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Secção I

Investigação Científica*

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Legal support of the rights of the child and the gestational courier in the context of the fourth generation of human rights in Ukraine

Apoio jurídico aos direitos da criança e da gestante no contexto da quarta geração de direitos humanos na Ucrânia

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ABSTRACT: The permissiveness of Ukrainian legislation toward surrogate motherhood makes Ukraine one of the world's centers for surrogacy. The paper discusses the solution to the issue of ensuring the implementation of human reproductive rights in the international and national legislation of Ukraine. Attention is drawn to the need to consider the norms of morality, ethics, and religion. The purpose of the article is to substantiate the issue of legal support for the implementation of reproductive human rights by considering the theoretical and applied aspects of the violation of the rights of a surrogate mother, a child born to her in the context of the fourth generation of human rights. The authors analyzed international experience in regulating relations in the field of surrogacy (based on USA, Germany, Italy, Spain, and other countries experiences). The authors researched judicial practice, which began to form in Ukraine. This concern was expressed about the lack of effective government response to cases of violation of the rights of a surrogate mother and child on the territory of the state. The authors formulated a proposal on the need for constant state control over organizations that provide mediation and medical services in the field of surrogacy.

KEYWORDS: Fourth generation of human rights; Humanization of legislation; Gestational courier; Surrogacy; Assisted reproductive technology.

RESUMO: A benevolência da legislação ucraniana em relação à maternidade de substituição faz da Ucrânia um dos centros mundiais da maternidade de substituição. O artigo discute a solução para garantir a aplicação dos direitos humanos em matéria de reprodução na legislação internacional e na legislação nacional da Ucrânia. Chama-se a atenção para a necessidade de ter em conta normas morais, éticas e religiosas. O objetivo do artigo é fundamentar a questão do apoio jurídico para a implementação dos direitos humanos reprodutivos, considerando os aspectos teóricos e práticos da violação dos direitos de uma mãe de substituição, da criança que nasceu, isto no contexto da quarta geração de direitos humanos. Os autores analisaram a experiência internacional na regulação das relações no domínio da maternidade de substituição (com base nas experiências dos EUA, Alemanha, Itália, Espanha e outros países). Os autores pesquisaram a prática judicial, que começou a formar-se na Ucrânia. Foi manifestada a preocupação com a falta de resposta efectiva do governo aos casos de violação dos direitos da mãe de substituição e da criança no território do Estado. Os autores

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formularam uma proposta sobre a necessidade de um controlo estatal constante das organizações que prestam serviços de mediação e médicos no domínio da maternidade de substituição.

PALAVRAS-CHAVE: Quarta geração de direitos humanos; Humanização da legislação; Gestação de substituição; Técnicas de reprodução assistida.

1 INTRODUCTION

The 21st century is the era of innovative technologies that open up new opportunities for the rapid development of all spheres of our lives and directly impact the ethical and legal foundations of social life. Each stage of society's development is objectively accompanied by the formation and subsequent legislative consolidation of a particular generation of rights. Over the past two decades, the list of human rights and freedoms has increased steadily. High achievements of science (discoveries in medicine, biology, genetics, space sphere) have led to the need to distinguish a new generation of rights called "the fourth generation of human rights" in the legal doctrine.

In the context of the fourth generation of human rights, two groups of rights are distinguished: (1) related to the development of digital technologies; (2) somatic. The right of a surrogate mother and a child born via surrogacy belongs to the latter group. Etymologically, the concept of "somatic" comes from the Greek word "soma" – "body". This is a group of rights associated with the ability of an individual to dispose of the body independently. In 1986, a boy was born in Louisville, USA, through surrogacy. This fact began the confrontation between scientists and nature for the right to give a chance to parents who did not have it. The further development of somatic rights formed the corresponding social relations associated with a whole complex of moral, ethical, and spiritual issues. They are distinguished by a purely personal character, close relationship with the physiological nature, and require legal regulation.

The evolution of humankind has entailed a conflict between science and morality. Issues of legal support of the rights of surrogate mothers and children born using this method of assisted reproductive technologies in Ukraine are the subject of this publication.

According to the World Health Organization (WHO), the problem of infertility today occurs in every fifth married couple in the world. The rise in prevalence of commercial surrogacy is tied to both scientific advances in ARTs and to decreasing childbirth rates in Western countries. This is attributed primarily to the age-related

infertility of women deferring motherhood due to gendered economic inequalities and waning social support such as accessibility of childcare have also chronicled the rise in surrogacy use by the LGBTQ+ community and the attendant challenges for reproductive justice⁴. The liberalization of legislation in biomedicine covers a significant number of countries. Commercial surrogacy remains allowed in a limited number of states⁵. We are convinced that the moral and ethical principles of most countries have served as the primary criterion for establishing a prohibition regime. Countries such as France, Sweden, Hungary, Germany, Iceland, Italy, Japan, Switzerland, Pakistan, Saudi Arabia, Serbia have banned the exploitation of surrogate mothers and child trafficking⁶. India, Thailand, and Nepal, which used to be recognized surrogacy centers, have closed their borders to foreign customers.

Regulatory schemes in countries across the world are not designed in a way that is protective of the rights of the surrogate mothers. Prohibitive regulations, where commercial surrogacy is banned, have caused heightened exploitation because a ban in one country has been shown to lead to surrogacy service providers moving their practices to locations where there are greater human rights risks for the surrogate mothers. In contrast, permissive approaches, where commercial surrogacy is allowed, focus on improving the market function, while falling short of fully protecting surrogate mothers' rights, indicating scope for improvements in this approach⁷.

According to the WHO Guidelines, the term “gestational courier” is used instead of the term “surrogate mother,” meaning “a woman who became pregnant as a result of fertilization of oocytes with sperm from a third party – patients. A pregnancy occurs under the conditions or agreement that the parents of the child born will be one or two people whose gametes were used for fertilization.” Accordingly, surrogate motherhood is considered to be implemented by mutual agreement of the parties entitled to use this method of assisted reproductive

⁴ CHENEY, K. Discordant Expectations of Global Intimacy: Desire and Inequality in Commercial Surrogacy. *Sociological Research Online*, 2022, № 27(1), pp. 43–59. <https://doi.org/10.1177/1360780420984169> (viewed in 12/06/2024).

⁵ YAREMA, Mariya. Surrogate Motherhood: Ethical Issues. *Analecta of the Ukrainian Catholic University*. 2019, vol. 2, pp. 343-358.

⁶ International experience of legislative regulation of the issue of use reproductive technologies (including surrogate motherhood) / compiled by: A. Brashovyanu. Kyiv, 2013.

⁷ LUO, Y., MARSHALL, S., CUTHBERT, D. The Human Rights Implications of Not-for-Profit Surrogacy Organizations in Cross-Border Commercial Surrogacy: An Australian Case Study. *Business and Human Rights Journal*, 2022, vol.7(1), DOI: <https://doi.org/10.1017/bhj.2021.49> (viewed in 12/06/2024).

technologies, the implantation of an embryo belonging to spouses, created as a result of in vitro fertilization, to carry and give birth to a child, with the subsequent transfer to intended parents.

The permissiveness of Ukrainian legislation to surrogacy makes Ukraine one of the world's centers for this assisted reproductive technology. Ukrainian clinics specializing in the use of reproductive technologies and providing services in the field of commercial surrogacy occupy more than a quarter of the global surrogacy market⁸. However, there are no official statistics on the number of people who have used the surrogacy program in Ukraine.

Furthermore, particular countries such as Ukraine – are less costly than other destinations, but this cost advantage comes with fewer legal protections for surrogate mothers. While representing a more attractive option for consumers, recommending surrogacy arrangements in jurisdictions such as Ukraine risks exacerbating exploitation⁹.

Ensuring the implementation of human reproductive rights, considering the norms of morality, ethics, and religion, requires coordination at both the International and national levels.

2 RESEARCH AND RESULTS

Surrogacy has been recognized by the Parliamentary Assembly of the Council of Europe as an essential human rights issue requiring urgent action. The practice of surrogacy undermines a woman's human dignity, and her body is used as a commodity.

In the United States of America, in 1998, the Supreme Court of the State of New Jersey considered a lawsuit. It was noted that a woman carrying a child was acting as a mechanism rented for the period of fetal development – an incubator. Well-known child psychologist Dr. Lee Salk, who was involved in the “Baby M” case, openly admitted this fact. At the trial, he noted that the childless plaintiff spouses did not hire a surrogate mother but a surrogate uterus. Accordingly, a

⁸ HRES, Nataliia, STRELNYK, Viktoria, Surohatne materynstvo kriz pryzmu “chetvertoho pokolinnia” prav liudyny. Yurydychnyi naukovyi elektronnyi zhurnal, 2021, vol. 7. <https://doi.org/10.32782/2524-0374/2021-7/14> (viewed in 12/06/2024)

⁹ LUO, Y., MARSHALL, S., CUTHBERT, D. The Human Rights Implications of Not-for-Profit Surrogacy Organizations in Cross-Border Commercial Surrogacy: An Australian Case Study. *Business and Human Rights Journal*, 2022, vol.7(1), DOI: <https://doi.org/10.1017/bhj.2021.49> (viewed in 12/06/2024).

woman and a child are considered not as people, but as things. Such a judgment contradicts the recognition of the right to dignity of a person.

The European Parliament Resolution of 17 December 2015 on the Annual Report on Human Rights and Democracy in the World noted that the practice of gestational surrogacy, which involves reproductive exploitation and the use of the human body for financial or other gain, in particular in the case of vulnerable women in countries that are developing, should be banned¹⁰.

Discrepancies in states' domestic legislation give rise to complex issues of private international law. Surrogacy agreements cause difficulties in establishing/recognizing the legal paternity of a child born under a surrogacy agreement. There are disputes about citizenship, immigration status, parental responsibility, child support, etc. Such a contract implies vulnerability and risk.

Different views, interpretations of the legal regulation of surrogate motherhood through moral, ethical, and religious perceptions, differing in the cultural aspect of the countries, determine the relevance of the chosen topic. From the standpoint of Christianity, surrogate motherhood is allowed if the surrogate mother agrees to bear, give birth to residual (frozen) human embryos that have appeared as a result of artificial reproductive technologies to save them from death. The main motive is an attempt to save an innocent human life, which justifies the transfer of someone else's human embryos into a woman's uterus¹¹.

Morality is considered a system of norms and principles of people's behavior toward each other and society. Ethics is a philosophical science, which object of study is morality, morality as a form of social consciousness, one of the most important aspects of human life. Therefore, the issue of recognizing the limit remains controversial admissibility in the relationship of surrogacy for society from a moral and ethical point of view.

Approaches of different states to issues such as identification of paternity, assisted reproductive technologies, and surrogacy contracts differ significantly in the cultural, political, and social context of a country. As a result, there is a lack

¹⁰ European Parliament resolution of 17 December 2015 on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter. Available from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015IP0470> (viewed in 12/06/2024).

¹¹ LENYO, Ihor. A Christian view of surrogate motherhood. Bioethical principles. <https://sobor.com.ua/news/khristiyanskii-poglyad-na-surogatne-materinstvo> (viewed in 12/06/2024).

of international consensus on the issue of establishing and challenging paternity in the context of using assisted reproductive technologies. Given this approach, surrogacy is a complex ethical and moral phenomenon that generates discussions.

3 International experience of surrogacy through the prism of humanization of legislation

The government independently decides whether to allow or prohibit surrogacy. In particular, in the decisions of *Menesson v. France*¹² and *Labasse v. France*¹³, the European Court of Human Rights specifically determined that each country has the right to prohibit surrogacy on its territory. The ban on surrogacy cannot negatively affect children born in this way abroad. In this context, the court underlined that countries where surrogacy is prohibited must recognize the relationship between children born to a surrogate mother abroad and their biological parents. Otherwise, children's rights to respect for private and family life, guaranteed by Art. 8 Convention for the Protection of Human Rights and Fundamental Freedoms, are violated. Human rights operate at the level of International Law and Fundamental Rights constitute the positiveization of Human Rights in the internal legal system of each country¹⁴.

France outlawed surrogacy by the 1994 Respect for the Human Body Act¹⁵. The principle of French law recognizes the "inaccessibility of the human body": a person cannot be the object of an agreement or contract. The French Court of Cassation in 1991 found that any surrogacy agreement could not lead to the adoption of a child. All surrogacy contracts, whether commercial or altruistic, are considered illegal.

Sweden also banned commercial and altruistic surrogacy after the "Wendel Report" was released in 2016. Measures were introduced to restrict the access of Swedish citizens to surrogacy.

¹² EUROPEAN COURT OF HUMAN RIGHTS. *Menesson v. France*, Application no 65192/11, Council of Europe: European Court of Human Rights, 26 June 2014. Available from: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22002-9781%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-9781%22]}) (viewed in 12/06/2024)

¹³ EUROPEAN COURT OF HUMAN RIGHTS. *Labassee v. France*, Application no 65941/11, 26 June 2014. Available from: [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22002-9780%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-9780%22]}) (viewed in 12/06/2024)

¹⁴ Natan Oliveira de SOUZA, CASTILHOS, D. S. (2022). The European Union Court of Justice in defense of Human Rights. *Revista Jurídica Portucalense*, 307-337. Retrieved from <https://revistas.rcaap.pt/juridica/article/view/27320> (viewed in 12/06/2024).

¹⁵ FRANCE. Law № 94-653 of July 29, 1994. On Respect for the Human Body. Official journal "Laws and Decrees" No. 0175 of July 30, 1994.

In Germany, surrogacy is considered a violation of the right to human dignity, Law on Protection of Embryos criminalizes the use of surrogacy methods. Contracts between future parents and a potential surrogate mother are considered invalid and not subject to execution¹⁶.

Under Spanish law, an agreement under which a woman undertakes to become pregnant and give birth to a child in favor of the other party is recognized as null and void. Only the woman who gave birth to the child is recognized as the child's mother¹⁷. In this case, the biological father can exercise the right to challenge his paternity. The law provides for the possibility of imposing a fine and closing a medical center that carried out conception with the help of assisted reproductive technologies. In this regard, in Spain in recent years, the number of couples traveling abroad (in particular, to Ukraine) to use the services of surrogate mothers has increased.

The Italian constitution establishes the responsibility of genetic ancestors concerning their children and the corresponding right of the latter to be raised first. The Italian Civil Code prohibits actions against one's own body if they violate a legal norm. Law 40/2004¹⁸ provides punishment involving imprisonment for illegal participation in the commercial surrogacy process. In April 2014, the Italian Constitutional Court, taking into account the right to have children, self-determination, and health, ruled unconstitutional to ban the donation of gametes for assisted reproductive treatment.

In Great Britain, surrogacy is regulated by the Surrogacy Mediation Act 1985, the Adoption Act 1976¹⁹, and the Human Fertilization and Embryology Act²⁰. The aforementioned legislative acts only allow the conclusion of agreements concerning altruistic surrogacy. Any activity, the subject of which is

¹⁶ FEDERAL REPUBLIC OF GERMANY. Adoption Placement Act as published on 21 June 2021 (Federal Law Gazette I, p. 2010).

¹⁷ SPAIN. Law № 35/1988 of 22 Nov 1988 on Assisted Reproduction Procedures. Bulletin Oficial del Estado. 24 Nov 1988. No. 282. P. 33373–33378. Available from: <https://www.ncbi.nlm.nih.gov/pubmed/11659178> (viewed in 12/06/2024)

¹⁸ ITALY. Law 19 February 2004, № 40 Regulations on Medically Assisted Procreation published in the Official Gazette No. 45 of February 24, 2004. Available from: <https://www.iss.it/documents/20126/6898329/Act+Feb.+19%2C+2004+%2C+No+40.pdf/276cf272-69b1-4a3d-bf92-a4d9d6c54bad?t=1656076081602> (viewed in 12/06/2024)

¹⁹ UNITED KINGDOM. Adoption Act 22nd July 1976: Available from: <https://www.legislation.gov.uk/ukpga/1976/36/contents> (viewed in 12/06/2024)

²⁰ UNITED KINGDOM. Human Fertilization and Embryology Act. 13 November 2008. Available from: <https://www.legislation.gov.uk/ukpga/2008/22/part/1> (viewed in 12/06/2024).

mediation in the conclusion of surrogacy agreements, is prohibited. Liability for persons entering into a surrogacy contract is not provided.

Surrogacy has been banned in Switzerland since 1998. In Austria, the 1992 Medical Assisted Reproduction Act provides for the use of eggs and embryos only by a woman who gives birth, which makes surrogacy impossible.

In Israel, surrogacy can be allowed after approval by the committee for the Approval of Agreements to Carry a Fetus. The legislator in 1996 provided that a man and a woman in a partnership relationship have the right to choose a surrogate mother independently or through an agency and sign an agreement with her (Agreement Approval and status of the Infant). For an agreement between a surrogate mother and a childless couple to be recognized, the surrogate mother and biological parents must be citizens of Israel, observe Judaism (a contract cannot be concluded between persons of different nationalities and religions)²¹.

The 2016 Law of Lithuania on Medical Fertilization prohibits some forms of surrogacy but does not provide for criminal prosecution. Since 2019, Poland has provided criminal liability for persons agreeing on surrogacy²².

All of this applies to the regulation of surrogacy in Czechia. Although surrogacy entered Czech legislation as a legal category in January 2014 (§ 804 of the Civil Code), a comprehensive set of rules have yet to be adopted. The basic legal framework that has to be relied upon at the moment was not primarily designed for surrogacy cases. Consequently, it does not adequately reflect the specific nature of these cases. This lack of dedicated legislation leads to unpredictability and legal (social) uncertainty, which becomes particularly apparent during adoption court proceedings²³.

The legislator of the People's Republic of China has introduced a complete ban on surrogacy. Decree No. 47 of 2000 On Medically Assisted Procreation

²¹ Public Committee to Consider Legislation Regulating Fertility and Childbirth in Israel (Mor-Yosef Committee). Available from: <https://www.health.gov.il/publicationsfiles/bap2012.pdf> (viewed in 12/06/2024).

²² POLAND. Act of 16 October 2019. Penal Code and the Act - Code of Civil Procedure. Available from: <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20190002128/O/D20192128.pdf> (viewed in 12/06/2024)

²³ HONZOVÁ, Ivana et al. Selected legal aspects of surrogacy. *Human Affairs*, vol. 30 (1), 2020. <https://doi.org/10.1515/humaff-2020-0004> (viewed in 12/06/2024).

prohibited the commercialization and use of commercial surrogate mothers²⁴. However, in December 2017, a genetic child of a married couple, who died in a car accident four years before the child's birth, was born in China with the help of a surrogate mother. This procedure received a negative assessment, which is explained by the ethically unacceptable reproduction of deceased people.

In Portugal, surrogacy is regulated by Law 32/2006, as amended by Law No. 90/2021²⁵, which allows surrogacy under special and exceptional circumstances. These circumstances include cases where a woman cannot carry a pregnancy due to the absence, injury, or disease of the uterus or any other clinical condition that permanently prevents pregnancy. The law emphasizes the non-commercial nature of surrogacy agreements, stressing that such agreements should not provide for financial compensation other than reimbursement of medical and related costs directly related to the pregnancy.

Currently, Portuguese legislation in the field of surrogacy is in the process of improvement, the purpose of which is to create regulatory mechanisms based on the principles of non-commerciality, respect for reproductive autonomy, and protection of the dignity and rights of all parties in surrogacy agreements.²⁶

In the USA, the Gestation Surrogacy Act of 2004, which is only valid in the state of Illinois, is considered the most liberal document governing surrogacy²⁷. A legitimate surrogate mother is a woman who undertakes to become pregnant and give birth to a child conceived due to in vitro fertilization with the help of a reproductive cell of one of the child's intended parents with whom there are no genetic links. The surrogacy agreement must be drawn up in writing and signed before the artificial insemination procedure begins. When using this procedure, there is a high probability of multiple pregnancies, which provokes the demands of genetic

²⁴ HUNG Yu Ng E. et al. Regulating Reproductive Technology in Hong Kong. *Journal of Assisted Reproduction and Genetics*. New York, 2003. № 7.

²⁵ PORTUGUESE REPUBLIC. Law № 90/2021. Republic Diary № 242/2021, Series 1 of 2021-12-16. Available from: <https://diariodarepublica.pt/dr/detalhe/lei/90-2021-175983728> (viewed in 12/06/2024).

²⁶ CONDE, A., Santos PEREIRA, C., DIAS COSTA, E. et al. Surrogacy in Portugal: drawing insights from international practices. *Revista Jurídica Portucalense*, 2024, 175–191. [https://doi.org/10.34625/issn.2183-2705\(35\)2024.ic-09](https://doi.org/10.34625/issn.2183-2705(35)2024.ic-09) (viewed in 12/06/2024)

²⁷ ILLINOIS GENERAL ASSEMBLY. Gestation Surrogacy Act. Public Act 093-0921. HB4962 Enrolled. LRB093 20774 LCB 466675b. Available from: <https://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=093-0921&write=> (viewed in 12/06/2024).

parents to “selectively reduce” the number of embryos and becomes the most common cause of abortion.

One of the high-profile cases occurred in California in 2016. A surrogate mother, Melissa Cook, went to court demanding custody of one of the three children she was carrying. The genetic father was forced to get rid of one child selectively because he only wanted twins²⁸. The dispute resolved in the Cook case concerns the problem of a surrogate mother’s control over her own body. In fact, it is “rented out”. If the court met the father’s demand to get rid of one of the fetuses, it would mean that the woman would be forced to undergo a medical procedure against her will.

Thus, in some countries, commercial surrogacy is recognized at the legislative level, but the issue of harmonizing legislation with the principles of respect for human dignity remains problematic.

4 General approaches to the legal regulation of surrogacy in Ukraine

The implementation of somatic rights of citizens does not have a clear regulation. A sharp decline in the population’s reproductive health, a drop in the birth rate, and new developments in the field of biomedicine require proper legal regulation on the use of artificial insemination methods. Determining the mechanism of cross-border agreements on surrogacy, considering the growth of pragmatic tolerance to reproductive markets, remains an urgent issue.

The process of humanization of legislation in the context of the fourth generation of human rights, taking into account the protection of the dignity of every person, regardless of age, sex, developmental characteristics, other features, recognition by developed European countries of the inadmissibility of the exploitation of the human body (in the aspect of humiliation of human dignity, including children born for through surrogacy), the lack of permission/prohibition on the use of a woman’s own body obliges Ukraine to accelerate the adoption of a regulatory legal act in the field of reproductive technologies and surrogacy.

The sphere of surrogacy relations in Ukraine is developing intensively: reproductive medicine is considered developed, of high quality, and the legislation is loyal, which generates significant demand among foreigners. The

²⁸ When Parents and Surrogates Disagree on Abortion, <https://www.theatlantic.com/health/archive/2016/02/surrogacy-contract-melissa-cook/463323/> (viewed in 12/06/2024).

first program for using the reproductive method in our country was carried out in Kharkiv in 1995. A surrogate mother was a woman who carried her daughter's child while her daughter suffered from a congenital absence of a uterus. Interestingly, the woman became a mother and grandmother at the same time.

Ukraine remains one of the countries where altruistic and commercial surrogacy are allowed.

The legislation enshrines the right of an adult woman or man for medical reasons to carry out treatment programs of assisted reproductive technologies under the procedure and conditions established by law²⁹. Participants in surrogacy relations can only be spouses registered under the procedure established by law. Single men or women, or couples in a civil marriage, are deprived of this opportunity. In case of transfer into the body of another woman of a human embryo conceived by spouses (man and woman) due to the use of assisted reproductive technologies, the parents of the child are the spouses. Challenging motherhood is not allowed if a human embryo is transferred into the body of another woman, conceived by the spouses (husband and wife) due to the use of assisted reproductive technologies³⁰.

The fundamentals of the legislation of Ukraine on health care stipulate that the use of artificial insemination and embryo implantation is carried out under the established conditions and procedure, according to the medical indications of the adult woman with whom such an action is performed, subject to the written consent of the spouses, ensuring the anonymity of the donor and maintaining medical secrecy³¹.

Carrying a child conceived by a woman as a result of the use of assisted reproductive technologies is accompanied by significant reactions from her immune system. Lack of genetic relationship can lead to complications of pregnancy. Under the influence of hormones, a woman's psychological attitude to

²⁹ UKRAINE. Civil Procedure Code of Ukraine Law № 1618-IV of 18 March 2004. Legislation of Ukraine. 2023 Available from: <https://zakon.rada.gov.ua/laws/show/1618-15#Text> (viewed in 12/06/2024).

³⁰ UKRAINE. Family Code of Ukraine: Law № 2947-III January 10, 2002. Available from: <https://zakon.rada.gov.ua/laws/show/2947-14#Text> (viewed in 12/06/2024).

³¹ UKRAINE. Fundamentals of L legislation of Ukraine on Healthcare: Law of Ukraine № 2801-XII of November 19, 1992// Database "Legislation of Ukraine". Available from: <https://zakon.rada.gov.ua/laws/show/2801-12%23Text#Text> (viewed in 12/06/2024).

the fetus changes. She treats the child as her own. This provokes the emergence of psychological trauma, emotional breakdowns, and conflicts with parents.

Thus, in the decision of the Uman City District Court of the Cherkasy Region in case No. 705/5327/14-C of June 12, 2015³², the genetic material of the future potential father and surrogate mother was used to conceive a child in vitro. An agreement was concluded between the genetic parents, the surrogate mother, and the medical clinic to carry out the surrogacy procedure. The surrogate mother agreed to specify the intended father as the father of the unborn child. After the birth of the child, the surrogate mother registered the child as her own and her husband's child. Because of this, the genetic father filed a claim for recognition of paternity and making appropriate changes to the birth certificate. The court satisfied this claim in part, recognizing the genetic parent as the parent of the child, obliging the surrogate mother to transfer the child to the genetic father, and the civil registration department to amend the child's birth record.

A pregnant surrogate woman is deprived of the opportunity to exercise her right to divorce due to pregnancy. The Zarichnyi District Court of Sumy, by its ruling dated December 28, 2019³³, returned the claim to the plaintiff in terms of the divorce. Since she gave birth on November 27, 2019, and, at the time of filing the claim, she was the mother of a child under one year of age. The plaintiff tried to prove that she had participated in a fertility treatment program using assisted reproductive technologies through surrogacy and had no genetic link with the child. The woman claimed that the genetic parents of the girl born to her were citizens of the People's Republic of China, about which she drew up a statement on November 29, 2019. The court substantiated the return of the statement of claim in terms of divorce by the fact that, under current legislation, a claim for divorce cannot be brought during the wife's pregnancy and within one year after the birth of the child, unless one of the spouses has committed unlawful behavior containing signs of a criminal offense, concerning a spouse or a child. The plaintiff is obliged

³² Decision of the Uman City District Court of Cherkasy Region of June 12, 2015 in case No. 705/5327/14-ts / Unified State Register of Court Decisions Available from: <https://reyestr.court.gov.ua/Review/45291321> (viewed in 12/06/2024).

³³ Decision of the Zarichny District Court of the city of Sumy of December 28, 2019 in case No. 591/7976/19 / Unified State Register of Court Decisions Available from: <https://reyestr.court.gov.ua/Review/86701591> (viewed in 12/06/2024).

to add to the statement of claim all the available evidence, confirming the circumstances of the claims, which was carried out by the plaintiff³⁴.

5 Problems of legal regulation of contractual relations in the field of surrogacy

The relationship between the customer (biological parents) and the contractor (surrogate mother) is regulated by the agreement. Civil law does not provide for an appropriate statutory concept. The national legislation does not contain a regulatory definition of surrogate motherhood, a surrogate mother. There are no requirements for a surrogacy contract. The legal literature contains the definition of a surrogacy contract: "Surrogate motherhood is a contract under which the surrogate mother (the executor) undertakes to bear, give birth to, and transfer the child to the customers after implantation or transplantation into her body (without the use of her biological material) of the embryo of the spouses who provided their genetic material (customers), and the customers undertake to pay the executor the actual costs associated with the performance of the contract and remuneration unless otherwise established by the contract"³⁵.

The legal doctrine distinguishes contracts into defined and non-defined ones depending on the possibility provided for civil legislation to conclude a particular contract. Defined contracts include contracts which conclusion is directly defined and regulated by acts of civil legislation. Non-defined contracts include contracts that are not explicitly provided for in civil law acts. The principle of freedom of contract, according to which the parties are free to conclude an agreement, choose a counterparty, determine conditions taking into account the requirements of civil law, business customs, requirements of rationality and justice, enables the parties to conclude an agreement that is not provided for by civil law and meets the necessary requirements (Article 6, 627 of the Civil Code of Ukraine). According to Art. 3 of the Civil Code of Ukraine, any contracts must comply with the general principles of civil law, namely: inadmissibility of arbitrary interference in the sphere of personal life, deprivation of property rights, except for cases established by the Constitution and law; freedom of contract, freedom

³⁴ UKRAINE. Civil Procedure Code of Ukraine Law № 1618-IV of 18 March 2004. Legislation of Ukraine. 2023 Available from: <https://zakon.rada.gov.ua/laws/show/1618-15#Text> (viewed on 12/06/2024).

³⁵ TALANOV, Yuriy. Actual problems of surrogate motherhood in the legislation of Ukraine. Bulletin of Kharkiv National University of Internal Affairs 2012, No. 1 (56). pp. 360- 368.

of entrepreneurial activity, judicial protection of civil rights and interests, justice, good faith, and rationality.

Consequently, contractual relations in the field of surrogacy have the right to exist, provided that they comply with the general principles of civil legislation.

A surrogacy agreement contains particular features of a service agreement and a work contract by its legal nature. Thus, according to the contract for the provision of services, one party (the executor) undertakes, on the instructions of the other party (the customer), to provide a service in the process of performing a specific action or carrying out a particular activity. The customer undertakes to pay the executor for the specified service unless otherwise provided by the contract (part 1 of Article 901 of the Civil Code of Ukraine).

Under a work contract, one party (contractor) undertakes at its own risk to perform certain work on the instructions of the other party (customer), and the customer undertakes to accept and pay for the work performed (part 1 of Article 837 of the Civil Code of Ukraine).

However, none of these agreements reflects the specifics of relations in the field of surrogacy. Accordingly, it can be assumed that a surrogacy contract is a non-defined contract, the conclusion of which should take place within the framework of the general principles of civil legislation of Ukraine. We consider it appropriate to regulate contractual relations of surrogacy at the legislative level.

The absence of statutory concept in civil legislation that takes into account the specific relationship of surrogate motherhood, a model contract for the provision of surrogacy services, and the requirement for notarization of the agreement gives rise to the possibility of various abuses by clinics and intermediaries, violation of the rights of surrogate mothers, biological parents and children. In practice, situations arise when a surrogate mother refuses to transfer a newborn child to genetic parents, threatens to terminate the pregnancy, requires additional funds, and threatens to disclose information about the birth of a child. Other situations include the customer's refusal to pay the surrogate mother the agreed compensation, the lack of proper conditions during pregnancy and childbirth, etc.

Clinics that perform reproductive procedures prioritize the birth of a healthy child, the satisfaction of clients' interests, and not the health of the woman. More often, women from vulnerable groups become surrogate mothers who are forced

to agree to highly unfavorable terms of the contract because of a difficult financial situation. Every month in Ukraine, more than 150 women express their readiness to become surrogate mothers, mainly due to financial problems.

6 Problematic aspects of recognition of maternity and paternity

According to the World Health Organization criteria, every child has the right to life from the moment of birth. The legislation of Ukraine does not provide for control over the further fate of a child born as a result of the use of surrogacy after the expiration of the contract, the departure of potential parents to their country of residence. It should be noted that paragraph 1 of Article 7 of the Convention on the Rights of the Child, ratified by Ukraine on February 27, 1991, states that a child must be registered immediately after birth. The child has the right to a name, to acquire citizenship, and, as far as possible, to the right to know his or her parents, their care³⁶. A child born by a gestational courier is in an exceptional situation, which is associated with the need to establish the child's origin.

Despite the importance for the child of enjoying their right to nationality from birth, in practice, the issue of nationality is often one of the thorniest in International Commercial Surrogacy situations. It is often one of the first issues relating to a child's rights presenting as a challenging to give effect to in International Commercial Surrogacy arrangements. This is due to the practical nature of the concept of nationality, in that it triggers other protections, such as citizenship, the right to freedom of movement (art 13, Universal Declaration of Human Rights) and the right to return and leave one's country of nationality (art 12, International Covenant on Civil and Political Rights), and the ability to hold a travel document issued by the corresponding state of nationality³⁷.

Recognition of maternity and paternity is one of the most important personal rights of parents and children. The establishment of kinship is based on biological ties to which the law attaches legal significance.³⁸ When establishing the origin of

³⁶ GENERAL ASSEMBLY RESOLUTION. Convention on the Rights of the Child: International Legal Document of November 20, 1989. Available from: https://zakon.rada.gov.ua/laws/show/995_021%23Text (viewed in 12/06/2024).

³⁷ ACHMAND, Claire, Children's Rights in International Commercial Surrogacy: Exploring the challenges from a child rights, public international human rights law perspective. University of Leiden, 2018.

³⁸ BRAGA, Fátima. Medically Assisted Procreation and the Constitutional Principles of Equality and Non-Discrimination. *Revista Jurídica Portucalense*. 2023, pp. 57-74. [https://doi.org/10.34625/issn.2183-2705\(ne\)2023.ic-04](https://doi.org/10.34625/issn.2183-2705(ne)2023.ic-04) (viewed in 12/06/2024).

a child born as a result of surrogacy, the child's interests must be protected. Practical confirmation is the case of a Belgian couple who entered into a surrogacy agreement with a Ukrainian woman. Following the child's birth, the Ukrainian authorities issued a birth certificate where the intended parents were indicated as legal parents. After registering the child's birth, the Belgians turned to the embassy in Kyiv with a request to obtain a passport for the child but were refused due to failure to provide the relevant documents. Under these circumstances, the applicants asked the Brussels court to issue a travel document and recognize the child's Ukrainian birth certificate. The Belgian authorities refused to issue documents for the child's entry into the country, so the parents were forced to leave the child in Ukraine. In fact, there is a violation of the child's rights³⁹.

An important issue is the legalization of the status of children and citizenship in the country of their biological parents. Recognition of a child born by a surrogate mother as a citizen is within the competence of the state and depends on national legislation. Thus, to become officially the parents of a baby born by a surrogate mother, British spouses must receive a "parental order" from the court. At the same time, they are obliged to prove that they reimbursed all the expenses of the woman who was carrying their child. Legally, a surrogate mother does not receive a fee, but compensation. Otherwise, the British court will have every reason not to recognize the biological parents. Under Ukrainian law, in this case, the surrogate mother will not have any rights to the child, and foreigners will be recognized as the child's father and mother. According to British law, the intended parents have no parental rights, and the mother of the baby will be considered a woman who, carrying the baby, signed consent to his / her transfer to foreigners. Thus, under UK law, the child will have neither citizenship nor legal parents.

A baby born by a surrogate mother to foreign parents receives a Ukrainian birth certificate, corresponding consent from the surrogate mother, and a certificate of genetic connection with the baby from the clinic. Parents, as a rule, submit these documents to the embassy of their country to obtain permission to transport the child and the child's passport. All this becomes possible provided that their country recognizes surrogate motherhood.

³⁹ EUROPEAN COURT OF HUMAN RIGHTS. D. and Others v. Belgium, no. 29176/13, decision of 8 July 2014 Available from: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-155182%22%7D> (viewed in 12/06/2024).

7 Areas for improving legislation in the field of surrogate motherhood

Considering the permissibility of altruistic and commercial surrogacy in Ukraine, we are convinced that adopting a comprehensive regulatory legal act in the field of surrogacy arrangements will solve the legal and organizational problems faced by participants in assisted reproductive technologies. In the case of the birth of several children, parents undertake to accept them and register them, indicating themselves as parents. In the event of the birth of a child with developmental disabilities or special needs, which is not related to fulfilling obligations under the contract, the spouses do not have the right to refuse the child. They are obliged to carry out state registration of the child's birth in a timely manner, indicating themselves as parents. In the event of divorce or its invalidation during the pregnancy of a surrogate mother, potential parents, together or each separately, are obliged to accept the baby, to carry out state registration of birth, indicating both spouses as the parents. In the event of the death of one of the potential parents or recognition as deceased, during the pregnancy of the surrogate mother, all rights and obligations under the contract pass to one of the intended parents who remained alive. He/she is obliged to accept the newborn child, take measures for state registration of his/her birth with the indication of the spouses as the parents. In the event of the death or recognition as deceased of both spouses who participated in the surrogacy arrangement before the child's birth, the spouses are recognized as the child's parents⁴⁰.

There is a need to find a solution to the issue of protecting the rights and interests of the child in cases of birth with genetic, congenital defects, or diseases. It is not uncommon for parents-clients to refuse unwanted children. This practice leads to an imbalance and increases the vulnerability of children and surrogate mothers to various forms of exploitation. Specified conditions make our country attractive for foreigners who intend to give birth to a child with the help of surrogate mothers. The introduction into Ukrainian legislation of a provision prohibiting the refusal to accept a child by intended parents would create conditions for the legal protection of the child's interests.

⁴⁰ UKRAINE. Family Code of Ukraine: Law № 2947-III January 10, 2002. Available from: <https://zakon.rada.gov.ua/laws/show/2947-14#Text> (viewed in 12/06/2024).

On December 28, 2021, the government bill No. 6475⁴¹ (hereinafter referred to as the bill) on assisted reproductive technologies was registered in the Verkhovna Rada of Ukraine. The draft law defines the basic terms of assisted reproductive technologies: anonymous donor, infertility, embryo, assisted reproductive technologies, surrogate mother, etc., establishes the conditions and procedure for the application of this method (for example, mandatory genetic diagnosis). Surrogacy procedure is allowed only in accredited medical institutions. Requirements are introduced for surrogate mothers: follow the doctor's recommendations during pregnancy, transfer the child to parents within two hours after birth, and not disclose information about genetic parents. Between the surrogate mother and parents, according to the draft law, an agreement should be concluded that establishes the rights and obligations of the parties to assisted reproductive technologies, including an intermediary (a medical institution). The origin of a child born as a result of such a method must be determined through a DNA test. The document also regulates the conditions and procedure for cryopreservation of reproductive cells, embryos, tissues, and their use.

The bill regulates the conditions and procedure for the use of surrogate motherhood. A child can be carried by relatives of genetic parents (grandmother, mother, sister, aunt, niece). The personal presence of genetic parents and a surrogate mother is mandatory in a healthcare facility that provides services of assisted reproductive technologies when signing the contract and before starting to apply the surrogate motherhood technique. The draft law contains provisions on the prohibition of the use of the surrogacy method for persons of the same sex. The rights and obligations of a surrogate mother and parents are defined, which will prevent the risk of disclosure of confidential information, any manipulation regarding the transfer of a born child to genetic parents, as well as the transfer of documents related to the birth of a child, and the child's registration.

The bill regulates the choice of the sex of the unborn child. Thus, when using assisted reproductive technologies, sex selection is allowed if there are medical

⁴¹ SPAIN. Law № 35/1988 of 22 Nov 1988 on Assisted Reproduction Procedures. Bulletin Oficial del Estado. 24 Nov 1988. No. 282. P. 33373–33378. Available from: <https://pubmed.ncbi.nlm.nih.gov/11659178/> (viewed in 12/06/2024).

(risk of transmission of a disease associated with sex) or social (presence of at least two children of the same sex in the family) indications.

In addition, the draft law contains requirements for a surrogate motherhood agreement, and its essential conditions are enshrined. However, some of them, in our opinion, need to be improved. For example, the contract should contain not only the specified amount of compensation to the surrogate mother for the bearing and birth of a child but also the procedure for making payments. One of the terms of the contract is to determine the actions of genetic parents and a surrogate mother in the event of the birth of a child with a genetic disease, congenital malformations, and other diseases. We believe that to protect the rights and interests of the child, any abandonment of the baby should be prohibited.

We are sure that the draft law should be supplemented with the provisions of guarantees for the protection of the interests of the surrogate mother, the procedure for monitoring the fulfillment of obligations by the intermediary, the surrogate mother, and genetic parents. It should be noted that a number of relations in the field of surrogate motherhood, according to the draft law, are subject to regulation at the level of by-laws, and require their development and adoption within the time limits established by the final provisions.

The very fact of developing and submitting the draft law On Assisted Reproductive Technologies for consideration by the Committee on National Health, Medical Assistance and Medical Insurance of the Verkhovna Rada of Ukraine is an important step toward the proper regulation of surrogate motherhood relations.

We emphasize that the draft law needs to be revised to take into account the provisions of international legislation, in particular: Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind (adopted by Resolution 3384 (XXX) of the 1975 General Assembly), UN Convention on the Elimination of All Forms of Discrimination against Women (1979), General Assembly Resolution UN 37/194 Principles of Medical Ethics (1982), Universal Declaration on the Human Genome and Human Rights (1997), Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (ratified in Ukraine on March 22, 2002).

It is important to recognize at the legislative level the inadmissibility of using assistive medical technologies to select the sex of a child to be born, except in cases where this is done to avoid serious hereditary diseases associated with sex.

The lack of a unified approach in the internal laws of states creates challenges in solving issues of private international law. Such a situation affects the recognition of the child's citizenship, immigration status, the responsibility of parents or guardians, etc. The work of the Permanent Bureau of The Hague Conference on International Private Law (HCCH) is being carried out to solve these problems. The issue of recognizing the legal origin of children in connection with international agreements on surrogate motherhood is being studied in detail. We support the opinion that the Group of Experts on International Private Law that it is necessary to develop a protocol on legal paternity on the basis of international agreements on surrogate motherhood⁴².

Reproductive technologies have changed the traditional idea of how a new life is born, and the role and function of parents. As a result of the lack of a legislative framework, it is difficult to determine where the line is between the legal use of assisted reproductive technologies and the criminal scheme of child trafficking. For example, intermediaries were recently discovered who sent Ukrainian women to the Czech Republic, where they illegally gave birth to children for foreigners. Each child costed from 50-70 thousand euros.

We are deeply convinced that the problem of surrogacy requires international discussion, taking into account external changes and internal risks of such a phenomenon. The idea of the law of nations should govern international politics⁴³.

When one country bans surrogacy, another may be available for practicing it. As a result, international commercial surrogacy moves to new countries. Hence, it is important to establish international policies and regulations to ensure

⁴² Hague Conference on Private International Law. The parentage / surrogacy project. <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy> (viewed in 12/06/2024).

⁴³ BARANOWSKA, Marta. In Defence of International Law, or Szymon Rundstein's Idea of the Law of Nations. *Studia Iuridica Lublinensia*, 2023, № 32. DOI: <https://doi.org/10.1017/bhj.2021.49> (viewed in 12/06/2024).

that surrogacy is in the children's interest – the same way The Hague Convention made sure that international adoptions do not result in child trafficking⁴⁴.

Thus, more than 100 surrogate babies, who had to be taken by parents from France, Italy, Spain, Great Britain, were forced to stay in Ukraine in March 2021. The reason for the unpredictable closure of borders was the rapid spread of COVID-19. The situation has been resolved, but our state has not found an algorithm for resolving this issue in the future.

The full-scale invasion of Ukraine by the Russian Federation on February 24, 2022 entailed even more serious risks. The aggression forced Ukrainian surrogate mothers to make a choice – to evacuate or stay at the risk of falling into the war zone. There are no safe places left for newborns on the territory of the state. At the beginning of the war in Ukraine, some surrogate mothers lost contact with their agencies, so they had to look for biological parents on social networks. Others remain blocked in cities under Russian bombardment. The fate of hundreds of surrogate mothers carrying babies for American and European biological parents, as well as newborns across the country, is becoming more precarious as Russia intensifies its violent efforts to seize strategic Ukrainian cities. For surrogate mothers who decide to give birth outside of Ukraine, there remains the risk of legal non-recognition of babies as children of their “customers”.

Of course, such force majeure as pandemic and war cannot be compared. However, each circumstance exposes the risks of exercising the right to paternity and motherhood through the use of the surrogate motherhood method. The deployment of force majeure circumstances demonstrated the unpreparedness of all participants in the process to ensure coordinated actions⁴⁵.

CONCLUSIONS

The rights of a surrogate mother and a child born are referred to as somatic rights in the context of the fourth generation of human rights. This is a group of

⁴⁴ ULLAH, Akm Ahsan, NAWAZ, Faraha, Surrogacy-led migration: reflections on the policy dilemmas, *Public Administration and Policy: An Asia-Pacific Journal*, 2020, Vol. 23, № 2, pp. 157-171. <https://www.emerald.com/insight/content/doi/10.1108/PAP-03-2020-0014/full/html> (viewed in 12/06/2024).

⁴⁵ OSTROVSKA, Bogdana. The fate of surrogate mothers and children in the conditions of war in Ukraine. *Materials VI International Scientific and Practical Conference Russian-Ukrainian war: law, security, world, Ternopil, Western Ukrainian National University*, April 29-30, 2022.

rights associated with the ability of a person to independently dispose of his or her body. Corresponding social relations are associated with a whole range of moral issues, they are distinguished by a purely personal character, a close relationship with the physiological nature of a person and require legal regulation.

The approaches of states to such issues as assisted reproductive technologies, surrogate motherhood agreements differ significantly, taking into account the cultural, political and social conditions of the country. As a result, there is no international consensus on the issue of establishing and challenging paternity when using this method of assisted reproductive technologies. In some countries of the world, the existence of commercial surrogacy is recognized at the legislative level, but the issue of harmonizing legislation with the principles of respect for human dignity remains a problem.

Ukrainian legislation opens vast opportunities for exercising paternity and maternity rights through surrogacy. At the same time, the state must ensure the recognition of the rights of all participants in the surrogacy arrangements, regardless of the terms of the surrogacy agreement, taking into account the requirements of national and international legislation. The protection of the rights and interests of children, their identity in the context of the “fourth generation of human rights” should be recognized as a priority when using assisted reproductive technologies in Ukraine. Introducing a mechanism for proper state control over organizations that provide mediation and medical services in this area will eliminate the possibility of obtaining financial benefits from mediation and prevent the transformation of reproductive medicine into a commercial enterprise.

We believe that every step in resolving the issue of legal regulation of the use of surrogacy requires a balanced attitude, taking into account the extreme vulnerability and delicacy of relations. When forming a unified approach, the international community should use the support of lawyers and take into account the opinion of healthcare professionals and the public. Legal support of the interests of the child and the “gestational courier” in the context of the “fourth generation of human rights” should take place by balancing ethical, religious, and moral norms.

The draft law On Assisted Reproductive Technologies is an important step on the way to proper legal regulation of social relations in the field of surrogate

motherhood. The adoption of the normative legal act will allow improving the provision of medical assistance to the population during the implementation of treatment programs of assisted reproductive technologies. Also, protecting the rights of citizens during treatment using assisted reproductive technologies, donors of reproductive cells, and children born with the use of such a method will strengthen the authority of Ukraine as a state capable of protecting rights in the reproductive sphere.

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