



# The dilemma of the surrogacy contract in the face of the legislative omission of the Colombian state

<sup>1</sup> Juan Bautista Bedoya Florez, <sup>2</sup> Liliana Del Carmen Cadena Barrios, <sup>3</sup> Cindy Lorena TolozaGamarra, <sup>4</sup> María Teresa ZuletaCastilla

<sup>1</sup>Universidad Popular del Cesar, Colombia. <https://orcid.org/0009-0009-3674-9121>

<sup>2</sup> Universidad Popular del Cesar, Colombia. <https://orcid.org/0009-0000-2821-157X>

<sup>3</sup>Universidad Popular del Cesar, ORCID: <https://orcid.org/0009-0000-8478-7127>

<sup>4</sup>Universidad Popular del Cesar, ORCID: <https://orcid.org/0009-0009-3306-3773>

**ABSTRACT:** Surrogacy poses a significant legal challenge in Colombia, given the absence of specific regulations guaranteeing the protection of the rights of those involved in this type of contract. Although voluntary autonomy has been the main basis for its execution, the legislative omission of the State has created a regulatory vacuum that exposes the pregnant woman and the unborn child to potential violations of fundamental rights. This paper examines the constitutional tensions that arise from this omission, analyzing the conflict between contractual freedom and the need to guarantee principles such as human dignity, equality, and legal security. From an interpretive paradigm, with a qualitative approach and a legal hermeneutic method, the paper reflects on the urgent need for regulatory intervention that clearly and fairly regulates surrogacy within the framework of the Social State of Law, protecting the rights of all parties involved.

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## 1. Introduction

In the Colombian context, the family is conceived as a fundamental legal and social institution, recognized as a structural axis of coexistence and the organization of the Social Rule of Law. Over recent decades, this institution has undergone profound transformations driven by cultural changes, scientific advances, and new social dynamics that have influenced its forms and functions. One of the most visible manifestations of these changes is surrogacy, a practice that has emerged as an alternative in the field of assisted reproduction, sparking broad ethical, legal, and social debates.

In the absence of specific legal regulation, this mode of reproduction has developed in Colombia based on the principle of private autonomy. This has led to the signing of agreements between private individuals without the existence of binding legal standards that fully guarantee the rights of the parties involved. As a result, multiple legal and constitutional dilemmas have arisen, particularly regarding the protection of the surrogate mother and the *nasciturus*, whose vulnerability demands urgent normative attention. Based on an interpretative paradigm, a qualitative approach, and the method of legal hermeneutics, this study aims to analyze the regulatory vacuum and to propose legal criteria that may guide a regulation respectful of the constitutional principles of human dignity, equality, and reproductive autonomy.

## **2. Methodological Perspective**

This research is framed within the interpretative paradigm, which is suitable for understanding the social and legal meanings associated with the phenomenon of surrogacy in the Colombian context (Martínez, 2010). From this perspective, the focus is placed on the comprehension of meaning rather than on data quantification, allowing a deeper exploration of the constitutional and normative tensions involved.

The study adopts a qualitative approach, supported by a systematic process of documentary analysis. This includes a review of updated sources from the state of the art (Martínez et al., 2024), as well as the incorporation of classical and contemporary theoretical references drawn from the theoretical framework (Salcedo et al., 2022). In addition, the analysis considers legal norms, judicial decisions, and doctrinal contributions relevant to the research objective.

This qualitative methodological strategy enables a critical examination of the legal framework governing the exercise of private autonomy, with particular attention to the limits imposed by the legal system and the guarantees it must offer in relation to the fundamental rights of the parties involved. Through this perspective, the study seeks not only to describe the current legal framework but also to identify tensions, gaps, and challenges that affect the balance between contractual freedom and the protection of rights.

The chosen method is legal hermeneutics, an appropriate tool for the systematic interpretation of legal norms, constitutional principles, rulings of the Constitutional Court, and relevant doctrinal contributions. Through this method, the legal feasibility of surrogacy contracts is analyzed, along with their regulatory gaps and the challenges posed by their development in the absence of specific legislation. The study is primarily based on secondary sources and jurisprudence, with the aim of identifying normative meanings that may inform legislative proposals respectful of human dignity and the principle of legal certainty.

## **3. Result and Discussion**

The family is the natural symbol of society, its nucleus, and its most representative element. Although the family is defined differently and recognized in substantially different ways, such as the Constitutional Court's recognition of the single-parent family (2017), it remains the least important form of reproduction.

The ideal Colombian family at the beginning of the 20th century was a large family with many children. Given the high incidence of child deaths due to difficult access to healthcare, a number of siblings was necessary to replace the deceased in order to have offspring who would carry on the family name generationally. Muñoz, Cecilia, and Pachón, Ximena, (1991). Therefore, the family model to which we are accustomed as a Colombian society currently incorporates the need for procreation, perhaps due to historical precedents such as the one mentioned above, combined with the strong influence of the Christian faith, which understands procreation as an obligation of the marital bond, or out of vain pride, has generated an enormous demand for scientifically assisted procreation. This has led to countless internet advertisements and various media outlets publishing "womb wanted," "womb for rent," and other offers in response to such requests.

To answer this question, it must be emphasized that humanity has always sought means other than natural means to achieve the reproductive ideal. This reality was so undeniable and present that it was accepted by our 1991 Political Constitution in its Article 42, which recognized that children born in or out of wedlock, whether adopted, conceived naturally, or with scientific assistance, have equal rights and duties (Gómez, 2017).

The importance of children other than those conceived through natural conception in our Constitution is

notable, and if we are bold, we can speak of the constitutionalization of the right to scientifically assisted procreation, with the constitutional guarantee of being claimed through a tutela action, as enshrined by the Constitutional Court in 2020, which upheld the right to reproductive autonomy.

Now, under scientific understanding, we can clearly recognize that surrogacy or surrogacy is a scientifically assisted way of conceiving children (Bernal, Rocío, p. 23), regardless of whether it is called "surrogacy" or "womb renting," because it undoubtedly involves human intervention, supported by science and clinical and scientific procedures, which manipulates gametes for fertilization. However, regarding this contract, unlike other scientific interventions for parentage, this one, which is not regulated in Colombia, depends entirely on the autonomy of the private will of the parties and on some improvised judicial contributions, which undoubtedly, and without limits, can undermine the highly relevant rights of those involved in this negotiation.

Various problems could arise from this legislative omission by the Colombian state. One of them is the possible violation of human rights due to the legislative omission by the Colombian state in regulating surrogacy contracts.

In Colombia, there is contractual freedom, support for self-determination, and autonomy of will as contractual principles. The minimum requirements for binding obligations are: capacity, unenforceable consent, a lawful purpose, and a lawful cause, as enshrined in Article 1502 of the Civil Code.

### **The autonomy of the will in the surrogacy contract.**

First, we will define whether the autonomy of the private will of the parties is sufficient for the validity of the legal transaction of surrogacy.

We define autonomy of the will as the power of individuals to direct their affairs without any type of intervention, with this will being considered law in the private jurisdiction of their business or private affairs. We also recognize that this agreement of wills between two parties is a source of obligations as stipulated in Article 1494 of the Civil Code. However, we must analyze whether this autonomy is absolute today for the execution of legal transactions, and more specifically in the surrogacy contract.

The autonomy of private will at the international level is viewed through a critical lens. This is because arbitrariness has historically existed when the parties are left to the absolute freedom of direction and regulation of their businesses. The abuse of a dominant position can be aggressive, as shown by the contracts denounced by Dr. Villermé, where children as young as six years old were exploited, working deep in mines for at least twelve hours a day. This situation gave rise to the famous phrase by the priest Lacordaire, "Between the strong and the weak, between the rich and the poor, it is freedom that oppresses, it is the law that liberates." Acosta J. (2019)

It is clear that irregular situations may arise in different legal transactions for various reasons, but especially due to abuse by the strong party. In the provision of the conditions of the acts. In Colombia, for example, the constant abuses in consumer contracts have pushed the limits on the autonomy of private will through the well-known Consumer Statute, Law 1480 of 2011. This state intervention aims to protect consumer rights, regardless of whether producers and suppliers are involved in the contractual relationship. This is an indisputable way to balance the burdens in the commercial relationship, not to mention the administrative powers to resolve various conflicts that may arise between the parties in this type of matter.

It is evident, then, that the parties' private autonomy is not always sufficient for the conclusion of contracts, especially when a legal transaction such as the one under study involves matters involving human and fundamental rights such as life, human dignity, and family. This phenomenon was

demonstrated in the case resolved in 2009 by the Constitutional Court in its Tutela ruling, which discussed the existence of a surrogacy contract and the obligations arising from the contract concluded solely under the direction of the parties' private autonomy. Once analyzed by the Court, the violation of human and fundamental rights was proven, and their protection was determined. Therefore, in our view, the parties' private autonomy is not sufficient for the validity and success of surrogacy contracts.

Considering the above, it is therefore necessary for the State to regulate contracts requiring special attention, such as surrogacy, to prevent the violation of human rights such as life, family, and human dignity.

Keynes justifies that the state must intervene to protect the weak and vulnerable (LampresaVelardo, 2011); this notion has been applied to various contractual relationships, such as commercial relationships with the Consumer Statute; labor relationships with the minimum and indisputable rights of workers; and the principle of reality over forms, as established in the Substantive Labor and Social Security Code; and administrative relationships with the state contracting regime, among others, demonstrating this imperative from all disciplines. Therefore, in family matters, the contractual relationship of surrogacy cannot be an exception, as it requires state intervention in legislative matters. It has been proven that the mere autonomy of the parties' will does not provide legal security for the parties involved, as there are parties involved who are in fragile positions and need minimum guarantees that must be protected. To better understand our position, we must consider the concept established by the Constitutional Court (2009), based on the doctrine that maternal surrogacy is the act of assisted reproduction that results in the birth of a child gestated by a woman subject to a convention by which she must assign all rights to the newborn to others with whom she would maintain her biological filiation. In compliance with the above concept, there are three parties involved in this legal act: the contracting party, who for all purposes is the person who benefits from receiving rights to the newborn based on their biological relationship; second, the contractor, who by nature must be a woman who will lend her womb for the development and care of the fetus until birth; and lastly, and most importantly, the child, who ultimately represents and is the object of the contract and must be delivered by the contractor to the contracting party.

According to the guidelines or sub-rules described by the High Constitutional Court, we should not call or title such a legal agreement as surrogacy, but rather as surrogate motherhood, since the Constitutional Court (2009) clearly indicated its refusal to accept a profit motive in this legal act, which creates an enormous difference to the lease or rental contract, in which there is financial compensation. In our opinion, the Constitutional Court invites us to remove this legal transaction from commerce, leaving the characteristic of a free title as an essential element. However, as it is criticized, this position is not adjusted to reality, in addition to being very naive, since clearly those who allow their womb to be lent for this agreement generally seek monetary compensation, whether for egg donation or surrogacy. In Europe, taking into account the research, the women interviewed, and the different institutions that promote this practice as a commercial and highly lucrative act (DW Documental, 2021), it is clear that these surrogate mothers generally do so for money and not for altruistic acts, thus revealing the monetary nature as a full reality, as mentioned by Arteaga, C.

It was not necessary for the Supreme Constitutional Court to step outside the scope of the case under study to realize this truth, since in its ruling T-968 of 2009, it indicated in the facts that the plaintiff effectively agreed to the monthly remuneration for the loan of the use of the womb with the biological father.

Unlike the Constitutional Court, we view the position of the state of Louisiana as more realistic, as its concept of surrogacy describes it as an agreement in which a person not married to the sperm provider agrees, for a consideration of value, to be inseminated (...) Rodríguez-Yong, C. A., & Martínez-Muñoz, K. X. (2012). This position is consistent with global estimates, as in the United States, Mexico, and other European countries, especially Ukraine, there are companies dedicated to the legal business of surrogacy,

with costs ranging from 35,000 to 55,000 euros, and some reaching 100,000 euros, with different types of packages, such as the so-called VIP packages.

Due to the sensitivity of the parties involved and the human and fundamental rights at stake, if the state does not intervene promptly and chooses not to directly legislate the surrogacy contract, we are faced with evidence of imminent risk and danger of the violation of these human rights of two vulnerable parties, important rights such as human dignity, life, and liberty, and even more so when, for some authors, this business is related to the practice of human trafficking. Zenia, P (2021). This premise is not capricious, and the fact is that surrogacy without pertinent or supervised regulation is a return to the traits of slavery.

This is because if one studies what slavery was like in the past, the ownership of the master over the master and his children is very similar to surrogacy, so it is not a very new matter, as it was practiced in ancient times. An example of the characteristics of surrogacy and its relationship to slavery is the early biblical account in the book of Genesis, chapter 16, verses 1 to 4, which states: "Sarai, Abram's wife, had borne him no children; and she had an Egyptian maid whose name was Hagar. Then Sarai said to Abram, 'You see that the Lord has made me barren; therefore, I pray you, go in to my maid; perhaps I shall have children by her.' So Abram listened to Sarai's plea." Reina Valera, 1960.

The above example grounds us somewhat and shows us how surrogacy can be related to modern slavery, a matter of constant ethical discussion. Today, the dominant position of being able to pay (in the vast majority of cases) gives the surrogate mother the right to demand that she hand over the child, the fruit of her maternal care and shelter, simply because of the existence of a contract. Just like Sarai, who forced her slave to surrender her child solely for the right granted to her by the title of "master" over her.

It has been a true, constant struggle for humankind to emerge from a state of slavery to freedom and equality, and today it is threatened by social inequality, where men and women of superior economic means rent the wombs of women with limited financial resources, who, out of necessity, choose to accept this treatment, even though they are later emotionally affected by giving the child to a couple who has paid for the right to deprive them of it.

It is true that the Colombian state does have normative regulations regarding legal transactions, and for contractual relationships in general, which can be directly applied to various atypical and unnamed legal transactions, including surrogacy. Principles such as good faith, just cause, lawful purpose, consent free of defects, among others, lead us to accept the statement of Dr. Gustavo Marín Vélez (2005), who associated the General principles as an alternative way to resolve and carry out this type of legal acts, and by grace he is right, however, in our opinion, these general contractual principles are not sufficient, since we are not talking about ordinary commerce or a simple private act, where the parties can dispose of their assets, but on the contrary this is a matter where human rights of extreme delicacy are involved, and more so when it comes to the development of a fetus from its first beginnings and the possibilities of culmination in person. Such insufficiency is observed in the case of the ruling of Protection 968 of 2009, a decision where the family judge was forced to issue different pronouncements, given that in his orders he was violating the fundamental rights of the plaintiff and the minor resulting from the agreement, and it is understandable, since the agreement is not regulated by law, the determination of the dispute is left to the judge and the parties, existing legal uncertainty and a violation of these rights.

The aforementioned ruling clearly violated fundamental rights by the Family Court Judge when he declared the existence of a surrogacy contract and validated the commitment to deliver the minor as a result of that contract, allowing the minor to leave the country in the custody of his biological father. This disregarded the minor's rights and their supremacy, especially when no compelling reasons were provided to remove the minor from his biological mother's environment.

This case demonstrated the overwhelming effort and psychological exhaustion the minor's mother endured in securing custody and not being separated from him, despite her limited resources. And all this occurred thanks to the abuse of the law imposed in the surrogacy contract under surrogacy, all due to the lack of knowledge of this law due to the lack of any regulation.

Therefore, the Constitutional Court, seeking to avoid similar affronts, and in view of the danger posed by the lack of legal framework regarding surrogacy contracts, declared the need for Congress to regulate the aforementioned contract by establishing the minimum contractual conditions. For example, the person who hires a woman to lend her womb must have physical difficulties conceiving; the gametes for conception must not be from the surrogate mother, so that there is no biological relationship or affiliation; the motivation must not be lucrative, but rather altruistic; the surrogate mother must be of legal age, in optimal physical and mental health, and have previously borne children; the surrogate mother must be required to undergo the relevant examinations before, during, and after pregnancy, as well as psychological evaluations. that the surrogate mother, once she has signed the informed consent form and is fertilized by the gametes, cannot withdraw from the delivery of the child; that the biological parents cannot reject the child under any circumstances; that the surrogate mother may only terminate the pregnancy upon medical prescription, among others, Constitutional Court, (2009) p. 58.

Note that despite the sub-rules established by the court, difficulties in the violation of human and fundamental rights continue to exist. The Court's ruling in 2009 was not sufficient. The same high court, in its Ruling T 275/22, resolved to protect the rights to life in dignified conditions, family, and minimum living standards, given that the social security system does not know how to respond to the legislative gap faced regarding maternity leave in a surrogacy case.

It is regrettable that, following the 2009 ruling on the protection of rights, Congress was asked to legislate on the subject of surrogacy, this has not been possible to date. Such is the seriousness of the omission that, in 2022, in Ruling T 275, the Court took the trouble to expose Congress's lack of diligence despite the various bills submitted since 1998, the vast majority of which were archived. Likewise, in the aforementioned ruling, the Court again urged the Congress of the Republic of Colombia to legislate on surrogacy, requesting the national government to submit a bill within six (06) months aimed at regulating surrogacy.

For all these reasons, and despite the various calls imposed by the Supreme Constitutional Court and the existing need, our legislator, much less the national government, has sought to regulate the contract under study, refusing to study and approve various bills presented to Congress on the subject. This causes discouragement among the social conglomerate due to the existing legal uncertainty, and furthermore, the constant danger and threat to the human rights at stake for the weaker parties in the contractual act. Therefore, it is indisputable that the lack of legislation or state intervention exposes the violation of human and fundamental rights of those who have participated and those who may participate in this type of business, and above all, the abuse that can occur by the strongest against the most vulnerable and weakest in the contractual relationship, when there is an economic interest that motivates the parties to enter into it.

### **The different positions that the National Government and the legislature can consider for the regulation of surrogacy in Colombia.**

Our first option is to prohibit the practice of surrogacy radically, as in Germany. This, due to legal uncertainty and the human and fundamental rights at stake, is unethical. For example, imagining forcing a surrogate mother to hand over the child who was in her womb during its development solely for contractual reasons, is especially unethical when she refuses to hand over the child, whether for reasons related to the bonds that may have developed between them. All legal transactions must be subject to good morals and public order, according to Article 1532 of the Civil Code.

In the article "Surrogacy, Exploitation of Women for Reproductive Purposes," reviewed by Gutiérrez, Ingrid, and Michel, Martha (2014), they argued that the maternal bond with the fetus begins at conception, so the actions of the surrogate mother have a strong influence on the fetus and vice versa. They explain that during pregnancy, a dependency develops that creates bonds, but from the fifth month of pregnancy, communication between the pregnant woman and the fetus strengthens, perceiving their movements. The reciprocal relationship with respect to communication, where the fetus perceives sensations and responds proportionally to its perceptions, is why when the mother experiences emotions such as depression, anguish, or anxiety, the fetus responds to these with an acceleration of its vital signs (López, 2008). It should also be noted that this relationship between these two generates significant changes in the pregnant woman's brain function. Natalia López (2008) explains how, using functional neuroimaging techniques, brain areas are activated and deactivated when the mother hears or sees her child, and calls this the neural correlate of emotion. Considering the above statements and an emotional analysis of the psychological harm that the surrogate mother may suffer at the time of separation from her "contractual object," it is significant, without underestimating the harm to the development of the newborn in its initial stage of growth, as it could cause potentially irreparable damage. Initial breastfeeding is fundamental and promoted by pediatricians and nutritionists for at least six months as the only way to impact the child's psychomotor development in those first months. Peraza G. (2000)

Therefore, we believe that surrogacy is deeply debated regarding the fundamental human rights at stake that we should not jeopardize, especially those of the surrogate mother and the newborn, who have full constitutional protection. Prohibiting it would be a good initial alternative.

Our second position, given that the Constitutional Court has basically accepted surrogacy, is to regulate it under the parameters of the 2009 ruling, but with solemn acts and under the supervision of administrative entities.

Basically, it means accepting surrogacy but prohibiting profit-seeking within it, even penalizing those who enter into or promote these types of contracts motivated by no altruistic motive. If we harbor economic interest, we would be very close to a modern form of slavery or human trafficking with a noble and familial appearance.

To understand this point, we must clarify that, by virtue of human dignity itself, no part of the body (including the mother's womb) can be considered property or an asset in a person's estate. Therefore, it cannot be used for exploitation. This would open the door to the commercialization of organs and limbs of all kinds, a situation that would be burdensome. We know that although the general reality, as we initially discussed, is that surrogacy is like renting a womb, we cannot encourage this practice in our country for onerous purposes.

Avoiding the profit motive would prevent a dominant party, by having enough money, from inducing another person to facilitate their womb just to meet their needs, because they may not want to celebrate it, but in the face of extreme financial need, or finding their minimum vital affected, as is common in our Latin American countries, and are forced to celebrate this contract, this being a way of subduing the weak party and no one will be subjected to slavery or servitude UN (1948).

To verify the above, and to ensure that the parties are effectively entering into the contract for altruistic purposes, it should not be left solely to the parties' autonomy of will. Entities such as the Colombian Family Welfare Institute must oversee, before and during the contract, the formal requirements of ensuring that the woman seeking to offer her womb is in stable financial circumstances so as not to be motivated by profit-making motives, that her mental and physical health is good, and that the contracting party must require the contractor to purchase an insurance policy to cover any damages that may arise in the event of injury during and after pregnancy, among other things.

For this reason, and in addition to the aforementioned, in making a decision on this matter, the legislator must thoroughly consider the following questions: What will happen if there is a breach of contract? What is the method of compensation? What will happen to the child's future due to the breach of contract? How are couples who are fully committed to the contract and whose breach is caused by the termination of the pregnancy compensated? How to determine the moral damages for both the child and the surrogate mother due to their separation? What are the consequences of an annulment due to defects in consent?

Given the lack of State intervention in regulating the legal business of surrogacy, it is necessary that both the National Government and the Congress of the Republic of Colombia heed the call to normatively regulate all possible aspects, thus avoiding imminent danger to human and fundamental rights such as freedom, equality, human dignity, life, and the family of those involved in this business, so as not to become a form of fertility tourism through surrogacy contracts disguised as altruism.

## 5. Conclusions

Surrogacy, in the Colombian legal context, faces a worrying legislative omission that has left a significant regulatory gap. This lack of regulation compromises the effective protection of the fundamental rights of the parties involved, especially those of the pregnant woman and the unborn child, who are in a situation of legal vulnerability. By depending exclusively on the autonomy of private will, surrogacy contracts are exposed to potential abuse, legal loopholes, and judicial decisions that, in the absence of a clear regulatory framework, may prove contradictory or insufficient.

Although the 1991 Political Constitution enshrines the right to reproductive autonomy and the equality of children, regardless of their origin, there remains a need to harmonize these principles with legislation that offers clear legal guarantees. A hermeneutical analysis of the legal system shows that comprehensive legislative intervention is urgently needed, capable of establishing limits, safeguards, and oversight mechanisms that prevent the exploitation of women's bodies and protect the best interests of children.

Consequently, the Colombian State, in its role as guarantor of fundamental rights, must assume the responsibility of overcoming this regulatory omission by promoting a legal framework that respects human dignity and the founding principles of the Social Rule of Law.

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