

SURROGACY IN MEXICO

THE CONSEQUENCES OF POOR REGULATION

GIRE

DIRECTION

REGINA TAMÉS
JIMENA SORIA

ADMINISTRATION

SILVIA GARCÍA
ALFREDO CANCINO
STEFANI DURÁN
CATALINA GONZÁLEZ
MARIO MACÍAS
MICAELA MACÍAS
PABLO ORTEGA

COMMUNICATIONS

BRENDA RODRÍGUEZ
OMAR FELICIANO
GEORGINA MONTALVO
ELENA ROJAS

ACCOUNTING

ROSA MARÍA ROSAS
MARGARITA GONZÁLEZ
SUSANA IBARREN
KAREN MEDINA

INSTITUTIONAL

DEVELOPMENT
JENNIFER PAINE
JULIETA HERRERA
ANTONINA WEBER
MARTY MINNICH

CASE DOCUMENTATION AND LITIGATION

ALEX ALÍ MÉNDEZ
JACQUELINE ÁLVAREZ
ELBA ARAGÓN
MELISSA AYALA
ALEHÍ BALDERAS
OFELIA BASTIDA
YOLANDA MOLINA
ANEL ORTEGA

PUBLIC POLICY

ADVOCACY
REBECA RAMOS
IVÁN BÁEZ
JOAQUINA DÍAZ CORONA
ALEJANDRO GALLAND
REBECA LOREA

RESEARCH

ISABEL FULDA
VALENTINA GÓMEZ
KAREN LUNA
MARIANA ROCA
MARTÍN VERA

EDITORIAL CREDITS

EXECUTIVE DIRECTOR

REGINA TAMÉS

TEXT AND RESEARCH

ISABEL FULDA

ACCESS TO INFORMATION

VALENTINA GÓMEZ

DESIGN

ELENA ROJAS

EDITING

MARIANA ROCA

GRAPHS

MARÍA CARRAL
ELENA ROJAS

WEB DESIGN

DATA 4

PHOTOGRAPHY

FUNGIFILMS
GRACE NAVARRO
MARTY MINNICH
ELENA ROJAS
SHUTTERSTOCK

COVER PHOTO

ELENA ROJAS

Surrogacy in Mexico. The Consequences of Poor regulation

2017 Grupo de Información en Reproducción Elegida, A.C.

(GIRE: Information Group on Reproductive Choice) A.C. Coyoacán,

C.P. 04030, Mexico City

Phone number: 5255 5658.6684

Email: correo@giremx.org.mx

gire.org.mx

f: GrupodelInformacionenReproduccionElegida

t: @GIRE_mx

ACKNOWLEDGEMENTS

GIRE'S ADVISORY BOARD

GERARDO BARROSO

LUISA CABAL

ROY CAMPOS

MARTA LAMAS

GENARO LOZANO

FRANCISCA POU

KARLA IBERIA SÁNCHEZ

MARÍA LUISA SÁNCHEZ FUENTES

CECILIA SUÁREZ

ROBERTO TAPIA-CONYER

RODOLFO VÁZQUEZ

JOSÉ WOLDENBERG

Surrogacy in Mexico. The consequences of poor regulation

Digital version: <http://gestacion-subrogada.gire.org.mx>

INDEX

I. INTRODUCTION	7
2. PRINCIPLE DEBATES REGARDING SURROGACY	11
2.1 Regulate or Prohibit	12
2.2 Payment for Surrogates	12
2.3 Accessing Surrogacy	13
3. SURROGACY IN MEXICO	17
3.1 Tabasco	20
3.1.1 2016 Reforms	21
A. Infringement on Federal Jurisdiction	22
B. Discriminatory Provisions	22
C. Legal Uncertainty	23
D. Possible Progress	24
E. Unconstitutionality Claim	26
3.2 Human rights violations: The current situation in Tabasco	27
A. Surrogate Women	28
• Informed Consent and Legal Uncertainty	28
• DRight to Health and Privacy	29
• Criminalization	31
B. Children Born of these Agreements	31
C. Intended Parents	34
4. THE LEGAL FRAMEWORK AT THE FEDERAL LEVEL	37
4.1 Assisted Reproduction	39
4.2 Current Legislative Proposals	42
5. CASES REGISTERED, DOCUMENTED, AND LITIGATED BY GIRE	47
6. CONCLUSIONS	55
7. RECOMMENDATIONS	59

1. INTRODUCTION

Photograph: Marty Minnich.



I. INTRODUCTION

Surrogacy is an arrangement in which a woman agrees to carry a pregnancy for another individual or couple who intend to parent the child born of this pregnancy. This practice is also referred to as “womb for rent”, “contract pregnancy” and “surrogate motherhood”. However, throughout this report, the term surrogacy will be used, because GIRE considers it the most neutral and acceptable from a human rights perspective.¹ The practice of surrogacy varies greatly around the world. In the majority of cases, the intended parents’ gametes and/or donors’ gametes are used. In some contexts, and under certain regulations, it is also possible for the surrogate to contribute her genetic material. The agreement is at times remunerated, while at others it is assumed to be a “gift” that does not necessitate payment. People who act as intended parents in a surrogacy contract can be residents of the country where the process takes place or foreigners from places where it is prohibited. They can be couples or single people intending to start a family. Surrogates can be married, single, have children, be Mexican or foreign, be close friends with the intended parents or complete strangers.

Two states in Mexico permit these types of contracts: Tabasco and Sinaloa. In both cases, the legislation addresses solely civil matters. However, given that surrogacy practices imply responding to general health as well as civil matters, the former needs to be regulated at the federal level. Because assisted reproductive techniques (ART)² are used to achieve pregnancy in surrogacy arrangements, the absence of assisted reproduction regulations in Mexico affects the conditions in which these contracts are signed. In this sense, it is urgent that the Mexican Congress and the Health Ministry meet their obligations to enact federal legislation to address ART, in accordance with human rights and scientific advances. Without the existence of these norms, the parties involved in surrogacy agreements will continue to be vulnerable and susceptible to a variety of human rights violations.

For this report, access to public information requests were developed, an exhaustive analysis of state and federal laws related to this issue was carried out and the surrogacy cases that have been registered, documented and litigated by GIRE since 2014 were systematized. The goal of this work is to provide a clear panorama of the surrogacy situation in Mexico and contribute to a more objective discussion on the issue that allows prejudices to be questioned and eliminated.

This research identified a situation in which deficient surrogacy regulations in Mexican state law are met with a complete lack of federal regulation on assisted reproduction, both of which give way to numerous human rights violations, including the right to non-discrimination, to personal identity and to legal certainty. GIRE's recent experience providing legal assistance to people participating in surrogacy arrangements reveals patterns of abuse in which the State has not met its obligation to guarantee all parties' human rights. In light of this situation, the State must find a way to protect people who wish to be parents, women who decide to be surrogates and children who are born through these agreements. GIRE believes that this task is possible if its guiding principle is to guarantee the protection of the human rights of everyone involved. This report aims to contribute to this objective.

2. PRINCIPAL DEBATES REGARDING SURROGACY

2. PRINCIPLE DEBATES REGARDING SURROGACY

Surrogacy is a controversial and complex practice that requires the use of different analytical dimensions, the consideration of possible conflicts between the parties, and the challenge of preconceived ideas about family and reproduction. Though multiple elements must be considered in relation to these agreements, three principle debates exist around the practice. Firstly, whether surrogacy should be regulated or prohibited; secondly, whether the surrogate should receive payment for her services; and thirdly, who should be able to access these contracts.

2.1 REGULATE OR PROHIBIT

For decades, the surrogacy debate has been divided between those who consider the practice inherently deplorable and coercive, and therefore assert that it must be prohibited in all its forms,³ and others who think that respect for human rights –particularly women’s agency to decide over their own bodies– requires acceptance of the practice; this group believes that, although abuses can and do exist, protective measures can be put in place in order to prevent or minimize them, as well as to ensure the consent of all the parties involved.⁴ The first stance seeks to prohibit, and even criminalize surrogacy. The second view opts to regulate it. This is GIRE’s perspective.

One of the primary concerns expressed from feminist standpoints around surrogacy is whether the unequal conditions in which contracts are commonly established affect the surrogate’s ability to consent to them. In effect, the socioeconomic contexts in which these agreements tend to take place should not be overlooked, but GIRE considers that it is precisely for this reason that regulation is so important. Measures to ban surrogacy are often based on gender stereotypes and prejudices about maternity, pregnancy and women’s autonomy. Furthermore, prohibition does not contribute to the protection of the parties against the most common forms of abuse identified with the practice.

International experience has proven that an adequate regulation of surrogacy can help protect the rights of all individuals involved, particularly those of surrogates, who are often most vulnerable to abuse in deregulated contexts. Prohibiting the practice will not make it disappear. In fact, prohibition would drive the practice underground, where the State can neither protect the parties involved, monitor consent, nor ensure that clinics and agencies act in accordance with legal and human rights standards. GIRE believes that prohibiting surrogacy, and especially imposing penalties on those who practice it, would worsen the conditions in which it is carried out. In particular, it would increase the persecution many surrogates already face, contributing to even further human rights violations.

2.2 PAYMENT FOR SURROGATES

Payment is one of the most controversial issues in the surrogacy debate. Among those who condemn payment to surrogates, there are some who argue that the amount of money surrogates are commonly paid, particularly in developing countries, is so low that it amounts to exploitation. Moreover, others hold that, because remuneration for these services is high compared to what women who are surrogates could earn doing another activity, the payment constitutes a form of inducement. In other words, given their lack of economic opportunities elsewhere, there would be no rational way for them to reject the offer, making their consent questionable.⁵ The contexts of deep inequality in which surrogacy tends to take place are used to strengthen both these arguments. In contrast, however, there are some who defend payment to surrogates by affirming that respect for their agency means recognizing and compensating them for their reproductive services. Although there is potential for abuse in highly unequal contexts, measures to prevent exploitation

and ensure surrogate's informed consent can be put in place and the service does not necessarily have to be provided altruistically.

The debate around payment has been translated into a plethora of regulations around the world that limit, prohibit or permit different types of remuneration for surrogates. In California, for example, it is accepted that surrogates receive an agreed upon payment, which is considered a sort of salary for a service provided and the practice is referred to as commercial or for-profit. In the United Kingdom and Australia, laws establish that surrogacy agreements must be 'altruistic'; in practice, however, surrogates receive compensation not only for expenses incurred during the pregnancy, but also for their time, trouble and other considerations, which has led some to identify this cases as a form of implicit commercial arrangements. In all cases, the commissioning parents take responsibility for the costs of the pregnancy at least. In other words, even though some perspectives do not consider surrogacy to be a form of work or service, there is at least a widely accepted consensus that the surrogate should not bear the costs of her pregnancy, which are not necessarily limited to medical expenses, but may include transportation costs, life insurance and nutrition stipends.

GIRE considers that the commonly-held narrative, suggesting that surrogacy must be undertaken for strictly altruistic reasons, is based on gender stereotypes and overlooks surrogates' reproductive autonomy. This narrative is also not very effective for dealing with possible abuse scenarios that could arise in clinics and agencies. Establishing a compulsory requirement that the service be unpaid, both in legislation and in surrogacy contracts, is not the ideal way to protect surrogates and would most likely drive the practice underground. In other words, promises of payment would persist, but because they would be informal, the agreements would deny surrogates the ability to make a legal claim to demand compliance. In the case of Mexico, if payment to surrogates was prohibited, the State would have to prove that this is the best alternative to protect the human rights of all parties. Otherwise, the measure could be deemed unconstitutional.

2.3 ACCESSING SURROGACY

Both in theory and in practice, questions regarding who can enter into surrogacy agreements are another important point of discussion. Although some restrictions around who can participate in these contracts, both with respect to intended parents and to surrogates, have been presented as a way to prevent or minimize instances of abuse, these efforts have frequently led to requirements that, far from resolving these problems, are in fact arbitrary and discriminatory.

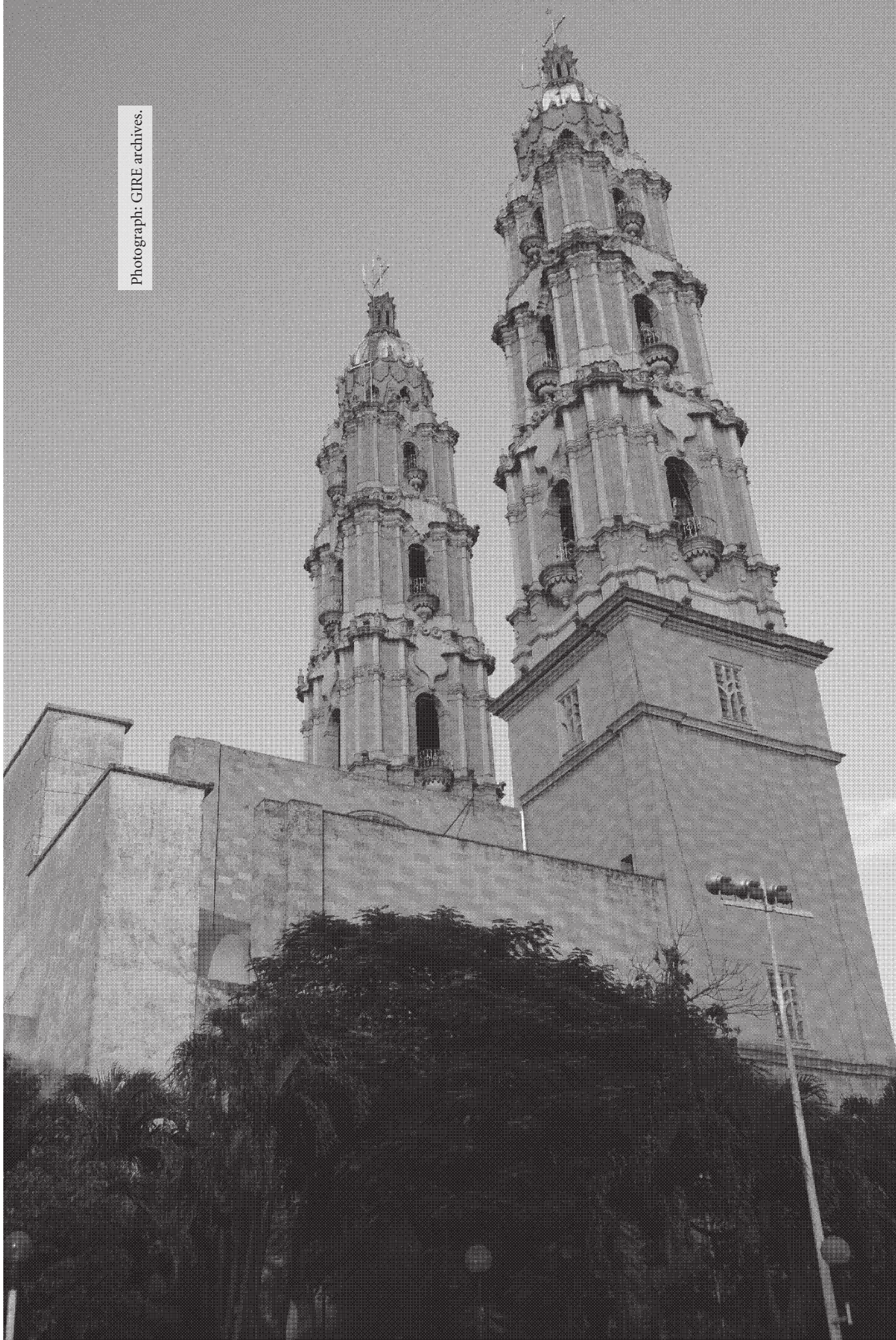
Despite the fact that restrictions are commonly justified under the pretense that they serve to protect surrogates or children born through these agreements, this is not always the case. Often, they disguise prejudices that are inconsistent with the protection of human rights, or they are simply not a suitable way to achieve this objective. For example, a common restriction in the international legal framework is that intended parents must be a couple comprised of a man and a woman. Recently, the Mexican Supreme Court of Justice (scjn) emitted jurisprudential thesis 08/2017, whose application became mandatory starting January 30th, 2017. In its thesis, the scjn determined that "family life between individuals of the same sex is not limited to life as a couple, but can extend to the couple's decision to procreate and raise children. In this manner, some same-sex couples raise families consisting of one of the partners' biological children, children adopted by one of them, or there are also couples that procreate through the use methods resulting from scientific advances".⁶ The resolution recognizes the constitutional protection given to all types of families, including those formed through ART. Article 1 of the Mexican Constitution (CPEUM) and this precedent obligate authorities to recognize different types of families, without discrimination as to whether they are single parents, same-sex couples, or heterosexual couples.

Additionally, some countries that have become an international surrogacy destination have decided to limit access only to nationals or permanent residents of the country in which the agreement is made. Most

commonly, these restrictions are defended with the claim that they will help resolve abuse identified with the international practice of surrogacy. However, experience demonstrates that these restrictions, in addition to being discriminatory, do not resolve structural problems found in the practice. On the contrary, it can lead to unexpected effects, such as the stigmatization and persecution of foreigners, and their inability to acquire identification for their children born through surrogacy, as has been the case in the state of Tabasco, in Mexico.

GIRE's view is that any restriction on access to surrogacy arrangements must be clearly justified by the State to guarantee that it is reasonable, proportional and the best way to protect the human rights of all parties involved. More specifically, GIRE asserts that access to surrogacy must not be limited on the basis of sex, marital status, sexual orientation or citizenship. In the case of other possible restrictions, such as age limits or residency, the State must provide clear reasons to justify that these requirements are the best way to protect rights of those involved. On the contrary, restrictions could be declared unconstitutional by the SCJN. The state of Tabasco will serve to illustrate some of these points.

Photograph: GIRE archives.



3. SURROGACY IN MEXICO



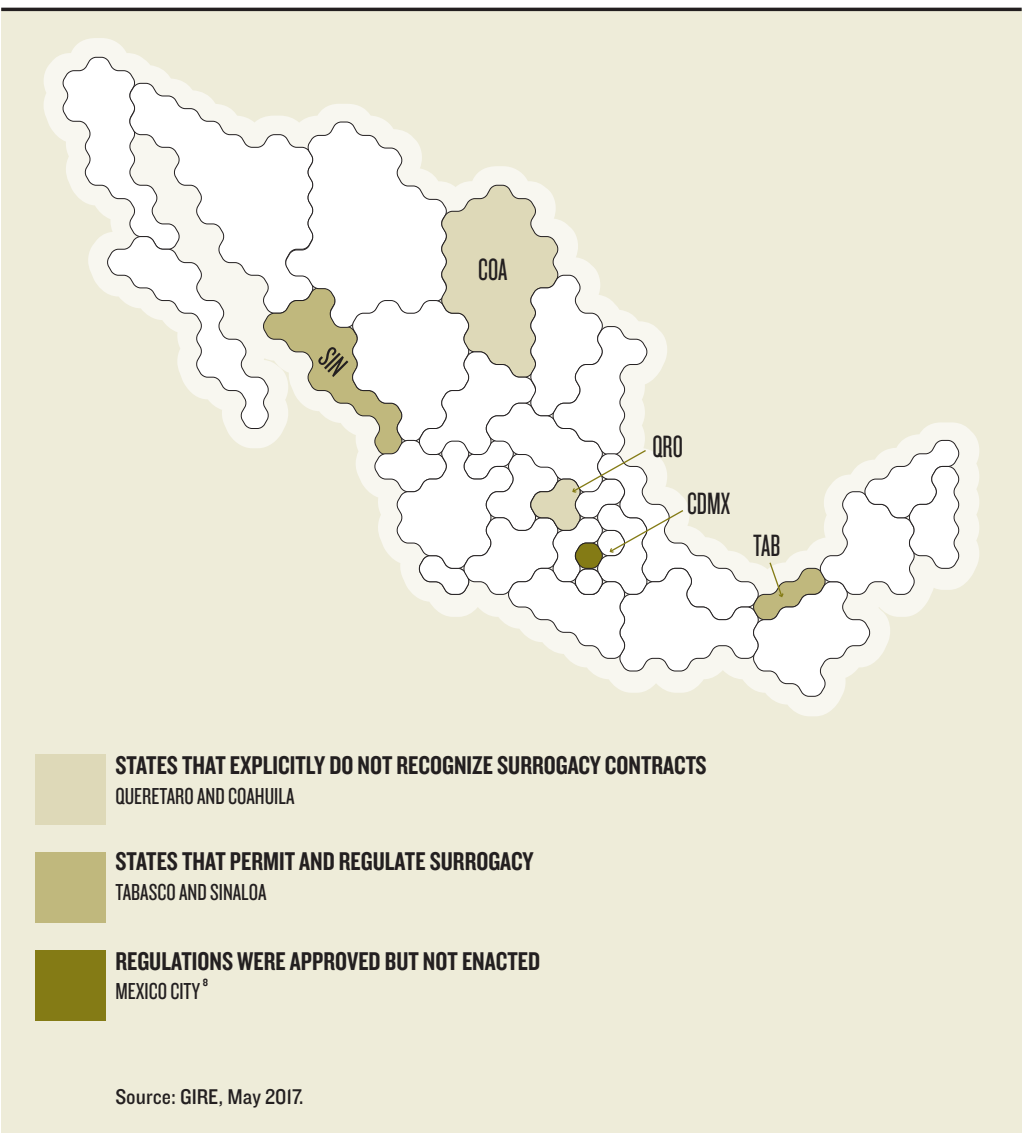
Photograph: GIRE archive.

Mirna entered into a surrogacy agreement. GIRE's documentary film, *Deseos (Longing)*, tells her story.

3. SURROGACY IN MEXICO

In Mexico, surrogacy is only regulated in two states: Tabasco and Sinaloa. In 1997, Tabasco introduced an article into its Civil Code that established the possibility to register minors born of a surrogacy agreement. The legislation permitted the recognition of these contracts, but it did not offer adequate protection for the parties. On January 13, 2016, the governor of Tabasco sent a legislative bill to the local congress to further regulate the practice. The approved reform created new opportunities, but also led to new problems and human rights violations by state authorities. In the case of Sinaloa, the regulation of surrogacy was introduced in 2013. However, its restrictive legislation, particularly in regards to same-sex couples and non-Mexicans, has largely prevented the state from becoming a surrogacy destination with the political, judicial and media presence of Tabasco.⁷ In contrast, Coahuila and Queretaro have articles in their civil codes that declare that any surrogacy contracts will be considered void. In other words, in those states, the law establishes that the woman who gives birth will always be the legal mother, and no other claims to the contrary can be made. The practice is not regulated in the rest of the country.

SURROGACY IN FAMILY AND CIVIL LAW



3.1 TABASCO

From 1997, Tabasco's Civil Code had minimal surrogacy regulations in place. In fact, in its 92nd article, the code merely defined the legal concept and allowed for the registration of children born as a result of these agreements, as long as all the parties involved provided the civil registry with a birth certificate and a notarized contract. The regulations did not protect surrogates, did not establish any information on who could access the practice, and did not contemplate intervention by authorities to regulate and monitor contracts and their development.

Despite the fact that surrogacy arrangements have been possible in Tabasco for 20 years, the number of individuals and couples that traveled to the state to engage in these contracts increased significantly after 2012. This was the year India—the world's main surrogacy destination—modified its legislation to impose significant restrictions on foreigners and same-sex couples. In 2014, Thailand followed suit, which also led to an increase in surrogacy cases in Mexico.⁹ Thus, changes in the international legal framework had an important impact for Tabasco to become (although to a lesser degree) a national and international surrogacy destination. With the increase in the number of cases, the problems with its legal framework soon started to become apparent.

In response to this situation, in 2015, Tabasco's governor sent a legislative bill to the state congress to include a chapter on surrogacy in the state's Civil Code that would further regulate the practice. The proposal was problematic on many levels and GIRE cautioned Governor Arturo Nuñez of the consequences that would arise if the modifications to the Civil Code were approved as they were. GIRE's recommendations were ignored, and the legislative reforms were enacted without further revisions on January 13th, 2016. Furthermore, the reforms did not provide clarity on what would happen with contracts signed prior to this date but that would conclude afterwards; that is, pregnancies established under the previous regulations whose births would occur after it.

Photograph: GIRE archive.



Ana and her husband had a positive experience participating in a surrogacy arrangement. GIRE's documentary film, *Deseos (Longing)* tells her story.

3.1.1 2016 REFORMS

PRINCIPAL ELEMENTS OF THE REFORM

C: INFRINGEMENT ON JURISDICTION

D: DISCRIMINATION

LU: LEGAL UNCERTAINTY

ART. 380 BIS 2. Only women between the ages of twenty-five to thirty-five may be contracted as surrogates (...)

✗(D)

(...) they must be in good bio-psychological health, and must have voluntarily consented to be gestational or substitute surrogates, and have been fully informed regarding the process prior to manifesting their consent.

✓

The surrogate must demonstrate: that she has not been pregnant during the **previous 365 consecutive days** and that she has **not participated in this procedure on more than two consecutive occasions** (...)

✗ (LU)

The surrogacy contract must be signed by the **commissioning mother and father** and the surrogate woman and, if it were the case, by her spouse or partner, as well as by an interpreter if it were necessary.

✗ (D)

Institutions conducting this procedure and prenatal care must send a **monthly report** to the state's Health Ministry. A **Notary Public certifying a surrogacy contract must report** the signing of an agreement within a 24-hour time period to both the state's Health Ministry and Civil Registry.

✓

ART. 380 BIS 4. The contract will be nullified in cases of:
(...) IV. Intervention on behalf of agencies, firms and third parties.

✗ (LU)

ART. 380 BIS 5. Requirements to access contracts:

I. Mexican citizenship.

✗ (D)

II. The woman commissioning the service must prove a physical inability or medical contraindications preventing her from carrying the pregnancy in her uterus, and she must be between 25 and 40 years of age.

✗ (D)

A doctor must provide a certificate to ensure that the surrogate does not suffer from any condition that would put the well-being and healthy development of the fetus at risk.

✓

Once the instrument is signed before a Notary Public a competent judge must approve it.

✓

The implantation of up to two embryos is authorized.

✗ (C)

ART. 380 BIS 7

"The surrogate may sue the commissioning mother and the father for medical expenses incurred in cases of illnesses caused by genetic abnormalities and those caused by inadequate medical prenatal and postnatal care."

✗ (LU)

A. INFRINGEMENT ON FEDERAL JURISDICTION

Article 3 of the General Health Law (LGS) states that sanitary control over the disposal of organs, tissues and cells is exclusively a matter of general health. Thus, the establishment of legislation applicable to assisted reproduction is a federal responsibility, and based on Article 73 of the Mexican Constitution, the LGS should include this regulation. However, as a response to the lack of such federal regulation in Mexico, provisions related to assisted reproduction techniques have been set forth in state-level civil codes and family law. These provisions are an infringement on federal jurisdiction. Tabasco's Civil Code following its 2016 reforms is no exception.¹⁰ On the one hand, its Article 30 Bis attempts to define the concept of assisted reproduction, which infringes on the LGS, as the definition is already integrated into current federal initiatives that will be described below. On the other hand, Article 350 Bis 5 limits the implantation of embryos to two per assisted reproduction process. Setting the number of possible embryo transfers can be vital to protect the life and health of women involved in any in vitro fertilization (IVF) procedures. Nevertheless, this is a technical aspect that must be defined by an Official Mexican Norm (*Norma Oficial Mexicana*). The latter would be subject to frequent revision by the federal Health Ministry in accordance with expert opinions on the issue and advances in medical science. Matters of assisted reproduction therefore have no place in state-level civil law.

Although the establishment of comprehensive regulations that provide certainty and protection to all parties involved in a surrogacy agreement is urgent, state-level regulations should avoid encroaching on federal jurisdiction. However, local legislatures can contribute to pressure the Mexican Congress and the Health Ministry to pass assisted reproduction regulations that allow them to legislate in their jurisdictions, which would simultaneously provide a clearer legal framework with respect to the issue.

B. DISCRIMINATORY PROVISIONS

Current regulations in Tabasco place restrictions on who can enter into surrogacy agreements. Firstly, all of the persons involved in the process must be Mexican nationals. This discriminates particularly against foreigners who are permanent or temporary residents in Mexico, including individuals in formal or informal partnerships with Mexican citizens. As argued above, far from resolving patterns of abuse supposedly identified by the state government prior to the 2016 reforms, the exclusion of non-nationals has fomented a climate of persecution and stigmatization of both foreigners who participate in surrogacy agreements and surrogates who sign contracts with them.

Coupled with these requirements, Article 380 Bis 1 of the current code refers to the existence of a commissioning mother *and* father. This definition is discriminatory on the grounds of sex and marital status, as it excludes single people and same-sex couples from accessing these agreements. In Mexico, this limitation violates Article 1 of the constitution and the resolution issued by the Supreme Court on January 27th, 2017 regarding family life between same-sex persons, as well as violating various international conventions of which Mexico is a signatory.

Furthermore, the legislation automatically excludes certain groups of people based on their age: commissioning women under 25 and over 40 years of age, and surrogates outside the range of 25 to 35 years of age. While it can be argued that age requirements in the case of surrogates are established with the intention to protect their life and health, this objective can be better fulfilled by what is already established in Article 380 Bis 3, the condition that the surrogate obtains a medical opinion on her overall good health and the safety of the pregnancy before signing the contract. A case-by-case analysis of each surrogate's health situation avoids excluding women on the basis of their age without a prior evaluation determining if the limit is appropriate in each case. It is pertinent to emphasize that this basis for exclusion is not a generalized criterion in Latin America. According to the Latin American Assisted Reproduction Registry, in 2012, 69% of women accessing ART were over 35.¹¹ The practice of automatically excluding all women over 35 fails to consider their particular biological

or anatomical condition, which could possibly be ideal to achieve pregnancy with help from ART. Here it is important to highlight a federal judge's ruling in the case of María Teresa (outlined in Chapter 4), in which age requirements proved to be discriminatory because they established a difference that authorities could not justify. In this case, María Teresa was barred from accessing an assisted reproduction program in the "20 de Noviembre" National Medical Center, a federal hospital based in Mexico City, on the basis of her age.

Moreover, it is worrying that there is an age requirement set in law for the commissioning mother, considering there is neither a corresponding medical justification provided nor an equivalent requirement for the commissioning father. Thus, this restriction appears to be based on the state's discriminatory presumption that the mother will be the primary caregiver responsible for raising children and furthermore, that she could not do this task properly after the age of 40. The declarations of Juan José Peralta Fócil, the Coordinator of Legal Matters for the state government of Tabasco, underscore this last issue. In an interview related to recent surrogacy cases in the state of Tabasco, Peralta Fócil stated that the only reason a couple would have children after a certain age is to have them "as slaves".¹² Once again, the state government contributes to the stigmatization of non-nationals, same-sex couples, single people and people who, after a certain age, want to participate in surrogacy agreements in Tabasco. Although the best interest of the child can justify the establishment of certain access requirements for surrogacy contracts, these must be based on individual case-by-case evaluations. Prejudices held by legislators and public servants must certainly not affect the establishment of regulations and public policies.

In order to determine the number of surrogacy contracts carried out in the state from the time of enacting the new legislation until March 1st, 2017, GIRE sent access to public information requests to Tabasco's Health Ministry, one of the institutions responsible for the registration of cases in the state. The response the authorities gave highlights the fact that the age and nationality of commissioning mothers and surrogates are provided, whereas this data on commissioning fathers is missing. This omission was justified by the authorities with the following statement: "the commissioning father's age is not available, as it is never established in relevant contracts".¹³

C. LEGAL UNCERTAINTY

Lastly, ambiguous provisions contained in the new chapter of Tabasco's Civil Code could lead involved parties to find themselves in a situation of legal uncertainty. For example, the legislation states that the surrogate must not "have participated in this procedure on more than two consecutive occasions" (Article 380 Bis 3). This requirement may be intended to protect surrogates from abuse, or risk to their life or health. However, not only is it arbitrarily established, but it is open to interpretation. The restriction on number of participations does not make it clear whether it refers to implantation attempts, pregnancies or births resulting from a surrogacy agreement. Considering that the failure to meet these requirements could nullify the contract, it is important to clarify what the Article is referring to.

In addition, the Civil Code stipulates that any intervention by agencies, firms or third parties nullifies the contract (Article 380 Bis 4 fraction iv). While it is true that some national and international clinics and agencies have operated irregularly in Tabasco, prohibiting the existence of intermediary actors in the practice, far from solving these problems, can contribute to exacerbate them. Most importantly, it may force the practice to move underground without authorities being able to control them. The activities of clinics, firms and agencies involved in surrogacy agreements must be monitored to prevent abuse, yet the services they provide, such as psychological, medical and legal representation are essential elements that must remain in place. The supposed elimination of "third parties" would therefore place surrogates (many of whom often are already in precarious situations) in even more vulnerable situations. Just as the State regulates the intervention of intermediaries in adoption cases, surrogacy legislation must recognize the existence of third parties and define which institutions are responsible for regulating and monitoring their activities.

Moreover, it is also necessary to clarify what it would mean to nullify a surrogacy contract in cases where a surrogate is already pregnant, or when the child has already been born. For example, what would happen if it is discovered, after the birth of a child via surrogacy, that the surrogate participated in the practice on more than two consecutive occasions, or that the commissioning mother exceeded the age limit? Would there be a sanction imposed on the parties involved? Would it affect the parentage of the minor? The lack of specificity on what it means to nullify a surrogacy contract is a serious omission that could particularly affect surrogates and children born of these agreements, placing them in an alarming state of legal uncertainty.

Lastly, Article 380 Bis 7 of the Tabasco Civil Code states that commissioning parents have to cover medical expenses incurred through pregnancy, labor and during the postpartum period, and must purchase health insurance to cover elevated medical expenses for the surrogate. Without a doubt, this is a positive component that can contribute to protecting the life and health of surrogates. As argued above, however, exclusively requiring coverage of medical expenses places surrogates in a position where they are unable to demand coverage of other types of costs, such as transportation, clothing and food. In addition, providing monetary compensation for a service such as surrogacy is a reality that must be recognized in legislation to respect the will of the parties, protect the surrogate's reproductive autonomy and because, otherwise, agreements would most likely continue in a clandestine fashion.

D. POSSIBLE PROGRESS

Despite the extensive media coverage and political visibility of surrogacy in Tabasco, there had not been any official public data representing the magnitude of the practice in the state. Among the positive changes introduced in the Civil Code after 2016, there is the obligation for the state's Civil Registry and Health Ministry to register both surrogacy agreements and births.

In the last five years, Gire has sent access to public information requests to government authorities to determine how many surrogacy processes have been registered in the state of Tabasco. Year after year, authorities responded that registering the practice was not their responsibility or that they did not systematize information in order to protect the identity of children born of these arrangements.¹⁴

In the context of the new regulations, Gire again sent access to information requests to the authorities now responsible for registering surrogacy cases. In response, the Civil Registry stated that, due to the fact that it does not "conduct" these types of procedures, it "much less" registers them, and thus it finds it impossible to provide this information.¹⁵ This demonstrates that, even with the new reforms in place, the Civil Registry has failed to record the number of surrogacy procedures that are carried out in Tabasco. The state's Health Ministry, however, answered positively: it stated that from January 13th, 2016 to March 1st, 2017, it had registered four cases in which all commissioning mothers and surrogate women were Mexican nationals.¹⁶

Furthermore, the reforms state that public notaries and healthcare institutions are required to notify the Civil Registry on the initiation, development and conclusion of surrogacy agreements. In theory, these measures would help avoid any difficulties in registering minors born of these agreements, and overall, would prevent public servants from directing unfounded suspicions or threats towards intended parents and surrogates. These measures would consequently prevent cases like Emiliano and Mariana's.

EMILIANO AND MARIANA:¹⁷ UNJUSTIFIED OBSTRUCTIONS IN ACQUIRING A BIRTH CERTIFICATE

Emiliano and Mariana are a Mexican couple from the state of Tamaulipas. Due to fertility issues, they decided to participate in a surrogacy program. In accordance with the law, the couple signed a contract with a surrogate, which was ratified and certified before a Notary Public in November 2015.

In September 2016, the couple traveled to Villahermosa to witness the birth of their twins. However, when they submitted the paperwork to register their children, their request was denied. The Director of the Tabasco Civil Registry accused them, saying that their contract was “likely to be false”, and notified them that their original documents would be sent to the highest state court, and that the Child Welfare Agency (DIF) would be notified in order to possibly apprehend the minors to ensure their safety.

The couple returned to Tamaulipas with their children, but without birth certificates. The minors did not have identification documents for more than six months. During this period, the children could not receive public or private healthcare services, as there was no official identification to prove their parentage. The couple presented two amparos (an amparo is a legal stay or federal lawsuit filed by an individual, challenging the official acts of a federal, state or municipal authority as unconstitutional)

with the assistance of their lawyers. The first was denied, but the second guaranteed the children’s immediate registry. Six months later, the same official from the Civil Registry who denied them access to the registry told them, “we have never had problems with Mexican citizens, here are your birth certificates”.

Unlike foreigners, single people and same-sex couples who are discriminated against by the state’s current legislation, Emiliano and Mariana met all the criteria set forth in current and past legislation: they are a heterosexual Mexican couple, with an infertility diagnosis. Despite meeting the criteria, they faced a long and costly process to obtain birth certificates for their children. Authorities have not yet justified this obstruction.

Lastly, current legislation states that, once an agreement is reached between the parties and a Notary Public certifies the contract, a judge must monitor and approve its content. Without a doubt, clauses included in surrogacy contracts are among the most important factors for defining the conditions in which the practice will be carried out, as well as to ensure truly informed consent on behalf of involved parties. Notaries must guarantee that all provisions contained in these contracts are in fact legal. However, contracts with clauses that violate human rights or even those that lack the signatures of all parties involved, are rampant in practice. Furthermore, information shared with GIRE reveals a pattern of misinformation in which notaries involved in certifying surrogacy contracts do not provide copies of the document to all the parties, or they retain surrogate's identification documents. In this sense, a legal authority such as a judge can act as an additional filter that prevents these sorts of situations and monitors both the legality of contracts and the consent given by all parties. Nevertheless, it is too early to tell if this will have the desired effects or if the identified patterns will persist.

E. UNCONSTITUTIONALITY CLAIM

On February 15th, 2016, the Attorney General's Office (PGR), at the time headed by Arely Gómez González, presented an unconstitutionality claim against Tabasco's Civil Code reforms. Among other issues, the PGR argued: *a)* that there was an infringement on jurisdiction due to the fact that the third paragraph of Article 380 Bis refers to the post-mortem disposal of gametes, subject to federal health laws in accordance with the General Health Law; *b)* the requirement that a woman demonstrate spousal authorization in order to participate in a surrogacy agreement goes against the right to equality between men and women enshrined in the Mexican Constitution, and *c)* that current regulations do not adopt a position on the issue of payment in surrogacy agreements, which the PGR asserts must be defined as an altruistic service.

While the PGR rightly questions certain elements of the code as being unconstitutional, their claim falls short of a substantive analysis from a human rights perspective. They fail to examine the reform's discriminatory components described above, as well as ambiguous elements of the legislation such as the causes for nullifying surrogacy contracts. In accordance with Article 71 of the Regulatory Act from subsections i and ii of the constitutional Article 105, the SCJN is charged with "correcting errors noted in invoked provisional quotes, and will supply the concepts of validity outlined in the claim". Thus, in the process of reviewing the unconstitutionality claim, the Court can compensate for these deficiencies and reach a decision with respect to unconstitutional elements that may not have been included in the original complaint.

A STATE BILL: ATTEMPT TO REPEAL THE 2016 REFORMS

On March 28th, 2017, state congressman Charles Méndez Sánchez from the Democratic Revolutionary Party (PRD) presented a bill to the Tabasco legislature to repeal Chapter IV Bis of its Civil Code related to surrogacy arrangements. Though this chapter is certainly problematic, its repeal in the terms presented by the initiative is not ideal. Additionally, from a human rights perspective, the arguments included in the initiative demonstrate serious problems. Firstly, it seeks to prohibit ART in general. This would automatically discriminate against people whose only chance of being a biological parent is through these techniques, in addition to not allowing them to benefit from medical and scientific advances and exercise their right to raise a family. In addition, the bill establishes the need to “protect” embryos, which runs counter to precedents set by the Inter-American Court of Human Rights. Specifically, the case of *Artavia Murillo et al., (In Vitro Fertilization) v. Costa Rica* established “conception” to mean “implantation”, and that embryos are not persons, which is a basic guiding principle necessary for discussing entitlement to human rights.¹⁸ Lastly, the bill assumes that surrogacy “commodifies” human life. This is a legal and conceptual inaccuracy that disregards the fact that surrogacy can be a legitimate agreement among people exercising their right to reproductive autonomy, provided the practice’s requisites are permitted and monitored by authorities to guarantee the protection of all parties’ human rights.

In accordance with the state congressman’s explanatory statements, the initiative intends to eradicate the practice of surrogacy in Tabasco. In reality, however, it only attempts to repeal Chapter VI Bis of the Civil Code. This would leave Article 92 of the Civil Code in place which would allow surrogacy to continue in Tabasco, although under the minimal regulation existing prior to the 2016 reform. If this initiative were to pass, Tabasco would return to the regulations in force in 1997, which did not contain the same problematic elements discussed in this report, but lacked important protective elements for participants in these agreements. At the time of publishing this report, the legislative proposal was awaiting a final decision.

3.2 HUMAN RIGHTS VIOLATIONS: THE CURRENT SITUATION IN TABASCO

Reforms to Tabasco’s Civil Code have introduced new problems and have left existing patterns of abuse unresolved. While it is too early to tell what the effects of the new legislation will be, there are worrying patterns in the state’s current actions. Particularly concerning are human rights violations against surrogates, children born of these agreements and intended parents.

Tabasco’s government currently demands that parties that signed a contract before the enactment of the new legislation fulfill the new requirements integrated as part of the Civil Code reforms. Thus, parties that signed a surrogacy contract before January 2016 are currently facing obstacles when registering their children because they do not meet the new requirements. This retrospective application of the law violates the human rights of all parties, and has led to a generalized situation of legal uncertainty in Tabasco. The Coordinator of Legal Matters for the government of Tabasco, Juan Peralta Fócil, admitted in a public interview that at least 11 children were still without birth certificates for not meeting the new legislation’s requirements. He also stated that his department knew of over a hundred cases of current pregnancies that could face the same problems.¹⁹

The current situation in Tabasco affects intended parents faced with an environment in which they are persecuted and stigmatized by the state government, children who remain without identification documents during weeks or even months, and surrogates, who are being threatened by state authorities and have in some cases faced criminalization for participating in surrogacy contracts.

A. SURROGATE WOMEN

INFORMED CONSENT AND LEGAL UNCERTAINTY

Women who have participated in surrogacy arrangements have shared stories with GIRE that reveal that the right to information is very rarely respected or guaranteed. For example, often, the same agency or clinic's legal personnel that explain the contract to the surrogate (if it is explained at all) are also the intended parents' legal advisors. This represents a significant conflict of interest. Furthermore, most surrogates with whom GIRE has had contact with do not possess a copy of their contract, are not familiar with it, and were never offered the opportunity to negotiate its terms. Moreover, agencies tend to obstruct any communication among surrogates and intended parents, assuring each party that the other has no interest in establishing contact. This way, agencies prevent parties from meeting and perhaps discovering irregularities, especially with respect to payments.

GIRE has documented that notaries and law firms representing these cases directly contribute to a lack of clarity and incomplete information on the types of responsibilities and requirements that surrogates must fulfill upon signing a contract. Because most surrogates GIRE interviewed do not have a copy of their contracts, they have no way of proving the contractual relationship in cases of abandonment or a breach of the contract by intended parents. Lisa's case is a particularly grave illustration of this situation.

LISA:²⁰ THE RISKS OF INFORMAL AGREEMENTS

Lisa was 33 years old and had two children when she decided to become a surrogate. She never signed a contract, but was told that she would be given financial aid for her educational and professional endeavors for agreeing to enter a surrogacy arrangement, and that she would receive a monthly monetary compensation of \$10,000 pesos. She met Eduardo, one of the intended parents for whom she was carrying, a California resident, on a visit he made to Tabasco. Together they discovered that she had not received the funds he had paid month after month to the agency. Both parties decided to forgo the agency and carry out the agreement independently.

In October 2015, after seven months, the child was born with respiratory and circulatory complications. This implied expensive intensive care. The baby needed urgent surgery, but Eduardo and his partner would not come forward. They said that the boy would have to survive on his own, and that they would only assume paternity once he was healthy.

Given Eduardo's response, Lisa offered to register the child for coverage under her health insurance, but he had to be registered as her and her husband's child. The baby, Rodolfo Valentino, was hospitalized for three months. Before the baby was discharged from the hospital, Eduardo told Lisa that he had to return to California, and that he would be back soon. But she didn't hear from them again.

Now Rodolfo Valentino is almost two years old. Lisa and her husband have raised him as their own child. They have foregone many things so that Rodolfo Valentino could have the medical attention he requires.

However, Eduardo came back in July 2017. He threatened and deceived Lisa to hand over the baby and she never heard from them. More than three weeks have gone by since Rodolfo Valentino disappeared and Tabasco authorities have done nothing in order to recover him. Lisa and her family fear for his integrity, since he needs special medicine and treatment.

GIRE defends her case and anticipates a judicial review at the federal level so the child can be reunited with his family.

Lisa's case reflects a pattern of abuse and deficiencies present in surrogacy practices in Mexico. Her story is one of abuse by an agency that retained payments the intended parents sent month after month, while simultaneously blocking communication between both parties. Eliminating the intermediary actor did not solve the problem. In fact, proceeding with the pregnancy based on solely a verbal agreement with the couple placed Lisa in an even more vulnerable situation, as there are no existing international regulations of the practice. The intended parents were able to simply abandon Lisa and the baby, returning to their country without consequence.

Certainly, however, the surrogate's protection is not guaranteed with the sole presence of intermediaries, because those who provide services for both surrogates and intended parents often enter into conflicts of interest. Given that personnel providing healthcare, legal assistance or psychological support services to surrogates are usually financed by intended parents, their support is not always professional or impartial. According to the International Federation of Gynecology and Obstetrics (FIGO), independent medical and legal advice is essential to ensuring all parties are aware of their rights and responsibilities in a surrogacy contract.²¹

Surrogates must have access to healthcare and legal advice at least that does not depend on the intended parents, where they can have a confidential relationship with service providers. A possible solution could be to guarantee high-quality public healthcare and free legal advice for surrogates. Especially in contexts where there is no guarantee that public services are of acceptable quality, another alternative could be to provide surrogates with private health insurance or a fund with which they may choose their healthcare provider, instead of the former being exclusively controlled by the intended parents or by agencies (who are, again, biased because they are directly financed by the contracting party).

RIGHTS TO HEALTH AND PRIVACY

In most cases, surrogates in Tabasco face inadequate medical services, obstetric violence and violations of their right to privacy. Some of these patterns arise from the moment they sign the contract, which often includes clauses disregarding surrogates' ability to make decisions about their own bodies. For example, GIRE has reviewed several contracts stating that surrogates cannot terminate their pregnancy even if their life is at risk, despite the fact that Tabasco's criminal code does not penalize abortion (Article 136) when the woman's life and health are at risk, and the SCJN clearly establishes that this decision can be made solely by the pregnant woman in question.²² One of these contracts explicitly states that "the surrogate understands and agrees to accept all medical risk associated with the pregnancy, including risk of death". Another contract declares that "the surrogate expresses her agreement that she will not abort or attempt to abort any child that results from the embryo transfer". These clauses violate women's right to make decisions about their own bodies, as protected by Article 4 of the Mexican Constitution, and by international conventions to which Mexico is a party. Moreover, although these particular clauses may not be present in certain contracts, often the conditions in which the practice is conducted entail significant forms of control over surrogates. For example, in situations when surrogates live together in a house controlled by the agency, they often face rules that prevent them from receiving visits and dictate specific hours of the day in which they are allowed to leave the house. Additionally, personnel from the agency are often responsible for acquiring food and medicine, which represents a significant form of control.

Violations of surrogates' right to privacy and health in Tabasco reflect existing structural problems in Mexico with respect to access and quality of maternal health services in general. But while the absence of quality care affects all women who become pregnant in Mexico, this problem is exacerbated when it comes to surrogacy agreements, especially when health practitioners act in the interest of intended parents over surrogates, treat them based on prejudices about their participation in these contracts, or when agencies retain medical information regarding treatment or care. Victoria's case clearly illustrates this situation, where an absence of prenatal and medical care resulted in the loss of her pregnancy and a risk to her life and health.

VICTORIA:²³ LACK OF MEDICAL CARE FOR A SURROGATE

Victoria is a 32-year-old mother of three girls and has a one-month-old granddaughter. She lives in a rural area on the banks of the Grijalva River, on the outskirts of the municipality of Villahermosa. She says she decided to participate in a surrogacy program to be able to buy land for her daughters. After signing a contract with an agency in Tabasco, she travelled to Puerto Vallarta in July of 2016 to receive an embryo transfer.

She was diagnosed with gestational diabetes when she was four months pregnant. Despite this diagnosis, she was not given specialized medical care, and she always felt she was treated badly by medical personnel. On February 3rd, she awoke feeling ill and her abdomen was hard so she decided to go to the clinic. It took three hours for her to receive medical

attention. The doctors did not tell her that the fetus was not showing vital signs. Victoria knew intuitively that something bad had occurred. She was told to go the Tabasco Medical Clinic, whose staff told her the fetus had died in her uterus. Though Victoria requested a cesarean procedure, she was obligated to give birth vaginally.

Because no one from the agency showed up to assist her while she was hospitalized, Victoria's family had to cover prescription expenses. Upon release from the hospital, the agency still did not pay for her medication, nor did she receive the payment promised for surrogacy services during the months she was pregnant. Victoria wants the agency to pay for her services and wants compensation for medication expenses necessary for her recovery.

GIRE has also documented that the great majority of surrogacy births are conducted via cesarean procedures, as this is more convenient for physicians and intended parents, who can in this way plan their trips to Tabasco, either from other countries or states in Mexico. This practice fails to consider the preferences of surrogates regarding their labor process, as well as the increased risks this implies for their life and wellbeing. In 2012, Mexican public hospitals reported 50% of births were cesareans, a rate much higher than the 10-15% recommended by the World Health Organization.²⁴ In 2016, this figure jumped to 54.9%.²⁵ The majority of surrogate births take place in private hospitals, where the situation is similar or worse. Thus, even though the number of unjustified cesareans is not a problem exclusively found in surrogacy agreements, it contributes to exacerbating surrogates' vulnerable position in relation to agencies, clinics and intended parents.

CRIMINALIZATION

Most worrying is the fact that Tabasco's new legislation has fostered an atmosphere of persecution against surrogates who have or are currently carrying out surrogacy agreements with foreigners or same-sex couples. Currently, surrogates who signed legal contracts before reforms that came into effect in January 13th are being threatened by public officials for not complying with the current legislation. Some women have even faced criminal charges for child trafficking, a very serious crime.

MARCELA:²⁶ FORCED TO LIE

Marcela is a woman from Tabasco who entered into a surrogacy agreement with Shaul, an Israeli citizen. She asked repeatedly for the intended father's name and information because she was not provided with any document stating who he was. The agency always reiterated that Shaul did not want anything to do with her. When she finally met him, he explained he had wanted to contact her but had been told exactly the same thing.

Marcela developed anemia in her second month of pregnancy, and had to be bedridden for a period of time. During her pregnancy, she was treated poorly by health care providers. Furthermore, the agency told her that, upon arrival to the hospital to give birth, she was to pretend that the baby was hers, and make corresponding payments so no one would "suspect" anything. She was assured it was dangerous that the intended father, not being Mexican, be

at the hospital with her due to the climate of persecution against foreign intended parents in Tabasco. Before starting her cesarean procedure at the hospital, a nurse made her sign a document under oath in front of an "attorney" claiming that her pregnancy was not a product of a surrogacy agreement. After the child was born, she paid and left, bringing the baby to Shaul outside the hospital.

After a two-month delay in obtaining identification documents, Shaul and the baby are now in Israel. Marcela, however, is worried. At the beginning of June, she received a subpoena from the State Prosecutor's Office. She is afraid she will be investigated just like other surrogates in Tabasco. GIRE is currently providing her with legal counsel, and presented an *amparo* to know more about her situation.

B. CHILDREN BORN AS A RESULT OF THESE AGREEMENTS

The current situation in the state of Tabasco, in particular in relation to children born of foreign intended parents, has led to the violation of children's right to an identity. GIRE has documented the obstacles intended parents face in acquiring passports for their children born through surrogacy agreements. The Ministry of Foreign Affairs (SRE), the institution responsible for providing these documents, at times has blocked the issuance of children's passports, particularly in cases of same-sex male couples, claiming they find it "suspicious" that no woman's name appears on the child's birth certificate. They argue their intent is to protect children from crimes such as human trafficking. However, in a recent report in response to an *amparo* filed by GIRE, the SRE claimed that "it has always recognized that children born on national territory through surrogacy are Mexicans by birth". Nevertheless, GIRE is familiar with at least one case in which the SRE obstructed the issuance of a passport in a surrogacy case.

JOSÉ: TRAPPED IN MEXICO FOR MORE THAN SIX MONTHS

José and his husband travelled to Mexico from Spain to participate in a surrogacy arrangement. According to the couple's testimony, upon birth their baby was registered as José's son. The clinic assured the couple this was the correct way to proceed, as the birth certificate forms in Tabasco did not allow for children to have two fathers. With the passport office closed for the winter holidays in Tabasco, the couple travelled to Mexico City with the child's birth certificate, a copy of their surrogacy contract and a letter from the hospital to begin the necessary paperwork to acquire a passport. In this office, an official assured them that the document could not be processed due to the absence of a mother, and suggested that they invent a name to place on the document. The couple refused, and then travelled to Tabasco to request a passport. There, they met with a delegate who admitted to

opposing surrogacy, and therefore would not help them. The delegate suggested that they abandon the baby and return to Spain.

Due to contradictory and confusing responses from authorities, José and his partner did not know when or how they would be able to return to their home country. Finally, on June 26th, 2015, they were able to acquire a passport and return to Spain with their nearly seven-month-old baby. This case illustrates the types of serious problems that can stem from surrogacy regulations that do not adequately protect all parties involved and particularly, those that place children in a situation of legal uncertainty.

However, according to recent experiences in the cases GIRE has documented and litigated in Tabasco, the most common obstruction for registering children currently comes from the Tabasco Civil Registry, who denies birth certificates for children born through surrogacy arrangements. This is particularly serious given that a child's registration is the first, necessary step for acquiring other documents such as a passport, proving parentage and accessing services like basic healthcare.

In relation to this, GIRE requested information from the Tenth Judicial Circuit (corresponding to Tabasco) about the number of *amparo* suits presented against the Civil Registry Office for refusals to issue birth certificates in cases of surrogacy. The Tenth Circuit responded that there were 15 such cases on record: nine in 2016 and six in 2017, indicative of a worrying pattern in Tabasco.²⁷ Michael's case, which involved the retention of his newborn son by state authorities for over a month, illustrates this pattern.

MICHAEL AND VALERIA:²⁸ ILLEGAL RETENTION OF A MINOR AND CRIMINALIZATION OF A SURROGATE

Michael is a man with both Greek and American citizenship who came to Mexico to engage in a surrogacy agreement with Valeria, a surrogate woman from Tabasco. His son was born on December 21st, 2016 and had to remain in intensive neonatal care due to respiratory complications. The next day, an official identifying herself as a Tabasco DIF (Child Welfare Agency) worker took the baby away without any explanation. In the days following this incident, both Michael and Valeria visited the Children's Hospital and the State Prosecutor's Office demanding to know the baby's whereabouts. They received no information. Valeria submitted a request in writing requesting access to the DIF center where the baby was, to provide him with necessary care he required as a newborn. She also requested the DIF to grant access to Michael, the child's biological father.

Between the 5th and 6th of January, Valeria visited the Tabasco Attorney General's Special Office charged with Family Protection and the Protection of the Rights of Children and Adolescents to locate the baby. The prosecutor directly accused Valeria saying "You do not have to lie to me. I know you are selling children". On January 30th, 2017, GIRE

presented an amparo suit on the minor's disappearance. As a result, Valeria discovered there was a criminal investigation file against her. With GIRE's legal counsel, another amparo was submitted to determine whether there was an existing warrant for her arrest.

On January 31st, Michael was able to recover his child from the DIF center in Villahermosa, over a month after his seizure by officials. Finally, in February 2017 he obtained a birth certificate, and after completing the necessary passport paperwork, he and his son left Mexico. Valeria, on the other hand, has not received the payments the agency promised and she continues to face criminal charges for child trafficking. GIRE is offering her legal aid in order to close this investigation.

While it is certainly crucial to guarantee the safety of children and ensure their protection against serious crimes such as child trafficking, this cannot serve as an excuse to discriminate against same-sex couples, foreigners, or single parents, nor can it be used to impede access to the registration and identification documents to which newborns have a right. The absence of identification documents for children born in national territory is an inexcusable violation of their human rights.

THE EUROPEAN COURT OF HUMAN RIGHTS AND THE RIGHTS OF CHILDREN IN SURROGACY CASES²⁹

In September 2014, the European Court of Human Rights (ECHR) handed down two rulings recognizing children born as a result of surrogacy agreements: *Mennesson v. France* and *Labasse v. France*. Both cases are similar: two different French couples with infertility issues travelled to California to carry out a surrogacy process using the gametes of the intended parents. According to California law, both couples were considered as parents of the children. But when trying to register the children with the French Consulate, their request was denied. As surrogacy is prohibited in France, the Consulate did not recognize this type of parentage. The ECHR condemned France, stating that its failure to recognize these children's parentage violated their rights to privacy, identity and to a family. Given the lack of international judicial precedents on the issue, this ruling represents a first step to understanding that states are primarily obligated to respect children's rights, regardless of their regulatory public policies on surrogacy.

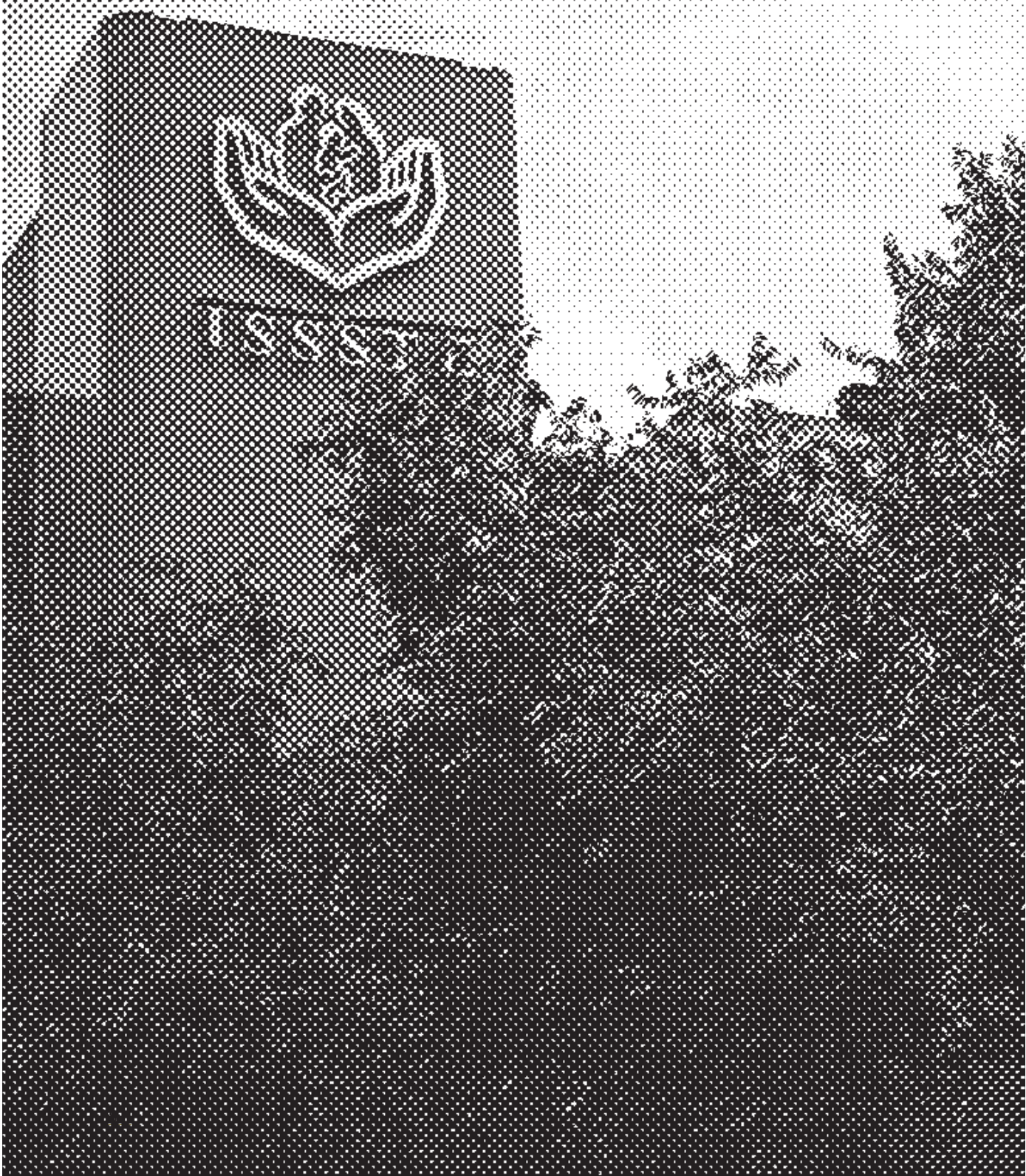
C. INTENDED PARENTS

Current legislation on surrogacy in Tabasco discriminates against single people, same-sex couples, foreigners and individuals who exceed the established age limits who wish to start a family through surrogacy. In the latter case, commissioning mothers are required to fulfill an age requirement that is not asked of intended fathers. These restrictive provisions coupled with the lack of clarity about what would happen to those agreements already in course when enacting the reforms, has facilitated the mistreatment and stigmatization of intended parents in the state of Tabasco. In some cases, foreign commissioning parents who were forced to stay in Mexico have lost their jobs awaiting judicial decisions that would allow them to leave the country with their newborns. In other cases, they have been warned by their agency's personnel not to visit hospitals to witness the birth of their child, because local DIF officials were "taking children away", as was the case with Michael and his son. Due to this fear, many have had to wait a few days before meeting their newborns, while surrogates have had to pretend they are the biological mothers and care for the children at least for some time. Certainly, surrogates and children remain the most vulnerable parties in this process however, Tabasco's inadequate regulation and the government's retroactive application of the law has also affected intended parents.

Photograph: GIRE archives.



Photograph: Grace Navarro.



4. THE LEGAL FRAMEWORK AT THE FEDERAL LEVEL

4.1 ASSISTED REPRODUCTION

It is estimated that since the birth of Louise Brown, the first person born through in vitro fertilization (IVF) in 1978, approximately five million people have been born via ART.³⁰ The International Federation of Fertility Societies (IFFS) reported in 2016 that at a global level there are a total of 5,353 assisted reproduction centers.³¹ Despite this, ART are only regulated or legal in 80% of the countries in which they are practiced,³² which means that 20% offer unregulated services. This is the case in Mexico. To date, neither the Mexican Congress nor the federal Health Ministry have met their obligation to enact legislation or policies on assisted reproduction in accordance with advances in medical science and respect for human rights.

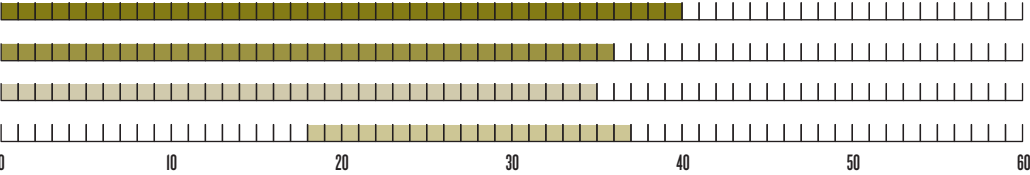
Accessing ART implies exercising a series of human rights, among them: the right to found a family, the right to privacy (reproductive autonomy), the right to health and the right to benefit from scientific progress. Guaranteeing these rights includes regulating and implementing ART so that people who cannot get pregnant without medical assistance can benefit from them. For decades, thousands of people have accessed ART in Mexico for a variety of reasons: they are infertile, are a same-sex couple, or are single. However, currently, there are no federal laws or policies regulating these procedures, which occur without adequate health verifications and without protecting the human rights of all parties.

The absence of assisted reproduction regulations in Mexico causes substantial legal uncertainty leading to the abuse of involved parties, increased vulnerability for medical personnel, and human rights violations. In addition, an inexistent legal framework allows both public and private institutions offering assisted reproductive services to establish their own access criteria. This sets the stage for arbitrary and discriminatory requirements. For example, certain public institutions only allow legally recognized couples to access ART (Specialized Women's Clinic, ISSFAM),³³ sometimes even specifying that they must comprise of a man and a woman (National Institute of Perinatology, MOH),³⁴ or place a maximum limit on the number of children the couple already has ("20 de Noviembre" National Medical Center, ISSSTE).³⁵

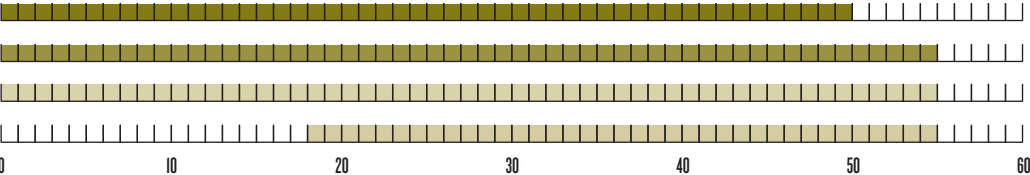
REQUIREMENTS TO ACCESS ASSISTED REPRODUCTION PROGRAMS

SPECIALIZED WOMEN'S CLINIC (ISSFAM)	20 DE NOVIEMBRE NATIONAL MEDICAL CENTER (ISSSTE)	NATIONAL INSTITUTE OF PERINATOLOGY (SSA)	“MÓNICA PRETELINI SÁENZ” PERINATAL MATERNAL HOSPITAL (SSA- MEXICO)
-------------------------------------	--	--	--

WOMAN'S AGE



MAN'S AGE



HEALTH STATUS



MARITAL STATUS



PREVIOUS CHILDREN



Source: GIRE developed the table based on data obtained through access to public information requests.

DISCRIMINATION BASED ON AGE: THE ASSISTED REPRODUCTION PROGRAM AT THE “20 DE NOVIEMBRE” NATIONAL MEDICAL CENTER

Since 2013, GIRE has provided legal assistance to Cecilia and Sergio, a married couple who was denied access to the Assisted Reproduction Program in the “20 de Noviembre” National Medical Center belonging to the Institute of Social Security Services for State Employees (ISSSTE), on the grounds that Cecilia exceeded the age limit of 35, one of the program’s criteria. Cecilia and Sergio presented a discrimination complaint before the National Council for the Prevention of Discrimination (CONAPRED).

In September 2016, they were accepted into the program as patients, but were not admitted until February 2017, four years after their initial request. With GIRE’s assistance, the couple presented an amparo lawsuit stating the Program’s entry requirements are discriminatory and arbitrary. The judge assigned to their case decided not to adopt a position on the discrimination implicit in the Assisted Reproduction Program requirements. The Mexican Supreme Court of Justice (SCJN) was called upon to take the case, but returned the file and responded that before deciding on the matter, the Collegiate Tribunal must first resolve issues of legality. In April 2017, the Collegiate Tribunal dismissed the case for procedural reasons and thus, it did not enter into an exhaustive study of the issue. This dismissal was sent to the SCJN where it must be resolved.

In addition, as of 2015, GIRE has provided legal counsel for María Teresa, a woman who was also denied access to the Medical Center’s Assisted Reproduction Program because of her age (like Cecilia, she was 36 years old when she requested entry into the program). After not receiving a referral for an appointment at the National Medical Center despite her infertility diagnosis, with GIRE’s assistance she filed a complaint before CONAPRED in

October 2015. In addition, she presented an amparo lawsuit for violations of her right to equality, to be free from discrimination, to privacy and to benefit from scientific and technological progress. In María Teresa’s case—in contrast to Cecilia’s—, a judge determined that the age limit established by the Medical Center’s Assisted Reproduction Program was discriminatory and violated human rights. In the ruling, the judge stated that the “success of these techniques is not only associated with the patient’s age, but with the reproductive capacity of both the man and the woman, which is dependent on a variety of factors.” For this reason, the Medical Center’s age limit requirement was ruled as arbitrary.

Both Cecilia and María Teresa’s complaints before CONAPRED were pending and stayed open until July 2017, when such Council issued Resolution 8/2017 which recognizes that the criteria based on age is discriminatory and that there is no objective and reasonable argument to support that the program should be exclusive for legally established couples with one or no children. It settles that Centro Médico’s criteria violates human rights and establishes the following reparation measures: 1) a written apology, 2) the implementation of all necessary actions to eliminate any discriminatory criteria to access the IVF program, 3) ongoing human rights training for all personnel, and 4) a psychological evaluation in order to determine the damage produced by such discrimination.

In June 2017, the Mexico City Collegiate Tribunal requested that the SCJN take on María Teresa’s case, thus allowing for the possibility that ART be discussed from a legal standpoint in the country’s most important court. This is still pending.

The judicial branch, along with autonomous public agencies such as CONAPRED, the National Human Rights Commission (CNDH) and state-level human rights commissions can all play an important role to help question discriminatory requirements that permeate access to ART in Mexico. Unfortunately, these are long processes that are frequently subject to a judge or public servants' interpretations. As long as there are no existing laws to regulate ART in Mexico, these harmful practices will continue without State supervision.

4.2 CURRENT LEGISLATIVE PROPOSALS

At the time of this report's publication, the Health Committee of the Chamber of Deputies was discussing a proposed bill on Assisted Human Reproduction (AHR). The bill was prepared by the Senate's Health, Human Rights and Legislative Affairs joint Committees, and approved by the majority of the House on April 28th, 2016. The proposal seeks to reform the LGS to establish AHR regulation as a federal health matter, so that its control and regulation would be the Federal Health Ministry's responsibility.

The bill contains positive elements such as the creation of a National Assisted Reproduction Registry dependent on the Federal Health Ministry, which could help address the lack of statistical data on the issue, and would permit more accurate diagnosis of the practice in Mexico. It also allows for people over 18 years of age to access ART, without restrictions on marital status or nationality. This is a significant contrast with the discriminatory provisions commonly found in state-level legislation, as well as previous federal legislative proposals. However, if approved, the proposed bill contains elements that must be carefully considered to prevent it from being contrary to human rights.

On the one hand, the proposed bill states that individuals need a medical justification to access ART. This definition supposes the couple is comprised of a man and a woman, and as such, excludes same-sex couples and single individuals. If the current bill is approved as is, the various authorities involved in the issue must not interpret the medical requirement as an infertility diagnosis —understood as an “illness” that prevents heterosexual couples from reproducing— but rather must interpret this requirement as a *biological* impediment. This would serve to include people who cannot reproduce for other reasons, such as same-sex couples and single people.

On the other hand, the bill provides a list of ART related practices punishable by law, and states that these include “any assisted reproduction practice contrary to human dignity” (Article 71 Bis 5). The failure to specify which criminal elements must be proven, in other words, which ART-related practices are “contrary to human dignity”, leaves this open to personal interpretation. This violates the principle of specificity in criminal law. It is therefore essential to clearly outline which conducts are considered a crime, eliminating ambiguity open to interpretation that could lead to unjustified criminal sanctions on women who voluntarily participate in surrogacy agreements.

Although the Health Committee in the Chamber of Deputies had previously received this proposal for review and judgment, it issued its own draft bill on RHA and surrogacy in September 2016. It is worth mentioning that this draft was based on a proposal by Congresswoman Sylvana Beltrones, without considering a previous bill presented by Congresswoman Maricela Contreras in 2015. The Health Committee's draft proposal presents additional problems to those found in the Senate's bill.³⁶ Among other issues, it requires an infertility diagnosis to access ART, prohibits the use of genetic material from a person other than the woman's partner (which does not apply to eggs, an unjustified restriction that affects those who require the use of donated gametes), and requires that married women request spousal approval to initiate an assisted reproduction process.

To date, the issue has not been listed on the agenda for discussion. As it is further advanced in the legislative process and more consistent with respect for human rights, the House's Health Committee should review the bill already approved by the Senate, taking into consideration the recently-presented bills in the Chamber, as well as opening it up for expert consultation.

PENDING INITIATIVES ON ASSISTED REPRODUCTION IN THE MEXICAN CONGRESS

BILL APPROVED BY THE SENATE

STATUS:

Under revision by the Health Committee in the Chamber of Deputies.

PENDING:

Final language of the bill to be emitted by the Health Committee which will then be voted upon by the full Chamber of Deputies. If approved, it will be ready for publication.

POSITIVE ASPECTS:

- It establishes the suitability of the General Health Law for AHR regulation.
- It establishes a National Assisted Reproduction Registry.
- It does not include citizenship or marital status requirements to access ART.

MAIN PROBLEMS:

- It is ambiguous on criminal sanctions.
- It establishes medical requirements to access ART (if these are not modified, they must be interpreted in a non-discriminatory manner).

BILL PROPOSED IN THE CHAMBER OF DEPUTIES

STATUS:

Text emitted by the Health Committee in the Chamber of Deputies.

PENDING:

Once voted and approved by the full Chamber of Deputies, it would pass to the Senate for review and possible approval.

POSITIVE ASPECTS:

- It establishes AHR as a federal health issue.

MAIN PROBLEMS:

- ART can only be accessed by infertile couples.
- It establishes ambiguous criminal sanctions open to interpretation.
- Women require spousal approval to access ART.

The approval of assisted reproduction regulations would help provide legal certainty for those who access these techniques as well as those who participate in surrogacy agreements in states where the practice is permitted. At the moment of this report's publication, three legislative proposals with specific provisions on surrogacy were being reviewed in Congress: a) a second bill approved by the Senate intending to add Articles 61 Ter and 462 Ter to the LGS to prohibit and criminally sanction surrogacy under certain circumstances, b) the Health Committee's bill mentioned above in the Chamber of Deputies, and c) Congresswoman Maricela Contreras's proposal. All are described in the following table:

SURROGACY BILLS PENDING IN CONGRESS

BILLS	REQUIREMENTS FOR INTENDED PARENTS	REQUIREMENTS FOR SURROGATES	COMPENSATION
Approved Senate Bill	<ul style="list-style-type: none"> - Mexican citizenship. - A medical indication. 	<ul style="list-style-type: none"> - Mexican citizenship - No more than two previous pregnancies via the same technique. 	<ul style="list-style-type: none"> - Compensation for medical expenses is permitted, but the parties should not earn a profit from the same.
The Health Committee's Bill in the Chamber of Deputies	<ul style="list-style-type: none"> - Mexican citizenship. - Infertility diagnosis. 	<ul style="list-style-type: none"> - Mexican citizenship of legal age. - Can participate a maximum of two times in these types of agreements. 	<ul style="list-style-type: none"> - The contract is not for profit. The commissioning parties must cover expenses prior to and after birth.
Maricela Contreras's Bill	<ul style="list-style-type: none"> - One or two individuals, it does not establish other requirements. 	<ul style="list-style-type: none"> - Physically and mentally healthy, with a family environment free of violence. - Has not been pregnant for the last year and has not participated more than twice in this type of agreement. 	<ul style="list-style-type: none"> - The contract is not for profit.

Both the Senate’s approved bill and the Chamber of Deputies’ Health Committee’s proposal establish discriminatory requirements for accessing and entering into surrogacy agreements, such as mandatory Mexican citizenship and a medical requirement or infertility diagnosis. In addition, both proposals impose harsh sanctions (six to 17 years in prison) for those who do not meet the stipulated criteria. This could potentially criminalize any consenting participant if, for example, they failed to meet the age requirement or exceeded the permitted number of repetitions of the practice. In this sense, the criminalization that surrogates, who are often the most vulnerable party in these agreements and who, in theory, these regulations aim to protect, could face if these proposals pass is particularly worrisome.

In contrast, Congresswoman Contreras’s bill neither imposes discriminatory restrictions to participate in these agreements, nor contains disproportional criminal sentences related to the practice. Furthermore, it sets limits to surrogacy contract clauses, protecting surrogate’s access to medical care and the rights of children born of this practice. It also considers the reparation of damages and, in its case, compensation or the payment of damages for the possible death or permanent incapacity of the surrogate, derived from this

BILLS	CRIMINAL PUNISHMENT	OTHER
Approved Senate Bill	<ul style="list-style-type: none"> - Six to 17 years in prison if: <ul style="list-style-type: none"> a) compensation is paid; b) the woman has been pregnant twice via the same technique; c) the intended parents are not Mexican; d) The intended parents do not cover expenses or abandon the surrogate woman. 	
The Health Committee's Bill in the Chamber of Deputies	<ul style="list-style-type: none"> - Six to 17 years in prison to those who: <ul style="list-style-type: none"> a) provide monetary compensation; b) exploit conditions of poverty, the ignorance or vulnerability of the surrogate; c) gestate for non-Mexicans; d) abandon a surrogate. 	One of the commissioning parents and the surrogate must be relatives.
Maricela Contreras's Bill	<ul style="list-style-type: none"> - A five to ten year sentence for medical personnel that carry out practices contrary to requirements established by law. - A five to ten year sentence for commissioning parents or surrogates attempting to obtain monetary gain or to cause damage. 	<ul style="list-style-type: none"> - Preference should be placed on ensuring that the surrogate and one of the intended parents are relative, although this is not obligatory. - Contracts may not contain clauses that violate the human rights of the parties. Specifically: limiting access or medical attention for the surrogate or the rights of the minor.

practice, according to the economic situation of the commissioning parents. Nevertheless, it is similar to other bill in that it only allows “non-profit” agreements, an element that perpetuates gender-based stereotypes, ignores the surrogates’ agency, and does not recognize the negative effects of eliminating or limiting payment of economic compensation in these cases. In the three bills, in addition, criminalization of women who enter into these agreements for payment is contemplated.

The processes, requirements and authorities involved in a surrogacy contract are established at the state level, because they pertain to the area of civil law, whose obligation is – among others – to protect free will. If approved, federal legislation on the issue should not establish discriminatory criteria, nor should it lead to unjustified limits that cause adverse consequences for involved parties, especially for surrogates and the children born of these agreements. As mentioned in the previous chapter, the situation in Tabasco after the 2016 reforms illustrates some of these problems.

5. CASES REGISTERED, DOCUMENTED, AND LITIGATED BY GIRE

Photograph: Grace Navarro.



5. CASES REGISTERED, DOCUMENTED, AND LITIGATED BY GIRE

CASES REGISTERED - SURROGATES³⁷

NAME	PLACE OF RESIDENCE/ CITIZENSHIP	YEAR(S)
Maura	Mexico City	2015-2016
Michaela	Tabasco	2015
Arely	Colombia	2014

CASES REGISTERED- INTENDED PARENTS

NAME	PLACE OF RESIDENCE/ CITIZENSHIP	YEAR(S)
Sean	United States	2015-2017
Luciano	Spain	2015-2017
Mark	United States	2016-2017
Manolo	Spain	2016-2017
Levy	Israel	2016-2017
John	United States	2016-2017
Carlos	Mexico	2016-2017
Abrahám	Israel	2016-2017
Isaac	Israel	2016-2017
Schlomo	Israel	2016-2017
Yacob	Israel	2016-2017

CASES DOCUMENTED- SURROGATES³⁸

Lisa	Tabasco	2015-2016
------	---------	-----------

Lisa* is a woman from Tabasco who carried a pregnancy for Eduardo and David, a couple from San Diego, California. Due to several irregularities from the agency's part, they decided to continue with the agreement independently, but they never signed a contract. The baby was born prematurely and with serious health problems which required expensive special care. The commissioning couple refused to take any responsibility. Therefore, Lisa and her husband registered the baby as their own, in order for their insurance to cover him. A few weeks later, the commissioning parents left for the United States and Lisa never heard from them again. Rodolfo Valentino has received all the medical attention he requires from Lisa and her family. Nevertheless, Eduardo came back almost two years later, and through threats and deceit, he forced Lisa to hand over the baby. Currently, the boy's whereabouts are unknown and his family is worried that he may not be getting the attention he needs. Local authorities have not contributed in finding him.

*The case was documented as Lisa in respect to her privacy. Nevertheless, now that GIRE is offering her legal advice and the case has gone public, she decided to use her actual name, Laura.



David, Hanoch and Shaul, three single Israeli fathers who faced challenges registering their newborn children in Mexico.

Victoria	Tabasco	2015-2016
-----------------	----------------	------------------

Victoria is a 32-year-old woman with three daughters and one granddaughter, who signed a surrogacy contract with an American citizen. Four months into her pregnancy, she was diagnosed with gestational diabetes. Though she began to face multiple problems, she never received adequate medical care. Eight months into the pregnancy she went to the hospital because she had contractions. She was treated badly and faced unjustified delays. Finally, she was informed that the fetus had died, and was obligated to have a vaginal delivery. Though she lost the pregnancy, she and the commissioning father maintained in contact. This led them to discover that the agency had given each of them different information on expenses and compensation for the gestational process. To date, Victoria has neither received the promised compensation, nor has she been refunded for the expenses incurred when she went to the hospital alone for a gynecological emergency related to her pregnancy.

Isabel	Tabasco	2015-2017
---------------	----------------	------------------

Isabel is a 31-year-old mother of three. After signing a surrogacy contract in 2015, in December 2016 she gave birth to a baby with various health complications. The baby needed to be transferred to a neonatal clinic and had to be hospitalized for more than ten days. She received insufficient prenatal care, given that during the pregnancy her glucose levels were consistently high, although never treated nor explained to her. Though she knows she did not contract gestational diabetes, she was not given a copy of her lab results and to date, has not received a comprehensive general check-up. In June 2017, the State Attorney General for Gender Violence presented her with a summons. Currently, she does not know why she has been summoned or what her legal situation is.

CASES DOCUMENTED- INTENDED PARENTS

Martín and Luisa³⁹	Argentina	2015-2017
--------------------------------------	------------------	------------------

Martín and Luisa are an Argentinean couple that could not get pregnant because Luisa lost her uterus after the birth of their first child. Before travelling to Mexico, the couple tried to adopt a child in their country, but were unsuccessful. They established a surrogacy contract in Tabasco and, on November 27th, 2016, they arrived in Villahermosa with their 9-year-old daughter to await the birth of their baby, who was born three days later. On December 6th, they submitted their documents to the Civil Registry Office in Villahermosa to process their baby's birth certificate. It was denied. For two months, the family had to remain in a hotel, fearing that the authorities would take away the baby or that they could not go back to Argentina. A positive ruling as a result of an amparo lawsuit allowed them to finally obtain the birth certificate. They were able to go home in March 2017.

Emiliano and Mariana⁴⁰	Tamaulipas	2015-2017
--	-------------------	------------------

Emiliano and Mariana are a Mexican couple from Tamaulipas. They decided to enter a surrogacy program due to infertility issues. Their twins were born in September 2016. Tabasco's Civil Registry denied the minors' birth certificates without any justification, arguing that their contract was "probably" false. The minors did not have birth certificates for six months, which impeded them from receiving health care. After two amparo suits, the birth certificates were finally issued to the couple.

José	Spain	2015
-------------	--------------	-------------

José and his husband are a Spanish couple that chose to carry out a surrogacy arrangement in Tabasco. When their baby was born, he was registered only as José's son. The clinic assured the couple this was the correct way to do it, because birth certificate forms do not allow for the possibility of registering two fathers. Since the passport office in Villahermosa was closed for winter holidays, the couple went to Mexico City to process the child's passport. They were told the document could not be processed due to the absence of a mother on the birth certificate, and were told to invent a name to place on the document. The couple refused, and travelled to Tabasco to request a passport. There, they met with a delegate who admitted being against these type of processes, and therefore would not help them. The delegate suggested that they abandon the baby and return to Spain. In June 2015, the couple finally obtained the passport for their almost seven-month-old son, and were able to return to Spain.

CASES LITIGATED- SURROGATES⁴¹

Valeria	Tabasco	2016
----------------	----------------	-------------

Valeria is a mother of two from Tabasco. She signed a surrogacy contract with Michael, an American citizen. She gave birth to a boy in December 2016. After someone identifying herself as a DIF official abducted the baby from the hospital, both Valeria and Michael visited various authorities to find out the baby's whereabouts. In the process, accompanied by GIRE, Valeria discovered that a criminal file for child trafficking was opened against her. GIRE is currently working to close this investigation.

Marcela	Tabasco	2015-2017
----------------	----------------	------------------

Marcela is a 27-year-old woman with four children. In January 2017, she gave birth to a baby girl as a result of a surrogacy arrangement. Her pregnancy was complicated. She was bedridden for a whole month and had bleeding during this time, which caused her to develop anemia. The agency blocked contact between her and the commissioning father during the pregnancy. Before receiving gynecological emergency treatment, the day of the child's birth, hospital staff asked that she sign a document under oath that her pregnancy was not a product of a surrogacy contract. Marcela recently received a summons from the State Prosecutor's Office. She is worried she will be criminally investigated like other surrogates in Tabasco. GIRE is currently providing Marcela with legal counsel to obtain this information, and if necessary, to close the investigation against her.

Gabriela	Tabasco	2015-2017
-----------------	----------------	------------------

Gabriela is a woman from Tabasco who gave birth to twins in December 2016 as a result of a surrogacy agreement with a foreign intended father. The moment they were born, she was made to sign a document stating that she was giving them up for adoption. The agency, however, asked her to pick up the twins from the hospital because the intended father's entry was "prohibited". Currently, every month DIF personnel visit Gabriela's house without giving their names and positions, stating that they are "initiating a lawsuit" against her. She knows that the twins finally got their birth certificates and left the country with their father. However, she does not know what her legal situation is. GIRE is representing her case and has presented an amparo to determine if she is being criminally investigated and, if so, for what crime.

CASES LITIGATED- INTENDED PARENTS

Michael

United States

2015-2017

Michael is an American man, originally from Greece, who established a surrogacy contract with a woman in Tabasco. Two days after his baby was born, supposed Tabasco government authorities took the baby from the hospital without providing any information to the father or the surrogate. With legal assistance from GIRE, Michael discovered that his son was in a (DIF) Child Welfare Agency. After two months, and various efforts before public institutions and media, he was able to locate him. During this time, the baby did not receive necessary medical care. A month later, Michael obtained the required identification documents and left Mexico.

David

Israel

2015-2017

David is an Israeli man who established a surrogacy agreement with a woman from Tabasco in December 2015. He flew to Mexico for the birth of his baby on January 6th, 2017. Once the baby was born, the Civil Registry denied his registration. Thanks to an Israeli judge's ruling that recognizes paternity through DNA testing, the Israeli Embassy issued the child identification so that they could leave the country. However, the Embassy requested that he also file a complaint to obtain a Mexican birth certificate. Finally, David was able to leave Mexico with his two-month-old baby. GIRE is providing him with legal assistance. The issuance of the Mexican birth certificate is still pending.

Shaul

Israel

2015-2017

Shaul is an Israeli man who established a surrogacy agreement in Tabasco in December 2015. His agency recommended that he remain in his hotel instead of attending the birth of his daughter, in light of the climate of persecution of non-nationals in the state. A few weeks after the birth, in February 2017, the Civil Registry denied the issuance of a birth certificate. Thanks to an Israeli judge's ruling requiring that paternity be recognized through DNA testing, the Israeli Embassy issued the child identification. However, the Embassy requested that he also file a complaint to obtain a Mexican birth certificate. He was able to leave Mexico with his two-month-old baby girl in March 2017. GIRE is providing Shaul with legal assistance to demand the issuance of the birth certificate. The resolution is still pending.

Hanoch

Israel

2015-2017

Hanoch is an Israeli citizen who decided to establish a surrogacy arrangement in Mexico. He signed his contract in 2015 and his son was born in Villahermosa on December 27th, 2016. The baby had to remain hospitalized for nine days and Hanoch could not visit him because his agency had recommended staying in his hotel to avoid problems with authorities. He was able to remain informed about the baby's health thanks to the positive relationship he had developed with the surrogate with whom he signed a contract. When the baby was released from the hospital and Hanoch attempted to request a birth certificate, it was denied. Based on legal precedents set in Israel, his baby received Israeli identification documents with results of a DNA test, though he was also encouraged to request a Mexican birth certificate. In March 2017, more than two months after the baby's birth, Hanoch and his baby left Mexico. His baby has yet to receive Mexican identification. GIRE is assisting with the process to obtain this documentation.

6. CONCLUSIONS



6. CONCLUSIONS

Surrogacy is a complex issue garnering increasing importance in national and international debates on reproductive rights. Its regulation must take various factors into account, such as the future nationality or migratory situation of babies born through these processes, probable asymmetrical power relationships between surrogates and intended parents, and ethical and scientific questions concerning the regulation of genetic material and new forms of parentage. Mexico is one of the countries in the world in which the practice is legal and for this reason, this debate is urgent.

While legislation to regulate both ART and surrogacy in Mexico is critical, not just any legislation should be adopted. The legislation must be firmly guided by a guarantee of the rights of the three main parties involved in surrogacy agreements: surrogates, intended parents, and children. Furthermore, legislation must not discriminate against people who do not fit the traditional, nuclear family model, such as same-sex couples, single people, and couples who are not Mexican. Finally, in compliance with the Mexican Constitution, this regulation must respect the division of powers between the federal government and the Mexican states. It will be difficult, however, to enforce comprehensive protection of all parties involved in surrogacy arrangements if there is no existing federal framework on assisted reproduction.

The experience in Tabasco regarding surrogacy illustrates some of the problems with establishing incomplete and flawed legislation on a complex matter. In addition, the retroactive application of the law by governmental authorities following the 2016 reforms has led to various human rights violations, against intended parents and children and in particular the criminalization of surrogate women. Given its experience in the matter, the government of Tabasco has the opportunity to reform its legislation and become a model for a surrogacy regulation that is compatible with human rights and reproductive justice.

7. RECOMMENDATIONS

7. RECOMMENDATIONS

MINIMUM COMPONENTS OF A MODEL LEGISLATION:

- Definition of surrogacy as a contract in which a woman agrees to carry a pregnancy for another individual or couple who intend to act as parents to the child born of this pregnancy.
- Avoid criminalization of the parties who have consented to these agreements, as well as discrimination against individuals wishing to access these agreements on the basis of nationality, age, sexual orientation and marital status.
- Guarantee quality and confidential health care services, as well as independent legal representation for surrogates. Conflicts of interest among personnel involved in the practice must be recognized and minimized.
- Establish that intended parents must cover at least all expenses related to the pregnancy, birth and postpartum period, whether or not the pregnancy is successful.
- Ensure the revision of the terms of the contract by a competent notary and/or judge who secures the informed consent of all parties, the legality of the contract and monitor that its clauses do not violate human rights, for example, by including promises of abortion or continuation of pregnancy based on requests from the commissioning party.
- Establish the obligation to notify relevant authorities in order to avoid problems while the contract is in effect or after the birth of the child, and to accelerate their registration and the issuance of identification. These authorities could be federal or state health institutions, Civil Registries, the Attorney General's Special Offices on Children or migration institutes.

LAWS AND POLICIES

FOR CONGRESS: Regulate ART with criteria consistent with human rights and medical science.

FOR THE HEALTH COMMITTEE IN THE CHAMBER OF DEPUTIES: Emit a decision regarding the two bills approved by the Senate on the matter of AHR and surrogacy, in accordance with human rights standards established in the Constitution and international conventions.

FOR THE FEDERAL HEALTH MINISTRY: Emit an Official Mexican Norm to regulate the medical and technical aspects of the provision of assisted reproduction services in the private and public sectors, in accordance with human rights standards.

FOR THE GOVERNOR OF TABASCO: Present a legislative bill addressing the current legislation's problems of infringement on federal jurisdiction, human rights violations and legal uncertainty.

FOR THE TABASCO STATE LEGISLATURE: Modify the state's Civil Code so it corresponds with human rights standards established in the Constitution and international conventions to which Mexico is a party.

IMPLEMENTATION OF LAWS AND POLICIES

FOR THE FEDERAL HEALTH MINISTRY AND COFEPRIS: Provide a list of authorized health establishments that offer public assisted reproduction services.

FOR THE FEDERAL HEALTH MINISTRY, STATE HEALTH MINISTRIES, IMSS, ISSSTE AND ISSFAM: Guarantee that entry requirements for assisted reproduction programs are in accordance with human rights and medical science.

FOR THE GOVERNOR OF TABASCO: Monitor the implementation of surrogacy legislation in Tabasco in order to avoid retroactive applications of the law, as well as public officials from acting in a discriminatory manner or contrary to all parties human rights.

FOR DIF, THE ATTORNEY GENERAL'S SPECIAL OFFICE ON CHILDREN, THE INTEGRAL PROTECTION SYSTEM FOR CHILDREN AND ADOLESCENTS: Safeguard the superior interest of children in surrogacy cases.

FOR THE CIVIL REGISTRY IN THE STATE OF TABASCO: Expedite the issuance of birth certificates for children born of surrogacy agreements in Tabasco without obstructions or unjustified refusals.

ACCESS TO JUSTICE

FOR THE SCJN: Adopt a position on discriminatory requisites in Tabasco's Civil Code in relation to Unconstitutionality Claim 16/2016 submitted by the Federal Attorney General's Office and add additional elements to the Claim if missing.

FOR THE CNDH, STATE HUMAN RIGHTS COMMISSIONS AND STATE TRIBUNALS: Establish comprehensive reparations to victims of human rights violations in the context of access to assisted reproductive techniques and surrogacy arrangements, in accordance with the highest standards of protection, that take victims' requests into account. Follow up on compliance with these recommendations.

FOR THE STATE PROSECUTOR'S OFFICE IN THE STATE OF TABASCO: Review investigative files opened for child trafficking offenses to confirm whether accusations are unfounded in cases of surrogate women, and if this were the case, close the investigations.

FOR NOTARIES AND JUDGES QUALIFIED TO REVIEW SURROGACY CONTRACTS: Ensure contractual clauses are legal, compatible with human rights standards, and that all parties give their informed consent.

ACCESS TO INFORMATION

FOR TABASCO'S CIVIL REGISTRY: Create a registry of the number of surrogacy arrangements and births taking place in the state, protecting the privacy of all parties involved at all times.

FOR THE HEALTH MINISTRY OF THE STATE OF TABASCO: Include data on commissioning fathers in the surrogacy case registry.

NOTES

1. For discussion of different terms used to describe the practice and their conceptual implications see Beeson, D., Marcy Darnovsky & Abby Lipman, “What’s in a name? Variations in terminology of third-party reproduction” in *Reproductive BioMedicine Online*, vol. 31, no. 6, December 2015, pp. 805–814.
2. ART are defined as treatments that manipulate human embryos and gametes to achieve pregnancy, such as artificial insemination and in vitro fertilization (IVF). See International Federation of Fertility Societies, “IFFS Surveillance 2016, 7th edition” in *Global Reproductive Health*, vol. 1, no. 1, 2016. Available at <http://journals.lww.com/grh/pages/currenttoc.aspx>.
3. See for example, Anderson, E. “Why Commercial Surrogate Motherhood Unethically Commodifies Women and Children: Reply to McLachlan and Swales” in *Health Care Analysis*, vol. 8, no. 1, March 2000, pp. 19–26.
4. See Bailey, A. “Reconceiving Surrogacy: Toward a Reproductive Justice Account of Indian Surrogacy” in *Hypatia*, vol. 26, no. 4, 2011, pp. 715–741.
5. For a discussion of these arguments and how they should be separated conceptually see Macklin, Ruth, *Surrogates and other mothers: the debates over assisted reproduction*. Philadelphia: Temple University Press, 1994.
6. SCJN, First Chamber, “Same-sex couples’ right to family life. Jurisprudential thesis 8/2017 (10a.)” in Federal Judicial Seminar, 27 January 2017. Available at <http://bit.ly/2jxqRVn> [Accessed: March 20 2017].
7. This report focuses on the case of Tabasco. To know more about Sinaloa’s legislation, see the Assisted Reproduction Chapter in GIRE, *Women and Girls Without Justice: Reproductive Rights in Mexico*, 2015. Available at <http://informe2015.gire.org.mx>.
8. Mexico City’s Legislative Assembly approved the Mexico City Surrogacy Law on November 30th, 2010. This law however, was not published and is not currently in effect.
9. In response to the international scandal known as Baby Gammy, in which an Australian couple supposedly abandoned their baby born with a cognitive disability who was a product of a surrogacy arrangement. See: Callaghan, Sascha and Newson, A, “Surrogacy, motherhood and Baby Gammy” in *BioNews*, no. 766, August 11 2014. Available at http://www.bionews.org.uk/page_444683.asp.
10. For examples of other state-level laws that infringe on jurisdiction in this way, see GIRE, *Women and Girls Without Justice: Reproductive Rights in Mexico*, 2015. Available at <http://informe2015.gire.org.mx>.
11. Zegers-Hochschild, Fernando, et. al., “Assisted Reproductive Techniques (ART) in Latin America: The Latin American Registry”, in *JBRA Assisted Reproduction*, vol. 18, no. 4, 2014, p. 127-135. Available at <http://bit.ly/1G599IS> [Accessed: March 20 2017].
12. “Foreigners who commissioned substitute mothers in Tabasco broke the law, according to authorities: an interview with Juan José Peralta Fócil” in *Noticieros Televisa*. Available at <http://noticieros.televisa.com/videos/extranjeros-que-contrataron-madres-sustitutas-tabasco-violaron-ley-autoridades> [Accessed March 2017].
13. Tabasco Government, Health Ministry, National Access to Public Information System: file 00398017.
14. Tabasco Government, Civil Registry, Access to Information Request, Infomex: file 00398317.
15. *Idem*.
16. As mentioned above, information related to commissioning fathers was not included in the response. Tabasco Government, Health Ministry, *op. cit*.
17. Names have been changed to protect the individual’s privacy.
18. Inter-American Court of Human Rights, Artavia Murillo et al., (IVF) v. Costa Rica. Preliminary objections, merits, reparations and costs. Judgment of 28 November 2012 Series C No. 257, paragraph 264. Available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_257_ing.pdf
19. “Foreigners who commissioned substitute mothers in Tabasco broke the law, according to authorities: an interview with Juan José Peralta Fócil” *op. cit*.
20. The case was documented as Lisa in respect to her privacy. Nevertheless, now that GIRE is offering her legal advice and the case has gone public, she decided to use her actual name, Laura.
21. FIGO, *Ethical Issues in Obstetrics and Gynecology by the FIGO Committee for the Study of Ethical Aspects of Human Reproduction and Women’s Health*, London, 2012.
22. SCJN, Unconstitutionality Claim 146/2007 and its accumulation 147/2007. Judge in charge of contribution: José Ramón Cossío Díaz” from the *Gender Equality Unit of the Federal Judiciary: national jurisprudence [website]*, 28 August 2008. Available at http://www.equidad.scjn.gob.mx/biblioteca_virtual/jurisprudencia/nacional/jurisprudencia/02.pdf [Accessed: 26 February 2017].
23. Name has been changed to protect the individual’s privacy.
24. GIRE. *Women and Girls Without Justice: Reproductive Rights in Mexico*, 2015. Available at <http://informe2015.gire.org.mx>.
25. INPER, *Auto-evaluation report by the General Director: 1 January to 31 December 2015*. Mexico: Health Ministry INPER, 2016. Available at www.inper.mx/descargas/pdf/INFORME-DE-AUTOEVALUACION-2015.pdf [Accessed: 16 April 2017].

26. Name has been changed to respect the individual's privacy.
27. Federal Judiciary, 10th Circuit of the Federal Judiciary, Access to Public Information System: Infomex, folio 0320000094417.
28. Her name has been changed to respect the individual's privacy.
29. European Court of Human Rights, *Case of Mennesson v. France*, Application no. 65192/11: Final Judgment, 26 de September 2014. Available at <http://bit.ly/1Hg7S5T> [Accessed: 24 March 2017]. *Affaire Labasse c. France*, Requête no 65941/11: Arrêt Définit, 26 September 2014. Available at <http://bit.ly/1UB3Z2i> [Accessed: 24 March 2017]
30. European Society of Human Reproduction and Embryology, "ART fact sheet" in *ESHRE*, July 2014. Available at <https://www.eshre.eu/Press-Room/Resources.aspx> [Accessed: 28 April 2015].
31. International Federation of Fertility Societies, "IFFS Surveillance 2016, 7th edition" *op. cit.*
32. *Idem.*
33. Federal Government, ISSFAM, Specialized Women's Clinic, Access to Public Information System, Infomex: file 0000700158514.
34. Federal Government, Health Ministry, National Institute of Perinatology, Access to Public Information System, Infomex: file 1225000000715
35. Federal Government, ISSSTE, "20 de Noviembre" National Medical Center, Access to Public Information System, Infomex: file 0063700018015.
36. Provisions related to surrogacy contained in the Chamber of Deputies bill proposal will be analyzed in the future, although they have been presented simultaneously.
37. The names of surrogate women and intended parents have been changed to respect their privacy.
38. Name has been changed to respect the individual's privacy.
39. Name has been changed to respect the individual's privacy.
40. Name has been changed to respect the individual's privacy.
41. Name has been changed to respect the individual's privacy.

