

Social and philosophical background and legal mechanism of assisted reproductive technologies regulation (by example of surrogate maternity)

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Abstract. In many countries of the world, the practice of using assisted reproductive technologies faces a number of legal obstacles, from the introduction of restrictions to their complete prohibition. In most cases, these restrictions are due to public rejection of these methods and procedures for social, psychological and religious reasons. Indeed, these technologies add reissues of assess in galore of women in the society, its functions, problems of relationships with a surrogate mother or an egg donor, emergence and distribution of a surrogate mother's or donor's rights, as well as persons' who are beneficiaries of the results of these technologies. However, a solution of these problems cannot be achieved only by improving the legal mechanisms regulating the use of these technologies. In this situation, the solution is at the junction of the interests of the society (state) and personal interests of persons who need their use, while normative consolidation and enforcement is only a form of consolidating of the achieved balance.

Key words: assisted reproductive technologies, legal regulation mechanism, human reproductive rights, surrogate maternity.

1 Introduction

On April 26, 2012, in Strasbourg, in the framework of the spring session of the Parliamentary Assembly of the Council of Europe, the conference "Surrogate Motherhood: A Violation of Human Rights" was held. The main topic of discussion at the conference was the report "Surrogate Motherhood: A Violation of Human Rights" presented by the European Centre for Law and Justice. The document refers to the violation of the women's rights arising from their commercial exploitation, as well as the difficulty of determining parental rights since up to six people may be involved in the process of conceiving, carrying and raising a child (two donors of sex cells, a surrogate mother, her husband, a child's "legal" parents). In addition, the document emphasizes the problem of subsequent self-identification of a child born from a surrogate mother and his psychological health.

Undoubtedly, assisted reproductive technologies are influencing a change in the foundations of the social institution of family and marriage: a traditional monogamous family with heterosexual spouses is gradually losing momentum as a pattern of behaviour in relation

to single-parent families (an incomplete family) and homosexual cohabitations, both male and female. Both forms of marriage and family relations are given an opportunity to have a genetically their own child through biomaterial donation and surrogate maternity. In addition, the availability of assisted reproductive technologies contributes to the expansion of asexual reproduction, which worsens the situation with gender interaction and gender identification as well.

The option of using assisted reproductive technologies for single women, men and persons with non-standard sexual orientation is also unacceptable since it deprives an unborn child of the most hypothetical possibility of having the right to a mother and a father. The current trend of the growing interest of homosexual couples to the use of the surrogate maternity technology in order to “acquire” children for themselves actualizes the issue of the most egregious violations of children’s rights in such situations [1].

Another controversial issue, which currently remains unsolvable, is associated with the determination of an embryo’s status. The position of perception of an embryo as a living being with all the moral and ethical consequences, rights and obligations arising from this finds both supporters and opponents.

2 Aim

The purpose of this study is to identify and analyze the main reasons for resistance to distribution of assisted reproductive technologies from a social and philosophical point of view, description of the types of legal mechanisms for securing the right to use these technologies, as well as study of law enforcement practice, primarily judicial practice, in solving problems of their application.

This study is based on international acts in the field of human rights, legislation of various countries of the world (India, the United States, Ukraine, a number of European countries), judgments, scientific works and opinions of progressive-minded people in the sphere of sociology, philosophy and law. Such methods as dialectical, comparative, analytic, synthetic and comprehensive are used in the article.

3 Surrogate maternity in religion

Reproductive technologies have created a whole layer of problems of philosophical and cultural nature which, in retrospect, are caused by a uniquely negative perception of these technologies in the religious sphere.

However, looking into the history, we can see that the Old Testament describes one of the surrogate maternity stories. Being infertile, Sarah, Abraham’s wife, invited a maid to conceive and carry out Abraham’s child. In Bible days, it was believed that if a wife could not give birth to an heir, she could pass on this mission to a maid who would conceive a baby with an infertile woman’s husband, and after giving birth, she immediately would give the baby to the spouses. In so doing, this infertile wife would take the child as a mother after birth, putting him on her lap, and would consider the baby to be her own genetically. History is replete with examples where slaves or concubines served as surrogate mothers in different countries of the world. At that time, of course, only “traditional surrogate maternity” was used, i.e. a baby’s father and a surrogate mother herself were his genetic parents since fertilization was carried out naturally [2].

At the same time, it is necessary to note that nowadays there is lack of unity in the approach to the problems associated with the use of reproductive technologies, in particular, surrogate maternity, in world-class religious denominations and some major national religions.

For instance, Judaism, which does not disapprove “in vitro” conception if sperm and oocyte are taken from a Jewish married couple. Artificial insemination by an anonymous donor can lead to unintentional incest.

Buddhism is not categorically opposed to donor sperm fertilization with the help of artificial childbirth technologies under the following conditions: 1) spouses’ voluntary consent; 2) compliance with donor confidentiality; 3) absence of a remuneration arrangement since his (a donor’s) participation has to be based on a desire to help his fellow human. However, even with such a liberal attitude, Buddhism indicates that raising an adopted child would be a more preferable solution to the indicated problem of childlessness.

Islam generally supports extracorporeal fertilization as it is believed that this process is similar to natural fertilization but it is allowed only under two conditions: sperm and oocyte have to belong exclusively to a husband and wife between whom a marriage agreement (nikah) has been concluded; after fertilization outside a living organism, an oocyte has to be transferred into a mother’s uterus, i.e. that of a woman’s whose oocyte has been fertilized.

The use of such concepts as “donor sperm”, “donor oocyte”, and much less “surrogate maternity” is strictly prohibited, comparable to adultery and generates a significant number of social problems. Persons involved in this in any way, if they have not complied with the two conditions above, are committing a sin and are subject to punishment [3].

The Orthodox Church approaches the assessment of various methods of insemination differentially but surrogacy is disapproved. In “The Basis of the Social Concept” of the Russian Orthodox Church, it is stated that: “Among the admissible means of medical aid may be an artificial insemination by the husband’s germ cells, since it does not violate the integrity of the marital union and does not differ basically from the natural conception and takes place in the context of marital relations” [4].

The Orthodox Church strongly opposes surrogate maternity, believing that the “mother’s feelings are trampled upon, and the child... may subsequently experience an identity crisis”. From the Orthodox point of view, all types of extracorporeal fertilization, involving the preparation, preservation and intentional destruction of “excess” embryos, are “unnatural and morally inadmissible” [4].

However, certain changes in the degree of non-perception of the consequences of the use of reproductive technologies by religious denominations should also be noted. In this area, we can distinguish that the Church is inclined to concordance with the existing situation, namely, an increase in the number of children born using reproductive technologies, including surrogate maternity, although as it has been noted above it often used to be absolutely categorical.

For example, since 2013, the Russian Orthodox Church, whose negative attitude towards surrogate maternity has been indicated above, allows for the baptism of a child born using “surrogate maternity” at the request of persons raising him if these are either his “biological parents” or “surrogate mother”, but only after they realize that, from a Christian point of view, such a reproductive technology is morally reprehensible and will do church repentance, regardless of whether they ignored the position of the Church knowingly or unknowingly [5].

In this situation, we observe a certain correlation in interpretation of the canons of the Church based on the conditions when individual followers of the Church teachings tackle the problem of impossibility of natural propagation not on the basis of their social and ethical beliefs and the religious canons but in favour of using surrogate maternity, which entails bringing them to justice. Thus, the Orthodox Church allows for “accepting Christ by faith” for a child born by a surrogate mother on the assumption that “the fact of the “surrogate birth” does not in itself constitute an obstacle to baptism of a person, since he is not responsible for his parents’ behaviour” [5].

4 Moral and ethical problems of surrogate maternity in law

The predominantly negative attitude of religion towards surrogate maternity is also accompanied by a number of moral and ethical problems. Let us consider the most significant, in our opinion, of these problems through the prism of emerging relations in law and development of legal regulation of the sphere of reproductive biomedical technologies.

1. Surrogate maternity is based (moreover, sold on a commercial basis – on a remuneration basis for a surrogate mother and her intermediary) on reducing that is amoral and grossly infringes on a woman's rights, bringing down her significance and role as a mother to a significance and role of a paid live incubator in the surrogate maternity industry, essentially, an instrument of production, actual transformation of a woman into a commercially exploited "human incubator".

A number of foreign authors rightly refer to surrogate maternity as an immoral business based "on a woman womb", "uterus leasing" and "uterus hire" technology" [6;7].

In one of the editions of the World Health Organization, a surrogate mother is called a "gestational carrier" and the following definition is given: "A gestational carrier is a woman in whom a pregnancy resulted from fertilization with third-party sperm and oocytes. She carries the pregnancy with the intention or agreement that the offspring will be parented by one or both of the persons who produced the gametes" [8].

This situation is completely unacceptable as it grossly violates the human dignity of a woman and her right to be a mother, is contrary to Art. 3 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms dated November 04, 1950, Art. 5 and 7 of the Universal Declaration of Human Rights dated December 10, 1948, Art. 7 of the International Covenant on Civil and Political Rights dated December 19, 1966, the Convention on the Elimination of All Forms of Discrimination against Women dated December 18, 1979, a number of other international instruments on women rights.

According to the ECtHR [9], seven of the thirty-seven Contracting States of the Council Europe have permissive legislation regarding surrogacy. Some of them permit commercial surrogacy and others only permit altruistic surrogacy. Only non-commercial surrogacy is also allowed in Australia, Great Britain, Denmark, Israel, Canada, the Netherlands and certain states of America.

At the same time, such countries as Russia and especially Ukraine stand out against the rest. Ukraine has a significant advantage for married couples since in Russia, even in the absence of any genetic relationship, it is a surrogate mother who has the priority right to determine a child's fate since genetic parents' rights are recognized only after the child is abandoned by his surrogate mother. And in Ukraine, the legislation, in particular, Part 2 of Art.123 and Part 2 of Art. 139 of the Family Code of Ukraine, provides for the presumption of origin of a child from his parents – donors of genetic material. In particular, Part 2 of Art. 123 provides for that in the case of transferring a human embryo conceived by spouses (male and female) as a result of the use of assisted reproductive technologies to another woman's body, the child's parents are the spouses; and Part 2 of Art. 139 prohibits challenging maternity in such a case [10]. Based on these statutory provisions, in judicial practice of Ukraine, the position that "the law connects the fact of maternity with the origin of a child from a certain woman, therefore a child born by a surrogate mother is not her genetic descendant and therefore, she cannot be considered his mother" [11] was met with support. At the same time, the legal nature of surrogate maternity relations is considered as a service for bearing and birth of a child with the subsequent registration of customers as the child's parents [11].

As a result, a woman who has carried and given birth to a child is completely unprotected by the law in the aspect of exercising her right to maternity regarding the child, and to a

great extent, it approximates the understanding of the role of such a woman as a means for producing children, which is absolutely unacceptable in a civilized society.

2. Surrogate maternity is based on the positioning a child not as a person but as an object of the law, a certain object of a transaction, essentially, as an inanimate object to whom product attributes and consumer properties of goods are ascribed.

It is not a mere coincidence that in 1992, the Court of Appeals of Michigan (USA) in the case of *Doe v. Attorney General*, 487 N.W.2d 484 (Mich. Ct. App. 1992), in which several potential parties to surrogacy agreements attempted to challenge Michigan law prohibiting such agreements, emphasized that the ban on surrogate maternity is aimed at ensuring several of the most important interests of the state: first, preventing a child from becoming mere commodities; secondly, the best interests of the child; and, thirdly, preventing the exploitation of women [12].

A number of foreign legal scholars assess this kind of commercial relations as distorting the nature of parental relations between a mother and a child and as unlawfully encroaching on the human dignity of women. They convincingly prove sound reasoning of the use of the notion of “child trafficking” to such kind of commercial relations [6, 7].

According to the UN’s Special Rapporteur on the sale of children, child prostitution and child pornography, Maud de Boer-Buquicchio, children face becoming commodities due to spread of surrogacy in the absence of international statutory provisions to regulate it. In her report to the Human Rights Council in Geneva, Maud de Boer-Buquicchio said that “children are not goods or services that the State can guarantee or provide. They are human beings with rights.” [13]... The Special Rapporteur explained that nowadays if a surrogate mother receives remuneration, the whole process corresponds to the definition of sale and purchase, as defined under international human rights law. In her opinion, this is exactly the situation currently practised in some countries. The Special Rapporteur insists that courts or other competent authorities should be involved in the regulation of the process, as private contracts generally do not provide sufficient human rights safeguards [14]. Most women employed in this business are well aware that they bear children for sale, customers and intermediaries use them as an incubator, buying a foetus as a commodity. However, they are not faced with any moral dilemmas and do not argue about the “ethicality” of their earnings [15].

However, despite the understanding of the actual nature of the relationship between customers and surrogate mothers, especially when providing such services for a valuable consideration, the legal systems of individual countries simplify the legal regime for customers of such services. The ruling of the Iowa Supreme Court can be an example, as it recently confirmed the legality of gestational surrogacy contracts (including those provided for a valuable consideration), as well as the adoption of the Uniform Parentage Act 2017 (UPA 2017) in Washington allowing compensated surrogacy services [16].

Undoubtedly, we can only welcome prescribing detailed rules in this field aimed at protecting the rights of all participants in surrogate maternity relations. However, such an approach of the states does not fully meet the interests and opinions of a significant part of society and, as a rule, transfers the responsibility for controlling the exploitative forms of using women either to lawyers who will be obligatory participants of such relations, representing interests of parties, or to the courts which will subsequently face the need to find a balance between the law and interests of society represented by participants of surrogate maternity procedures, or children born as a result of such a procedure.

In practice, it is difficult to solve the problem in case of birth of a sick child (having physical defects, pathologies, serious internal diseases, etc.) by a surrogate mother. Then customers of surrogate maternity services have the right (usually, it is a typical condition of a surrogacy service agreement) to refuse such a child (as some kind of “faulty goods” which do not comply with the original agreements), which is a gross violation of the child’s rights

and humiliation of his dignity. And the surrogate mother in such situation is also completely unprotected and deprived of the rights: her customers do not only leave the child but according to the model provisions of the agreement, are free to recover “compensation” from her, stating that there is only her (the surrogate mother’s) guilt in the birth of the sick child. In this case, for the surrogate mother (given her lower social status in comparison with the customers of her services), it will be extremely difficult (on the verge of the impossible) to prove the absence of her guilt in this outcome.

3. Surrogate maternity is a gross violation of the child rights, first of all, to personal and family identity and related to his specific communication with his own mother because, as numerous scientific studies have shown, a child in infancy has a stable psycho-physiological connection with his mother (who has carried and given birth to the child), and such a relationship is formed already at the prenatal stage of his development (when he is in the womb of the mother – the one who is carrying him). As Sonia Allan refers, “regardless of genetic connection, the gestational mother provides many biological resources during the pregnancy” [17]. A mother is tied to a child psychologically, and a forced break of this interaction can negatively affect both a surrogate mother and a child.

Also the use of surrogate maternity, associated with exploitation of another’s body, deprives a child of his own family and generally has a devastating effect on the moral foundations of the institution of the family and fundamental moral foundations of society.

As mentioned above, a significant number of nations oppose the practice of surrogate maternity directly prohibiting it, expressing special forms of responsibility, as well as fixing provisions on invalidity of contracts with persons engaged in organizing surrogate maternity services and contracts concluded directly with surrogate mothers. Ways to circumvent such prohibitions by subordinating regulation of such services under foreign law as a result of attracting foreign clinics or women from third countries, face opposition through the judicial system which uses the categories of “supra-imperative rules”, “public order” or “circumvention of the law” to deny the requirements associated with the recognition of parental rights to children born as a result of the use of reproductive technologies.

However, such a ban is subject to criticism from experts who indicate that intended parents may go abroad to benefit from foreign legislation which authorize gestational surrogacy. This situation can neither be solved by a pure prohibition, nor by diplomatic discussions with countries authorizing surrogacy in order to bar access of French nationals to surrogacy as the Report of the Senate suggests, since it denies real births occurred abroad and is prejudicial to the children, who cannot be punished for the acts of their parents [18].

The French courts are known for their radical position regarding non-recognition of the parental rights of persons to a child who was born as a “result of performance of a surrogacy agreement concluded bypassing the French law, which is insignificant in connection with the violation of public order despite the fact that abroad (at the place of its conclusion) it is considered valid” [19]. The situation accompanying this ruling and other similar situations related to the non-recognition by the French courts of the fact of paternity to a child born under a surrogacy agreement gained momentum in the judgments of the European Court of Human Rights in the cases of *Labassee v. France* (no. 65941/11) and *Mennesson v. France* (application no. 65192/11) [20], as well as decisions of the Court of Cassation of France in 2015 which reversed its prior position. In accordance with the said judgments, the situation of the intended father, as long as he is genetically related with the child, is settled. However, the position of the French highest Court is still awkward towards the intended mother. Indeed, the mother is, under French law, the woman who gives birth, whatever her genetic link with the child is. Hence, the woman who gives birth to a child procreated with a donor’s egg is automatically considered to be the woman’s embryo as soon as it is inseminated in her uterus.

Accordingly, when a surrogate mother carries and gives birth to a child who was procreated by the intended mother's egg and intended father's gamete, she is considered to be the mother. French law continues to stick to a very old vision of maternity: the mother has to give birth. If in most births, it corresponds to the genetic reality, it is not necessary the case. The intended mother is left in a legal vacuum [21]. In this case, we are witnessing progress in changing the position of the state regarding surrogate maternity. However, so far this is carried out only through judicial practice but not via amendments of statutory provisions. A similar process can also be observed in Austria [22], and in Germany [23].

4. The business based on commercial surrogate maternity is immoral and inhumane. It can be defined as organization of children trafficking and mediation of such trafficking. In addition to the above analogy, in fact and from a moral point of view, for the purposes of discussion, this practice can be comparable with introduction of the possibility of free commercial circulation of human internal organs.

The argument given by supporters of social acceptability of commercial surrogate maternity is that remuneration for a surrogate mother only reimburses the expenses incurred during the period of carrying a child and in connection with carrying someone else's child does not stand up to criticism since there is a significant difference of surrogate maternity on a commercial basis from non-commercial surrogate maternity: a surrogate mother and, the main problem, an intermediary receive remuneration (essentially, income) by carrying out an entrepreneurial activity.

According to both the Hague Convention and the Council of Europe Convention on adoption, no one shall derive any improper financial or other gain from an activity relating to the adoption of a child. It would be contrary to the dignity of the child, because adoption would become a market. Commercial surrogacy is intrinsically contrary to this provision [24]. It must be recalled that according to Article 2a of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, "sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration".

According to Dr Grégor Puppinck, the Director General of the European Centre for Law and Justice, surrogate maternity is one of the modern varieties of human trafficking based on commonplace relations of purchase and sale which are disguised by the euphonic rhetoric of "helping childless people". Only poverty can stir into such a business, and the fact that women are forced to give birth to others for money fundamentally contradicts the concept of human dignity [15].

Different approaches of nations to regulation of the sphere of surrogate maternity have led to the emergence of the so-called "surrogate tourism" aimed at carrying a child by a surrogate mother in a country where surrogate maternity is allowed.

At the same time, it should be agreed that the business based on commercial surrogate maternity is immoral and inhumane. It can be defined as organization of children trafficking and mediation of such trafficking. The argument given by supporters of social acceptability of commercial surrogate maternity is that remuneration for a surrogate mother only reimburses the expenses incurred during the period of carrying a child and in connection with carrying someone else's child does not stand up to criticism since there is a significant difference of surrogate maternity on a commercial basis from non-commercial surrogate maternity: a surrogate mother and, the main problem, an intermediary receive remuneration (essentially, income) by carrying out an entrepreneurial activity. However, surrogate maternity cannot be reduced solely to the legitimacy of disposing one's body. It is a much more complicated process from the moral, ethical and psychological points of view which invariably influences the way it is enshrined in the law by either permission or prohibition.

5 Scientific capacity

Paper was developed in the field of jurisprudence, in context of legislation analysis and application, therefore, objective and scientific capacity of work can be seen in analysis of efficiency of norms and implementation thereof in further regulation. Therefore, careful scientific analysis of the subject is performed to increase scientific contribution, and conclusions obtained in result of research are consequently summarized, which authors will use as a part of issues included and reviewed in preliminary studies.

6 Conclusions

It should be stated that at the present stage of development of relations regarding the use of reproductive biotechnologies, the law as a social regulator does not effectively fulfil its functions. In fact, in the modern world, we can observe the fragmented process of penetration of regulatory provisions concerning surrogate maternity into the legal systems of different countries. On their own initiative, some “leading” centres providing surrogate maternity services (for example, India, the United States) take measures to regulate certain aspects of these services. However, such countries as Ukraine, Russia and some other “harbours of international surrogacy tourism” stand on the sidelines of these processes.

There is also no progress in settling relations in the sphere of surrogate maternity at the international, global level. As a result, when characterizing the elements of these relations, a problem arises regarding the interpretation of their content through the prism of international rules which do not take into account modern changes in public perception of such fundamental terms as a “family”, “maternity”, “surrogate mother” and others related to this area.

In such a situation, judicial practice is the main link between understanding the nature and scope of human rights enshrined in the provisions of international treaties and actually existing at this stage of development of public relations. Thus, through law enforcement and interpretation of rules of the law, the judicial system ensures the evolutionary development of the regulatory framework in the application of reproductive biotechnology.

In fact, we are witnessing a change in approaches to ensuring the availability (legitimization) of surrogate maternity through court judgments. And, in this case, we do not refer only to the practice of the European Court of Human Rights. Through judicial practice, national courts of different countries, including even those of France and Germany, which are the most “unfriendly” to surrogate maternity, gradually change the approaches to the invalidity of surrogacy agreements, consequences of their conclusion, recognition of the legality of methods of circumvention of the law prohibiting such agreements, permissibility of granting the status of parents to customers of surrogate maternity services through the mechanism of subsequent adoption of children, etc.

However, despite such steady progress in the development of regulation of surrogate maternity, in many countries, even despite de jure recognition of human reproductive rights, there are formal barriers to their implementation. This is a consequence of the conflict of the law and social attitudes of the society. At the same time, in some countries, there is also a reverse trend when these rights are granted an absolute status at the level of judicial practice, which results in a violation of the principle of equality of human rights, the rights of a child to personal and family identity. An initiative supported by the international community regarding the creation of a system of international legal regulation of relations connected with surrogate maternity and introduction of fundamental principles for carrying out accompanying activities can be the solution to these problems.

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