, it will be necessary to weigh the elements identified in this article to achieve the best constitutional balance, oriented toward human dignity, freedom, and the effectiveness of human rights.

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<sup>61</sup> Constitutional Court of Colombia, Judgment T-968 de 2009.

<sup>62</sup> Constitutional Court of Colombia, Judgment C-569 de 2016, Alejandro Linares Cantillo, in 19. 10. 2016.

<sup>63</sup> Constitutional Court of Colombia, Judgment T-968 de 2009.

<sup>64</sup> GARAYOVÁ, L. Surrogate Motherhood – the European Legal Landscape.

<sup>65</sup> MARTÍNEZ-MUÑOZ, K. X., RODRÍGUEZ-YONG, C. A. La maternidad subrogada: tendencias de regulación en Latinoamérica; TORRES, G., SHAPIRO, A., MACKAY, T. K. A review of surrogate motherhood regulation in south American countries: pointing to a need for an international legal framework.

Considering those cases in which surrogacy is performed without the elements of validity of contracts related to the free exercise of the autonomy of the will, such as, for example, an onerous gestation (illicit subject-matter) and/or entered into by a gestational carrier in conditions of weakness that imply a defect in her freedom to contract.

The initial response of the legal system would be annulling the legal transaction, under considerations similar to those taken into account by the French and Italian authorities in the paradigmatic cases known to the European Court of Human Rights.<sup>66</sup> However, in a specific case, based on the other constitutional elements analyzed here, it is not unreasonable to think that the best interests of the minor would entail the execution of the surrogacy thus contracted. This would guarantee filiation in favor of the petitioning parents. In such case, how valid would be the conformation of the family originated in an apparent illegality? The answers would necessarily involve analyzing the interactions between the constitutional principles identified in this research.

In this sense, the best interest of the minor seems to increase its importance for the constitutional analysis of surrogacy cases. This applies both in extreme cases of invalidity of the contract and when the satisfaction of the reproductive rights of the applicants, the fundamental rights of the gestational carrier, or the possibility of forming a family must be weighed. For example, when there is doubt as to whether surrogacy is a legitimate way of guaranteeing the sexual and reproductive rights of the applicants or when these rights conflict with those of the gestational carrier, the best interests of the minor seem to be the key to solve the case.

#### IV. CONCLUSIONS: INTEGRATION OF THE CONSTITUTIONAL ELEMENTS OF SURROGACY

This article revolves around the legal discussions on surrogacy by systematizing its elements of constitutional importance, with emphasis on Colombia. These elements are related to normative values inherent to the concept of human dignity; in particular, those corresponding to the constitutional limits to the exercise of the autonomy of will in the structuring of the surrogacy agreement; the scope of the principle of the best interest of the minor; the guarantee of the sexual and reproductive rights of the applicants; and the impact of surrogacy on the development of the family institution at the constitutional level.

In Colombia, a possible conclusion would seem to be that the constitutional analysis of specific cases of surrogacy, when considering the different constitutional elements presented, should guarantee human dignity and the highest level of protection of the rights of the parties involved, under the consideration that the best interest of the minor should prevail, as outlined in the Constitution.

Beyond the possible ethical dilemmas deriving from such elements, it incorporates legal elements, related to the balance between the personal freedom to make decisions about one's own body, reproductive freedom or family formation, and the state's power to

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<sup>66</sup> EMALDI CIRIÓN, A. Ethical and juridical implications relating to surrogate pregnancy. An overview from a European perspective.

limit those freedoms or to guarantee in a balanced manner the interests of children born within the framework of the agreement.

The article also states that the constitutional elements of surrogacy cannot be considered in isolation. Although they involve clearly identifiable abstract categories in the constitutional legal framework, they are exposed to a necessary interaction when analyzing specific cases of the development of surrogacy and its endless variables. For instance, the protection of the diverse family formed through surrogacy can only be analyzed by considering the best interests of the minor or the duty to guarantee the reproductive rights of the applicants. Similarly, analyzing the autonomy of will as the basis of the agreement constitutionally requires mentioning the protection of the fundamental rights of the gestational carrier or the child.

The comprehensive analysis of surrogacy, thus, from the constitutional point of view, based on the elements identified in this article, and others that may be pinpointed in the future, must strike the right balance between different constitutional principles. This balance is necessary to ensure the validity of personal autonomy, the proper exercise of state power and the fundamental rights of the parties involved. This will allow for the use of scientific developments while ensuring the human dignity of the pregnant person, the child, and the applicants.