

Articles

Revising the legal status of surrogacy. An evaluation having regard to bioethical principles and legal comparisons

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Abstract

This paper describes both traditional and gestational forms of surrogate motherhood and the motivations behind them. The author analyses them through a bioethical lens and with reference to fundamental rights in German constitutional law, emphasising especially the human dignity of the child and the carrying mother, while the role and the importance of reproductive freedom is acknowledged as well. Highlighted among bioethical principles are the principles of autonomy and justice. This leads to reservations towards commercialised surrogacy and to an assumed need for procedural or institutional safeguards concerning e.g. the option of the carrying (biological) mother to retain the child or the right of a child that has been given away to know of its parentage later in life.

Moreover, the author explains the current legal situation related to surrogacy in German civil and criminal law, extending to the consequences of surrogacy tourism. This situation is contrasted with the law as applicable in jurisdictions with an altruistic model of surrogacy (specifically the United Kingdom, Greece, and Israel) and those viewing surrogacy primarily as a negotiable service (e.g. California or Ukraine). In conclusion, a strictly regulated legalisation of altruistic surrogacy is recommended as a last resort against medically induced childlessness.

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A. Introduction

About one in ten couples is involuntarily childless.¹ For many couples, the diagnosis of sterility represents a deep crack in their life planning. The revelation often leads to depressive moods, feelings of helplessness or guilt, as well as alienation from one's own body and partner.² Given these circumstances, it is not surprising that a large number of German couples resort to assisted reproduction. This frequently extends to surrogacy. Surrogacy is an arrangement where a woman carries a child for the intended parents. As this practice is prohibited in Germany, many couples engage in 'surrogacy tourism', travelling to foreign jurisdictions with more liberal legal frameworks to circumvent domestic bans.³

I. Overview of the legal, political and ethical status quo

While the acts necessary for the inducement of surrogacy are punishable in this country, in particular by section 1 paragraph 1 numbers 1, 2, 6, and 7 of the Embryo Protection Act (*Embryonenschutzgesetz* - ESchG),⁴ there are more liberal regulations that favour such tourism in numerous other nations.⁵ In Germany, the prevention of split motherhood was

¹ Jacky Boivin and others, 'International estimates of infertility prevalence and treatment-seeking: potential need and demand for infertility medical care' (2007) 22 *Human Reproduction* 1506, 1509; Petra Haag, Norbert Hanhart and Markus Müller, *Gynäkologie und Urologie: Für Studium und Praxis* (5th edn, Medizinische Verlags- und Informationsdienste 2010) 235; Anjali Widge, 'Sociocultural attitudes towards infertility and assisted reproduction in India' in Effy Vayena, Patrick J Rowe and P David Griffin (eds), *Current Practices and Controversies in Assisted Reproduction – Report of a WHO Meeting* (World Health Organization 2002) 60, 60.

² cf Alexander Diel, *Leihmutterschaft und Reproduktionstourismus* (Wolfgang Metzner Verlag 2014) 25; Viola Frick-Bruder, 'Das infertile Paar' in Gerhard Bettendorf and Meinert Breckwoldt (eds), *Reproduktionsmedizin* (Fischer 1989) 399, 403; Bernhard Strauss and Dagmar Ulrich, 'Psychologische Betreuung von Sterilitätspatienten; Aufgaben, Probleme und konzeptionelle Überlegungen' in Elmar Brähler (ed), *Psychologische Probleme in der Reproduktionsmedizin* (Springer 1991) 127, 129–132.

³ cf Diel (n 2) 25; Frick-Bruder (n 2) 403; Strauss and Ulrich (n 2) 129–132.

⁴ cf BT-Drs 11/5460, 9 (government proposal); Jan Backmann, *Künstliche Fortpflanzung und internationales Privatrecht: Unter besonderer Berücksichtigung des Persönlichkeitsschutzes* (C.H. Beck 2002) 18; Hans-Ludwig Günther, Jochen Taupitz and Peter Kaiser (eds), *Embryonenschutzgesetz Kommentar* (2nd edn, Kohlhammer 2014) section 1 paragraph 1 number 1, paras 1–2.

⁵ See below under E.II.

the main justification for the ESchG, which came into force in 1991.⁶ In the current legal policy discourse, however, an amendment to reproductive law is often being demanded, also in view of surrogacy tourism.⁷ This discourse was recently reflected on considerably in the (now expired) coalition agreement for the 20th legislative period (2021-25). That programme provided for the legalization of embryo donation and elective single embryo transfer, as well as the establishment of a commission to examine egg donation and altruistic surrogacy.⁸ However, legislative implementation failed to materialize.

The discourse is triggered by the fundamental constitutional and thus ethical questions raised by surrogacy. Article 1 paragraph 1 of the German constitution (*Grundgesetz* or Basic Law) protects the human dignity of all those involved, including the (surrogate) mother and the child-to-be,⁹ and prohibits the commercialisation of the human body and the exploitation of women.¹⁰ At the same time, Article 2 paragraph 1 guarantees the free development of one's personality,¹¹ which may also include the right to freely decide on family planning.¹² Furthermore, surrogacy affects other fundamental rights, such as the protection of marriage and family under Article 6 paragraph 1 of the Constitution,¹³ which, according to certain opinions, includes the right to freedom of reproduction.¹⁴ The right to physical integrity of the parties involved under Article 2 paragraph 2 sentence 1 is also affected.¹⁵ It can thus be stated that the topic of surrogacy is located in a tense relationship between various fundamental legal ethical principles, which manifests itself in a lively legal policy discourse.

⁶ cf BT-Drs 11/5460, 7, 15.

⁷ cf Heribert Kantenich and Klaus Pietzner, 'Probleme der Reproduktionsmedizin in Deutschland aus medizinischer und psychosozialer Sicht' in Henning Rosenau (ed), *A Contemporary Reproductive Medicine Act for Germany* (Nomos 2012) 13, 31; Jens Kersten, 'Regulatory mandate for the state in the field of reproductive medicine' (2018) 37 NVwZ 1248, 1251; Günther, Taupitz and Kaiser (n 4) B.I. para 8.

⁸ cf Coalition Agreement 2021-2025 between the Social Democratic Party of Germany, Alliance 90/The Greens and the Free Democratic Party, <https://www.spd.de/fileadmin/Dokumente/Koalitionsvertrag/Koalitionsvertrag_2021-2025.pdf> accessed 8 March 2025, 92.

⁹ Udo Di Fabio, 'Art 2 GG' in Günter Dürig, Roman Herzog and Rupert Scholz (eds), *Grundgesetz-Kommentar* (105th supplement, C.H. Beck 2025) para 17; Hartmut Krefß, 'Leihmutterschaft: Normative Eckpunkte für rechtliche Klärungen' (2022) 40 MedR 881, 885.

¹⁰ So-called "Objektformel". See BVerfGE 9, 89 = NJW 1959, 427 (Federal Constitutional Court); Matthias Herdegen, 'Art 1 GG' in Dürig, Herzog and Scholz (n 9) para 36.

¹¹ BVerfGE 9, 89 = NJW 1989, 2525; Friedhelm Hufen, *Staatsrecht II – Grundrechte* (10th edn, C.H. Beck 2023) section 14 para 5; Stefan Rixen, 'Art 2 GG' in Michael Sachs (ed), *Grundrechtskommentar* (10th edn, C.H. Beck 2024) para 42.

¹² cf Wolfgang Eichberger, 'Art. 2 GG' in Peter Huber and Andreas Voßkuhle (eds), *Grundgesetz Kommentar* (8th edn, C.H. Beck 2024) para 29; Gerrit Manssen, *Staatsrecht II – Grundrechte* (20th edn, C.H. Beck 2024) para 265.

¹³ Hufen(n 11) section 16 para 14; Hans Jarass, 'Art 6 GG' in Hans Jarass and Bodo Pieroth (eds), *Grundgesetz für die Bundesrepublik Deutschland Kommentar* (18th edn, C.H. Beck 2024) para 9; Manssen (n 12) para 482.

¹⁴ Dagmar Coester-Waltjen, 'Reproduktive Autonomie aus rechtlicher Sicht' in Claudia Wiesemann and Alfred Simon (eds), *Patient Autonomy – Theoretical Foundations – Practical Applications* (Mentis 2013) 222, 223; Hufen (n 11) section 16 para 14; Ralf Müller-Terpitz, 'Art 2 GG' in Andreas Spickhoff (ed), *Medizinrecht Kommentar* (4th edn, C.H. Beck 2022) para 10.

¹⁵ Hufen (n 11) section 10 para 7; Hans Jarass, 'Art 2 GG' in Jarass and Pieroth (n 13) para 123; Manssen (n 12) para 316.

II. Structure, objectives and methodology of this thesis

This article aims to contribute to finding a solution concerning the need for regulation of surrogacy. In order to analyse the legal and ethical implications, as a basis for a proposed solution, it is first necessary to take a detailed look at the medical-legal foundations of surrogacy (B.). Building on this, the article is dedicated to ethical areas of conflict, such as the autonomy of the intended parents or the best interests of the child (C.). Subsequently, the German legal situation is presented, relating to its weaknesses in criminal and civil law, and contrasted with the ethical assessment carried out earlier (D.). This is followed up on by a legal comparison of selected legal regimes, in order to obtain suggestions for the necessary reforms of surrogacy law (E.). Finally, the results are summarized and potential regulatory possibilities for a law on reproductive medicine are highlighted (F.).

B. Medical-legal foundations of surrogacy

The following section discusses the basic medical aspects to surrogacy, including their legal context (I.). Furthermore, indications, associated risks, and success rates are presented (II.).

I. Conceptual foundations and typology of surrogacy

First of all, it is advisable to differentiate between the different types of surrogacy procedures (1.). These must also be distinguished from other types of reproductive medicine procedures (2.).

1. Systematization of different medical forms of surrogacy

Surrogacy is an assisted reproduction procedure in which a woman - the surrogate mother - carries a child for another person or a couple - the intended parents.¹⁶ There are two main forms of surrogacy: traditional and gestational surrogacy.¹⁷ In traditional surrogacy, the surrogate mother is fertilized with the sperm of the intended parent or a donor. The surrogate mother is thus the genetic mother of the child.¹⁸ Although traditional surrogacy does not fall under the penal provision of section 1 paragraph 1 number 7 of the

¹⁶ cf Heribert Kentenich, 'Sollte die Leihmutterschaft verboten werden?' (2023) 51 *gynäkologische praxis* 187, 189; Christoph Markwardt, 'Art 22 EGBGB' in Beate Gsell and others (eds), *Beck-online. GROSSKOMMENTAR Zivilrecht* (C.H. Beck September 2025) para 33.

¹⁷ Marion Depenbusch and Askan Schultze-Mosgau, 'Leihmutterschaft' in Klaus Diedrich, Michael Ludwig and Georg Griesinger (eds), *Reproduktionsmedizin* (Springer 2013) 297, 298; Kentenich (n 16) 189; Sarah Tschudin and Georg Griesinger, 'Leihmutterschaft' (2012) 10 *Gynäkologische Endokrinologie* 135, 135.

¹⁸ Kentenich (n 16) 189; Tschudin and Griesinger (n 17) 135; Olga van den Akker, 'Psychological trait and state characteristics, social support and attitudes to the surrogate pregnancy and baby' (2007) 22 *Human Reproduction* 2287, 2287.

ESchG,¹⁹ its mediation in particular nonetheless constitutes a breach of section 13a number 1 variant 2, sections 13b and 13c of the Law on Adoption Placement (*Adoptionsvermittlungsgesetz* – AdVermiG) and may be criminally sanctioned pursuant to section 14b of the same law.²⁰ It therefore remains undesirable in the eyes of the legal system.²¹

In gestational surrogacy, on the other hand, the egg of the intended parents or a donor is fertilized *in vitro* with the sperm of the intended parent or a donor.²² The cells or the embryo are then transferred to the surrogate mother's uterus. The surrogate mother is therefore not the genetic mother of the child.²³ This form of surrogacy is expressly prohibited under section 1 paragraph 1 number 7 ESchG.²⁴

2. Related terms and procedures in reproductive medicine

To be distinguished from surrogacy medically and legally, but still closely related to the topic, are egg and embryo donation, in which the intended mother herself takes on the pregnancy with corresponding genetic foreign material.²⁵ The actions necessary for this purpose are punishable under section 1 paragraph 1 numbers 1 and 6 ESchG.²⁶ Just like surrogacy, egg donation in particular is often the focus of liberalization debates.²⁷ Elective single embryo transfer (eSET), which is not a form of donation but an *in vitro* fertilization procedure, should also be mentioned. In that case, the egg cells are evaluated in the various stages before and after *in vitro* fertilization for their timely development.²⁸ The aim is to identify the embryo that has optimal development potential, and to transfer only this embryo.²⁹ In contrast to so-called preimplantation genetic diagnosis, which is

¹⁹ Ralf Müller-Terpitz, '§ 1 ESchG' in Spickhoff (n 14) para 20; Luise Paetow, 'Sollte die Leihmutterschaft in Deutschland zulässig sein?' (2022) 5 KriPoZ 346, 347.

²⁰ cf OLG Hamm NJW 1985, 2205 (Higher Regional Court of Hamm); Hans-Joachim Lutz, '§ 13a AdVermiG' in Georg Erbs and Max Kohlhaas (eds), *Strafrechtliche Nebengesetze* (54th edn, C.H. Beck 2025) para 4; Paetow (n 19) 348.

²¹ cf BT-Drs 11/4154, 9 (government proposal).

²² Eva Schumann, 'Familienrechtliche Fragen der Fortpflanzungsmedizin im Lichte des Grundgesetzes' in Rosenau (n 7) 155, 169–170.

²³ Kentenich (n 16) 189; Tschudin and Griesinger (n 17) 135.

²⁴ Müller-Terpitz (n 19) para 21; Paetow (n 19) 347.

²⁵ cf Bundesärztekammer (German Medical Association), 'Richtlinie zur Entnahme und Übertragung von menschlichen Keimzellen oder Keimzellgewebe im Rahmen der assistierten Reproduktion' (2022) 119(10) Deutsches Ärzteblatt A10.

²⁶ Jan Backmann, *Künstliche Fortpflanzung und internationales Privatrecht: Unter besonderer Berücksichtigung des Persönlichkeitsschutzes* (C.H. Beck 2002) 15; Taupitz Günther, Taupitz and Kaiser (n 4) section 1 paragraph 1 number 1, paras 2–3.

²⁷ cf Heribert Kentenich, 'Eizellspende und Leihmutterschaft – Sollte dies aus psychischen und ethischen Gesichtspunkten verboten bleiben?' (2025) 20 Ärztliche Psychotherapie 20, 20–22. See also Lina Wendland, 'The Legalisation of Egg Donation' (2024) 1 HeineLR 58.

²⁸ Uwe Körner, 'In-vitro-Kultur menschlicher Embryonen. Medizinische Möglichkeiten und Konsequenzen' (2003) 15 Ethik in der Medizin 68, 69; Hartmut Kreß, 'Kultivierung von Embryonen und Single-Embryo Transfer' (2005) 17 Ethik in der Medizin 234, 234.

²⁹ Günther, Taupitz and Kaiser (n 4) section 1 paragraph 1 number 3, paras 5–7.

punishable under section 3a paragraph 1 ESchG,³⁰ the eSET is based on pure observation and no genetic examinations of the embryo are carried out.³¹ Whether eSET can be reconciled with the ESchG, which according to its conception rejects arbitrary embryo selection, is controversial.³²

Finally, most procedures relating to medically assisted reproduction are associated with cryopreservation.³³ After removal, gametes are frozen directly in liquid nitrogen and thus permanently preserved ("cryopreserved") in their vitality.³⁴ The ESchG does not comment directly on the question of whether cryopreservation is permissible, although the doctors' reservation pursuant to section 9 number 4 ESchG implies its general admissibility.³⁵

II. Medical indication, risks, and success rates of treatment

For a well-founded legal-ethical analysis, it is crucial to understand the medical motivation behind surrogacy (1.) as well as its risks (2.), and evaluate them (3.).

1. Causes of medically induced childlessness

Medically induced childlessness and thus the need for surrogacy result primarily from the infertility of the intended parents.³⁶ Globally, about 10% of couples are affected by infertility.³⁷ The absolute numbers of surrogacy are relatively low.³⁸ While 30% of infertility cases are due to genetic disorders in men and negative factors on the female side of the equation such as fallopian tube defects or hormonal disorders play a role in about 55% of cases, the cause remains unclear in the remaining cases.³⁹ In such cases, section 27a of the German Social Code, Book 5 (*Sozialgesetzbuch Fünftes Buch - SGB V*) grants couples the right to at least partial reimbursement of the costs of fertility

³⁰ cf Ralf Müller-Terpitz, '§ 3a ESchG' in Spickhoff (n 14) para 5; Hartmut Kreß, 'Präimplantationsdiagnostik und Fortpflanzungsmedizin angesichts des ethischen Pluralismus' (2010) 43 ZRP 201, 201.

³¹ Jochen Taupitz, 'Welche Möglichkeiten bietet die moderne Auslegung des Embryonenschutzgesetzes?' (2009) 42 Der Gynäkologe 502, 502; Kreß (n 28) 234.

³² Against: Hans Lilie, 'Neue rechtliche Konfliktfelder der Reproduktionsmedizin: Probleme der Dreierregel' (2006) 100 Zeitschrift für ärztliche Fortbildung und Qualitätssicherung 673, 674; Joachim Renzikowski, 'Embryonenauslese und "Dreierregel"' (2004) 2 Gynäkologische Endokrinologie 172, 176; In favour: Monika Frommel, 'Auslegungsspielräume des Embryonenschutzgesetzes' (2004) 1(2) Journal für Reproduktionsmedizin und Endokrinologie 104, 104–106; Taupitz (n 31) 503.

³³ cf Karl-Heinz Möller, 'Rechtliche Regelung der Reproduktionsmedizin in Deutschland' in Michael Ludwig and Georg Griesinger (eds), *Reproduktionsmedizin* (Springer 2013) 583, 596.

³⁴ cf Jürgen Liebermann and Frank Nawroth, 'Kryokonservierung' in Michael Ludwig and Georg Griesinger (eds), *Reproduktionsmedizin* (Springer 2013) 233, 234.

³⁵ Adolf Laufs, 'Nr. 3250' in Hans-Jürgen Rieger (ed), *Heidelberger Kommentar Arztrecht Krankenhausrecht Medizinrecht* (68th supplement, C.H. Beck 2017) para 1; Rüdiger Zuck, '§ 68' in Michael Quaas, Rüdiger Zuck and Thomas Clemens (eds), *Medizinrecht* (4th edn, C.H. Beck 2018) para 85.

³⁶ cf Kentenich (n 16) 190–191; Francoise Shenfield and others, 'ESHRE Task Force on Ethics and Law 10: Surrogacy' (2005) 20 Human Reproduction 2705, 2705

³⁷ Boivin and others (n 1) 1509; Widge (n 1) 60.

³⁸ cf Kentenich (n 16) 191; German National Academy of Sciences Leopoldina, *Fortpflanzungsmedizin in Deutschland – für eine zeitgemäße Gesetzgebung. Stellungnahme* (Leopoldina 2019) 79.

³⁹ Leopoldina (n 38) 20.

treatments under certain circumstances.⁴⁰ Convenience or lifestyle reasons, on the other hand, are only rarely the reason for surrogacy.⁴¹

2. Risk assessment, chances of success, and psychological impact

According to the majority of findings, gestational surrogacy carries medical risks for the surrogate mother and the child that are similar to a natural pregnancy.⁴² They show rates of miscarriage comparable to other methods of artificial insemination, leading to parenthood in 30-70% of cases.⁴³ It also seems that the prenatal relationship with the surrogate mother does not give rise to any fear of developmental psychological damage.⁴⁴ In contrast, individual studies indicate an increased incidence of abnormal prenatal ultrasound findings or an increased fetal mortality.⁴⁵ Psychological studies have so far shown hardly any negative effects of surrogacy on the relationship between child and intended parents, although the data available is limited.⁴⁶ Some surrogate mothers experience psychological problems in the weeks after giving birth, but these subside and hardly cause any long-term stress.⁴⁷ The contact between surrogate mother and child is described by the surrogate mothers, if any, as predominantly harmonious.⁴⁸

3. Final assessment and conclusion for further consideration

According to current medical evaluation, surrogacy thus has respectable success rates with justifiable medical risks. However, a final risk assessment requires further investigations on a broader data basis.⁴⁹ Against the background of the previous statements, however, there is currently professional agreement that the implementation of surrogacy does not generally violate the principle of *non nocere* (non-maleficence).⁵⁰ In this respect, from a medical perspective, no well-founded objections can currently be raised against regulated surrogacy.

⁴⁰ Christian Lang, '§ 27a SGB V' in Ulrich Becker and Thorsten Kingreen (eds), *SGB V – Gesetzliche Krankenversicherung* (9th edn, C.H. Beck 2024) para 1; Uwe Nebendahl, '§ 27a SGB V' in Spickhoff (n 14) para 1.

⁴¹ Leopoldina (n 38) 78.

⁴² Kentenich (n 16) 190; Shenfield and others (n 36) 2705; Viveca Söderström-Anttila and others, 'Surrogacy: outcomes for surrogate mothers, children and the resulting families – a systematic review' (2015) 22 Human Reproduction Update 260, 262.

⁴³ cf Söderström-Anttila and others (n 42) 262.

⁴⁴ cf Axel Schölmerich, 'Entwicklungspsychologische Aspekte der Leihmutterschaft' in Edward Schramm and Michael Wermke (eds), *Leihmutterschaft und Familie. Impulse aus Recht, Theologie und Medizin* (Jena 2018) 209, 211–212, 214.

⁴⁵ cf Rhea Chattopadhyay and others, 'What patient factors affect success in women utilizing frozen donor eggs? A SART database analysis' (2020) 114(3) Fertility and Sterility 274.

⁴⁶ Vasanti Jadva and others, 'Surrogacy: the experiences of surrogate mothers' (2004) 18 Human Reproduction 2196, 2202; Tschudin and Griesinger (n 17) 137; Van den Akker (n 18) 2294.

⁴⁷ Susan Golombok and others, 'Surrogacy families: parental functioning, parent-child relationships and children's psychological development at age 2' (2006) 47 JCPP 213, 219; Jadva and others (n 46) 2203.

⁴⁸ cf Golombok and others (n 47) 219; Jadva and others (n 46) 2201.

⁴⁹ See also Schölmerich (n 44) 214.

⁵⁰ cf Krefß (n 9) 883. See also below under C.II.1.

C. Ethical conflicts of values and ways to overcome them

Building on the medical evaluation, this section examines the conflicting principles of surrogacy in the light of the Constitution (I.) and bioethical principles (II.), concluding with a final evaluation (III.).

I. Field of conflict between self-determination and the best interests of the child

Ethically, it is necessary to weigh the reproductive freedom of persons who wish to have children (1.) against the protective rights of the pregnant woman (2.) and the well-being of the future child (3.), in order to arrive at a value-based judgment (4.). As the German Basic Law, through its fundamental rights, establishes an objective value system by providing universally binding principles that guide law, politics, and society,⁵¹ the constitutional foundations of these positions are analysed in the following section.

1. The reproductive autonomy of the participants

The concept of reproductive autonomy, which is also recognised in jurisdictions other than Germany,⁵² deals with ensuring reproductive health and individual freedom of choice over reproduction.⁵³ As a fundamental rights guarantee, the right to reproductive autonomy includes the freedom to decide for oneself on the "whether" and "how" of one's own reproduction.⁵⁴ It thus also extends to medically assisted reproduction.⁵⁵ The dogmatic derivation of this right is controversial.⁵⁶ The right to reproductive autonomy is at least partly founded in the general freedom of action under Article 2 paragraph 1 of the Basic Law.⁵⁷ However, since reproduction deeply interferes with the human self-image and has a close connection to human dignity, this derivation is not entirely convincing. The same applies to justification by way of Article 6 paragraph 1 of the Basic Law, which is sometimes advocated for.⁵⁸ More convincingly, that article only protects the raising of

⁵¹ On the constitution as an objective value order: BVerfGE 9, 89 = NJW 1958, 257; Anne Katrin Diefenbach, *Leihmutterschaft – Rechtliche Probleme der für andere übernommenen Mutterschaft* (thesis, University of Frankfurt 1990) 119.

⁵² cf Laura Klein, 'Reproduktive Freiheiten unter dem Grundgesetz' (2023) 56 KJ 9, 10; Kreß (n 9) 884.

⁵³ cf United Nations, *Programme of Action adopted at the International Conference on Population and Development* (1994) para 7.2.

⁵⁴ Ulrich Gassner and others, *Fortpflanzungsmedizingesetz – Augsburg-Münchener-Entwurf* (Mohr Siebeck 2013) 31; Klein (n 52) 10; Josef Franz Lindner, 'Verfassungsrechtliche Aspekte eines Fortpflanzungsmedizingesetzes' in Rosenau (n 7) 144.

⁵⁵ Dagmar Coester-Waltjen, 'Reformüberlegungen unter besonderer Berücksichtigung familienrechtlicher und personenstandsrechtlicher Fragen' (2002) 18 Reproduktionsmedizin 183, 188; Ulrich Gassner, 'Legalisierung der Eizellspende?' (2016) 49 ZRP 126.

⁵⁶ cf Dana-Sophia Valentiner, *Das Grundrecht auf sexuelle Selbstbestimmung* (Nomos 2021) 402.

⁵⁷ See also Coester-Waltjen (n 14) 226; Ulrich May, *Rechtliche Grenzen der Fortpflanzungsmedizin* (Springer 2003) 171.

⁵⁸ See also Hufen (n 11) section 16 para 14; Ralf Müller-Terpitz, 'Art 6 GG' in Spickhoff (n 14) para 2.

children by their parents, not the prior formation of a family.⁵⁹

Instead, in view of its influence on one's way of life, starting a family, including procreation, is an aspect of personality development and therefore falls within the scope of protection of the general right of personality under Article 2 paragraph 1 in conjunction with Article 1 paragraph 1 of the Basic Law. The normative reference to Article 1 paragraph 1 of the Basic Law illustrates the high abstract value of the right to reproductive autonomy.⁶⁰ From this reference also follows that a restriction of the general right of personality, as is the case with the provisions of the ESchG already discussed,⁶¹ is either inadmissible or can only be justified under strict proportionality requirements,⁶² depending on the classification within the "sphere theory" developed by the Federal Constitutional Court. That theory outlines three levels of protection: intimate sphere (absolute personal freedom in the innermost matters), private sphere (limited interference in private relations), and social sphere (where the state can regulate for general welfare).⁶³

In summary, the right to reproductive autonomy is a legal interest of paramount importance.⁶⁴ Both the intended parents and the pregnant woman are entitled to developing and keeping their personalities. Subject to classification within the private sphere, restrictions of this right are permissible only if conflicting important legal interests of constitutional status are affected.⁶⁵

2. The protective rights of the pregnant woman and her availability

Such a conflicting legal interest could be constituted by the human dignity of the surrogate mother under Article 1 paragraph 1 of the Basic Law. This guarantees the protection of the individual from being degraded by the state or third parties to a mere object or instrument of alien interests.⁶⁶ With regard to possible violations of human dignity, there are differences in character between gestational (a.) and traditional surrogacy (b.).

⁵⁹ Peter Badura, 'Art 6 GG' in Dürig, Herzog and Scholz (n 9) para 2; Christian von Coelln and Johanna Fontana, 'Art 6 GG' in Sachs (n 11) para 45.

⁶⁰ cf Karl-Heinz Möller and Kyrill Makoski, 'Rechtliche Regelung der Reproduktionsmedizin in Deutschland' in Klaus Diedrich, Michael Ludwig and Georg Griesinger (eds), *Reproduktionsmedizin* (Springer 2020) 585, 585.

⁶¹ Peter Häberle, '§ 1 ESchG' in Erbs and Kohlhaas (n 20) para 1; Müller-Terpitz (n 19) para 20.

⁶² On the sphere theory: BVerfGE 34, 238 = NJW 1973, 891; BVerfGE 65,1 = NJW 1984, 419 (Federal Constitutional Court).

⁶³ BVerfGE 35, 202; with further references: Di Fabio (n 9) paras 158–160; Eichberger (n 12) para 173.

⁶⁴ See also Leonie Laubacher and Felix Ruppert, 'Mehr Selbstbestimmung in der Reproduktionsmedizin? Eizellspende und Leihmutterchaft im Abschlussbericht der Kommission' (2024) 57 ZRP 132, 135.

⁶⁵ Di Fabio (n 9) para 134; F Hufen (n 11) section 11 para 24.

⁶⁶ cf Herdegen (n 10) para 29; Udo Steiner, 'Art 1 GG' in Spickhoff (n 14) para 1.

a. Violation of human dignity in gestational surrogacy

In the case of gestational surrogacy, a violation of human dignity in the person of the surrogate mother could already result from the artificial nature of the procedure.⁶⁷ The restriction of the role of the gestational surrogate mother to the supplier of bodily functions in the absence of genetic kinship with the child, as well as her potential interchangeability, testify to a certain instrumentalization.⁶⁸ However, it is questionable whether the degree of instrumentalization reaches the level of a violation of human dignity.

An answer to this question can be provided by a comparison with living organ donation.⁶⁹ According to section 8 paragraph 1 of the Organ Transplantation Act (*Transplantationsgesetz* – TPG), living organ donation is permissible if it is medically justifiable, there is a prospect of success, and the donor is of legal age and capable of giving consent.⁷⁰ In the case of the removal of non-regenerative organs, the majority of cases,⁷¹ a close relationship between donor and recipient is also required.⁷² In surrogacy, an organ, namely the uterus, is also made available for a certain period of time. However, unlike living organ donation, the organ remains in the surrogate mother's body and is not given away permanently.⁷³ Rather, it is merely a temporary use for the sake of carrying of a child. Since the legislature has recognised the much more invasive procedure of living organ donation as permissible under strict conditions, a fundamental legislative value decision may be derived therefrom, making surrogacy appear to be compatible with human dignity.⁷⁴ However, whether gestational surrogacy in all conceivable forms is compatible with human dignity and which restrictions are necessary analogous to living organ donation requires further legal-ethical clarification by the legislator.

b. Violation of human dignity in traditional surrogacy

The accusation of a violation of human dignity is less serious in the case of traditional surrogacy, especially with regard to the woman's right to self-determination over her own

⁶⁷ See also Dagmar Coester-Waltjen, *Die künstliche Befruchtung beim Menschen – Zulässigkeit und zivilrechtliche Folgen*, 2. *Teilgutachten zum 56. Deutschen Juristentag* (C.H. Beck 1986) 91; Diefenbach (n 51) 150.

⁶⁸ For church positions, see the statement of the Protestant Church in Germany: Evangelische Kirche in Deutschland, *Zur Achtung vor dem Leben – Maßstäbe für Gentechnik und Fortpflanzungsmedizin* (EKD 1987) 4.3.

⁶⁹ Kreß (n 9) 885.

⁷⁰ cf Thomas Gutmann, '§ 8 TPG' in Ulrich Schroth, Peter König, Thomas Gutmann and Fuat Oduncu (eds), *Transplantationsgesetz Kommentar* (1st edn, C.H. Beck 2005) paras 7–9.

⁷¹ cf Karl Heinz Schulz and Silvia Kröncke, 'Psychologische Evaluation und Beratung im Vorfeld einer Organ-Lebenspende' in Arnd May and others (eds), *Patientenverfügungen: Handbuch für Berater, Ärzte und Betreuer* (Springer 2016) 413, 414; Tschudin and Griesinger (n 17) 136.

⁷² cf Gutmann (n 70) para 26.

⁷³ See also Kreß (n 9) 885.

⁷⁴ Contra Diefenbach (n 51) 153.

body.⁷⁵ Even in traditional surrogacy, the fact that the fertility of the surrogate mother is exploited comes into play. However, the surrogate mother remains genetically formative as an individual in this procedure, the choice of another surrogate mother necessarily resulting in the conception of a different child.⁷⁶ The woman therefore does not just function as a mere "incubator."⁷⁷

In these cases, it is then incumbent on the public authorities, according to Article 1 paragraph 1 sentence 2 of the Basic Law, to safeguard the dignity of the women carrying the child.⁷⁸ However, the state does not have to protect a woman from herself as long as she voluntarily opts for the procedure.⁷⁹ Whether an objectification is apparent and thus human dignity is violated in both forms of surrogacy depends decisively on the extent to which the pregnant woman is influenced by others, for example through commercial incentives.⁸⁰ If the surrogate has been unduly influenced by others, her autonomy must be given priority due to the inalienable character of human dignity.⁸¹ Even allowing for such surrogacy would then be contrary to human dignity. Consequently, the legislature would violate its constitutionally required duty of protection if it were to be legalised.

3. The protective rights of the unborn child

Concerning the child, questions of legal ethics first arise as to whether unconceived life enjoys protection at all (a.). It is then discussed which legal positions of the child are affected (b.).

a. The protective status of the developing life

Since contractual agreements, for example, are already made before conception, it must first be clarified to what extent life that has not yet been conceived also comes under the protection of human dignity. In any case, it is recognised that the protection of human dignity is afforded from the time of nidation, or implantation.⁸² A widespread consensus affirms protection in the form of a claim to respect from conception onwards, since genetic individuality is already established at this point in time.⁸³ However, in view of

⁷⁵ cf Coester-Waltjen (n 67) B80–81; Commission on Reproductive Self-Determination and Assisted Reproduction, *Report* (Federal Ministry of Justice, 2024) <https://www.bmj.de/SharedDocs/Publikationen/DE/Fachpublikationen/2024_Bericht_Kom_218_StGB.html> accessed 8 March 2025, 464.

⁷⁶ cf Diefenbach (n 51) 150.

⁷⁷ Diefenbach (n 51) 150.

⁷⁸ cf Christian von Coelln and Michael Sachs, 'Art 20 GG' in Sachs (n 11) para 111; Kreß (n 9) 884; Tobias Linke, 'Die Menschenwürde im Überblick: Konstitutionsprinzip, Grundrecht, Schutzpflicht' (2016) 56 JuS 888, 892.

⁷⁹ cf Diefenbach (n 51) 125; Alexandra Goedel, *Leihmutterschaft – eine rechtsvergleichende Studie* (Peter Lang 1993) 160–161.

⁸⁰ See also Diefenbach (n 51) 153; Goedel (n 79) 160–161; Kreß (n 9) 885.

⁸¹ Herdegen (n 10) para 73; Hufen (n 11) section 10 para 29.

⁸² cf BVerfGE 39, 1 = NJW 1975, 573, 573 (Federal Constitutional Court); Rixen (n 11) para 143.

⁸³ cf Herdegen (n 10) para 71; Rixen (n 11) para 223b.

reproductive medicine developments, especially *in vitro* fertilization, a further advance of protection before conception is necessary, for example to condemn manipulations of germ cells.⁸⁴ Since such techniques are specifically geared towards the emergence of human life, they must affect the scope of protection of human dignity.⁸⁵ According to the view taken here, Article 1 paragraph 1 of the Basic Law therefore applies to reproductive medical measures even before conception, ensuring that a child planned in the context of surrogacy is also constitutionally protected. Human dignity is not linked to the individual bearer but to the "essence of the human being" as a species, adapting in its level of protection accordingly.⁸⁶

b. Affected fundamental rights of the expected child

The legislator justifies the existing ban on surrogacy with the prevention of "split motherhood", which could endanger the well-being of the child.⁸⁷ In order to clarify the term, it must be noted that there is no universally valid definition of the term "best interests of the child."⁸⁸ Depending on the context in which the law is applied, the best interests of the child can also be dogmatically located in different constitutional provisions.⁸⁹ The normative demarcations between individual cases are controversial.⁹⁰ In the end, however, the best interests of the child can probably be summarised as the enabling conditions for child-friendly physical, mental and mental development rooted in the child's fundamental rights.⁹¹ Which fundamental rights guarantees are hidden behind the concept of the child's best interests and are therefore relevant in the given context must be examined separately for each individual case.⁹²

In the case of surrogacy, this could be, on the one hand, the right to physical integrity of the child under Article 2 paragraph 2 sentence 1 of the Basic Law. However, a violation of this right would probably only come into consideration if the circumstances of surrogacy

⁸⁴ cf Christian Starck, *Die künstliche Befruchtung beim Menschen – Zulässigkeit und zivilrechtliche Folgen*, 1. Teilgutachten zum 56. Deutschen Juristentag (C.H. Beck 1986) A17.

⁸⁵ See also Hartmut Kreß, 'Menschenwürde vor der Geburt. Grundsatzfragen und gegenwärtige Entscheidungsprobleme' in Hartmut Kreß and Hans-Jürgen Kaatsch (eds), *Menschenwürde, Medizin und Bioethik* (Aschendorff 2000) 11, 23; Starck (n 84) A17.

⁸⁶ On the differing level of protection: Herdegen (n 10) para 69. On the concept of human dignity more generally: Rixen (n 11) para 145b.

⁸⁷ cf BT-Drs 11/5460, 7, 15.

⁸⁸ cf Uwe Diederichsen, 'Zur Reform des Eltern-Kind-Verhältnisses' (1978) 25 FamFR 461, 468; Joachim Gernhuber, *Neues Familienrecht – Eine Abhandlung zum Stil des jüngeren Familienrechts* (Mohr Siebeck 1977) 104.

⁸⁹ cf Katharina Auer, *Kindeswohl im Fortpflanzungsmedizinrecht* (Duncker & Humblot 2024) 50.

⁹⁰ *ibid* 48–49.

⁹¹ See also Bernd Jeand'Heur, *Verfassungsrechtliche Schutzgebote zum Wohl des Kindes und staatliche Interventionspflichten aus der Garantienorm des Art. 6 Abs. 2 Satz 2 GG* (Duncker & Humblot 1993) 17.

⁹² On Article 2 paragraph 2 sentence 1 of the Basic Law: BVerfGE 162, 378 = NJW 2022, 2904, 2907 (Federal Constitutional Court); Auer (n 89) 65; Gerhard Robbers, 'Art 6 GG' in Huber and Voßkuhle (n 12) para 45.

regularly and unreasonably impair the medical development of the child.⁹³ According to the current state of research, there are no reliable indications of this sort.⁹⁴ Consequently, the implementation of surrogacy does not lead to a violation of the rights of the child under Article 2 paragraph 2 sentence 1 of the Basic Law.⁹⁵

A further violation of a fundamental right guarantee could be seen in the instrumentalization of the child as a commodity, contrary to its human dignity. Through the contractual surrogacy agreement, the child could become the object of economic interests, which calls into question its intrinsic value and its self-purposefulness.⁹⁶ An impermissible violation of human dignity would therefore always be assumed if the specific surrogacy agreement disregards the intrinsic value of the child.⁹⁷ This must be taken into account when discussing possible commercial liberalization approaches to surrogacy.

Finally, another relevant legal position of the child is the right to know its parentage under Article 2 paragraph 1 in conjunction with Article 1 paragraph 1 of the Basic Law.⁹⁸ The existence of this right is justified by the fact that the development of identity and health, especially with regard to hereditary diseases and the avoidance of incestuous connections, are inextricably linked to parentage.⁹⁹ Therefore, when considering liberalizing surrogacy, adequate transparency in the interest of the child-to-be is essential.

4. Final assessment on the basis of constitutional interests

The right to reproductive autonomy is a highly valued, but not an absolutely protected, legal good, and can be restricted by conflicting constitutional interests. Limits can lie in the human dignity of the woman carrying the child. However, a differentiated consideration of the various design options is still necessary in this regard. Furthermore, the child also enjoys protection of their human dignity, even before conception. Above all, commercialization of the child in the context of the conclusion of the contract opposes to human dignity. In the case of a possible liberalisation, the child's potential knowledge of parentage would also have to be legally ensured.

⁹³ On the level of protection under Article 2 paragraph 2 sentence 1 of the Basic Law: Rixen (n 11) paras 147–148, 223b.

⁹⁴ See above under B.II.2.

⁹⁵ cf Goedel (n 79) 158.

⁹⁶ cf Diefenbach (n 51) 144–145; Silvia Dietrich, *Mutterschaft für Dritte* (Peter Lang 1989) 458; Goedel (n 79) 159.

⁹⁷ See also Goedel (n 79) 159.

⁹⁸ cf Diefenbach (n 51) 140.

⁹⁹ BVerfGE 79, 256 = NJW 1989, 891, 892 (Federal Constitutional Court); Di Fabio (n 9) para 212.

II. Surrogacy in the light of bioethical principles

In addition to the constitution, the bioethical principle model conceived by *Beauchamp* and *Childress* can serve to resolve the legal ethical tension described above.¹⁰⁰ They comprise the principles of respect for autonomy (the right to informed self-determination), non-maleficence (the obligation to do no harm), beneficence (the obligation to act in the patient's best interest), and justice (fairness in the distribution of burdens and benefits). These four, in terms of biomedicine globally recognised principles provide a framework for argumentation and ensure that all relevant perspectives are included in the consideration.¹⁰¹ Less extensively discussed below are the principles of non-harm and beneficence (1.) in view of the medical assessment that has already been made. Instead, the focus should be on the principle of respect for autonomy (2.). This is followed by a consideration of the principle of justice (3.) and a summary of the findings (4.).

1. Surrogacy and the principle of non-harm and care

The principle of non-harm (*primum non nocere*) states that no avoidable harm may be inflicted on anyone.¹⁰² The principle of beneficence (*principium beneficentiae*) complements the principle of non-harm by demanding not only the avoidance of harm, but also the active promotion of the well-being of others.¹⁰³ Medically not indicated interventions for the benefit of third parties, such as in the case of surrogacy, require special justification.¹⁰⁴ Taking into account the high importance of the reproductive autonomy of the intended parents, as described, a voluntarily assumed risk of harm to the woman or child can be justified, provided that the risk of harm that does exist remains within the medically justifiable framework, as is the case here.¹⁰⁵ Surrogacy is therefore ethically justifiable in principle with regard to the principle of non-harm, but would have to be limited to the extent necessary for the medical protection of the surrogate mother or the child, for example in the case of existing risk-increasing diseases.¹⁰⁶

In addition, the setting of age limits should be considered in order to avoid medical and psychological risks for the child that may arise from an advanced age of the intended parents or the person carrying the child. This necessity to impose conditions like age limits is directly dictated by the principles of non-maleficence and beneficence, which

¹⁰⁰ cf Tom L Beauchamp and James F Childress, *Principles of Biomedical Ethics* (8th edn, OUP 2019) 12.

¹⁰¹ cf Tom L Beauchamp, 'Principles of Biomedical Ethics' in Nikola Biller-Andorno, Christian Lenk and Jochen Vollmann (eds), *Medizinethik* (Springer 2002) 71, 84.

¹⁰² Beauchamp and Childress (n 100) 117–118.

¹⁰³ *ibid* 166–168.

¹⁰⁴ cf Commission on Reproductive Self-Determination and Assisted Reproduction (n 75).

¹⁰⁵ cf Kentenich (n 27) 23. See also above under B.II.2.

¹⁰⁶ cf Rixen (n 11) para 174.

impose a primary ethical obligation to shield the child from foreseeable medical and psycho-social risks, thus ensuring the child's well-being is the ultimate limiting factor on parental reproductive autonomy.¹⁰⁷

2. Surrogacy and conceivable conflicts with the principle of autonomy

The principle of patient autonomy (*salus ex voluntate aegroti suprema lex*) is a principle of medical law enshrined in section 630d paragraph 1 sentence 1 of the German Civil Code (*Bürgerliches Gesetzbuch* – BGB), among others.¹⁰⁸ It is essentially based on the concept of *informed consent*.¹⁰⁹ In the context of surrogacy, the basic conditions of *informed consent* with regard to free will (a.) and the absolutely necessary extent of patient information through counselling (b.) will now be examined in order to arrive at an intermediary conclusion (c.).

a. Economic interests and their contravention of informed consent

The basis of not just *informed consent* but all consent is that a patient decides to undergo treatment out of their freely determined will.¹¹⁰ However, assuming an act of free will is problematic when socio-economic motives guide action.¹¹¹ There must therefore be a distinction between commercial (aa.) and altruistic surrogacy (bb.).

i. Autonomy in commercial surrogacy

A person acts commercially when they intend to make a profit in offering a good or service.¹¹² As already indicated in the context of human dignity, the pursuit of economic gain carries the risk that the surrogate mother will be degraded to an instrument of commercial purposes and *de facto* lose her self-determination.¹¹³ The concept of dignity itself is already distinct from purely economic considerations.¹¹⁴ No material value may be attributed to a truly dignified being.¹¹⁵ In particular, precarious financial circumstances, social and structural dependencies or a lack of knowledge can prompt women to opt for surrogacy.¹¹⁶ If commercialization were allowed in the context of a liberalization of

¹⁰⁷ cf Kentenich (n 27) 24.

¹⁰⁸ cf BVerfGE 115 25 = NJW 2006, 891 (Federal Constitutional Court); BSG NZS 2020, 590, 597 (Federal Social Court); Beauchamp and Childress (n 100) 63.

¹⁰⁹ Beauchamp and Childress (n 100) 80; Alexandra Esser, *Ist das Verbot der Leihmutterschaft in Deutschland noch haltbar?* (Nomos 2018) 103–104.

¹¹⁰ Beauchamp and Childress (n 100) 59.

¹¹¹ *ibid* 60–61.

¹¹² cf Commission on Reproductive Self-Determination and Assisted Reproduction (n 75) 486.

¹¹³ Dietrich (n 96) 331–332; Hande Ince, 'Leihmutterschaft – Ein Überblick' in Claude Arditta and others (eds), *Retortenmütter – Zum Problem der Leihmutterschaft* (Campus 1987) 75, 89.

¹¹⁴ Kreß (n 85) 11, 13.

¹¹⁵ *ibid*.

¹¹⁶ cf François Isambert, 'Génétique et société' in *Actes du Colloque Génétique et Société* (Société Française de Sociologie 1987) 285, 295.

surrogacy, this would create the basis for exploitation, thus for violations of human dignity and the principle of autonomy. Incidentally, the prohibition of commercialisation is also legally indicated by Article 3 paragraph 2 letter c of the EU Charter of Fundamental Rights.¹¹⁷

In nations with the legal possibility of commercial surrogacy, such as Georgia or Ukraine, such abuse is evident.¹¹⁸ There, social inequalities create the conditions for the abuse of the pregnant woman, which are often exploited by German citizens in the context of surrogacy tourism.¹¹⁹ Permitting surrogacy where women are treated as disposable is therefore ethically unjustifiable with regard to the principle of autonomy.¹²⁰

ii. Autonomy in altruistic surrogacy

On the other hand, the altruistic form of surrogacy appears to be more compatible with the principle of autonomy. Altruistic surrogacy means that the compensation of the surrogate mother only covers the pregnancy-related costs and is not aimed at profit.¹²¹ The compatibility mentioned above can be illustrated by a comparison with the legal concept of organ donation. Pursuant to section 17 paragraph 1 sentence 1 TPG, it is not permissible to make an economic profit from the trade in organs or tissues, while the reimbursement of expenses is permissible according to section 17 paragraph 1 sentence 2 number 1 TPG.¹²² There, the legislator denies the motive of obtaining a financial advantage through the donation. At the same time, however, the aim is to prevent the donor from being off worse after the donation.¹²³

Such an approach protects the right to reproductive autonomy of the intended parents and the surrogate mother, without jeopardizing the autonomy and dignity of the surrogate mother.¹²⁴ Nevertheless, it must be critically questioned whether it is an inadmissible instrumentalization if the egg donor or surrogate mother does not receive adequate compensation at all.¹²⁵ If no financial compensation is offered, the surrogate

¹¹⁷ Charter of Fundamental Rights of the European Union [2012] OJ C 326/02; cf Commission on Reproductive Self-Determination and Assisted Reproduction (n 75) 484.

¹¹⁸ Commission on Reproductive Self-Determination and Assisted Reproduction (n 75) 425; Philipp Kvit and Andreas Spickhoff, 'Rechtliche Einordnung der Leihmutterschaft in Deutschland' (2023) 70 FamRZ 653, 654. See also below under E.III.

¹¹⁹ cf Auer (n 89) 241; Diel (n 2) 17; Kentenich (n 16) 189; Commission on Reproductive Self-Determination and Assisted Reproduction (n 75) 482.

¹²⁰ See also Commission on Reproductive Self-Determination and Assisted Reproduction (n 75) 491; Leopoldina (n 38) 86.

¹²¹ cf Andrea Büchler, 'Leihmutterschaft – Ein Thema für das Familienrecht' [2021] *juridikum* 331, 337; Commission on Reproductive Self-Determination and Assisted Reproduction (n 75) 486.

¹²² Peter Häberle, '§ 17 TPG' in Erbs and Kohlhaas (n 20) para 3; Hans Scholz and Marc Middel, '§ 17 TPG' in Spickhoff (n 14) para 1.

¹²³ cf BT-Drs 13/4355, 15 (legislative proposal); BT-Drs 13/8017, 44 (committee proposal).

¹²⁴ cf Commission on Reproductive Self-Determination and Assisted Reproduction (n 75) 488; Leopoldina (n 38) 84.

¹²⁵ cf Commission on Reproductive Self-Determination and Assisted Reproduction (n 75) 488.

mother's burdens and expenses are sometimes not sufficiently appreciated.¹²⁶ However, remuneration beyond the expense allowance could be problematic, as it carries the risk that the child will become the object of contractual negotiation between the intended parents and the surrogate mother, impermissibly violating the human dignity of the child.¹²⁷ For example, it would be conceivable that the child would be measured by the price paid for it, or that conflicts on the child's back would arise from the remuneration agreement.¹²⁸

Although economic motives do not exclude self-determination *per se*, the prospect of remuneration can promote abuse and exploitation in an unavoidable way and thus undermine the autonomy of the birth mother.¹²⁹ Any form of remuneration that goes beyond an expense allowance is to be rejected in this respect. Nevertheless, altruistic surrogacy in this sense appears to be principally ethically justifiable with regard to the principle of autonomy.

b. Necessity of and design options for guidance

The basis of medical action is advice and education, and their understanding of all medical and health aspects.¹³⁰ Comprehensive, independent and mandatory psychosocial counselling for all those involved in surrogacy would therefore be central to ensuring autonomous *informed consent*.¹³¹ This counselling would have to take place before, during and after surrogacy, and include cases of failure or miscarriage. In order to exclude profit-oriented and thus autonomy-restricting interests, advice would have to be provided by independent, non-profit structures.¹³² In terms of content, it would have to address medical, psychological and social risks, individual burdens, and the rights of the child in an interdisciplinary manner.¹³³

The legal framework at home and abroad as well as alternatives to surrogacy such as adoption or foster care must also be addressed.¹³⁴ Supplementary social counselling would have to ensure that economic emergencies do not form the basis for decision-making.¹³⁵ In order to enable a reflected decision, a waiting period between the

¹²⁶ *ibid* 490.

¹²⁷ cf Dietrich (n 96) 458; Goedel (n 79) 159. See also above under C.I.3.b.

¹²⁸ cf Goedel (n 79) 159.

¹²⁹ On the influence of economic motives: Commission on Reproductive Self-Determination and Assisted Reproduction (n 75) 487–488.

¹³⁰ Kentenich (n 27) 24.

¹³¹ See also Kentenich (n 16) 192; Leopoldina (n 38) 95; Paetow (n 19) 354.

¹³² On the UK model: Kreß (n 9) 886.

¹³³ cf Commission on Reproductive Self-Determination and Assisted Reproduction (n 75) 469; Leopoldina (n 38) 95.

¹³⁴ Kentenich (n 16) 192.

¹³⁵ cf Leopoldina (n 38) 95.

consultation and the start of treatment should be considered.¹³⁶ It is therefore clear that in the event of a liberalisation of surrogacy, a legal regulation is needed that guarantees a comprehensive range of counselling services. This is the only way to protect the autonomy of those involved, instead of pushing intended parents into a surrogacy tourism that is poor in education, as is currently the case.¹³⁷

c. Final assessment and conclusion for further consideration

Commercial surrogacy is ethically unjustifiable, as it unduly endangers the autonomy of the surrogate mother through economic constraints. Altruistic surrogacy, on the other hand, is compatible with the principle of autonomy, provided that comprehensive and independent advice is given by and to all parties involved.

3. Tensions between surrogacy and the principle of justice

Similar to Article 3 of the Basic Law, the principle of justice requires that people be treated equally and that burdens and benefits be distributed appropriately.¹³⁸ It can be subdivided into the three dimensions of distributive justice (a.) as well as procedural justice, and commutative justice (b.).¹³⁹

a. Surrogacy and problems concerning distributive justice

Distributive justice describes the appropriate distribution of goods and burdens.¹⁴⁰ Commercial surrogacy would counteract distributive justice in such a way that access to surrogacy would be reserved for financially privileged people.¹⁴¹ It can therefore be stated that commercial surrogacy is also ethically unjustifiable from the point of view of justice. In the case of altruistic surrogacy, the question arises as to whether the community of solidarity should also assume the financial burdens of altruistic surrogacy.¹⁴² On the one hand, burden-sharing could reduce inequalities by making access independent from income. On the other hand, according to the legal concept of sections 27 paragraph 1 sentence 1, 27a paragraph 1 number 1 SGB V, only medically necessary treatments are covered by mandatory health insurance.¹⁴³ However, surrogacy might be considered

¹³⁶ cf Kentenich (n 16) 192; Paetow (n 19) 354.

¹³⁷ See also Auer (n 89) 254–255.

¹³⁸ cf Beauchamp and Childress (n 100) 226–229; Hans Jarass, 'Art 3 GG' in Jarass and Pieroth (n 13) para 1; Ferdinand Wollenschläger, 'Art 3 GG' in Huber and Voßkuhle (n 12) para 67.

¹³⁹ Beauchamp and Childress (n 100) 226–229; Tom L Beauchamp, 'Der „Vier-Prinzipien“-Ansatz in der Medizinethik' in Nikola Biller-Andorno and others (eds), *Medizinethik* (Springer 2021) 71, 79.

¹⁴⁰ Beauchamp and Childress (n 100) 267–268; Barbara Prainsack and Alena Buyx, *The Principle of Solidarity* (Campus 2016) 39.

¹⁴¹ cf Esser (n 109) 143.

¹⁴² cf Friederike Wapler, 'Reproduktive Autonomie und ihre Grenzen – Leihmutterschaft aus verfassungsrechtlicher Perspektive' in Schramm and Wermke (n 44) 107, 134.

¹⁴³ cf BAG NZS 1998, 477, 477; 1998, 525, 525 (Federal Social Court).

merely a medically unindicated wish fulfilment.¹⁴⁴ This could be countered by citing the fact that childlessness is usually based on the infertility of the parents due to illness.¹⁴⁵ As a compromise, the costs of independent advice could be covered in order to ensure informed consent and the protection of all parties involved.

b. Procedural justice and commutative justice

Transparent processes are required for procedural justice,¹⁴⁶ especially through the comprehensive and independent advice of all parties involved, which has already been discussed. Finally, commutative justice requires an equal exchange between the surrogate mother, the intended parents and the child.¹⁴⁷ This could be ensured by the surrogate mother's rights to information and communication, or mandatory meetings with the intended parents.¹⁴⁸ Financial dependencies in commercial surrogacy would once again be detrimental to a commutative relationship between the parties involved.¹⁴⁹

4. Final assessment based on bioethical principles

While the principles of non-harm and care are upheld, the principles of autonomy and justice pose a problem in commercial surrogacy, as economic interests jeopardize voluntariness and fair distribution. Altruistic surrogacy, on the other hand, is compatible with all principles, provided that comprehensive and independent counselling is made mandatory and affordable.

III. Final ethical assessment of surrogacy forms

In the course of the constitutional and principle-oriented debate, it has become clear that commercial surrogacy is to be rejected. It contradicts both the principle of autonomy and the principle of justice, and holds considerable potential for injury to the human dignity of the surrogate mother and the best interests of the child. Altruistic surrogacy, on the other hand, both in gestational and traditional form, is justifiable under strict conditions, in particular comprehensive counselling. In any case, a liberalization of surrogacy requires regulations that prevent the instrumentalization of surrogate mother and child.

¹⁴⁴ cf Kentenich (n 16) 188.

¹⁴⁵ See B.II.1 on the causes of childlessness.

¹⁴⁶ cf Miriam Rose, 'Familie in der aktuellen kirchlichen Debatte' in Schramm and Wermke (n 44) 223, 228.

¹⁴⁷ cf Leopoldina (n 38) 94–95.

¹⁴⁸ *ibid.*

¹⁴⁹ cf Rose (n 146) 223, 228.

D. Current legal situation in the Federal Republic of Germany

In the following sequence, it will be shown to what extent the German legal situation deviates from this ethical assessment. To this end, the criminality of surrogacy (I.) is outlined first, then civil law regulations on surrogacy contracts (II.), and finally its treatment in family law (III.). Subsequently, the findings are critically contrasted with the previous ethical evaluation and examined with respects to their weaknesses (IV.).

I. The current criminal prohibition of surrogacy

In these next few paragraphs, the basics revolving around the criminal prohibition of surrogacy (1.) and the criminal consequences of surrogacy tourism (2.) are discussed.

1. Normative foundations, criminal offences, and groups of perpetrators

In Germany, there is no special law on reproductive medicine. Surrogacy is regulated by the ESchG and the AdVermiG. Section 1 paragraph 1 number 7 ESchG sanctions gestational surrogacy.¹⁵⁰ Section 13a AdVermiG complementarily covers natural insemination and thus also traditional surrogacy as surrogacy within the meaning of the AdVermiG, in order to comprehensively prevent their mediation.¹⁵¹ According to sections 13c, 14b paragraph 1 AdVermiG, the surrogacy placement (the arrangement or brokerage of a surrogate mother to intended parents) is punishable, while the search or offer for one is an administrative offence according to section 14 paragraph 1 number 2 letter c AdVermiG.¹⁵²

Perpetrators in the sense of section 1 paragraph 1 number 7 ESchG can be doctors or scientists. The surrogate mothers and intended parents go unpunished according to section 1 paragraph 3 number 2 ESchG. The legislator classifies their behaviour as unlawful (not justified or even excused), but nevertheless refrains from punishment.¹⁵³ This is justified by the arguments that surrogate mothers and intended parents cannot grasp the risks of reproductive techniques, that the surrogate mother develops an emotional bond with the child, and that the intended parents' desire to have their own child seems, while still not acceptable, at least somewhat understandable.¹⁵⁴

¹⁵⁰ Müller-Terpitz (n 19) para 20; Paetow (n 19) 347.

¹⁵¹ Lutz (n 20) para 4; Paetow (n 19) 348.

¹⁵² cf Hans-Joachim Lutz, '§ 13c AdVermiG' in Erbs and Kohlhaas (n 20) para 1; Hans-Joachim Lutz, '§ 14 AdVermiG' in Erbs and Kohlhaas (n 20) para 1.

¹⁵³ cf Günther, Taupitz and Kaiser (n 4) section 1 para 30.

¹⁵⁴ cf BT-Drs 11/5640, 10.

2. Surrogacy tourism in the context of the applicability of German criminal law

In accordance with the territorial principle of section 3 of the German Criminal Code (*Strafgesetzbuch* – StGB), German criminal prohibitions apply in principle only to offences committed in Germany.¹⁵⁵ However, acts related to surrogacy carried out abroad can also be punishable under German law.¹⁵⁶ This applies to doctors who, in Germany, carry out preparatory acts for surrogacy taking place abroad, as the location of the participant is decisive for the criminality of participating in an offence (section 9 paragraph 2 sentence 1 StGB).¹⁵⁷ Doctors who, for example, pre-examine interested parties or recommend foreign contacts, can be liable to prosecution for aiding and abetting (section 27 StGB) an offence under section 1 paragraph 1 number 7 ESchG.¹⁵⁸ According to section 9 paragraph 2 sentence 2 StGB, this applies even if surrogacy is legal in the respective foreign country.¹⁵⁹

Criminal liability requires that the doctor's actions are causal for the subsequent surrogacy, by supporting or fostering it.¹⁶⁰ The doctor must also be aware of the intended surrogacy, in order to act with intent.¹⁶¹ Incitement to surrogacy carried out abroad can also be punishable, as per section 26 StGB.¹⁶² This would be the case if a doctor suggests to his patients that surrogacy be carried out abroad, provoking the decision to commit that crime.¹⁶³ As a result, German doctors can also be prosecuted for various behaviours related to surrogacy carried out abroad.

II. The legal validity of surrogacy contracts

In cases of gestational surrogacy, the nullity of any contracts results from the explicit condemnation by the ESchG, in conjunction with § 134 BGB.¹⁶⁴ Although traditional surrogacy is not subject to the criminal provisions of the ESchG, contracts are voided due to immorality according to section 138 BGB, in view of the judgement felled by the

¹⁵⁵ Edward Schramm, 'Das verbotene Kind – Zur (straf-)rechtlichen Bewertung der Leihmutterschaft in Deutschland' in Schramm and Wermke (n 44) 61, 67.

¹⁵⁶ cf Leopoldina (n 38) 69.

¹⁵⁷ Martin Heger, '§ 9 StGB' in Karl Lackner, Christian Kühl and Martin Heger (eds), *Strafgesetzbuch Kommentar* (30th edn, C.H. Beck 2023) para 3; Dorothea Magnus, 'Kinderwunschbehandlungen im Ausland' (2015) 35 NSTz 57, 57–58.

¹⁵⁸ Schramm (n 155) 61, 67.

¹⁵⁹ cf KG Berlin MedR 2014, 498, 498 (Higher Regional Court for Berlin).

¹⁶⁰ cf Günther, Taupitz and Kaiser (n 4) section C.II. para 26.

¹⁶¹ On intent on the side of the participants: BGH NSTz 1999, 399, 399–401 (Federal Court of Justice); Magnus (n 159) 59.

¹⁶² cf Magnus (n 157) 60; Paetow (n 19) 347.

¹⁶³ *ibid.*

¹⁶⁴ AG Hamm BeckRS 2011, 25140 (Local Court in Hamm, North Rhine-Westphalia); BT-Drs 11/5460, 16; Nina Dethloff, 'Leihmütter, Wunscheltern und ihre Kinder' (2014) 69 JZ 922, 923.

AdVermiG.¹⁶⁵ Generally, a contract that regulates the placement of a child for remuneration and turns the child into a commodity violates human dignity and is thus deemed amoral in the sense of section 138 BGB.¹⁶⁶ The nullity results in claims of the intended parents to repayment under the law of unjust enrichment (*condictio indebiti*).¹⁶⁷

III. Legal maternity and paternity in surrogate mothers

The status of legal parenthood carries far-reaching legal consequences, such as in relation to custody or a subsequent inheritance.¹⁶⁸ For this reason, legal maternity (1.) and paternity (2.) as well as the treatment of foreign status decisions (3.) are discussed below.

1. Legal maternity: *Mater semper certa est*

According to section 1591 BGB, the mother of any child is simply the woman who gave birth. This legal classification excludes the genetic mother from legal motherhood, even in the case of egg or embryo donation.¹⁶⁹ The intended mother or egg and embryo donors could only become legal mothers by way of adoption in accordance with sections 1741 and 1754 BGB.¹⁷⁰ Legally challenging the motherhood of the woman giving birth is as of yet impossible under German law.¹⁷¹ In higher-ranking constitutional law, it is sometimes argued that the genetic mother should also enjoy the protection of motherhood and family welfare granted under Article 6 paragraph 4 of the Basic Law.¹⁷² While current ordinary law excludes split motherhood, it is therefore considered conceivable in constitutional law.

2. Legal paternity: *Pater est, quem nuptiae demonstrant*

Legal paternity is governed by section 1592 BGB. If the surrogate mother is married, her husband is considered the legal father by current operation of law.¹⁷³ However, the intended father could contest the paternity of the husband under the conditions of sections 1599 and following.¹⁷⁴ If the surrogate mother is unmarried, the intended father could acknowledge paternity with the consent of the surrogate mother, in accordance

¹⁶⁵ cf OLG Hamm NJW 1986, 781, 782 (Higher Regional Court of Hamm); Marina Wellenhofer, '§ 1591 BGB' in Franz Jürgen Säcker (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 10: Familienrecht II* (9th edn, C.H. Beck 2024) para 21.

¹⁶⁶ cf Dethloff (n 164) 923.

¹⁶⁷ cf OLG Hamm (n 165) 782.

¹⁶⁸ cf Andreas Spickhoff, '§ 1591 BGB' in Spickhoff (n 14) para 1.

¹⁶⁹ Christine Budzikiewicz, '§ 1591 BGB' in Othmar Jauernig (ed), *Bürgerliches Gesetzbuch* (19th edn, C.H. Beck 2023) para 2; Wellenhofer (n 165) para 20.

¹⁷⁰ cf Dethloff (n 164) 930; Wellenhofer (n 165) para 21.

¹⁷¹ Wellenhofer (n 165) para 21.

¹⁷² Matthias Heider, 'Art 6 GG' in Ingo von Münch and Philip Kunig (eds), *Grundgesetz Kommentar* (7th edn, C.H. Beck 2021) para 75; Robbers (n 92) para 175.

¹⁷³ Andreas Spickhoff, '§ 1592 BGB' in Spickhoff (n 14) para 2; Marina Wellenhofer, '§ 1592 BGB' in Säcker (n 165) para 6.

¹⁷⁴ Wellenhofer (n 165) para 13.

with section 1592 number 2, sections 1594 and following.

3. Recognition of foreign status decisions

In some states such as Ukraine or California, the intended mother is immediately recognized as the legal mother.¹⁷⁵ According to the case law of the Federal Court of Justice, the domestic legal recognition of foreign court decisions that assign parenthood to intended parents does not violate *public policy*, at least if the child is genetically descended from an intended parent.¹⁷⁶ If, on the other hand, the parental status of the intended parents was established abroad by operation of law, parentage is assessed as per Article 19 paragraph 1 sentence 1 of the Introductory Act to the Civil Code (EGBGB) in accordance with the law of the child's habitual residence.¹⁷⁷ In the case of prompt entry, legal parentage is therefore subject to German law, with the result that the surrogate mother is the legal mother.¹⁷⁸ The intended mother can then only obtain parenthood through adoption.¹⁷⁹ If the child remains abroad for a longer period of time, foreign law remains applicable, with the result that the intended parents become the legal parents of the child.¹⁸⁰

IV. Criticism of this legal situation, contrasted with the ethical assessment

In summary, the current German legal situation concerning surrogacy is characterized by criminal prohibitions, civil nullity of surrogacy contracts, and imponderable legal statuses. It is therefore not surprising that 80.2% of intended parents from Germany state that they go seek fertility treatment abroad for legal reasons.¹⁸¹ The intended parents are pushed by the German legal situation into countries with lower standards of protection, where surrogate mothers are potentially exposed to exploitative conditions and thus violations of human dignity.¹⁸² Furthermore, birth abroad creates uncertainties, especially with regard to legal parenthood.¹⁸³ The question of parenthood is not even solved in the best interests of the child, but depends solely on the habitual place of residence, which is irrelevant to the peculiarities of surrogacy.¹⁸⁴

¹⁷⁵ cf Rolf Behrentin and Christoph Grünenwald, 'Leihmutterschaft im Ausland und die deutsche Rechtsordnung' (2020) 73 NJW 2057, 2057; Marko Oldenburger, 'Die Abstammung von Leihmütterkindern' (2020) 7 NZFam 457, 457–458.

¹⁷⁶ cf BGH DNotZ 2019, 54, 54; NJW 2015, 479, 479 (Federal Court of Justice).

¹⁷⁷ Nina Dethloff, 'Leihmutterschaft in rechtsvergleichender Perspektive' in Beate Ditzgen and Marc Philippe Weller (eds), *Regulierung der Leihmutterschaft* (Mohr Siebeck 2018) 55, 64.

¹⁷⁸ cf Dethloff (n 164) 929–930; Wellenhofer (n 165) para 26.

¹⁷⁹ cf BGH NJW 2019, 1605 (Federal Court of Justice); Wellenhofer (n 165) para 21.

¹⁸⁰ Dethloff (n 177) 64.

¹⁸¹ Françoise Shenfield and others, 'Cross border reproductive care in six European countries' (2010) 25 Human Reproduction 1361, 1361.

¹⁸² cf Sophie-Marie Humbert, *Plädoyer für die Legalisierung der Leihmutterschaft* (Mohr Siebeck 2023) 453.

¹⁸³ See also Esser (n 109) 228–229.

¹⁸⁴ See also Dethloff (n 164) 930; Hartmut Kreß, 'Samenspende und Leihmutterschaft – Problemstand, Rechtsunsicherheiten, Regelungsansätze' (2013) 19 FPR 240, 243.

The danger to the child's welfare is evidenced by certain case law,¹⁸⁵ which has allowed the recognition of the parenthood of intended parents in some cases and thus de facto softened the ban on surrogacy.¹⁸⁶ The current legal situation also carries the risk that doctors in this country will refrain from providing comprehensive information to intended parents who are seeking surrogacy abroad for fear of prosecution.¹⁸⁷ This runs counter to the principle of autonomy. From an ethical and constitutional perspective, the prohibitive legal situation is generally not required, at least with regard to altruistic surrogacy.¹⁸⁸ For altruistic surrogacy, these arguments are currently only countered by the legislator's scientifically unsubstantiated objection of the harms of split motherhood.¹⁸⁹

In this respect, the existing legal uncertainty and ineffectiveness contradicts the well-being of all parties involved and constitutes a need for legislative action, at least in the area of altruistic surrogacy.

E. Regulatory approaches in foreign legal systems

In order to design new legal regulations on surrogacy, a comparative analysis of foreign legal systems is advisable. Internationally, three regulatory models can be distinguished based on different ideas about the role of the surrogate mother, namely instrumentalization (I.), altruism (II.) and reproduction as a service (III.).¹⁹⁰ Their descriptions are followed by a conclusion as to which of these approaches could be implemented in Germany (IV.), focussing on the altruistic ideal type.

I. The surrogate mother as an instrumentalized and vulnerable woman

According to the first conception, surrogacy represents an instrumentalization of the surrogate woman. This view can be found in jurisdictions that prohibit surrogacy, such as Germany, Austria, Switzerland, France, Italy, Norway, and Portugal.¹⁹¹ In these jurisdictions, surrogacy contracts are often void and medical assistance is punishable by law.¹⁹² In terms of family law, regulations similar to the German regulations usually apply,

¹⁸⁵ cf BGH (n 179).

¹⁸⁶ See also Humbert (n 182) 60.

¹⁸⁷ See also Leopoldina (n 38) 69.

¹⁸⁸ See also Krefß (n 9) 885–886; Paetow (n 19) 354.

¹⁸⁹ cf Edward Schramm (n 155) 80.

¹⁹⁰ cf Michelle Cottier, 'Die instrumentalisierte Frau: Rechtliche Konstruktionen der Leihmutterschaft' [2016] *juridikum* 188, 188.

¹⁹¹ cf Anna Lina Gummersbach, 'Die Leihmutterschaft im französischen Recht' in Ditzgen and Weller (n 177) 101, 105.

¹⁹² Andrea Büchler, 'Autonomie, Reproduktion und die Leihmutterschaft' [2021] *juridikum* 331, 338; Cottier (n 190) 192.

especially as regards the surrogate mother being considered the legal mother.¹⁹³

II. The surrogate mother as an altruistic pregnancy donor

The second conception assumes that surrogacy is legitimate if it is done out of an altruistic motivation on the side of the surrogate mother.¹⁹⁴ Countries with this ideal type as a basis include the United Kingdom (1.), Greece (2.), and Israel (3.). In the following paragraphs, the legal situation of these countries is outlined in order to gain impetus for possible German reforms.

1. Main features and peculiarities of the legal situation in the UK

In the UK, the *Human Fertilisation and Embryology Act 2008* regulates altruistic surrogacy.¹⁹⁵ Commercial agreements are prohibited and the surrogate mother is initially the legal mother.¹⁹⁶ However, the intended parents can apply for a *Parental Order* after the birth in order to obtain legal parenthood, whereby same-sex couples also have the right to apply.¹⁹⁷ Meanwhile, the surrogate mother is paid significant sums of money as expense allowances.¹⁹⁸ At least one intended parent must also be resident in the UK.¹⁹⁹

2. Main features and peculiarities of the legal situation in Greece

Greece allows altruistic surrogacy under Articles 1455 and following of the Greek Civil Code, but only under strict conditions.²⁰⁰ Court approval before pregnancy is mandatory and both intended parents and surrogate mother must be residents of Greece.²⁰¹ In addition, the surrogate mother must not be genetically related to the child.²⁰² The compensation is limited to expenses and loss of earnings.²⁰³ The intended parents also obtain legal parenthood provisionally with the approval.²⁰⁴

¹⁹³ cf Lisa Engelhardt, 'Die Leihmutterschaft im schweizerischen Recht' in Ditzgen and Weller (n 177) 93, 93–94.

¹⁹⁴ Büchler (n 192) 337; Cottier (n 190) 195.

¹⁹⁵ Sebastian Schwind, 'Regulierung der Leihmutterschaft im Vereinigten Königreich' in Ditzgen and Weller (n 177) 117, 118.

¹⁹⁶ Goedel (n 79) 112–113.

¹⁹⁷ Schwind (n 195) 120.

¹⁹⁸ Dietrich (n 96) 195; Kreß (n 9) 882.

¹⁹⁹ Schwind (n 195) 128.

²⁰⁰ Esser (n 109) 220.

²⁰¹ Leon Grigorios, Angela Papetta and Chara Spiliopoulou, 'Overview of the Greek legislation regarding assisted reproduction and comparison with the EU legal framework' (2011) 23 *Reproductive BioMedicine Online* 820, 821–822.

²⁰² Katharina Helena Hoffmeister, *Reproduktives Reisen und Elternschaft* (Nomos 2022) 98.

²⁰³ Aristides Hatzis, 'The Regulation of Surrogate Motherhood in Greece' [2010] *SSRN Electronic Journal* 1, 3, 10.

²⁰⁴ Esser (n 109) 221.

3. Fundamentals and peculiarities of the legal situation in Israel

In Israel, the *Embryo Carrying Agreements Law 1996* regulates altruistic surrogacy.²⁰⁵ A state committee must approve the surrogacy agreement in advance, and the surrogate mother, who is necessarily unmarried, must belong to the same religion as the intended parents.²⁰⁶ Only married couples, including homosexual ones, are admitted.²⁰⁷ The surrogate mother receives compensation and the intended parents obtain legal parenthood by court order, provided that the surrogate mother agrees.²⁰⁸

III. The surrogate mother as a reproductive service provider

The geographic scope of the third concept, which follows the logic of the law of obligations, includes the US state of California and the nation of Ukraine.²⁰⁹ Pregnancy and birth are provided in return for freely negotiated and legally unlimited financial compensation.²¹⁰ The surrender of the child is also enforceable. In California, for example, this is the case even before birth, by way of a court application for the determination of parenthood.²¹¹ While this commercial approach offers the highest degree of legal certainty for the intended parents by securing their parenthood even before birth, it raises serious ethical and human rights concerns regarding the instrumentalization and potential exploitation of the surrogate mother, thereby contrasting sharply with the ethical foundations of the German constitutional order, which prioritises human dignity.

IV. Impulses from the legal comparison for a new German regulation

The comparative models provide essential impulses for a new German regulation of altruistic surrogacy, although a direct adoption of any single system is not feasible. To strike a necessary balance between the reproductive autonomy of the intended parents and the paramount principle of the child's well-being, the regulatory approach must include strict procedural and systematic safeguards. Specifically, the model of mandatory institutional approval before conception, established in jurisdictions like Greece and Israel, is highly convincing as it secures ethical and legal prerequisites early and prevents instrumentalization.

Furthermore, a new law must ensure the immediate establishment of parental status for the intended parents, preferably with an *ex tunc* effect (from the moment of conception)

²⁰⁵ Ulrich May, *Rechtliche Grenzen der Fortpflanzungsmedizin* (Springer 2003) 42–43.

²⁰⁶ Kreß (n 9) 882; May (n 205) 97.

²⁰⁷ cf Kreß (n 9) 882; May (n 205) 188–189.

²⁰⁸ Rhona Schuz, 'Surrogacy in Israel' in Claire Fenton-Glynn, Terry Kaan and Jens Scherpe (eds), *Eastern and Western Perspectives on Surrogacy* (Intersentia 2019) 166, 171, 177.

²⁰⁹ cf Hoffmeister (n 202) 93–94.

²¹⁰ *ibid.*

²¹¹ Esser (n 109) 218.

to avoid the legal uncertainties (the "limping" relationship) inherent in the post-birth *Parental Order* system used in the UK. Essential for a non-discriminatory and modern regulation is also the explicit inclusion of homosexual couples. Crucially, to preserve the altruistic character and prevent Germany from becoming a target for international commercial surrogacy, the regulation must include a residency requirement for at least one intended parent. These combined elements demonstrate that the ethical justification for liberalisation requires simultaneously the rigorous limiting of reproductive autonomy through legally established safeguards focused primarily on the protection of the child.

F. Conclusion

The current general ban on surrogacy is contrary to ethical and constitutional principles, in particular the right to reproductive autonomy. It drives intended parents into surrogacy tourism and the risks associated with it. There is therefore a need for well-regulated liberalization. As the constitutional, bioethical, and comparative legal analysis has shown, a new regulation should allow altruistic surrogacy as a medical *ultima ratio* under strict conditions, whereas the commercial form must remain prohibited. A future law on reproductive medicine should include core elements that are ethically and legally justified by the principles of non-maleficence and beneficence. More specifically, this includes admissibility being linked to a compelling medical indication; minimum ages and strict age limits for surrogate mothers and intended parents, designed to mitigate medical and psycho-social risks for the child; and health care being provided only in approved centres.

Procedural safeguards, taking inspiration from models like Greece and Israel, must consist of mandatory, independent and comprehensive psychosocial counselling for all parties involved, including the child, especially regarding their right to identity and information, as well as verification of voluntary consent by independent but state-controlled organisations. The contractual relationship must primarily ensure the immediate assumption of parenthood under family law by the intended parents, preferably with *ex tunc* effect from conception - a system preferred over the UK's post-birth *Parental Order* to avoid the legal uncertainties inherent in the latter. Furthermore, a short-term right of revocation of the surrogate mother after birth is necessary, functioning as a safeguard to protect the surrogate's dignity and fully voluntary consent, even if this compromises legal certainty for a brief period.

Transparency must be ensured by an obligation to document all relevant data, its reporting to a central register, and a right of the child to information. Violations, including breaches of documentation and information obligations, must be punishable. Crucially, the proposed regulation must include a residency requirement for at least one intended

parent to prevent reverse surrogacy tourism and to establish a safe, legal alternative for German citizens who currently resort to risky procedures abroad. Banning surrogacy tourism in its current form can, however, not solve the outlined ethical concerns. A new law should insofar serve as a structured, ethical, and constitutionally-based response to the international challenges of surrogacy.