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PROBLEMS OF LEGAL REGULATION OF SURROGACY

The article explores the problems of legal regulation of such a method of reproduction as surrogacy, which is an effective way to fight infertility in the modern progressive world. We focus on the commercial model of surrogacy. The main historical origins of this concept and their transformation in the modern dimension are analyzed. The analysis of the basic principles that should be applied in the formation of state policy regarding this institution is provided. Special attention is drawn to the legal status of all participants in this procedure and the priority of respecting the rights of the child born with the help of this method is emphasized. The main risks that exist during the procedure for each participant are considered. Several decisions of the ECtHR, the Ukrainian and foreign court cases, which formed the basis for the conclusions, and the proposals capable of regulating these relations at the legislative level are analyzed. A particularly urgent need for specialized legislation on this issue in every country, where commercial surrogacy is permitted, is proved.

Keywords: surrogacy, biomedicine, human rights, child rights, infertility.

The modern globalized world is transforming many spheres of social life while creating the latest progressive, yet debatable, ways of improving human existence. The development of science and technology directly influences the human capabilities, expanding them, and therefore human rights are acquiring more and more qualitative characteristics, which certainly creates the need for their qualitative regulation in the legal policy of the state. However, globalization entails a number of problems and crises, so today we are forced to acknowledge the enormous environmental and climatic factors that have a permanent negative impact on human health, which is especially reflected in the reproductive function, which is one of the most vulnerable in the human body.

Today, there is no comprehensive study that fully covers all the important issues of surrogacy, but the following can be outlined: Lina Peng¹ studies the surrogacy in view of its harm to the surrogate mother and the attitude of the society to this issue. Dr. J. Srinivas Rao, Dr. Matin Ahmad Khan², and Anu K.P., Inder D., Sharma N.³ studied this issue in India, which was the center of surrogacy until recently. Chamie J., Mirkin B.⁴ studied surrogacy in the context of observing the human rights.

However, the comprehensive analysis of the problem of surrogacy has not been raised in scientific sources, and the rapid transformation of legal approaches necessitates further analysis. The practice in Ukraine has been selected for central analysis in the article as it has recently become a center of "surrogate tourism" in Europe.

People who encounter this problem feel inferior, depressed, and lose some interest in life, which negatively affects family relationships and often causes dissolution of marital relationships. It should be noted that this problem has long-standing roots, so society at all historical stages sought to overcome this problem, since the procreation is ontologically determined by the primary purpose of a person on earth. Historical and legal sources contain references to such relationships, for example, «giving the womb for

¹ Peng, L. (2013). Surrogate Mothers: An Exploration of the Empirical and the Normative. *Journal of Gender, Social Policy & the Law*, 21, 3, 555-582.

² Srinivas Rao, J., Ahmad Khan, M. (2017). Surrogacy in India: Current Perspectives. *International Journal of Medical and Health Research*, 3, 5, 85-88.

³ Anu, K.P., Inder, D., Sharma, N. (2013). Surrogacy and women's right to health in India: issues and perspective. *Indian J Public Health*, 65-70.

⁴ Chamie, J, Mirkin, B. (2017). Surrogacy: Human right or reproductive exploitation?
<<http://yaleglobal.yale.edu/content/surrogacy-human-right-or-reproductive-exploitation>>.

rent: there are many examples in Ancient Rome where men gave their wives «for rent» (ventrem locare) to married couples where the wife was infertile, and other countries and civilizations also encountered this»¹. One of the first legal documents that governed this issue to some extent was the Code of Hammurabi (1780 BC)². «Articles 144-147 deal with the legal relations between a man and a woman who is infertile. As a way out of this situation, the wife can «give» her husband a female slave who would give birth to the child for them. If we move to the present time and abandon the words «give» and «female slave», then in our time it would be considered as a program of traditional surrogacy»³. Here is a short excerpt from Article 146 of the Code of Hammurabi: «If a man takes a godly (infertile) wife, she will give her husband a female slave, and this female slave will give birth to children...»⁴.

For the first time in the modern age, the term «surrogate mother» was used in the report of the Council of Europe, where a surrogate mother was defined as a woman who bears and gives birth to the child for another person. At the same time, it was indicated that before insemination she agreed to give the child after the birth to that person. «One of the first coordinated programs for traditional surrogacy in the United States – and the world – was successfully implemented in 1980 with the assistance of Surrogate Parenting Associates, Inc., founded a year earlier by Dr. R.M. Levin in Louisville. The process of examinations and agreements on all sorts of legal documents before the start of the program was delayed for a long nine months, but the pregnancy itself occurred on the first attempt and ended with birth of the healthy baby boy. Five days after giving birth, the surrogate mother relinquished her rights to the child born by her in favor of the biological father in local court. This, in fact, was the first pre-planned and coordinated program for traditional surrogacy in the world.»⁵.

Infertility is a serious problem, which is growing steadily every year, and the demographic rates of European countries have a negative dynamic, which actualizes this problem in the light of contemporary social changes.

The development of new technologies and the advancement of medical science have made it possible to realize the possibility of having genetically related children, even though a woman cannot conceive and bear a child, thus somehow overcoming the problem of infertility as such. Owing to the modern development of reproductive technologies, such people have a real chance to become parents and fully exercise their right to procreation as an integral part of the right to life.

For proper legal regulation, a type of method under study is significant; there are such types as altruistic (without the material benefit for the surrogate mother who is usually a close relative of the couple) and commercial (surrogate mother receives the material benefit). The cost of the carrying of pregnancy is contractual. For example, in the United States, the total expenditures are up to USD 100,000, in Canada – USD 90,000, in Thailand, Cambodia, Vietnam, and Taiwan – within USD 35,000, and in India (until the legal prohibition of commercial surrogacy in 2018)⁶ only 25,000.⁷ According to our content analysis of available internet resources, the average price when comparing the demand and supply of services for a surrogate mother in Ukraine is USD 8,000. This amount is significant enough for a surrogate mother as the country's minimum wage equates to USD 168 a month⁸. Given that Ukraine is relatively cheap and territorially close to Europe, it has now become a center for surrogate tourism.

A quarter of a century ago, the first surrogacy program was implemented in Ukraine – «a woman who carried a baby of her daughter, who was suffering from a congenital absence of her uterus, became a surrogate mother, thus becoming both a mother and grandmother at the same time»⁹. In Ukraine, over the past 18 years,

¹ Старовойтова, О.Е. (2016). *Тело и закон*. Санкт-Петербург: СПбГУАП, 144.

² Кодекс Хаммурапи. <<http://www.hist.msu.ru/ER/Etext/hammurap.htm>>.

³ Таланов, Ю.Ю. (2012). Сурогатне материнство: морально-правові аспекти. *Збірник наукових праць Харківського національного педагогічного університету імені Г. С. Сковороди*. "Право", 19, 42-47.

⁴ Кодекс Хаммурапи. <<http://www.hist.msu.ru/ER/Etext/hammurap.htm>>.

⁵ Таланов, Ю.Ю. (2012). Сурогатне материнство: морально-правові аспекти. *Збірник наукових праць Харківського національного педагогічного університету імені Г. С. Сковороди*. "Право", 19, 42-47.

⁶ The surrogacy (regulation) bill, 2018.

<http://www.prsindia.org/sites/default/files/bill_files/Surrogacy%20bill%20as%20passed%20by%20LS.pdf>.

⁷ According to data: Surrogate motherhood: a violation of human rights Report presented at the council of Europe, Strasbourg, on 26 april 2012.

⁸ Міністерство фінансів України. <<https://index.minfin.com.ua/ua/labour/salary/min/>>.

⁹ Сурогатність – церковний гріх чи ключ до щастя? <<http://bukpravda.cv.ua/articles/114/>>.

54,000 children have been born with the help of assisted reproductive technologies¹». Also, the popularization of this method of fighting infertility is intensified due to loyal legislation and the fact that Ukraine is one of the few countries where commercial surrogacy is not prohibited by law. And in connection with the prohibition of this type of surrogacy in Thailand and India, Ukraine is approaching the level of the world center of surrogacy, which emphasizes the timeliness and relevance of this study.

Despite such widespread distribution in Ukraine, there is still no comprehensive legal regulation of reproduction in general, and in particular the method of surrogacy. The state belongs to the Romano-Germanic type of legal system, so the main set of legal regulation is carried out using a statutory instrument. Clause 1, Article 92 of the Constitution of Ukraine² indicates that the rights and freedoms of a man and a citizen, the guarantees of these rights and freedoms; basic responsibilities of a citizen are exclusively defined by the laws of Ukraine. Therefore, there should be a legislative act to regulate the relations in the field under study. There is no such act today. The only state-level act is the Order of the Ministry of Health «On Approval of the Procedure for the Use of Assisted Reproductive Technologies in Ukraine»,³ which is an act of a medical nature and cannot disclose all the elements of the legal status of the parties.

Therefore, surrogacy has a long history of its formation and development with each step of human progress, and this method is constantly evolving. In today's globalized world, the problem of infertility and demographic decline can be resolved with the help of the method under study, but there are several dangerous factors that can counteract this method of reproductive technology. That is why the global community and countries where this method is allowed need a clear legal regulation of these relations with the consideration of the basic principles to avoid the problems mentioned above.

Of course, this method of reproductive technology is ambiguously perceived by different countries of the world in connection with religious, moral, and traditional factors. Today there is neither a single approach to this method of reproduction nor established standards for regulating this issue. That is why scientific and legal justification is a necessary leverage on the formation of policy of each state regarding the proper regulation of this complex issue. For the effective and full regulation of this process, there is a need for a qualitative separation of theoretical and legal principles, which can serve as a basic guideline for the formation of state policy in the field under study.

Analyzing the problematic aspects of the application of this method of assisted reproductive technology, we want to draw special attention to the legal status of the subjects, because in our view, the preservation of the rights and legitimate interests of everyone should be the focus of the international community and the states in which this method of reproduction is allowed.

Many researchers on the subject argue that a surrogate mother is subject to certain exploitation and that the parties to the surrogacy agreement are not equal. We do not support this opinion, because in all cases known to us, a surrogate woman gives her written consent for undergoing the procedure. It is usually possible to dispute about a fact that a woman is in a financially difficult position if she agrees for the use of her body. However, we cannot agree that this is a reason that can be regarded as exploitation. The known facts of real violence or exploitation occurred in countries such as Thailand, Cambodia, and India, through the recruitment, deception, or violence of intermediary firms with mercantile purpose.

For a female body, childbearing and childbirth itself is an extremely difficult process, and to unambiguously predict that a baby will be born healthy is impossible. We know of cases where, when using the method of reproductive technology under study, a child was born with physical defects or was disabled. In such cases, under the agreement, the surrogate mother abandons the child and transfers it to the biological parents, the parents also abandon their biological child due to physical defects. In such cases, the child is legally transferred to the state government bodies, where the child was born. In other words, a potentially desirable child remains orphaned and deprived of parental care. We consider such a violation of the rights of the child inadmissible, and we see the need to state in the specialized legislation an obligation

¹ How Ukraine almost became the center of surrogacy. <<https://www.dw.com/uk/як-україна-ледь-не-стала-світовим-центром-сурогатного-материнства/a-45289790>>.

² Конституція України 1996 (Верховна Рада України). Офіційний веб-сайт Верховної Ради України. <<http://zakon3.rada.gov.ua/laws/show/62/95-%D0%B2%D1%80>>.

³ Наказ про затвердження Порядку застосування допоміжних репродуктивних технологій в Україні 2013 (Міністерство охорони здоров'я України). Офіційний веб-сайт Верховної Ради України. <<https://zakon.rada.gov.ua/laws/show/z1697-13>>.

of (commissioners) potential parents of the child to take the child. The case of Baby Gummy¹ related to surrogacy is known worldwide. According to the surrogacy agreement, the Thai resident gave birth to twins for the Australian couple, unfortunately one of the children was born with Down syndrome and heart disease. The commissioning parents took only a healthy girl Pipah to Australia and left the sick girl in Thailand. We believe that this negative experience should serve as an example for all states in which surrogacy is permitted to establish the obligation to take a child born for them.

The only exception can be cases of gross breach of agreement by a surrogate mother, which took place in 1998 and was named Baby Doe². Where a surrogate mother did not obey the rules of conduct during the insemination, and she was actually carrying the child from her cohabitant. The child was born with hydrocephalus (brain disease). The commissioner abandoned the child and demanded DNA analysis at the initiative of the commissioner (potential father) and it turned out that the child is not related to him genetically.

It is also worth noting that fraudulent actions on the part of the medical clinic are possible. An example is the case of Paradiso and Campanelli against Italy, which has been heard by the European Court of Human Rights. «The expert concluded that the results of the DNA typing of Giovanni Campanelli and the DNA of the minor child exclude the assumption that Giovanni Campanelli is the biological father of the child. The juvenile court ruled that the applicants no longer had the right to participate in the child adoption hearing, since they were neither the parents of the child nor the family within the meaning of the provisions of the Adoption Act³». The child was taken to an orphanage, and in 11 months the child was adopted. Thus, the EU court upheld the position of the Italian authorities to terminate the guardianship of a child who is not genetically their, even though the child was born under a surrogacy agreement. The court also disregarded the recommendation of a psychologist who noted that the child was healthy and surrounded by the love of parents, grandparents, and other family members, and separation from this family could negatively affect the child's psychological health. «In her opinion, it can cause somatic symptoms and negatively affect the psychophysical development of the child, and in the long-term perspective psychopathic symptoms may intensify⁴».

The statement of Carla Spivack is reflected in the given case: «States have widely differing laws, some enforcing surrogacy contracts, some banning them entirely, and some allowing them under certain circumstances. Many states have no laws regarding surrogacy contracts at all. No single statutory regime has won widespread acceptance. As a result, courts are often left to decide parenthood disputes arising from these contracts, and employ a range of theories by which to do so: intent, contract, genetics, gestation and, rarely, best interests of the child⁵». We believe that in cases of conflict between the laws of different states regarding surrogacy, adoption should be used as the best way for the benefit of the child to live with a family that is really willing to do so. As Daniel Gruenbaum notes «The adoption of the child by the commissioning parents should be seen as an alternative and adequate solution to the limping legal parenthood that would otherwise arise from the non-recognition of a surrogacy judgment⁶». These principles would allow to abide by the Convention on the Rights of the Child⁷ and to provide the child with the best favorable conditions for their harmonious growth and development.

Another glaring problem is transferring the child to commissioners.

National legal acts (for example, in the US) define that «a surrogate mother» is an adult woman who is not the prospective mother of the child and enters into the surrogacy agreement for the purpose of carrying a child conceived using other people's gametes rather than her own⁸. However, the psychological state

¹ Surrogacy Why the world needs rules for 'selling' babies. *BBC News*. <<https://www.bbc.com/news/health-47826356>>.

² Extraordinary surrogacy "case Baby Doe". <<https://za-y-ac.livejournal.com/2687588.html>>.

³ *European Court of Human Rights Grand Chamber case of "Paradiso and Campanelli v. Italy"* < 1 > (application n 25358/12) < 1 >. <<https://gkrfkod.ru/pract/postanovlenie-espch-ot-24012017/>>.

⁴ *European Court of Human Rights Grand Chamber case of "Paradiso and Campanelli v. Italy"* < 1 > (application n 25358/12) < 1 >. <<https://gkrfkod.ru/pract/postanovlenie-espch-ot-24012017/>>.

⁵ Spivack, C. (2010). The law of surrogate motherhood in the United States. *The American Journal of Comparative Law*, 58, 1, 97-114. <<https://doi.org/10.5131/ajcl.2009.0042>>.

⁶ *The American Journal of Comparative Law* (2012), 60, 2, 475-505. <<https://doi.org/10.5131/AJCL.2011.0010>>.

⁷ Конвенція про права дитини 1989. Офіційний веб-сайт Верховної Ради України. <https://zakon.rada.gov.ua/laws/show/995_021>.

⁸ Брашовяну, А. (2013). *Міжнародний досвід законодавчого регулювання питання використання ... сурогатне материнство*. Київ.

of a woman who is carrying a baby for 9 months should be taken into account. During pregnancy, the female body undergoes internal changes that affect both psychological perception and vulnerability of the female mental state. A potential possibility arises that it will be difficult for a woman to give the child away after the act of delivery, even if genetically a child is a stranger to her. Women who became surrogate mothers experienced increased maternal instinct and psychological anxiety. An example of these considerations is the decision of the district court of the Odessa region, which states that on June 31, 2009, an agreement was concluded between a surrogate mother and (genetic parents) with the subject of surrogate motherhood. The surrogate mother, fulfilled the terms of the agreement, gave birth to a baby girl and registered the child as her own, by which she did not fulfill the conditions of the above agreement. At the hearing, the surrogate mother explained her decision by saying that she was «well aware of the requirements of the surrogacy agreement but began to feed the baby and therefore decided to give the baby her surname. Although it does not deny the fact that genetically the baby was conceived by the commissioners¹» in this case, the court defended the interests of biological parents and legally recognized their paternity. This case clearly demonstrates that it is necessary to make provision in the surrogacy agreement for the transfer of the child to biological parents as soon as possible. After all, finding a child with a surrogate mother in the postpartum period will bring to the woman certain sufferings or reproaches of conscience, which complicates the relationship between the parties to this agreement, which are already difficult. We believe that this proposal can positively influence the surrogate mother and give its results.

It should also be taken into account that many women face the problem of postpartum depression after giving birth, which can also be an additional cause of difficulty separating a baby from his/her mother. Therefore, there is a need for some psychological support for the surrogate mother.

Since in most countries under study, a mother is considered a woman who gave birth to the child and sometimes it is not taken into account that a surrogacy agreement has been concluded, there is a potential risk for commissioners not to have their genetic child, and litigation about recognizing paternity is extremely complex and long-lasting. Considering that the commissioners have spent considerable financial resources, it is also extremely difficult to recover them through the court due to the different conflicts and different legal regulations. In this regard, one should pay particular attention to the choice of a surrogate mother and take into account the presence of at least two children of her own, which will potentially reduce the risks of not fulfilling all the terms of the agreement by the surrogate mother.

Conclusion. In the modern globalized world, we are seeing a rapid development of science that allows us to improve our lives qualitatively. Fifty years ago, infertile people did not have the ability to have their children genetically.

Today, a clear, specialized legislative regulation of commercial surrogacy, both in Ukraine and in countries where it is absent, has been a demand of the time. This legislation should provide for the legal status of all participants in the relationship of this procedure and define the child as the core value with the child's interests preceding all others. And to establish appropriately guaranteed confidentiality, which must be respected by the medical staff that performs the procedure. Also, it is proposed to provide the surrogate child with a right to acquire the nationality of their biological parents. And in countries where this method of reproductive technology is prohibited, there should be the possibility of adoption as a legitimate solution to conflicts. We also believe that the interests of the child should be respected in each of the cases of surrogacy and the commissioners should be obliged to take away the child whom the surrogate mother refused, regardless of the child's state of health. Even if the commissioners abandon the child after recognizing their paternity, it will have completely different legal consequences and could provide a better life for the child.

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¹ Decision of Tatarbunary district court of the Odessa region on the case № 2-456/2010. *Court register*. <<http://www.reyestr.court.gov.ua/Review/47696049>>.

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