



## Research Article

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# The legal vacuum on surrogacy: Risks and challenges under European Human Rights standard's

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### Abstract

This research paper carried out a judicious examination of the mainstream legislative lacuna pertaining to surrogacy within the Albanian jurisdiction, which actually lacks an integrated and specific normative system governing this progressively salient modality of assisted reproductive technology. Nevertheless, the accelerating recourse to every domestic and cross-border surrogacy arrangements, Albanian legislation remains prominently absent, generating significant legal uncertainty on the matter of parentage, how a child born using surrogacy is recognized in the legal system.

Throughout the implementation of a comparative legal methodology, this research dissects a spectrum of regulatory paradigms widespread in selected European jurisdictions and evaluates their prospective suitability and applicability within the Albanian normative system. Considerable importance is attributed to the decisions of the European Court of Human Rights, notably in the context of the European Convention on Human Rights protecting private and family life.

The appraisal demonstrates a potential breach by Albania of its international human rights obligations through its current laws. Consequently, the study advocates for the prompt enactment of a thorough, ethically aligned, and legally robust framework focused at ensuring legal certainty, ensuring the fundamental rights and interests of all constituents.

**Keywords:** Surrogacy, Albanian law, Article 8 ECHR, comparative legal analysis, reproductive rights, international human rights law, parentage determination, legal uncertainty.

## 1. Introduction

Over the last decades, surrogacy has arisen as a complicated and debatable form of assisted reproductive technology (ART), demanding traditional legal concepts of parenthood, family, and bodily autonomy. As medical advances make it increasingly feasible, surrogacy raises significant ethical, legal, and human rights questions particularly in jurisdictions that lack a clear regulatory framework (Pennings, 2012).

Albania is one such country, where surrogacy remains unregulated by national legislation, leaving participants in a precarious legal position (Zyberaj, 2019). This article aims to examine, through a human rights perspective, the ramifications of Albania's legal silence on surrogacy. It seeks to analyze how the actual legal vacuum affects the legal acknowledgment of parenthood, the status granted to children, and the protections afforded to surrogates, while framing Albania's obligations within the broader European legal context. Furthermore, the study elicits regarding comparative legal analysis to assess normative models applied by curated states across Europe like Greece, UK, France, and Italy which exemplify a spectrum of legislative responses extending from permissive judicial supervision to stringent prohibition (Johnson, 2021).

Main research questions of the study are:

- What are the legal and human rights implications of Albania's deficiency to regulate surrogacy?
- In what approaches does this legislative vacancy conflict with Albania's obligations under Article 8 of the ECHR?
- Which correlative European approaches current viable models for constructing a human rights-based surrogacy framework in Albania?

### *1.1 Literature Review*

The corpus of scholarly literature handling surrogacy incorporates various disciplinary perspectives, mostly at the meeting point of legal, ethical human rights considerations in family matters. The current study highlights important heterogeneity over European legal regimes, reflective of contrasting socio-cultural values and legal ethical frameworks (Hudson, 2020).

Relational normative analyses reveal an extensive spectrum of regulatory paradigms. For example, the Greek legal framework, (Hellenic Republic, 2005) advocate altruistic surrogacy under comprehensive judicial supervision, thereby safeguarding the overall care and rights of the child together with the surrogate mother while simultaneously recognizing intended parenthood. Conversely, Italy's normative regime (Italian Parliament, 2004) adopts a prohibitionist stance towards surrogacy but advances comprehensive protective measures for posterity resulting from other assisted reproductive technologies, demonstrating a commitment to preserving family integrity within constitutional and bioethical boundaries.

Throughout Albanian context, theoretical research indicates a salient legislative lacuna concerning surrogacy, with the absence of unequivocal statutory provisions inducing important legal ambiguity and jeopardizing the implementation of fundamental rights embedded in domestic and international legal instruments.

The jurisprudence of the European Court of Human Rights constitutes a critical point of reference for states struggling with the legal ambiguities of surrogacy. Pivotal decisions have firmly expressed that the failure to legally recognize parentage in cross-border surrogacy arrangements contravenes upon the article 8 of the ECHR

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(European Convention on Human Rights, 1950) ensures the right to privacy and family life.

## **1.2 Methodology**

This study implements a qualitative, doctrinal legal methodology substantiated by comparative analysis. It persistently assesses the Albanian legislative corpus relevant to family law and assisted reproductive technologies, with particular attention to statutory provisions, judicial decisions, and administrative practices affecting the recognition of surrogacy arrangements. Primary legal sources analyzed include the Albanian Civil Code, Law No. 97/2017 on Assisted Reproductive Technologies (Albanian Parliament, 2017).

The paper incorporates comparative legal vantages, centering on jurisdictions with established surrogacy regulations such as Greece and the UK to define leadings practices and determine legislative innovations promoting the protection of basis rights as outlined in the surrogacy framework. Analytically, the assessment emphasizes the settlement of Albania's domestic legal provisions with its international human rights commitments. The methodological framework also integrates doctrinal study of legal precedents to substantiate normative claims and to apprise practical recommendations for legislative reform.

## **2. The legal Vacuum in Albanian Law**

Albania currently lacks a comprehensive legal framework governing surrogacy, making it one of the few European countries with no particular statutory provisions on the matter. The Albanian Family Code does not mention surrogacy, nor does any other national law directly address the legal status of surrogate frameworks legal entitlements of parents alongside the protection afforded to surrogate mothers and offspring. This legislative stillness generates legal ambiguity and potentially violates fundamental human rights, specifically those protected within the scope of Article 8 of the ECHR (European Convention on Human Rights, 1950).

In practical terms, the implications of this legal vacuum are meaningful. Albanian civil registration offices frequently refuse to register a birth certificate stemming from overseas legal frameworks when intended parents lack biological linkage to the child or if the certificate identifies the surrogate as the mother, thus creating a legal limbo for the child (Zyberaj, 2019). Moreover, in the absence of legal guidelines, potential surrogate mothers and intended parents lack protection from coercion, exploitation, or breaches of contract.

Attempts to address this normative omission have thus far proven insufficient. Even though occasional public debates and professional discussions have emphasized the need for regulation, legislative inaction has persisted. An eminent advancement occurred in early 2024 when the Albanian Ministry of Health, in cooperation with the Parliamentary Commission on Health and Social Affairs, proposed a draft law

on assisted reproduction technologies, which included provisions on altruistic surrogacy.

Nevertheless, the draft triggered substantial ethical, religious, and political controversy and failed to obtain sufficient parliamentary support for adoption. Key points of contention included the eligibility of unmarried or same-sex couples to access surrogacy and the moral permissibility of even altruistic arrangements (Gjoni, 2024). As of mid-2025, Albania remains without a legal framework that would integrate it with European legal and human rights standards.

### **3. Comparative legal approaches to Surrogacy in Europe**

The legal treatment of surrogacy within Europe is symbolized by significant divergences amid national systems. Some European countries have implemented permissive legal frameworks that regulate and facilitate altruistic and commercial surrogacy.

Greece belongs to a small group of EU nations that expressly legalize altruistic surrogacy under Law No.3305/2005, which requires prior judicial authorization and is available only to heterosexual couples with proven medical infertility (Kokkini-Iatridou & Sandland, 2017). The United Kingdom introduces another regulated model under the Surrogacy Arrangements Act and the Human Fertilization and Embryology Act. Although commercial surrogacy is forbidden, altruistic surrogacy is allowed, and legal parenthood may be transferred to the prospective parents through a court-issued order (Horsey K., 2016).

Contrarily, multiple jurisdictions rigidity forbid all forms of surrogacy. France, Germany, and Italy exemplify countries where surrogacy is regarded as contrary to public order and human dignity. French civil law, through Article 16-7 of the Civil Code (French Civil Code, 1994), deems surrogacy contracts null and void, reinforcing the state's position that the human body and its reproductive capacities should not be commercialized (Gross, 2018). In parallel, according to the Embryo Protection Act and The Adoption Placement Act penalize surrogacy, invoking constitutional protections of human dignity under Article 1 of the German Basic Law (Stoll, 2014).

Italy prohibits surrogacy criminalizing any form of assisted reproduction engaging third-party gametes, entailing surrogacy, with criminal penalties for both intermediaries or intended parents. Eastern European countries including Ukraine or Georgia have become prominent surrogacy destinations due to permissive and commercially oriented legislation. Ukrainian laws permit domestic and international intended parents to engage in commercial surrogacy arrangements, endorsing them as legal parents from birth without obliging adoption (Besson, 2020).

Meanwhile these jurisdictions offer clarity and access, concerns persist pertaining to limited protections for surrogate mothers and the risk of manipulation, markedly when arrangements include economically vulnerable women. While the Court concedes that national authorities retain a certain latitude in interpreting and applying the Convention in sensitive moral and ethical matters, this discretion is not

categorical, especially when it conflicts in accordance with the child's fundamental right to identity, stability, and legal recognition (Trimmings & Beaumont, 2013).

### ***3.1 Greece: A Permissive, Court-Supervised Regime***

Greece illustrates one of the most progressive jurisdictions within the European Union regarding altruistic surrogacy. The methods of medically assisted reproduction (Hellenic Republic, 2005) explicitly permit surrogacy under stringent judicial oversight. According to the Greek Civil Code, a court must endorse the arrangement before conception, on the basis of medical documentation proving the intended mother's incapacity to gestate.

Significantly, the prospective mother is recognized as the lawful parent from birth, consequently eliminating the need for postnatal legal procedures. This framework exemplifies a model where all parties rights are formally established and upheld, aligning with the ECtHR's guidance on legal predictability and respect for family life under Article 8 (European Convention on Human Rights, 1950).

### ***3.2 United Kingdom: Altruism within legal ambiguity***

The United Kingdom permits altruistic surrogacy under its current legislation, which inhibit commercial surrogacy and renders surrogacy agreements non-enforceable in court. Legal parenthood is not settled at birth; instead, intended parents must apply for a parental order.

This procedure calls for the surrogate's consent no earlier than six weeks after birth, generating potential risks for intended parents if the surrogate withdraws consent (Horsey, 2015). While the UK system endeavors to balance ethical concerns and reproductive autonomy, the lack of enforceability can risk the stability of family arrangements and possibly conflict with the principle of legal certainty under Article 8 ECHR.

### ***3.3 France: Prohibition and its legal consequences***

France adopts a restrictive stance on surrogacy, treating all forms of such arrangements—both altruistic and commercial—null and void. French courts have historically rejected to acknowledge the legal parentage of children born via surrogacy outside the country, especially when genetic ties are absent.

This approach was challenged in the breakthrough case of *Mennesson* (*Mennesson v. France*, 2014), where the Court held that the denial by France authorities to recognize the relation between the parent of the child born via lawful surrogacy in the United States is a violation of Convention. Although subsequent reforms allowing partial recognition were implemented, the French model still reveals substantial legal barriers to the realization of the family life for individuals involved in surrogacy arrangements (Gross, 2020).

### **3.4 Italy: Criminalization and extraterritorial reach**

Italy embodies one of the most restrictive legal framework in Europe concerning surrogacy. Law No. 40/2004 criminalizes all forms of surrogacy, with penalties extending to those who engage in such practices abroad. In 2023, a debatable legal amendment prolonged the criminal liability extraterritorially, making it a criminal offense for Italian citizens to pursue surrogacy in jurisdictions where it is lawful. This accentuates serious concerns concerning the extraterritorial implementation of the national criminal law, the proportionality of penalties, and potential infringements in consideration of what is most beneficial for the child.

The ECtHR has handled similar issues in *Paradiso and Campanelli* case (*Paradiso and Campanelli v. Italy*, 2017), where the judgment highlighted that taking the child away from intended parents, without establishing genetic or legal parentage, comprised a disproportionate interference with private life (European Convention on Human Rights, 1950), although the Grand Chamber eventually found no violation due to procedural irregularities.

## **4. The Human Rights Dimension: Article 8 ECHR and the imperative of legal recognition in Albania**

The current Albanian legislative framework is markedly silent on surrogacy, generating a significant legal vacuum that leaves children born through such arrangements, as well as their intended parents, in precarious legal and social positions. Within this context, the Convention emerges as a pivotal normative instrument, providing fundamental defense for private but not only even family life, enforcing positive obligations on states to guarantee their effective enjoyment. Article 8 embraces a broad protection against arbitrary state interference as well as a proactive duty for states to facilitate conditions permitting individuals to enjoy these rights in practice (*X and Others v. Belgium*, 2015). This dual negative and positive aspects emphasize the Convention's holistic approach to human rights protection, especially pertinent in complex bioethical contexts such as surrogacy. The Court jurisprudence has progressively confirmed the significance of surrogacy-related issues under Convention, emphasizing the child's right to identity and family right as core components of this protection. These rulings indicate the Court's acknowledgment that assisted reproductive technologies challenge traditional conceptions of family, demanding a subtle equilibrium between state discretion and the imperative to uphold the rights of parties involved (*Paradiso and Campanelli v. Italy*, 2017). This absence of clear legal frameworks or mechanisms for validating intended parentage post-surrogacy has consistently been ruled as a violation of Article 8, particularly where it engenders legal uncertainty or effectively declined the family unit's existence.

Moreover, the principle of prioritizing the child's well-being functions like a crucial standard within this framework, obliging states to implement legal measures that facilitate the recognition of parentage and safeguard the child's legal status and identity

(Neulinger and Shuruk v. Switzerland, 2010). This principle requires procedural safeguards assuring that children born through surrogacy are not subjected to legal ambiguity or marginalization, which would undermine their personal identity and familial bonds (Dickson v. United Kingdom, 2007).

#### ***4.1 The Albanian Legal Framework: A critical analysis***

In contrast to evolving international norms and ECtHR jurisprudence, Albania persists conspicuously lagging behind due to the absence of specific legislation regulating surrogacy. Although Law No. 97/2017 “On Assisted Reproductive Technologies” handles general issues relevant to medically assisted reproduction, it conspicuously omits any reference to surrogacy, thereby leaving a critical regulatory gap that reveals surrogacy-born children and intended parents to precarious legal conditions.

Comparative legal frameworks across Europe initiates a range of responses to these obstacles. For example, Greece’s Law No. 3305/2005 permits altruistic surrogacy under strict judicial authorization, which encompasses prior court approval to maintain the safeguards for both the child’s and surrogate mother’s interests, thereby providing legal clarity and protection. Similarly, Italy’s legislative perspective reflected in Law No. 40/2004 prevents surrogacy outright but sustains clear legal provisions concerning parentage in other assisted reproductive contexts, demonstrating an assertive legislative stance aimed at preserving family integrity and protecting vulnerable parties. These regulatory models underscore the critical need for Albania to implement comprehensive legislation that simultaneously acknowledges intended parentage and safeguards surrogate mothers from exploitation. Those reforms would align domestic law with international human rights principles and ECtHR jurisprudence, signaling an accordance between bioethical considerations and fundamental family rights protections.

#### ***4.2 Legal Recognition as a Human Rights Imperative***

Legal recognition of family ties established through surrogacy surpasses mere bureaucratic registration; it is an assertion of personal identity, family unity, and the principle of non-discrimination. The ECtHR has frequently stressed that states must simplify the recognition of such familial relationships, provided they do not infringe public order or fundamental ethical norms (*ordre public*) (*Lebassee v. France*, 2014). Failure to recognize intended parents may cause discrimination prohibited under Article 14 ECHR, (Council of Europe, European Convention on Human Rights, 1950) which forbids distinct the manner in which the Convention rights are exercised, notably where childrens born through surrogacy are treated less favorably than those born via traditional means.

Accordingly, Albania’s positive obligations mandate the enactment of comprehensive legal mechanisms, to ensure voluntary and informed consent, along with safeguards against exploitation. Further, the legislation must institute unambiguous rules for

the post-birth legal recognition of intended parents, embracing the issuance of birth certificates demonstrating true parental status. All such interventions must prioritize the child's best interests, consistent with global norms like the Convention on the Rights of the Child (UN, 1989).

## **5. Challenges and prospects for legislative reform in Albania: A Focus on legal gaps and detailed analysis of Albanian legislation**

The Albanian legal outline leading family relations and medically assisted reproduction endures laggard in the face of complex realities such as surrogacy. The lack of explicit legislation governing this practice has generated a normative vacuum that jeopardizes the legal security and fundamental rights of all parties that are involved. The keystone of parental recognition under Albanian civil law is the percept of maternal identity anchored in Article 44, which unequivocally establishes that *"the mother of the child is the woman who gives birth to him/her."* This normative presumption retains a significant impediment in cases of gestational surrogacy, where the surrogate does not have genetic link with the child. The rigidity of this principle precludes the automatic recognition of the intended mother, ensuing in protracted legal uncertainty and potentially harmful consequences for the child's legal status (Xhabija, 2022). Dissimilar legal systems like United Kingdom, which offer mechanisms like parental orders to establish legal parental status in favor of the intended parents, Albania has no equivalent procedural safeguards. Similarly, the Greek legal system's model, codified in Law No. 3305/2005, offers pre-authorization of surrogacy arrangements, ensuring clarity and protection for all parties involved. The absence of such mechanisms in Albania drives intended mothers to resort to adoption procedures, a process that is cumbersome, intrusive, and frequently incompatible with the best interests of the child, as it may delay the establishment of stable legal parentage (Lamçe, 2023). Regarding paternity, Albania commences the primary legal framework for establishing fatherhood. However, these provisions do not adequately accommodate the intricacies resulting from assisted reproductive technologies involving donation or surrogacy conducted abroad. As Xhabija (2022) notes, this results in a fragmented and inconsistent jurisprudence that fails to offer clear guidance to courts confronted with modern reproductive challenges. Such legal ambiguity undermines the essential necessary for safeguarding children's rights and family integrity.

### ***5.1 The legal uncertainty of Surrogacy contracts***

The enforceability of surrogacy agreements persists another critical legal challenge. Albanian Civil Code provisions invalidate contracts that are opposite to public order or morality. The ambiguous status of surrogacy contracts, which include the transfer of parental rights and occasionally financial compensation, positions them in a legal grey zone. While Albanian law does not clearly prohibit surrogacy contracts, courts

have often deemed them unenforceable due to the absence of specific statutory regulation and ethical safeguards (Lamçe, 2019). This lack of legal certainty reveals surrogate mothers to misuses and intended parents to precarious legal standing. Dine (2023) emphasizes that the absence of enforceable consent protocols and mandatory medical and psychological counseling mechanisms embodies a noncompliance to meet minimal ethical standards in reproductive medicine.

### ***5.2 Administrative incoherence in birth Registration and Citizenship***

An additional complication arises in the administrative sphere, particularly concerning birth registration and citizenship. This administrative lacuna hazards rendering children born via surrogacy effectively stateless and in the absence of access to social benefits, healthcare, and inheritance rights, contrary to Albania's obligations under Article 7 and Article 8 of the UNCRC (UN Convention on the Rights of the Child, 1989). This situation conflicts with Article 54 of the Albanian Constitution, mandates state responsibility in upholding children's rights. As the Convention jurisprudence establishes, states have positive obligations to implement measures that secure effective recognition of family relationships and legal parentage (Mennesson v. France, 2014).

### ***5.3 Ethical Framework and Bioethical Standards***

Albania is a signatory to the Oviedo Convention (Council of Europe, 1997), a binding instrument emphasizing the human dignity protection and the commercial exploitation prohibition in biomedicine. Anyway, Albania lacks domestic legislation implementing these bioethical principles in the context of assisted reproduction. This legislative silence undermines both ethical medical practice and Albania's compliance with international rights norms (Council of Europe, 1997). The absence of an autonomous ethics committee or regulatory body entrusted with oversight of ART procedures additionally mingles the issue. Without such oversight, there is an enhanced risk of coercion, the female body commodification, and omission of the child well-being central to European bioethical discourse and normative standards. Establishing ethical and legal safeguards is thus imperative to align Albania with its international obligations and to protect vulnerable parties involved in surrogacy.

## **6. Conclusion**

The legislative vacuum that practically defines the Albanian normative landscape in relation to surrogacy arrangements unveils a broader crisis of legal responsiveness to socio-medical evolution. The traditional conceptualization of parenthood entrenched in the Civil Code, particularly the unyielding adherence to the mater "*semper certa est principle*", fails to adapt the multidimensional realities of medically assisted reproduction. This legal bureaucracy disregards the increasing plurality of family

forms and the legitimacy of parental intent as a constitutive element of family life. From a doctrinal standpoint, the Albanian legal system persists anchored in a biologically deterministic model of parentage that improperly displays the social, ethical, and psychological dimensions of parenthood in surrogacy cases. Albania's non-regulation of surrogacy generates discrepancy with its own constitutional norms. Article 54 of the Albanian Constitution warrants special protection for children, encompassing children born extramaritally, while underscoring the state's responsibility to preserve the family as the foundational element of society. It obviously violates purpose of this constitutional provision. The imperative of legislative reform in Albania should thus be seen not merely as a policy choice but as a legal and moral obligation. The Albanian Parliament must conduct an applicable systematic revision of the Civil Code and relevant health and family legislative provisions to encompass:

- Codification of altruistic surrogacy arrangements, permitted under judicial supervision and grounded in the principles of voluntariness, transparency, and dignity;
- Instituting of a technical judicial mechanism for pre- or post-birth parentage determinations
- Unification of administrative procedures for civil registration of children born through surrogacy, involving cross-border cases, with the intention of guaranteeing legal identity, nationality, and access to fundamental rights;
- Incorporation of bioethical safeguards aligned with the Oviedo Convention and the Bioethics and Human Rights Declaration (UNESCO, 2005), composing mandatory counseling, forbiddance of financial gain, and protection against exploitation;
- Acknowledgment of foreign judicial decisions or civil proceedings pertaining to surrogacy, throughout accession to or harmonization with relevant international instruments, guaranteeing continuity of legal parentage across borders.

The reform process must be participatory, non-exclusive of legal scholars, bioethicists, medical professionals, civil society, and crucially individuals with lived experience of surrogacy. Only through such a judicious approach can Albania establish a legal framework that is not only normatively coherent and constitutionally sound, but also proficient of advancing reproductive justice and protecting the dignity and rights of all individuals engaged in surrogacy arrangements.

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