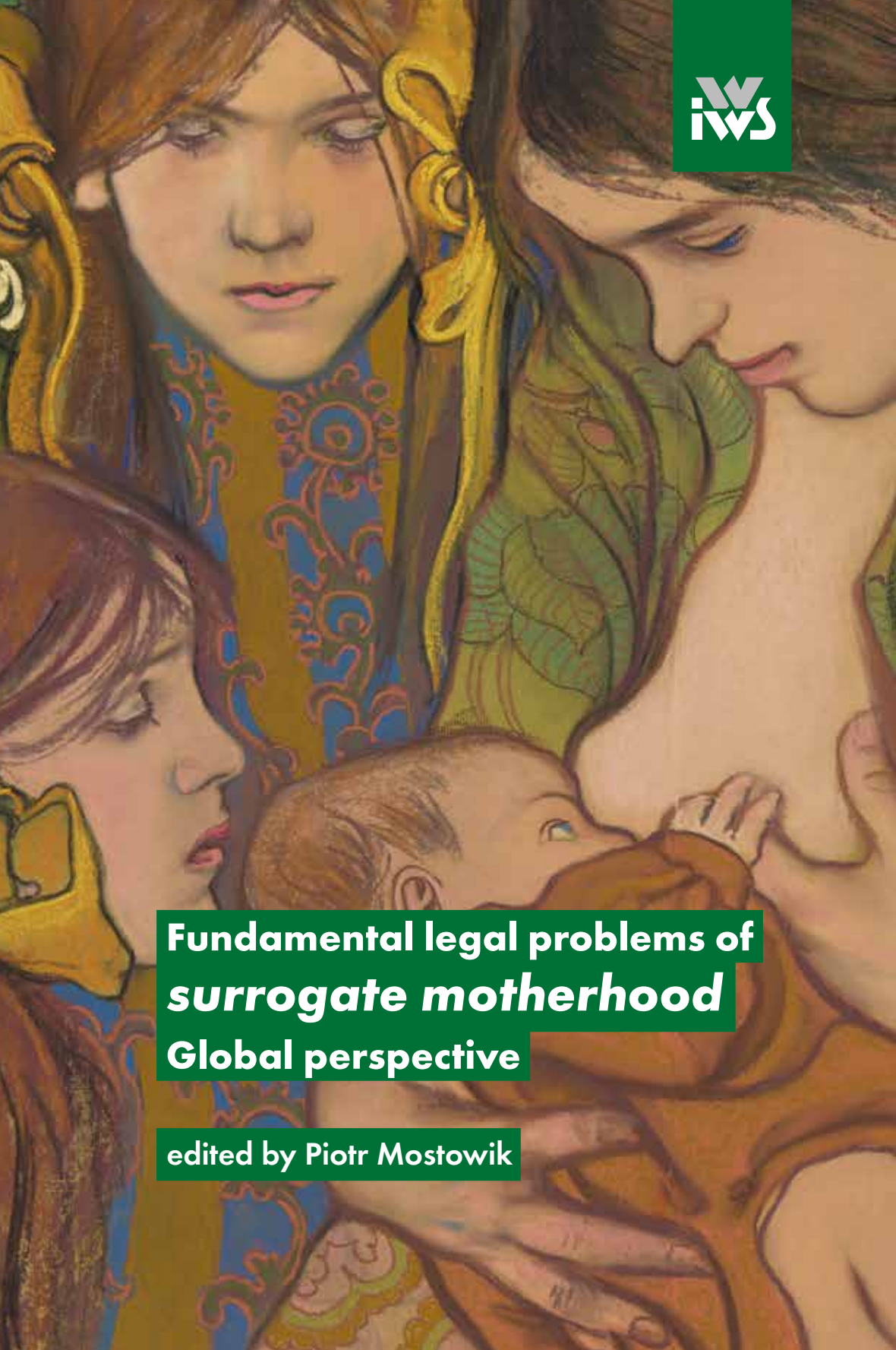

Fundamental legal problems of *surrogate motherhood* Global perspective

edited by Piotr Mostowik

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PRAWO PRYWATNE

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Motherhood. A breastfeeding mother on the right, two girls gazing at her on the left (1905), a painting by Stanisław Wyspiański (1869–1907) [photo: Bartosz Cygan / National Museum in Cracow]
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Editorial

The volume presents the core results of the research on "Foreign surrogate motherhood procedures and the universal prohibition of child trafficking – a multidisciplinary approach", which has also provided a group of international experts with an opportunity for scientific cooperation. This volume in English presents comprehensive studies of the discussed problem on global perspective for the purpose of international debate, as well as summaries of reports on particular legal systems and domestic issues, which have been originally prepared for local debate. The arrangement of its content, adopted by the editor, results from the research methodology. The project, which I was in charge of, was conducted under the auspices of the Family Research Center of Nicolaus Copernicus University in Toruń. The complementary publication in Polish will contain abstracts of reports prepared in English and expanded texts on crucial issues relevant to the field perceived from the domestic perspective. The order of texts within chapters or sub-chapters is alphabetical (ie. according to the names of authors or the states discussed).

The essential part of the study was to examine the global issue of the so-called "surrogate motherhood" in a way not presented in the literature so far, i.e., with recourse to a multidisciplinary approach of constitutional, international, private, and criminal law, as well as including its crossborder implications and the issue of the recognition of the effects of foreign law and procedures. The cooperation with the Institute of Justice in Warsaw made it possible to enrich the content of both volumes with further studies and to organize the printing of book, which should be thanked to the director dr. Marcin Romanowski.

It was most opportune that we had a chance to discuss the subject during the conference in Warsaw on 27–28 September 2018[1]. It is worth mentioning that it took place not far from the place where Janusz Korczak used to live and work intellectually on the "child's right to respect"[2], before being murdered with orphans under his care by German invaders during II World War; in the capital city of the state that initiated the work on the UN International Treaty on Rights of Children (1989), which become a great international success with nearly 200 signatories[3]; as well as in the country of origin of Saint John Paul the Second – the patron of family[4], and additionally – in the city where Council of Europe Convention on Action against Trafficking in Human Beings (2005) was signed.

It was both an honor and pleasure for me to coordinate the research. Once again I would like to express thanks to the legal experts who were active in working discussions in the course of several months, prepared their contributions, and took part in the conference, as well as to Dr Olga Bobrzyńska, who served as an indispensable organizational and substantial assistance during the research.

The main content of this publication are texts written by international experts, which are presented in the ordered 'from general to specific' chapters. The monograph begins with the considerations on theory, philosophy and sociology of law, as well as with comparative remarks about different legal systems in the world. Subsequently, comments on the fundamental principles of law resulting from the constitutions of the reported states and international treaties on the protection of human rights are presented. Further detailed considerations include issues of private (substantive) law, including the relationship of the legal institutions present in some of countries and called worldwide 'surrogate motherhood' (*de facto* – its various

[1] See: O. Bobrzyńska, "Fundamental and legal problems of so-called surrogate motherhood. Report from conference", *Prawo w działaniu – Law in Action*, 36/2018. pp. 7–17, www.iws.gov.pl/wp-content/uploads/2018/12/36-Reports-from-conference.pdf (last accessed: 15 November 2018).

[2] See: "Janusz Korczak – a brief biography", [in:] Janusz Korczak, *The Child's Right to Respect. Janusz Korczak's legacy. Lectures on Today's Challenges for Children*, Strasbourg 2009, pp. 11–12, www.coe.int/t/commissioner/source/prems/PublicationKorczak_en.pdf (last accessed: 15 November 2018).

[3] Current status is available at: http://indicators.ohchr.org (last accessed: 15 November 2018). See: T. Buck, A.A. Gillespie, I. Ross, S. Sargent, *International Child Law*, ed. 2, New York 2011, pp. 88–163.

[4] E.g. apostolic exhortation *Familiaris consortio* of Pope John Paul II on the role of the Christian family, http://w2.vatican.va/content/john-paul-ii/en/apost_exhortations/documents/hf_jp-ii_exh_19811122_familiaris-consortio.html (last accessed: 15 November 2018). See: A. López Trujillo, "The family in the Pontificate of John Paul II", http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_20031018_riflessioni-trujillo_en.html (last accessed: 15 November 2018).

types) to the legal principles of filiation (motherhood and fatherhood), personal status and adoption. The publication is crowned with considerations regarding the protection of fundamental principles of the legal order (*ordre public*) – first, through the solutions of domestic family law and private international law and civil procedure, and then concerning domestic criminal law and police cooperation. Thanks to the annex, the excerpts of interesting documents from various countries and organisations, as well as the updated review of information on practical aspects of the issue found in the press, can be acquainted. he order of texts within chapters or sub-chapters is alphabetical (ie. according to the names of authors or the states discussed).

The contribution in the project and presence at the conference do not obviously mean that each of the authors agrees with the postulates of introducing "surrogate motherhood" to those domestic legal systems that at present do not accept it or complies with the demands of recognizing the substantive effects of procedures organized abroad. Not only enthusiastic, but also skeptical and critical voices have been included and embraced during our international scholarly dialogue. Any serious academic debate about proposed law changes cannot simply consist of an unbridled affirmation of foreign developments but nonetheless requires also such comments. The future of law is unpredictable but we have attempted to identify the current and coming trends, evaluate them and propose the best solutions for the human society.

P.M.

Piotr Mostowik
PROFESSOR | JAGIELLONIAN UNIVERSITY IN CRACOW

"May you live in interesting times." General remarks

1. The extreme diversity of legal systems in the world

The phenomenon called "surrogate motherhood" – in different forms and scopes – is present and developing in some of legal systems at the beginning of the 21st century. Taking into consideration the whole global perspective, no comparable moral or legal ground in this area can be identified. Due to this fact, creating common legal standards in this subject area or moving forward with wide-spread international unification of substantive law or rules regarding the recognition of effects of foreign laws seems neither real not necessary. Because of the progressively growing differences between foundations of national laws (e.g. interpretation of prohibition of human trafficking and exploitation, as well as legal concepts of maternity, paternity and child's origin) and because of the lack of competence of international bodies to regulate this issue comprehensively[1], no universal but rather limited co-operations within different circles of states representing similar values and axiological approaches is likely to take place. For these reasons, it is necessary to consider also the identities of national legal systems when discussing the global issues of surrogacy.

The contracts with "surrogate mother" are invalid and non-effective in most of states in the world. Sometimes they are even expressly prohibited and the persons

[1] As far as the transnational effects of national approach to legal parentage (maternity and paternity) were concerned – see: P. Mostowik, "Legislative activities of European Union versus fundamental principles of paternity and maternity in Member States", *International Journal of the Jurisprudence of the Family*, 2017 vol. 8, pp. 79–94, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3224049 (last accessed: 15 November 2018).

organizing and performing the procedure can be penalized. However, demands aiming to introduce such a legal solution to domestic law or to recognize effects of foreign law and civil status registration (which *de facto* leads to a similar substantive effect) have been noticed also in the last group of countries. The issue – especially from the *post factum* perspective of the child's care – has been recently debated before the European Court of Human Rights and is at present being discussed both by international organizations and at national level. The development of the "surrogacy" provokes a number – as evidenced by the title of the book – both legal and ethical problems.

In the introductory words to the book, I would like both to refer shortly to circumstances influencing the methodology and scope of studies contained in the book and to present personal substantive remarks about terminology and legal problems regarding to the surrogate birth.

The main content of this publication are texts written by international experts, which are presented in the ordered 'from general to specific' chapters. The monograph begins with the considerations on theory, philosophy and sociology of law, as well as with comparative remarks about different legal systems in the world. Subsequently, comments on the fundamental principles of law resulting from the constitutions of the reported states and international treaties on the protection of human rights are presented. Further detailed considerations include issues of private (substantive) law, including the relationship of the legal institutions present in some of countries and called worldwide 'surrogate motherhood' (de facto – its various types) to the legal principles of filiation (motherhood and fatherhood), personal status and adoption. The publication is crowned with considerations regarding the protection of fundamental principles of the legal order (*ordre public*) – first, through the solutions of domestic family law and private international law and civil procedure, and then concerning domestic criminal law and police cooperation. Thanks to the annex, the excerpts of interesting documents from various countries and organisations, as well as the updated review of information on practical aspects of the issue found in the press, can be acquainted.

2. *Stricte* surrogacy and other forms of "surrogate birth"

It is worth mentioning in the beginning, that the commonly used term "surrogate motherhood" is inaccurate. Firstly, as the "surrogate mother" is described not

the woman with legal status of mother, who takes care of the child, but a woman who was pregnant, gave birth to the child and contractually transferred the status of parent to another person. Secondly, in fact the last one could be described as "surrogate" in relation to the one pregnant and giving birth. Thirdly, it is doubtful, whether a scope of applicability of legal solutions adopted under this name in some of legal systems can be described as "surrogate". It is controversial, whether the delivering the child to constellations of people within conception and reproduction is in biological nature not possible (i.e. single persons or same-sex couples) can be logically described as "surrogate". It does not substitute the result possible in the nature but creates a specific legal fiction. Summarizing, it seems that the term alternative terms of "surrogate pregnancy" and "surrogate birth" are more accurate. After such proposals of mine and the discussion during the project these expressions are also used by some authors of contributions to describe the essence of the topic.

In my opinion, at the beginning of the 21st century, we need to create some additional terms and classifications that correspond to the changed reality and non-uniformity of procedures called "surrogate motherhood." The most important and useful classification seems to be the one based on the genetic origin of the child, the biological pregnancy and birth, as well as the legal status of father and mother (or parents 1 and 2) contracted under the classified laws. My proposal, for the purpose of discussion and my report, is the following distinction:

a) *stricte* surrogacy – a couple of woman and man contractually acquire the legal status of mother and father of a child (embryo) of their genetic origin, regardless the fact that another woman was pregnant and gave birth to it (e.g. a pure "renting of womb");
b) surrogacy *sensu largo* – a couple of woman and man contractually acquire the legal status of mother and father of a child (embryo) of genetic origin of one of them (the semen or ovum comes from another man or woman, e.g., from the so-called donor), regardless the fact that another woman was pregnant and gave birth and the fact that the child is partly genetically derived from another (fourth) person (e.g., "renting of womb" combined with *in vitro* fertilization using either an egg cell or sperm of the so-called donor);
c) *pseudo* surrogacy – another configuration of persons contractually acquires the legal status of mother or parents 1 and 2, although, biologically evaluating, such a constellation could not in general be ancestors of the same child (e.g., one person or a same-sex couple).

3. The problem of assumptions and progressive content of surrogacy

If somebody asked, whether people are aware what the content of current legal concepts called "surrogate motherhood" is, I would say: "No. Definitely not". In most legal systems, the observation *mater semper certa est*[2] is still valid, because the legal maternity is connected with a woman who has given birth to a child. However, in some legal systems biology (nature) has been *de facto* rejected as the foundation for family law. In my opinion, the current state of play in some of legal systems in the second decade of 21st century can be described by the following description: A doubtful route from "womb to rent" via "infertility treatment" with "donated" egg or sperm up to "asexual [really artificial] reproduction" of singles and homosexual couples.

The initial fundamental issue concerns the expression used widely in Anglophone literature and, because of this formal reason, it is featured in the title of the book. Are we, by saying surrogate "motherhood", really talking about motherhood? The first – crucial to the quality of any scientific discussion – question is whether the woman, who was pregnant and subsequently gave birth to a child, can be described as "mother" under the legal systems that use this term to describe the legal solution (e.g. in birth/civil status record), when another woman is legally recognized as the primary mother (the one who acquired such a primary legal status via contract). Maybe the more precise term should be surrogate "birth" or "giving birth"? (or "surrogate uterus", "surrogate womb").

Under the legal systems that have introduced the so-called "surrogate motherhood" may occur a kind of competing with the alternative rule as regard to the child, i.e. the legal status of the woman who gave birth to the child and the legal status of person contracting with the surrogate. Non-pregnant woman has been legally described as primary "mother" or "parent 1 or 2". Single persons and homosexual couples become treated as "creators" of a child and registered in birth records as the primary legal parents filiation. So the child – as a result of this legal fiction in the birth records – comes from the constellations of people in which the conception and pregnancy is in general not possible. These systems may *de facto* affect the global scale, e.g., through exporting and importing the legal effects between different states.

[2] *The Code of Justinian* (*Corpus Iuris Civilis*): "Mater semper certa est, etiamsi uolgo conceperit, pater uero is est, quem nuptiae demonstrant" (II, 4, 5).

Specific problems concern the understanding of the principle of good/welfare of child, in particular, the choice between individual (*hic et nunc*) evaluation of a given child and the general long term perspective of the children in the society. The latter seems *prima facie* to be correct as far as the general effect (affect) of jurisprudence of international tribunals is concerned.

In addition, it can be observed that the current broad definition of the so-called "surrogacy motherhood" (e.g., "[a] woman agrees for money to carry a child for the intending parent(s) and relinquishes her parental rights following the birth"[3]) in fact is close to the fact of sale and purchasing a human being. Speaking precisely, the acquirement (most often – *via* non-altruistic contract) not only of the child but also of its legal origin and the legal status of the parent (filiation). In my opinion, we as researchers cannot – during planning and conducting scientific research – overlook the reality of the application of law. In order to be familiar with "the law in action" (by the way – this is precisely the title of a peer-reviewed journal edited by the Institute of Justice), we should also be familiar with current press and electronic media commentaries on the social and political reality. Such a situation raises a series of fundamental and legal problems that are engagingly discussed in the present book.

The preliminary research on several legal systems leads also to the conclusion that the evolution of the so-called "surrogacy motherhood" has created a number of fundamental problems and in-depth studies have become urgent. The origins of those problems lie in strongly differentiated legal systems concerning filiation (maternity and paternity) and civil status registration and criminal law, as well as concept of infertility treatment including actual situations not logically relevant from fertility concept, i.e., single person and same-sex (in practice: homosexual) contractors, that could be described by the words: surrogacy that *naturam non imitatur*.

4. The need for a complex research methodology

The progressive complex character of the topic results in the necessity of a comprehensive approach and a general methodological assumption that the topic should be studied and discussed not in the limited scope of one branch of law, as it has been usually presented in the literature so far, but in a more complex way. The subject

[3] See: working documents of the Hague Conference of Private International Law, https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy (last accessed: 18 November 2018).

matter requires studies from the perspective of humanities and the social sciences, in particular, in relation to various areas of law. Restricting the researches only to, for example, international, private or penal law would not present the diverse, intricate and multidimensional nature of the subject under study.

These observations resulted in the research being organized and based on a comparative analysis of the issue of surrogate motherhood and a multidisciplinary discussion of the issue in question, i.e., from the perspective of the constitutional, criminal, civil, and family law and civil registration. There is a need for the organization and systematization of the terminology and the preparation of possible actions under civil and criminal law to protect fundamental principles of the domestic legal order (e.g. aiming to support the prohibition of trafficking in children and to counteract the evasion of the adoption process). The procedures allowing surrogacy differ as to the conditions (e.g. as to the genetic link with the child) and effects of the surrogacy agreements (e.g., on civil status, or on financial restitution). On the other hand, the procedures prohibiting surrogacy are interesting from the perspective of many legal systems evaluating it negatively. Not only legal but also philosophical, sociological, and ethical aspects are of paramount importance. Of course, a comprehensive examination of the issues leads to a better diagnosis of the current legal situation and the reality based on it, and moreover – to a more correct answer to the question whether it is necessary to take any legal or political measures, e.g., ones of a protective or penal character.

Having in mind the reality (which in fact is going on)[4] – i.e. not only the legal but also the current political situation in the world – the fundamental issues related to the topic in question can be thoroughly studied and discussed. As a result, numerous essential questions are duly raised, putting the debate into the perspective of philosophy, sociology, anthropology, and theory of law. The key purpose is to study and understand domestic legal systems with focus on their fundamental principles – *de facto* grounds of (non)acceptance in substantive laws and (non)recognition of foreign civil status registration. We should take also into consideration both the constitutional and international legal foundations of filiation (child's origin, maternity and paternity), parents-child relationship, and human dignity. Current activities on

[4] The current reality is illustrated, for example, by the following websites: a service provided by a Ukrainian center: http://biotexcom.com/information/brief-explanation-surrogacy-process (last accessed: 14 November 2018); organization of a fundraiser for the acquisition of a child in South Africa by a Dutch homosexual couple: www.babyrainbow.nl (last accessed: 14 November 2018).

supranational level are of great importance so the surrogate motherhood as a subject matter of recent actions on international or federal level should be also considered.

The next research goal was to identify problems originated in public law. In particular, combating child trafficking, e.g., ban on "payment or compensation of any kind" under Article 4.d.4 of the Hague Adoption Convention (1993) and illegal "surrogacy business". This topic includes also criminal law, which is applied not only in the states completely prohibiting it, but also in legal systems which to some extent allow it (in fact, there is always some restricted extent and penalization of the activities and operations crossing the borders and territories of states). This includes also certain problems of criminal law, including difficulty to specify the prohibited activity and assign its connections to different areas of law.

The details and results of the so-called "surrogate motherhood" are the subject of great interest of substantive private law, in particular, family law. In many countries, for example, in Poland, France and Italy, the foreign law on surrogacy motherhood can be even evaluated as remaining in opposition to the domestic principles of substantive private law (maternity and paternity, civil status registration, adoption, freedom of contracts, unjustified enrichment).

It should be additionally noticed that the surrogate motherhood occurs quite often in cross-border situations. The problems raised in such circumstances are the subject matter of private international law and international civil procedure, which is the perspective from which I personally started studies on the topic. Luckily, some months or years have passed since: before the project could start I have matured intellectually and come to the conclusion that the studies and project should be carried out from a much broader perspective.

5. The first detailed questions identified as research topics

Shaping the research content in a complex way allows participating scholars to achieve a set of different goals. The first one is to research and try to describe what is legally and actually occurring in select states in the world under the name of "surrogacy motherhood" (including the growing surrogacy business and "child acquisition tourism"), as well as – if such a need appears – to propose terminology that precisely reflects the contents of different phenomena called in this way (e.g. to classify the different and – in my opinion – non-comparable situations described in scholarship under this one umbrella term). This part of research includes the

proposal of terminology and definitions that are precise and suit the current developed legal solutions and practice, as well as proposals to abandon the terminology that is misleading. The second one is to present and evaluate various legal solutions and facts (including growing differences between surrogacy models) from the perspective of philosophy, sociology and different branches of law (including law of international relations, constitutional law, private law, criminal law). The third one is to present conclusions *de lege lata*, i.e., a general assessment of the development of law and reality at the beginning of 21st century (in particular, from the perspective of human dignity, child trafficking, child's and woman's dignity and child's identity, as well as current trends in some societies), including the assessments from the conclusions of studies on different branches of law. The fourth one, as domestic laws are concerned, is to present arguments *de lege ferenda*, including substantial law and private international law solutions (including *ordre public* clause, effecting in the non-acceptance of effects of foreign law), arguments for/against probable future postulates of introducing or spreading the concept of "surrogacy motherhood agreements" in internal law or recognizing the effects of foreign procedures. The fifth goal is to evaluate or propose, if necessary, the future actions on international level, for example, recently proposed on the forums of Council of Europe and Hague Conference of Private International Law[5], or of opposite purpose, e.g. international agreement on non-recognition of foreign law, judgments, civil status records in all or some surrogacy cases, as well as international activities aiming at international police co-operation.

The comprehensive approach to the topic makes it easier to ask relevant questions and provide correct answers. In my opinion, there are several, identified during initial studies multidisciplinary questions that ought to be asked and tackled comprehensively. The most important fundamental and legal issues to discuss can be summarized by the following detailed questions:

What is the redefined and broadened content of legal solutions to the so-called "surrogate motherhood"?

Can the current state of play be critically evaluated as: (1) back to the future (despite the abolition of slavery) plus assisted reproductive technologies (including in

[5] See: https://assets.hcch.net/upload/wop/gap2015pd03b_en.pdf (last accessed: 19 November 2018), http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=23015&lang=en (last accessed: 19 November 2018); https://eclj.org/surrogacy/pace/gpa--vote-final-au-conseil-de-leurope (last accessed: 19 November 2018); https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy (last accessed: 19 November 2018).

vitro fertilization using material from donors) and (2) "asexual innovations" (delivering children to single persons and same-sex couples)?

Are the classifications and definitions adopted decades ago still useful in research and debate in the second decade of the 21st century?

Are, as the discussed examples show, human rights protected in action or is the protection now defunct?

Are the results of surrogacy motherhood an example of overt circumventing the prohibition of trade or trafficking of human beings? Do they indirectly violate the rules of human beings identity and constitute an unfair competition with the adoption system?

Are modern technologies and the redefinition of surrogate motherhood de facto in the service of child trafficking?

Are the ideas of unifying legal systems (with a positive or a negative answer) at international level possible and sensible in the era of totally different domestic laws?

What kind of roles will international law, jurisprudence of tribunals, and domestic private international law play in the future?

Will accepting by the tribunals some effects as exception in 'individual cases" lead to the danger of the general (law-making) effect of such a – de facto general – judgment?

Is it coherent and consistent to evaluate surrogate motherhood negatively in accordance with internal (regional) law and simultaneously to accept the effects of procedures that took place abroad?

What are the financial consequences of nullity of agreement and restitution actions when the contract is declared null and void under certain domestic laws?

What should (and is likely to) happen in the future (de lege lata and *de lege ferenda)?*

Does the international agreement on recognition (e.g. proposals discussed under the auspices of the Hague Conference of Private International law) of foreign judgments (birth records) contradict the international agreement on combating child trafficking and exploitation of women?

What kind of domestic or international legal and political measures in criminal law should and can be taken internally and internationally by groups of states refusing or accepting a contract with a surrogate regarding pregnancy, childbirth, and transfer of the child's civil personal status (filiation)?

6. Final remarks

The saying "May you live in interesting times" is sometimes reported as being of ancient Chinese origin, sometimes as of contemporary North American origin. According to some authors, it is a blessing, and according to others – it is a curse. Definitely, we are destined to be living in interesting times and have an opportunity to shape the future of the political and legal reality. The book proves that the diversity of phenomena called – *de facto* not precisely – "surrogate motherhood" should be seen not only from the restricted perspective of casuistic cases and particular branches of law, but with a general and long-term approach of all human sciences in mind; it should not be exclusively focused on current issues in internal legal systems but also on a regional and global perspective. Hence the importance of not only internal public law and private substantive law, but also of international private law and civil procedure, international criminal law and procedure, as well as international principles of human rights' protection and European police cooperation. It is only through comprehensive and complex studies that a reliable assessment of the fundamental legal problems of the discussed phenomenon is possible.

Finally, I would like to express hope that the participants in the discussion and readers of this book will in the future not only observe the above-mentioned processes, but also have arguments for shaping the legal instruments and law-making judiciary in compatibility with fundament ethical principles and human dignity as well as with non-casuistically perceived welfare of women, best interest of children, families and the human society at large.

CHAPTER I Philosophy, sociology, and theory of law

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Ethical and philosophical issues arising from surrogate motherhood

1. Introduction

The practice of surrogate motherhood belongs to the wide spectrum of new issues in human procreation, which were established due to the rapid and revolutionary advances in technology. There are some who claim that the idea of surrogate motherhood has been known for ages and it has been the same practice, which now has appeared in new form. The examples which are invoked usually to support this claim come from the Biblical and ancient times when infertile wives (like Biblical Sarai) gave their slaves or handmaiden (like Hagar) to their husbands (like Abram) so they could have the progeny (like Ishmael – the son of Abram and Hagar) with them.[1] Yet, the difference between the given examples of ancient customs and surrogate motherhood which we know now is crucial since the women who gave birth to children to provide successors to men were considered as mothers and did not have to relinquish their rights and responsibilities to the children.[2] What is more, they became legitimate wives to the fathers of their children. As Herbert Krimmel accurately points out, such ancient customs constituted "an extension (albeit polygamous) of the family unit."[3] Surrogacy, by contrast, undermines biological bonds and the meaning of family replacing the traditional familial relationships rooted

[1] Genesis 16, *The Holy Bible. King James Version*, New York Bible Society since 1809, printed in Great Britain, pp. 19–20.

[2] H.T. Krimmel, *The Case Against Surrogate Parenting*, "Hastings Center Report" 1983, no. 13 (5), p. 36.

[3] Ibidem.

in biology and commitment with new familial relationships rooted in contract and market exchange. The concept of surrogate motherhood we are discussing here is the invention of our times and the product of the application of new procreative technologies, which enable the separation of conception from sexual act and body, the separation of the particular elements of the process of procreation, such as conception and gestation, as well as the separation of procreation from responsibility of rearing.

The idea of surrogacy appeared as the new "reproductive option"[4] – a special kind of solution for infertility problems primarily due to gestational problems of women (medical problems with uterus). The use of assisted reproductive techniques (ART) such as in vitro fertilization (IVF) and in vivo fertilization opened a new set of opportunities to use the reproductive capacities to gestate and deliver a baby of other women if the one who was willing the baby was unable to gestate and deliver herself. The initial idea was to use the surrogate in order to help the couple to have a child who is genetically related to the father. The further advances of ART enabled also the use of the surrogate in order to help the couple to have a child genetically related to both of them (with the use of their gametes). In time, the use of both ART and surrogacy expanded to many different reasons, such as conditions which make pregnancy risky for the health of a women (e.g. heart disease or a severe eye disease); the sterility[5], being the result of medical treatment (e.g. hysterectomy with bilateral salpingo-oophorectomy in cancer treatment – removal of the uterus, cervix, ovaries, and fallopian tubes) or advanced age (when post-menopausal woman who are not able to have their own children use surrogates) or the so-called "social infertility"[6]

[4] J.L. Nelson, H.L. Nelson, *Reproductive Technologies, VI. Contract pregnancy*, [in:] *Encyclopedia of Bioethics*, 3rd edition, vol. 4, ed. S.G. Post, New York 2003, p. 2291.

[5] In medical language one distinguishes infertility from sterility. Infertility is understood as a temporary stage in attempting to have a child; sterility on the other hand is understood as permanent incapacity to beget children. In the gynecological context one uses a distinction between relative and absolute infertility. The former one is defined as limited reproductive capacity (*infertilitas*) and the latter as resulted from incapacity of fertilization (*sterilitas*). According to the clinical definition given by the World Health Organization (WHO) infertility is "a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse." (The International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) Revised Glossary on ART Terminology, 2009, http://www.who.int/reproductivehealth/topics/infertility/definitions/en/, accessed: September 2018). See: J. Haberko, *Ustawa o leczeniu niepłodności. Komentarz*, Warszawa 2016, p. 20–21.

[6] M.K. Smith, *Saviour Siblings and the Regulation of Assisted Reproductive Technology. Harm, Ethics and Law*, Ashgate, Dorchester 2015, p. 28.

(when the use of surrogates enable single men who do not want to be "burdened by a spouse" or gay couples to have their own children genetically related without any need for a sexual intercourse or any relationship with women).[7] Making use of surrogates enable also having a child to people who are not eligible for adoption due to their age, marital status, etc.[8] As Inmaculada de Melo-Martin accurately points out, the new procreative technologies combined with genetics (the so-called reprogenetics)[9] which were initially invented to alleviate medical problems are often used to challenge social problems which may give rise to justified moral concerns.[10]

All these new techniques of reprogenetics change the meaning of such fundamental concepts as procreation, parenthood, familial bonds or humanity.[11] In western societies there is a wide acceptance for ART if they are presented as medical procedures performed from therapeutic reasons and aimed at enabling people to have healthy children.[12] Biological revolution is enthusiastically welcomed, as Leon Kass writes, since it is based on values which are of high significance in democratic-liberal societies, such as: promoting health, alleviating suffering, progress, freedom of science, conquering nature, freedom of choice, enhancement.[13] Yet these values are being often pursued at the cost other incommensurable values, such as human dignity[14]. This what we consider as therapy may in the same time bring about questioning of what we understand as human parenthood or procreation.[15] Reprogenetics increases the scope of procreative choices and strengthens control over human procreation, yet it also brings about its dehumanization, technicization, and commercialization. These new reproductive technologies affect our system of values

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[7] See: H.T. Krimmel, *op. cit.*, p. 35.

[8] WebMD Medical Reference, *Using a Surrogate Mother: What You Need to Know*, reviewed by T.C. Johnson, "Infertility and Reproduction, Guide", 2017, https://www.webmd.com/infertility-and-reproduction/guide/using-surrogate-mother#1 (last accessed: September 2018).

[9] The term "reprogenetics" was popularized by the biologist Lee M. Silver (L.M. Silver, *Reprogenetics: Third millenium speculation*, EMBO Reports 2000, vol. 1, pp. 375–378), and can be also defined as the application of modern techniques of procreation aimed at having a child with the best biological and social chances for the future (J. Domaradzki, *Janusowe oblicze reprogenetyki*, Nowiny Lekarskie 2009, vol. 78, No. 1, pp. 72–73).

[10] I. de Melo-Martin, *Rethinking Reprogenetics: Enhancing Ethical Analyses of Reprogenetic Technologies*, Oxford University Press, Oxford 2016, p. 390.

[11] Ibidem; L. Kass, *op. cit*., P. Ramsey, *op. cit*.

[12] P. Ramsey, *Fabricated Man. The Ethics of Genetic Control*, Yale University Press, New Haven, London 1970, pp. 110–112.

[13] L. Kass, *Life, Liberty and the Defence of Dignity*, San Francisco 2002, pp. 3–8.

[14] Ibidem, p. 22.

[15] P. Ramsey, *op.cit.,* p. 112.

and shape our moral attitudes to human life, health, disease, disability, body, sex, familial bonds, kinship, intergenerational relationships, procreation, parenthood, progeny, human identity, responsibility, freedom, equality and justice.

Most of the moral problems which arise in the context of surrogate motherhood are the moral implications of the use of ART in general.[16] Yet, I would like to focus in this paper on moral and philosophical problems, which are specific for the surrogacy. Thus, I will not discuss here such moral issues as genetic selection or enhancement of progeny[17] since moral objections formulated in the discussion of these problems do not refer to surrogacy itself although one may make use of genetic selection in all contexts of the use of ART, including surrogacy. I will only discuss the moral problem of including the requirement of genetic selection in contractual provisions. The same regards moral issues concerning trade and donation of human gametes[18], or post-mortem fertilization[19] – though they may be used in surrogacy contract they are not an essential part of this practice (there are types of surrogacy which do not make use of them) and are a matter of separate moral concerns. For the same reasons, I will not discuss here the fundamental moral problem of the normative status of an embryo and fetus[20], since the moral objections grounded on the assumption of

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[16] C.B. Cohen, *Reproductive Technologies, VIII. Ethical Issues*, [in:] *Encyclopedia of Bioethics*, 3rd edition, vol. 4, ed. S.G. Post, New York 2003, pp. 2298–2307.

[17] M. Soniewicka, W. Lewandowski, *Human Genetic Selection and Enhancement: Parental Perspectives and Law*, Peter Lang, Frankfurt am Main 2019; I. de Melo-Martin, *Rethinking…*.; L. Kass, op.cit.; J.R. Botkin, *Prenatal Diagnosis and the Selection of Children*, "Florida State University Law Review" 2002, vol. 30, pp. 265–293; A. Asch, *Public Health Matters. Prenatal Diagnosis and Selective Abortion: A Challenge to Practice and Policy*, "American Journal of Public Health" 1999, vol. 89, No. 11, pp. 1649–1656; M. Soniewicka, *Failures of Imagination: Disability and the Ethics of Selective Reproduction*, "Bioethics" 2015, vol. 29, No 8, pp. 557–563; S. Wilkinson, *Choosing tomorrow's children. The ethics of selective reproduction*, Clarendon Press, Oxford 2010.

[18] R. Macklin, *What Is Wrong with Commodification*? [in:]: *New Ways of Making Babies: The Case of Egg Donation*, ed. C. Cohen, Bloomington-Indianapolis 1996, pp. 106–121; D. Fox, *Paying for Particulars in People-to-be: Commercialisation, Commodification and Commensurability in Human Reproduction*, "Journal of Medical Ethics" 2008, No. 34(3), pp. 162–166.

[19] A. Tworkowska-Baraniuk, *Sztuczna inseminacja nasieniem zmarłego dawcy – wątpliwości natury prawnej i etycznej*, [in:] *Non omnis moriar. Osobiste i majątkowe aspekty prawne śmierci człowieka. Zagadnienia wybrane*, ed. J. Gołaczyński, J. Mazurkiewicz, J. Turłukowski, D. Karkut, Wrocław 2015, pp. 811–824.

[20] R. Wasserstrom, *The Status of the Fetus,* „Hastings Center report" 1975, No. 5(3), pp. 18–22; C. Strong, *The moral status of preemebryos, embryos, fetuses, and infants,* "Journal of Medicine and Philosophy", No. 22(5), p. 457; B. Steinbock, *The Morality of Killing Human Embryos*, "Journal of Law, Medicine, and Ethics" 2006, No. 34(1), pp. 26–34; J. T. Noonan, Jr., *An Almost Absolute Value in History*, [in:] *The Morality of Abortion: Legal and Historical Perspectives*, ed. J.T. Noonan, Jr., Cambridge, MA 1970, pp. 51–59; M. A. Warren, *On the Moral and Legal Status of Abortion,* [in:] *The Problem of*

the normative status of a conceived child in all stages of its development are not objections against surrogacy as such, but against the use of IVF, and only some types of surrogacy make use of IVF too. Yet, surrogacy itself constitutes a set of moral and philosophical problems, which are worthy of consideration and which regard the idea of surrogacy itself and not only some aspects or methods used to achieve this goal. The main aim of this paper is to present and analyze moral and philosophical arguments concerning the idea of surrogate motherhood in general, and objections against different forms of surrogacy in particular.

I will start with providing the definitions and crucial distinctions of the discussed problem, as well as with discussing its conceptual frames. I will also present the prominent court cases, which reveal the most important dilemmas of the surrogacy contracts and elucidate significant moral questions. Then, I will turn to discussing the most important philosophical and moral issues such as the problem of the meaning of the relationship to our body from Aristotelian-Thomist, Kantian, utilitarian, Lockean, and phenomenological perspective. Further, I will discuss the concept of reproductive autonomy from Kantian, utilitarian and Lockean perspective. Finally, I will discuss the consequential, deontological, and neo-Aristotelian arguments used in the bioethical debate over surrogacy.

2. Terminological issues – concepts and definitions

There are many controversies regarding the terminology and definitions used in the context of surrogate motherhood. Conceptual issues are of high importance in philosophical and moral analysis of the problem. The terms we use in ethical debates are not purely neutral since they provide meaning and frame the discussion of the problem, usually bearing some axiological significance.

Laura Purdy coined the term "contracted pregnancy" in order to avoid the prejudice concerning the moral and legal status of a woman who gives birth to

Abortion, ed. J. Feinberg, Belmont, California 1974, p. 102–116; M. Lockwood, *The Moral Status of the Human Embryo: Implications for IVF,* "Reproductive BioMedicine Online" 2005, Supplement 1, vol. 10, pp. 17–20; J. Kapelańska-Pręgowska, *Prawne i bioetyczne aspekty testów genetycznych*, Warszawa 2011, pp. 160–189; O. Nawrot, *Ludzka biogeneza w standardach bioetycznych Rady Europy*, Warszawa 2011, pp. 96–150; J. Haberko, *Cywilnoprawna ochrona dziecka poczętego a stosowanie procedur medycznych*, Warszawa 2010, pp. 23–110; L. Bosek, *Gwarancje godności ludzkiej i ich wpływ na polskie prawo cywilne*, Warszawa 2012, p. 166.

a child.[21] In her opinion, naming the woman "surrogate mother" is incorrect since it suggests that the woman replaces another woman in reproductive services and does not have a status of a mother and any rights to the child which is a matter of dispute.[22] If the surrogate provides also her ova and is artificially inseminated by the donor or the future father of the child, her "biological input is at least equal to that of a man."[23] Yet, she is not in favor of the use of the term "mother" or "contracted mother"[24] with reference to neither the surrogate nor egg donor since she argues for reserving the term "mother" for the woman who plays the role of "social nurturing" of the child.[25] Also John Robertson questions the use of the term "surrogate mother" in the discussed context claiming that the woman who provides both her egg and uterus for the child is the natural mother, and she does not substitute the mother but rather the spouse who is infertile.[26] In his opinion, the adoptive mother is a surrogate mother in fact "since she parents a child borne by another" woman.[27] Robertson calls the surrogacy the special kind of "collaborative reproduction" where "A third person provides a genetic or gestational factor not present in ordinary paired reproduction which allows some persons who otherwise might remain childless to produce healthy children."[28] Among the techniques of "collaborative reproduction" he names also: artificial insemination by donor (AID). One could include here also mitochondrial replacement techniques (MRTs)[29] and reproductive cloning[30], where the former is currently available, and the latter not.

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[21] L. Purdy, *Surrogate Mothering: Exploitation or Empowerment?* [in:] *Bioethics. An Anthology*, Blackwell Publishing, ed. H. Kuhse, P. Singer, Oxford 2007, pp. 90–99.

[22] Ibidem, p. 91.

[23] Ibidem.

[24] This term was introduced by Sara Ann Ketchum (S.A. Ketchum, *New Reproductive Technologies and the Definition of Parenthood: A Feminist Perspective*, paper given at the 1987 Feminism and Legal Theory Conference, at the University of Wisconsin at Madison, summer 1987, p. 44).

[25] L. Purdy, *op. cit.,* p. 97.

[26] J. Robertson, *Surrogate Mothers: Not So Novel After All*, "Hastings Center Report" 1983, No 13(5), p. 28.

[27] Ibidem.

[28] Ibidem.

[29] I. de Melo-Martin, *Rethinking…*, pp. 86–90, 379–432.

[30] M. Tooley, *The Moral Status of the Cloning of Humans,* [in:] *Bioethics. An Anthology*, ed. H. Kuhse, P. Singer, Oxford 2007, pp. 162–177; R.M. Green, *Much Ado about Mutton: An Ethical Review of the Cloning Controversy,* [in:] *Cloning and the Future of Human Embryo Research*, ed. P. Lauritzen, Nowy York 2000, pp. 114–131; M.C. Nussbaum, C.R. Sunstein (ed.), *Clones and Clones. Facts and Fantasies About Human Cloning*, Nowy York, Londyn 1998; L. Kass, *op.cit.,* p. 136; P. Ramsey, *op.cit.*, pp. 60–103.

The authors of the entry to *Encyclopedia of Bioethics* adopted, after Purdy, the term "contract pregnancy".[31] Yet, this term is also questionable. First of all, not all practices of surrogacy are explicitly contractual – some of them are of more informal nature, without any written contract, without payment and do not involve intermediaries (they can be seen as contractual in a broad sense, of course). Secondly, this term refers to pregnancy only which can be misleading, since the described practice involve not only establishment of pregnancy in a woman and child's delivery, but foremost transferring the rights to the child to the third party.

To sum up, the terms which are used in this context include among others: **"surrogate motherhood"**, **"surrogate mothering"**, **"surrogacy"**, **"contracted motherhood"**, **"contracted pregnancy"**, **"contract pregnancy"**, **"collaborative pregnancy"**. I will use these terms (mostly surrogate motherhood, surrogacy and contracted pregnancy) interchangeably in my further considerations.

James Lindemann Nelson and Hilde Lindemann Nelson define contract pregnancy as a phenomenon which: "consists of a complex set of practices in which women employ their distinctive reproductive powers to give birth to children on the understanding that others will take on the responsibilities and prerogatives involved in the rearing of the children."[32] This definition seems to be too broad since it does not allow us to distinguish between such practices as prenatal adoption and surrogacy. I think that to make the distinction clear, we should define the contractual pregnancy (surrogate motherhood) as a complex set of practices in which women become pregnant with the use of ART and give birth to children in order to transfer the responsibilities and prerogatives involved in the rearing of the children to the other parties. In the contractual procedure, the parties to the contract who initiate the procedure and cover its costs (commissioning parties) are supposed to be seen as prospective parents. They usually pay the compensation and/or gratification to a woman for her reproductive services and contribution which may also include her ovum.

It is worth stressing that the contract pregnancy (surrogate motherhood) occurs in different options, which may be also significant for ethical and legal evaluation of the practice since they may have different applications and give rise to different moral and legal problems. One may distinguish between the so-called full surrogate

[31] J.L. Nelson, H.L. Nelson, *op. cit.*, p. 2291.
[32] Ibidem.

and partial surrogate in the contract pregnancy.[33] **The full surrogate** one refers to a woman who provides her ova and womb in order to gestate and give birth to children who are conceived with the use of artificial insemination – either in vitro fertilization (IVF) or in vivo fertilization. In other words, the full surrogate gives her gametes as well as her body and reproductive capacities to conceive, gestate, and give birth for another person or persons who will have the rights and responsibilities of rearing a child. Male gametes (sperm) used in the procedure of fertilization may be provided by the commissioning party who wants to be the father rearing the child or can be provided by the third party – anonymous donor or another person who relinquishes rights and responsibilities to the child. This kind of surrogacy is also called traditional surrogacy.[34] Many authors compare this kind of surrogacy to prenatal adoption.[35] Yet, the significant difference between these two practices is that adoption concerns giving away of an existing (conceived) child when the mother is unable or unwilling to nurture it; while the surrogacy concerns conceiving (creating) a child in order to give it away to someone else who will nurture it.[36] Krimmel compares this practice to AID since in both cases people are helping to create a child for someone else providing their germinal material.[37] Yet, the role of the surrogate is much bigger, since she not only provides her germinal material but also nurtures the fetus and delivers the baby, which results in developing a gestational bond between her and the child. I will come back to these issues in my further considerations.

The partial surrogate, on the other hand, is a woman who gestates and gives birth to children who were artificially conceived with the use of IVF and who are genetically not related to her. The genetic material – male and female gametes – are provided either by contractors (the prospective parents who want to rear the child) or by the third parties – anonymous donors or other persons who relinquish rights and responsibilities to the child. It is also possible that sperm is provided by a contractor and ova by a third party, or the other way round. Usually it depends on health issues and fertility problems of the prospective parents who want to have

[33] Ibidem. See: M. Safjan, *Prawne problemy zastępczego macierzyństwa*, [in:] *Prawne problemy ludzkiej prokreacji*, ed. W. Lang, Toruń 2000, pp. 292–305; O. Nawrot, *Miecz Salomona*, [in:] *Fascynujące ścieżki filozofii prawa*, ed. J. Zajadło, Warszawa 2008, p. 133–144.

[34] WebMD Medical Reference, *op. cit.*

[35] J. Robertson, *Surrogate Mothers…*, p. 28; B. Steinbock, *Surrogate Motherhood as Parental Adoption*, "Law, Medicine & Health Care" 1988, No. 16 (1–2), pp. 45–50.

[36] H.T. Krimmel, *op. cit.*, p. 35–36.

[37] Ibidem, p. 35.

a baby. This kind of surrogacy is called gestational surrogacy[38] and has become more frequent than the traditional one,[39] since it can guarantee that commissioning parties who provide their gametes are both genetic parents of the child, and thus the role, the biological ties and also, in some states, legal rights to the child of the surrogate are weaker.

Depending on the kind of surrogacy, we can distinguish three different roles connected with the role of the mother, which in the case of surrogacy may be played by different women. The first role is connected with providing the ova (genetic material) and this role can be named as the role of **"genetic mother"** or **"egg donor"**. The second role is connected with providing the womb and reproductive capacities for gestation of a child and its delivery – this role can be named as the role of **"gestational mother"**, **"gestational surrogate"** or **"birth mother"**, **"contract birthgiver"**. The third role is the one connected with rearing the child, having custody of the child (rights and responsibilities) and can be called **"rearing mother"**, **"sociological mother"** or **"legal mother"**.

As far as the male role in surrogate procreation is concerned, we can distinguish two possibilities, just like in adoption case – **the biological (genetic) father** and **the legal or sociological father** who is rearing the child. What differs the case of surrogacy and adoption, that the **"rearing father"** (the one who wants to have custody of the child) initiates the conception of the child, even if he is not the biological father himself, this is he who takes the decision of conceiving a child, instead of the biological father who only provides his genetic material for that purpose. In adoption case, by contrast, the child is already conceived and in most of the cases (except prenatal adoption) also borne, when the man who wants to rear the child takes this decision and initiates the legal procedure to gain custody of the child. In the case of surrogacy, the child would have never been borne if the man who wants to rear the child would not had found the surrogate mother who agreed to deliver the baby he wanted. This difference is morally crucial, what I will elucidate in my further considerations.

As mentioned before, contract pregnancy is constituted by a formal or sometimes informal agreement between the parties. The most common, formal agreement has usually a form of a written contract between the surrogate and the commissioning parties – a person or a couple. The surrogate obligates herself to either being

[38] Ibidem.
[39] Ibidem.

artificially inseminated, gestate, deliver the baby and then transfer her custody rights of the delivered child to the commissioning party, or she obligates herself to gestate and deliver a baby which was conceived through IVF, which requires her agreement on an embryo transfer to her body. Just as in the former case, she also obligates herself to relinquish her custody rights of the child so as the commissioning party could take the custody of the child. The commissioning parties obligate themselves to cover all the medical costs of ART, pregnancy and child delivery, as well as legal costs of the procedure. They obligate themselves to take the custody of the child. The contract may also include the obligation of the commissioning parties to compensate the surrogate for her "reproductive service" (in particular, for her time, risk, health and mental costs etc.) – this payment can be included in the contract as a form of compensation or as a form of gratification. The surrogacy does not have a pecuniary form if the surrogate does not get any financial gratification. Usually also the "compensation" for service is not considered as a form of financial gratification, since it is aimed at compensating costs held by the surrogate due to the procedure and not her benefit. Yet, if the compensation is very high it can be seen as a hidden form of gratification.

The surrogate may be found among the friends or family members of the commissioning parties.[40] "The American Society for Reproductive Medicine accepts certain family ties as acceptable for surrogates. It generally discourages surrogacy, though, if the child would carry the same genes as a child born of incest between close relatives."[41] The surrogate can be also a stranger found in the market (which is the most common practice) – either directly (by advertisements) or by a surrogacy firm which is paid for finding and connecting potential surrogates with those who seek them in order to have a child. In many states one can find special surrogate mother centers, clinics, newsletters.[42] Depending on the state regulation, the surrogacy agencies may run commercial business (USA), be non-profit organizations (UK) or even governmental bodies (Israel).[43]

Selecting a surrogate, just like selecting a germinal (an egg and/or sperm) donor is usually performed according to certain medical and non-medical criteria, such as the age of a woman (usually a woman who is 21–35 years old), medical check-up

[40] WebMD Medical Reference, *op. cit.*

[41] Ibidem.

[42] J. Robertson, *Surrogate Mothers…*, p. 28.

[43] C. Fabre, *Whose Body is it Anyway? Justice and the Integrity of the Person*, Oxford 2008, pp. 217–218.

(the woman usually has to have a medical exam to confirm that she would likely be able to deliver a healthy child; usually it is suggested that the woman is checked for infectious diseases, e.g. syphilis, HIV, hepatitis B and C, gonorrhea, Chlamydia, cytomegalovirus, and also checked for the immunity to measles, rubella, and chickenpox).[44] Other criteria that are often taken into account include: that the woman has already given birth to at least one healthy baby (this could also help to guarantee that she understands all the health and mental risks of pregnancy and childbirth, as well as emotional bonding with a newborn); that the woman has passed positively psychological screening (to guarantee that her baby will be also mentally sound as well as to guarantee that she is fully aware of the conditions of the contract); certain marital status (some people prefer a surrogate who is married than single); social background, education, IQ level, physical traits (just like in the case of germline donors, some parents select such a woman who would increase chances of a baby for preferred genetic traits such as intelligence, beauty, athletic body, adequate temperament or special talents like musicality).[45]

The agreement is usually concluded through intermediaries (a lawyer or an agency). What is more, the contract may also include special provisions concerning the conduct of the surrogate during pregnancy (e.g. special diet, medical control and precautionary measures such as avoiding risky sports or behavior or abortion in the case of genetic defects of the fetus). It can also include special clauses concerning for instance prenatal diagnosis and the requirement of abortion in the case of genetic defects, etc.

The surrogacy is quite expensive and varies from country to country depending on the costs of medical care, insurance system and legal aid. In the USA, the cost of surrogacy range from $80,000 to $120,000 up to date.[46] To lower these costs, some people decide to go abroad to hire a surrogate, in particular, to low-income countries such as India, Brazil, Mexico, Ukraine, etc. This practice is called "reproductive tourism"[47], which can be also motivated by legal restrictions on the use of

[44] WebMD Medical Reference, *op. cit.*

[45] R. Green, *Babies by Design,* New Haven 2007, pp. 77–78; D. DeGrazia, *Creation Ethics. Reproduction, Genetics, and Quality of Life*, Oxford 2012, p. 63–67; J. Harris, *Enhancing Evolution. The ethical case for making better people*, Princeton 2007.

[46] WebMD Medical Reference, *op. cit.*

[47] R. Deonandan, *Recent trends in reproductive tourism and international surrogacy: ethical considerations and challenges for policy,* "Risk Management and Healthcare Policy" 2015, vol. 8, pp. 111–119; M. Sandel, *Justice. What's The Right Thing To Do?*, New York 2009, p. 100; O. Nawrot, *Macierzyństwo zastępcze – aspekty moralno-prawne*, "Etyka" 2000 No. 33, p. 186.

ART in some countries from which people go to infertility clinics in the more liberal countries to conduct the procedure which they wish (e.g. to perform sex selection of the progeny[48], to create the so-called savior siblings[49] or to make use of MRTs[50]).

Let me invoke a description of typical surrogate mothering held in the USA in the 80. of the 20th century, which was given by John Roberts:

> For a fee of 5,000–10,000[51] a broker (usually a lawyer) will put an infertile couple (or less often, a single man) in contact with women whom he has recruited and screened who are willing to serve as surrogates. If the parties strike a deal, they will sign a contract in which the surrogate agrees to be artificially inseminated (usually by a physician) with the husband's sperm, to bear the child, and then at or soon after the birth to relinquish all parental rights and transfer physical custody of the child to the couple for adoption by the wife. Typically, the contract has provisions dealing with prenatal screening, abortion, and other aspects of the surrogate's conduct during pregnancy, as well as her consent to relinquish the child at birth. The husband and wife agree to pay medical expenses related to the pregnancy, to take the custody of the child, and to place approximately $10,000 in escrow to be paid to the surrogate when the child is transferred. The lawyer will also prepare papers establishing the husband's paternity, terminating the surrogate's rights, and legalizing adoption.[52]

The legal aspect of concluding the contract and enforcing it depends on the country regulation. From the legal point of view, both, the validity and enforceability of the contract itself as well as its provisions is a matter of legal dispute. In some countries, this kind of contracts are prohibited, in some are not prohibited but still not valid and/or not enforceable. Yet, in some countries this kind of contracts are valid but voidable or both valid and enforceable, though the provisions may

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[48] S. Wilkinson, *op.cit.*, pp. 209–250; I. de Melo-Martin, *Sex Selection and the Procreative Liberty Framework*, "Kennedy Institute of Ethics Journal" 2013, No. 23(1), pp. 1–18.

[49] S. Sheldon, S. Wilkinson, *Selecting Saviour Siblings*, "Medical Law Review" 2004, No. 12, pp. 137–163, especially pp. 140–141; M.K. Smith, *op.cit.*

[50] C. Palacios-González, M. De Jesús Medina-Arellano, *Mitochondrial replacement techniques and Mexico's rule of law: on the legality of the first maternal spindle transfer case*, "**Journal of Law and the Biosciences" 2017**, vol. 4, No. 1, pp. 50–69.

[51] The prices have significantly increased since the 80. of the 20th century, see above.

[52] J. Robertson, *Surrogate Mothers*…, p. 29.

be considered as invalid depending on their content. In countries in which these contracts are considered as valid and enforceable, like in the USA, they may require passing adoption proceedings in order to gain legal custody after the birth of the baby, or in some states a "declaration of parentage" may be obtained before the birth of the child.[53] This kind of adoption proceedings are called independently arranged adoptions as alternative to agency adoption (non-market system of distribution of children who have no parents). Yet, in the case of surrogacy, the adoption procedure is planned in advance before the conception of children, which makes it different from prenatal adoption as mentioned above.

The definition of parenthood may differ from country to country. For instance, in Poland the mother of a child is a woman who delivers the baby no matter of whose genetic material the baby is.[54] In the USA, there were cases in which the court declared that the genetic bond is stronger than gestational bond if they are separated in reproduction.[55] I will come back to these issues in my further considerations.

From the moral point of view, the most important issues of the discussion include the debate over the meaning of procreation and our body to us (the problem of the commercialization of human body and procreation, as well as the problem of the boundaries of autonomy); the concept of parenthood, the problem of parental responsibilities and the conditions of their transfer to the third parties; the problem of harm and wrong to children or women, as well as the problem of commodification of children and/or women; the moral implications of surrogacy for the parent-child relationship, family structure, familial bonds and kinship, as well as the identity of the child.

3. Landmark cases

The problem of validity and enforceability of the contracts appeared in practice in some landmark cases where either the contract birth-giver changed her mind and did not want to relinquish custody of the child whom she had borne or the commissioning parties who initiated the agreement and procedure changed their mind and did not want the custody of the child born by the contract birth-giver. There were

[53] WebMD Medical Reference, *op. cit.*

[54] Art. 61^9 k.r.o.

[55] *Johnson v. Calvert* 5 Cal.4^{th} 84, 851 P.2d 776 (1993).

also cases in which the disagreement occurred between the commissioning parties where one of them changed his/her mind about becoming a parent. There could be also disagreements between the contract birth-giver and her husband concerning the involvement in the procedure – in many regulations there is a legal presumption that the husband of the mother is the father of the child (the presumption is refutable and can be challenged). Let me shortly introduce four broadly discussed American cases in which the pivotal points of disagreement about the afore-mentioned legal and moral issues appeared.

3.1. The case of Baby M

The surrogacy contracts gained broad public attention in the case of "Baby M." for the first time. Let me invoke the facts considered by the Court:

> In February 1985, William Stern and Mary Beth Whitehead entered into a surrogacy contract. (…) The contract provided that through artificial insemination using Mr. Stern's sperm, Mrs. Whitehead would become pregnant, carry the child to term, bear it, deliver it to the Sterns, and thereafter do whatever was necessary to terminate her maternal rights so that Mrs. Stern could thereafter adopt the child. Mrs. Whitehead's husband, Richard, was also a party to the contract; Mrs. Stern was not. Mr. Whitehead promised to do all acts necessary to rebut the presumption of paternity (…). Although Mrs. Stern was not a party to the surrogacy agreement, the contract gave her sole custody of the child in the event of Mr. Stern's death. Mrs. Stern's status as a nonparty to the surrogate parenting agreement presumably was to avoid the application of the baby-selling statute to this arrangement. (…) Mr. Stern, on his part, agreed to (…) pay Mrs. Whitehead $10,000 after the child's birth, on its delivery to him. In a separate contract, Mr. Stern agreed to pay $7,500 to the Infertility Center of New York ("ICNY"). The Center's advertising campaigns solicit surrogate mothers and encourage infertile couples to consider surrogacy. ICNY arranged for the surrogacy contract by bringing the parties together, explaining the process to them, furnishing the contractual form, and providing legal counsel. (…)
>
> Mrs. Whitehead realized, almost from the moment of birth, that she could not part with this child. She had felt a bond with it even during pregnancy.

> (…) Despite powerful inclinations to the contrary, she turned her child over to the Sterns (…). The next day she went to the Sterns' home and told them how much she was suffering. (…) The Sterns, concerned that Mrs. Whitehead might indeed commit suicide, not wanting under any circumstances to risk that, and in any event believing that Mrs. Whitehead would keep her word, turned the child over to her. It was not until four months later, after a series of attempts to regain possession of the child, that Melissa was returned to the Sterns, having been forcibly removed from the home where she was then living with Mr. and Mrs. Whitehead, the home in Florida owned by Mary Beth Whitehead's parents.
>
> The struggle over Baby M began when it became apparent that Mrs. Whitehead could not return the child to Mr. Stern. Due to Mrs. Whitehead's refusal to relinquish the baby, Mr. Stern filed a complaint seeking enforcement of the surrogacy contract.[56]

Before the trial, there were some dramatic turns in the case. The Whiteheads fled with the child to Florida and were hiding for several months in motels and hotels until they were found by the police which forcibly removed the child, Melissa, from her grandparents' home in Florida and turned over to the Sterns. The trial court held that the surrogacy contract was valid and should be enforced. Thus, the court granted the sole custody of the child to Mr. Stern and terminated the parental rights of Mrs. Whitehead, allowing the adoption of Melissa by Mrs. Stern.[57] Mrs. Whitehead appealed claiming that the contract was invalid and should be considered as void. Finally, the Supreme Court of New Jersey stated that the contract was invalid and in conflict with the law and the public policy of the State. The court stated that Mrs. Whitehead was the natural mother of the child and that she was inappropriately called the "surrogate mother". She was recognized as the child's legal mother, yet the custody rights were given to Mr. Stern in accordance to the child's best interest and Mrs. Whitehead was granted visitation rights. The court justified the decision in the following way:

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[56] *Case of Baby M.*, 109 N.J. 396. 537 A.2d 1227, 77 A.L.R.4th 1 (1998), pp. 411–415. https://law.justia.com/cases/new-jersey/supreme-court/1988/109-n-j-396–1.html (last accessed: September 2018).

[57] Ibidem.

> While we recognize the depth of the yearning of infertile couples to have their own children, we find the payment of money to a "surrogate" mother illegal, perhaps criminal, and potentially degrading to women. Although in this case we grant custody to the natural father, the evidence having clearly proved such custody to be in the best interests of the infant, we void both the termination of the surrogate mother's parental rights and the adoption of the child by the wife/stepparent. We thus restore the "surrogate" as the mother of the child.[58]

It is also worth mentioning that the social and economic background of both couples involved in the surrogacy contract was much different.[59] The Sterns belonged to upper middle class, were well educated and well situated. They both held PhD (William Stern in biochemistry, and Elisabeth Stern in genetics). Mrs. Stern was not infertile but she was found to have a disease, multiple sclerosis, which in some cases could render pregnancy a serious health risk. She feared that pregnancy might cause her some forms of debilitation such as blindness, paraplegia, etc. The Sterns considered also adoption but decided to find different reproductive solutions since they were discouraged by the fact that adoption procedure took a long time. Besides, they had reasons to believe that they were not the best candidates for adoption agency due to their age, differing religious backgrounds. What is more, Mr. Stern was the Holocaust survivor and therefore was eager to continue his bloodline and pass his genes to the subsequent generations. The Whiteheads, on the other hand, belonged to lower class, were not well educated and suffered from poor material conditions. Mary Beth Whitehead abandoned school when she was 16 and married Richard Whitehead who was a Vietnam war veteran and an ex alcohol-addict. They had two children, aged 10 and 9. They moved many times and changed their occupation frequently due to their financial difficulties, and received unemployment benefit. Before Mrs. Whitehead responded to advertising by ICNY, she used to work as a pizza delivery staff and go-go dancer. She claimed that "she wanted to give another couple the "gift of life"", and wanted to receive $10,000 for her help.[60] Both couples were insensitive to the implications of such a contract.

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[58] Ibidem, p. 411.

[59] Ibidem, p. 411–415; G.E. Pence, *The Baby M Case*, [in:] *Classic Cases in Medical Ethics. Accounts of the Cases That Have Shaped Medical Ethics, with Philosophical, Legal and Historical Backgrounds*, New York 1990, pp. 89–113.

[60] Ibidem.

As George Annas stresses, the much better financial situation of the Sterns had significantly affected the final result of the legal battle in the court. The Sterns could hire a great lawyer and thus were granted with custody rights for the time of the trail, which determined the final decision of the court to keep the custody of the child due to the child's best interest; they could also be considered by the court as those who could guarantee better future for the child.[61] There were doubts whether Mary Beth Whitehead was fit as a mother because of her hysterical behavior after she gave birth to Melissa (attempts to kidnap the child, threats of killing herself and the child, emotional and moral blackmail, etc.). Yet, her determination to fight for the child and keep it no matter what could be also considered as her full commitment to the child, as Bonnie Steinbock points out.[62]

3.2. Johnson v. Calvert

In the discussion over the surrogacy contracts in the US, the judgment of the Supreme Court of California in the case of Johnson v. Calvert in 1993 had a significant impact.[63] Let me invoke the major facts of the case:

> Mark and Crispina Calvert are a married couple who desired to have a child. Crispina was forced to undergo a hysterectomy in 1984. Her ovaries remained capable of producing eggs, however, and the couple eventually considered surrogacy. In 1989, Anna Johnson heard about Crispina's plight from a coworker and offered to serve as a surrogate for the Calverts.
>
> On January 15, 1990, Mark, Crispina, and Anna signed a contract providing that an embryo created by the sperm of Mark and the egg of Crispina would be implanted in Anna and the child born would be taken into Mark and Crispina's home "as their child." Anna agreed she would relinquish "all parental rights" to the child in favor of Mark and Crispina. In return, Mark and Crispina would pay Anna $10,000 in a series of installments, the last

[61] G. Annas, *Baby M: Babies (and Justice) for Sale*, "Hastings Center Reports" 1987, No. 178 (3), pp. 13–15.

[62] B. Steinbock, *Surrogate Motherhood as Parental Adoption*, "Law, Medicine & Heatlth Care" 1988, No. 16 (1–2), p. 45.

[63] *Johnson v. Calvert* 5 Cal. 4th 84, 851 P.2d 776 (1993). https://www.courtlistener.com/opinion/1313999/johnson-v-calvert/ (access: September 2018).

> to be paid six weeks after the child's birth. Mark and Crispina were also to pay for a $200,000 life insurance policy on Anna's life.
> The zygote was implanted on January 19, 1990. Less than a month later, an ultrasound test confirmed Anna was pregnant.
> Unfortunately, relations deteriorated between the two sides. Mark learned that Anna had not disclosed she had suffered several stillbirths and miscarriages. Anna felt Mark and Crispina did not do enough to obtain the required insurance policy. She also felt abandoned during an onset of premature labor in June.
> In July 1990, Anna sent Mark and Crispina a letter demanding the balance of the payments due her or else she would refuse to give up the child. The following month, Mark and Crispina responded with a lawsuit, seeking a declaration they were the legal parents of the unborn child. Anna filed her own action to be declared the mother of the child, and the two cases were eventually consolidated. (…)
> The child was born on September 19, 1990 (…). At trial in October 1990, the parties stipulated that Mark and Crispina were the child's genetic parents. After hearing evidence and arguments, the trial court ruled that Mark and Crispina were the child's "genetic, biological and natural" father and mother, that Anna had no "parental" rights to the child, and that the surrogacy contract was legal and enforceable against Anna's claims. The court also terminated the order allowing visitation. Anna appealed from the trial court's judgment. The Court of Appeal for the Fourth District, Division Three, affirmed.[64]

In this case, by contrast to the afore discussed one, the contracted birthgiver was the partial surrogate since she was not the egg donor. The genetic mother was the one who entered into agreement with her and who wanted to be the legal mother. The Supreme Court addressed such legal questions as: what does it mean to be the "natural mother" of a child if the woman who carries the fetus to term is not the one who provided the ova and is therefore not genetically related to the child. The Court came to the conclusion that the Calverts who provided the gametes, which formed a zygote of which the child was born, were the child's **natural parents**. According to the decision, this does not violate law and is not contrary to public policy.

[64] Ibidem, p. 87.

According to the law of California, only one woman can be recognized as a natural mother, although the current reproductive technologies make it possible that more than one woman is involved in creating a baby (which not only regards partial surrogacy but also MRTs, as mentioned above). The Court concluded that the law "recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship", yet "when the two means do not coincide in one woman, she who intended to procreate the child, that is she who intended to bring about the birth of a child that she intended to raise as her own, is the natural mother" under the law.[65]

In other words, the American court decided that if the genetic and gestational bond between the woman and the baby do not coincide, the genetic bond accompanied with the **intention to create a child** prevail. If intention were not mentioned, but only the genetic bond, then it could adversely affect the status of the gametes donors who relinquish all responsibilities to the child who might be created out of their genetic material. The significance of the intention to create a child was the crucial point of the judgment in another landmark case, which I present next.

The primacy of the genetic bond over the gestational bond in recognizing the natural mother of the child was criticized by Annas.[66] According to him, this solution might be at odds with the child's welfare. The woman who gives birth to a child is always present at the birth, which can be of great importance for the good of the child when its health is in danger and the decision about child's treatment must be taken immediately after the birth. This problem was revealed in the case *Malahoff v. Striver*, which will be discussed below.

3.3. In re Marriage of Buzzanca

In the case of the marriage Buzzanca the problem of recognizing natural parenthood appeared again – this time no party of the surrogacy contract was genetically related to the child. Let me shortly invoke the major facts of the case:

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[65] Ibidem.

[66] G. Annas, *American Bioethics. Crossing Human Rights and Health Law Boundaries,* Oxford 2004, pp. 143–144.

> Jaycee was born because Luanne and John Buzzanca agreed to have an embryo genetically unrelated to either of them implanted in a woman-a surrogate-who would carry and give birth to the child for them. After the fertilization, implantation and pregnancy, Luanne and John split up, and the question of who are Jaycee's lawful parents came before the trial court.
> Luanne claimed she and her erstwhile husband where the lawful parents, but John disclaimed any responsibility, financial or otherwise. The woman who gave birth also appeared in the case to make it clear that she made no claim to the child.
> The trial court then reached an extraordinary conclusion: Jaycee had no lawful parents.[67]

The trial court focused in the decision on the genetic bond between the child and the parties to the contract and since neither the contract birth-giver nor the commissioning party provided the gametes, they were not recognized as "biological parents" of the child. Since the gametes were provided by the anonymous donors, the genetic parents could not be recognized at all. The Court of Appeal of the State California disagreed and recognized Luanne and John Buzzanca as lawful parents of Jaycee. The Court emphasized that the child "never would have been born had not Luanne and John both agreed to have a fertilized egg implanted in a surrogate."[68] In other words, the intention to create a child determined the concept of legal parenthood in this case. The Court argued that legal parenthood can be established by "conduct apart from giving birth or being genetically related to a child", i.e., by **initiating and giving consent for procreation**.[69] The example to which the court referred was the consent given by the husband for artificial insemination of his wife, by which the husband is the lawful father of the child. The same would apply to the man and woman who initiated the creation of a child by giving their consent to become the parents of the child created in the IVF procedure and implanted to the surrogate's womb who gave birth to the child.

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[67] *In re Marriage of Buzzanca*, 61 Cal.App4th 1410, 72 Cal.Rptr2d 280, 77 A.L.R.5th 775 (1998), pp. 1412–1413.

[68] Ibidem.

[69] Ibidem.

3.4. Malahoff v. Striver; Striver v. Parker

The last case that I would like to mention is the case Malahoff v. Striver where the child born as a result of the surrogacy contract was severely ill. Let me shortly present the facts concerning the case.[70] Alexander Malahoff entered into a surrogacy contract with Judy Stiver who was artificially inseminated with his semen (with the use of the *in vivo* insemination). Nine months later a boy, Christopher, was born. Judy Stiver was married to Ray Stiver. After blood tests, it turned out that the baby's father was Ray Stiver instead of Malahoff. Malahoff did not want the child and the Stivers took the responsibility. He also demanded the return of his payment for the surrogate who did not fulfill the contract together with compensation. She refused claiming that she fulfilled the requirements of the contract when she undergone artificial insemination, got pregnant and delivered the baby.

The child was diagnosed with cytomegalic inclusion disease at his birth and suffered from hearing loss, mental retardation, and severe neuromuscular disorders. It was stated that the baby's disease was the result of his mother's exposure to the virus during pregnancy. Yet, the Stivers were both free of the virus prior to the pregnancy and it was assumed that CMV was the result of the artificial insemination with Malahoff's sperm, who was not tested. The Stivers sued Malahoff and other people (physicians, lawyers, a broker) involved in the surrogacy contract and insemination for negligence.[71] She claimed the compensation for her and her child due to the negligence in ART procedure, though she consented in the surrogacy contract to take all the health risks connected with insemination and pregnancy, including even her death.

This case resulted in restricting the law in regard of surrogacy contracts. The court concluded: "Because surrogacy contracts create a high degree of risk of injury or loss, we conclude that the programs under which these contracts are arranged – when not outlawed as against public policy – create affirmative duties of care".[72]

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[70] *Malahoff v. Stiver*, 975 F.2d 261 (6th Cir. 1992); Doe v. Attorney General, 194 Mich.App. 432, 487 N.W.2d 484 (1992), https://law.justia.com/cases/federal/appellate-courts/F2/975/261/163461/ (access: September 2018).

[71] E. A. Cawthon, *Medicine on Trial. A Handbook with Cases, Laws, and Documents*, Oxford 2004, p. 152.

[72] *Stiver v. Parker* 975 F.2d 261, 272 (6th Cir. 1992), p. 270.

3.5. The problem of the concept of motherhood (parenthood) – what constitutes motherhood?

In the above-mentioned cases, the courts addressed crucial questions raised by recent advances in reproductive technology – namely what constitutes motherhood, what it means to be a natural parent and how it affects legal recognition of the parenthood. The courts recognized several ways of establishing legal parenthood, such as: giving birth to a child (motherhood based on **gestational bond**); providing genetic material of which the zygote is formed (parenthood based on **genetic bond**); consenting to take the responsibility for the child (parenthood based on rearing or **social bond**); consenting for artificial procreation and becoming a parent to artificially created child by initiating the procedure (bond created by intention – i.e. parenthood based on **contractual bond**).

The question arises which of these ways of establishing parenthood prevails, if they do not coincide? As it was mentioned above, in some regulations the gestational bond is recognized as the one that determines the motherhood (as it is in Polish law), which can have also practical meaning (the presence of the woman at child's birth) for taking the necessary urgent decisions on behalf of the child (e.g. concerning treatment). In some laws, genetic bond supported by the contractual bond is considered as prevailing (as it was in American cases mentioned above). This approach emphasizes that the decision to initiate the procreation and consent to such a procedure, as well as consent to become the parent, result in legal responsibilities for the created child even in the lack of genetic or gestational bond. Yet, the contractual bond is a legal fiction and not a natural one by contrast to the biological bonds. It resembles the legal-social bond created by the adoption, yet the difference between these institutions is that in the case of adoption the legal bond refers to custody rights of an already existing child. In the case of artificial procreation and surrogacy, the contractual bond discussed here refers to ascribing responsibility for creating a child, which can be considered as a separate issue from the problem of custody of this child (the parents could give the artificially created child to adoption just as natural parents do). Thus, the moral question arises whether the separation of biological bonds from social and legal responsibilities for the child intended before the creation of a child is right and whether this kind of practice should be morally approved and legally permissible. Krimmel argues that the separation of the decision to create a child from the decision to have and raise a child is morally

wrong and unfair to the child, which regards both full surrogacy and AID.[73] I will come back to this question in my further considerations.

Until recently, the definition of a natural (or in other words biological mother) was simple – it was the woman who was genetically related to the child and who gave birth to the child. The new advances in reprogenetics provide new possibilities of the separation of the birth-giver from the genetic mother and the terms "biological mother" or "natural mother" become confusing. Some experts claim that biological mother is the one who is genetically related to the child irrespective of the fact who gives birth to the child. In such a case egg donors, sperm donors and embryo donors should be also recognized as biological parents. Other claim that the biological mother is the one who gives birth to the child irrespective of genetic relation. According to Laura Purdy, putting emphasis on the significance of gestational bond as connected with special rights and responsibilities may constitute unfair social burden for women by comparison to men whose contribution is limited to providing genetic material only.[74] Nevertheless, men should bear equal responsibility for the creation of a child, which is reflected in most of our modern legal systems. One may also claim that if the birth-giver is different from the one who provides the ova, then the child has two biological mothers. Following this line of thinking, if the child were created with the use of not only ova donation but also mitochondrial transfer from a third woman, then such a child would have even three "biological mothers". One may also claim that the term "biological (natural) mother" should be used only with reference to women who give birth to their own genetic child and in other cases we should speak of donors ("egg donor", "mitochondria donor") and birth-givers, not biological (natural) mothers. Once again, we can see that the terminology we use is not value free and it can both express, and also shape, moral attitudes to certain practices.

It is worth considering whether undermining natural motherhood in the context of reprogenetics has any moral significance.[75] The natural has no normative meaning as such. Yet, even if the normative meaning of motherhood cannot be reduced to its purely biological meaning, it cannot be understood without any reference to its biological dimension. I will come back to this issue in my further considerations.

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[73] H.T. Krimmel, *op. cit.*, p. 35.
[74] L. Purdy, *op. cit.,* p. 94.
[75] Cf. L. Purdy, *op. cit.,* p. 94.

No empirical studies could provide the answer to this question, since the notion of motherhood (in both legal and moral terms) is a normative one. Yet, empirical data can be helpful for the adequate deliberation of what proves to be the best for the development of the child and child's wellbeing. Empirical evidence can only prove that genetic, gestational, and social bonds – all of them have a significant impact on the development of the child, by contrast to contractual bond which has purely abstract meaning and can even adversely affect the parent-child relationship when the child learns that her existence results from a legal and pecuniary contract between the parties. The question whether genes or rearing play more important role in shaping our identity is a matter of an old dispute known as the "nature or nurture" debate. We have strong empirical evidence about the adverse mental effect for the child's development and identity when the genetic and social bond are separated (which may result in the feeling of a child of being abandoned by his biological parents, in particular, by its mother, as it happens in the case of adopted children even if they are raised in a loving and caring environment). Yet, we have no established empirical data about the impact of the separation of genetic and gestational bond for the child's development and identity.

3.6. The problem of the subject of the surrogacy contract – what is sold and bought?

Another important question posed in the afore-mentioned cases is the question about the subject of the surrogacy contracts. In other words, what the surrogate sells and what the commissioning parties buy when they enter into a surrogacy agreement.[76] The answer to this question can be of importance for the decision whether such contracts are valid or void, whether they violate law and public policy or not.

There were considered several answers to this question. One may claim that the baby born as the result of such a contract is the subject of the contract. If we agreed to it, then the contract should be considered not only as void but also as a crime, since human trafficking (together with slavery and paid adoption) are strictly forbidden around the globe. Of course, to recognize the surrogacy contracts as a crime, the legal regulations which forbid directly the surrogacy are required according to the commonly adopted rule *nullum crimen sine lege*. Yet, one may argue for the adoption

[76] Ibid., p. 95; C. Fabre, *op. cit*., pp. 189–190; J.L. Nelson, H.L. Nelson, *op. cit.*, p. 2293.

of such restrictions using the justification that baby-selling must not be allowed in any circumstances even for the good of the child in stake.

Another answer to the question is that the **reproductive service** (fertilization and embryo transfer or insemination, gestation and delivery) is the subject of the contract. In such a case, a surrogate is being paid for giving access to her body and body parts, for the use of her reproductive capacities and her body for the duration of pregnancy. One ought to distinguish here between the service provided by full and partial surrogate. Both provide the access to their body for around 9 months or longer (in the case of ART it can include several attempts of insemination or IVF and embryo transfer, which in the latter case may be much bigger health burden than natural pregnancy). Yet, only the full surrogate contributes to pregnancy not only with her body and gestational capacities but also with an egg. In the latter case the question arises whether selling an egg as a part of surrogacy contract can be considered as a part of a service or should be considered as selling a body part like an organ? I will come back to the problem of selling one's own body and body parts in the next section. Now I would only like to point out that assuming that the reproductive service is the subject of the surrogacy contract, we would also have to agree that the surrogate does not have any obligation to relinquish the custody of the child and to give it away. If this were true, most of the cases like the ones mentioned above would never arise.

Thus, another option is that **custody rights** are the subject of the contract. In such a case surrogacy contracts would be equivalent to the institution of independently arranged adoptions which in such countries as the USA are available as an alternative to agency adoption in which children are distributed to parents by non-market instruments. In many countries, adoption is provided only by governmental agencies and custody rights are the subject left to the decision of the courts which do not have to take into account any private agreements (like in Poland). Yet the analogy between independently arranged adoption and surrogacy is misleading since in the former case the child is already conceived, while in the latter one it will be conceived as the result of the agreement. Thus, the subject of the surrogacy contract cannot be limited to custody rights, since the contract concerns the creation of the child too. One may argue that the subject of the surrogacy contract includes both reproductive service and custody rights to the child and a surrogate is being paid not only for getting pregnant but for getting pregnant with the use of certain genetic material and for child delivery, as well as for relinquishing her custody of the child and transferring the right to the commissioning parties.

According to Cecile Fabre, if we claim that the right of custody is the subject of the surrogacy contract, the contract is not different from selling a baby:

> My argument against the afore-mentioned two attempts to rescue surrogacy from the charge that it is tantamount to baby selling rests on the claims that surrogacy consists in relinquishing one's rights over the child in exchange for payment. And that selling something precisely consists in relinquishing one's rights over that thing in exchange for payment. Taken together those two claims entail that surrogacy does, indeed amount to baby selling.[77]

Fabre continues her argumentation by claiming that we have no property rights over our children and therefore we cannot transfer property rights to them. This is also expressed by the legal principle that no one can transfer more rights than he or she has (*nemo plus iuris in alium transferre potest quam ipse habet*). We can transfer only custody rights (in some legal systems this kind of transfer cannot be a subject of private agreement but only a subject of the decision of a governmental or legal body). Thus, as Fabre claims, the objection that surrogacy contracts entail baby selling can be refuted by arguing that there is nothing wrong in selling babies, since such contracts transfer custody rights and not property rights. Fabre assumes that selling babies is wrong only if it entails or brings about commodification of children, which is the result of treating children as one's own property. Yet, one may object to this line of argumentation claiming that also custody rights should not be the subject of market exchange, since the child-parent relationship should be also protected. Fabre discusses the hypothetical cases of parents selling custody rights to one-year old child of whom they got bored or a couple of celebrities creating their child for sale to those who want to have a celebrity's child for themselves.[78] She claims that in these cases the practice should be considered as morally wrong and legally impermissible, since such parents do treat their children as commodities although they do not have property rights over them. What matters here are the motives and intentions of the parents. Yet, one may claim that the custody rights should be excluded from market exchange since the child-parent relationship should not be treated as exchangeable and therefore commodified.

[77] C. Fabre, *op. cit.*, p. 190.
[78] C. Fabre, *op. cit.*, p. 191.

Some authors claim that the subject of the contract is the **relationship** between the mother and the child, which is transferred from one party to another and that such relationships are transferrable and may be the subject of market exchange, unless we prove that this kind of exchange would harm either children or women.[79] I will discuss this in my further considerations.

Before I turn to the presentation of the consequential, deontological and neo-Aristotelian moral arguments in the debate over surrogacy, I shall first discuss the philosophical problem of framing the contract by invoking the notion of liberty and privacy, namely the liberty of doing what we want with our body and procreative liberty. The first problem requires philosophical considerations of our relationship to our body. The second problem requires philosophical considerations of the concept of reproductive autonomy.

4. The meaning of the relationship to our body

A frequently given argument in favor of surrogacy contracts rests on the assumption that women are free to decide how they use their body, including their reproductive capacities and gametes.[80] Yet, in most legal systems commercialization of human body is forbidden – human body and its parts are usually excluded from property rights and are covered by the protection of personal rights.[81] Before I discuss whether surrogacy can be considered as a making use of the body and providing gametes can be considered as equivalent with organ donation (or selling), let me shortly present different philosophical approaches to the understanding of human body. These approaches differently answer the question: "Am I the owner of my body? (…) Is it mine or is it me?"[82]

[79] L. Purdy, *op. cit.,* p. 95. Cf. E.S. Anderson, *Is Women's Labor a Commodity?,* "Philosophy and Public Affairs" 1990, No. 19(1), pp. 71–87.

[80] C. Fabre, *op.cit*., pp. 186–218.

[81] L. Bosek, *op. cit.*, pp. 345–365.

[82] D. Garcia, *Ownership of the Human Body: Some Historical Remarks*, [in:] *Ownership of the Human Body. Philosophical Considerations on the Use of the Human Body and its Parts in Healthcare*, ed. H. A.M.J. ten Have, J. V.M. Welie, Dodrecht 1998, p. 67.

4.1. Aristotelian-Thomist approach

On the grounds of Aristotelian-Thomist philosophy, human body and its parts have a special normative status. This approach assumes psycho-physical integrity of a person which is embodied.[83] Instead of saying that people possess reason and body, we should rather say that persons are rational and corporal beings. Their body and reason are not the properties of a human being but rather the forms of their existence.[84] Human body cannot be treated as external to a human being, since all human beings exist in body. Thus, on the grounds of this philosophy, one can formulate the right to bodily integrity and claim that human body cannot be the subject of property rights but rather should be protected together with a person in the dimension of personal rights. Human body should be therefore treated with respect due to persons and should be excluded from market exchange – it can neither be owned as property nor transferred to anybody.

4.2. The Kantian approach

On the grounds of philosophy of Immanuel Kant, the pivotal meaning for morality has the notion of autonomy, which he identifies with human dignity. Kant associates human dignity with the capacity of every rational being to subject its will to universal moral law.[85] This claim is based on an assumption that a human being is potentially moral, rather than natural. Dignity is defined by Kant in opposition to "price" or as a "value beyond price":

> In the realm of ends everything has either a price or a dignity. What has a price is such that something else can also be put in its place as its equivalent; by contrast, that which is elevated above all price, and admits of no equivalent, has a dignity. That which refers to universal human inclinations and needs

[83] Św. Tomasz z Akwinu, *Traktat o człowieku, Summa teologii 1*, 75–89, transl. by S. Swieżawski, Kęty 2000, pp. 22–146. M.A. Krąpiec, *Ja – człowiek*, Lublin 1991, pp. 123–164; E. Gilson, *Tomizm*, transl. J. Rybałt, Warszawa 1998, p. 226.

[84] R. Spaemann, *Osoby*, transl. by J. Merecki, Warszawa 2001, p. 140.

[85] "The dignity of humanity consists precisely in this capacity for universal legislation" (I. Kant, *Groundwork for the Metaphysics of Morals*, transl. by. A.W. Wood, New Haven and London 2002, pp. 57–58).

> has a market price; that which, even without presupposing any need, is in accord with a certain taste, i.e., a satisfaction in the mere purposeless play of the powers of our mind, an affective price; but that which constitutes the condition under which alone something can be an end in itself does not have merely a relative worth, i.e., a price, but rather an inner worth, i.e., dignity. Now morality is the condition under which alone a rational being can be an end in itself, because only through morality is it possible to be a legislative member in the realm of ends.[86]

Having dignity means to have the intrinsic, absolute, incomparable worth, and to be irreplaceable. Kant writes that the dignity of a moral person ("the absolute inner worth") provides a basis for self-esteem.[87] The idea of respect for human dignity is expressed in the second version of Kant's categorical imperative: "So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means."[88] A person is understood as an end *in itself* (not *for herself*), which means that one should also respect dignity in oneself. This includes also the treatment of human body, which constitutes a human being and cannot be treated in separation to a person. Human body, according to Kant, is the prerequisite of being a person and thus we owe respect to human body just as we do to human beings. In other words, human body cannot be treated instrumentally, as a mere means to an end, since it would violate human dignity expressed in the humanity formula mentioned above.[89] Thus, a person who violates his or her own bodily integrity by self-mutilation or commits a suicide, violates moral law and rejects one's own personality by not respecting human dignity in himself or herself.[90] According to Kant, a person does not have his or her body, neither its parts at their free disposal – they cannot sell any part of themselves, not even a teeth or a finger, since these acts would mean that they treat themselves as a mere means to an external end and not as end in itself.[91]

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[86] Ibid., pp. 52–53.

[87] I. Kant, *The Metaphysics of Morals*, [in:] *Practical Philosophy*, ed. M. Gregor, Cambridge 1993, pp. 557–558.

[88] I. Kant, *Groundwork…*, p. 38.

[89] D. Garcia, *op.cit*, p. 72–74.

[90] I. Kant, *Metafizyczne podstawy nauki o cnocie*, transl. by W. Galewicz, Kęty 2004, pp. 93–95.

[91] D. Garcia, *op.cit.*, p. 73.

Thus, on the grounds of Kantian philosophy, human body is inalienable and excluded from market exchange, the right to bodily integrity is protected just as a person is protected and this special status and protection are justified by human dignity.[92]

4.3. The utilitarian approach

Utilitarian thinking is rooted in the philosophy of Jeremy Bentham, Henry Sidgwick and John Stuart Mill. Utilitarian approach combines consequential reasoning (our actions are judged from the perspective of their consequences) with teleological reasoning (consequences of our actions are judged from the perspective of an aim which is to be achieved).[93] Utilitarian ethical doctrine is based on the principle of maximization of utilities, which was expressed in "the greatest happiness principle".[94] Utilitarianism does not differentiate between people but only utilities, treating both people and their bodies instrumentally as the locations of utilities.[95] Neither human life, nor human body have intrinsic value (dignity), but rather a functional value which depends on their quality, social utility and people's preferences.[96] The quality of life doctrine defended by utilitarian philosophers rests on an assumption of separation between two domains of human life: biological ("*being alive*") and social ("*having life*"), where the former has an instrumental value – it should enable the pursuit of human values.[97] If biological form of life does not guarantee the minimum level (which is a matter of dispute) of social existence ("to fulfill yourself"), it

[92] F.J. Illhardt, *Ownership of the Human Body: Deontological Approaches*, [in:] *Ownership of the Human Body. Philosophical Considerations on the Use of the Human Body and its Parts in Healthcare*, ed. H. A.M.J. ten Have, J. V.M. Welie, Dodrecht 1998, pp. 187–206; D. Beyleveld, R. Brownsword, *Human Dignity in Bioethics and Biolaw*, Oxford University Press 2001.

[93] W. Kymlicka, *Współczesna filozofia polityczna*, transl. by A. Pawelec, Warszawa 2009, pp. 25–75.

[94] J. Bentham, *Wprowadzenie do zasad moralności i prawodawstwa*, transl. by B. Nawroczyński, Warszawa 1958, pp. 18–19; J.S. Mill, *Utylitaryzm,* [in:] J. S. Mill, *Pisma o wolności i szczęściu*, transl. by B. Baran, Warszawa 2017, pp. 125–190).

[95] C. Diamond, *How Many Legs*, [in:] *Value and Understanding: Essays for Peter Winch*, ed. R. Gaita, New York, p.153; W. Kymlicka. *op. cit.*, pp. 10–52.

[96] P. Singer, *Etyka praktyczna*, transl. by A. Sagan, Warszawa 2007, pp. 89–112; P. Singer, *Unsanctifying Human Life. Essays on Ethics*, ed. H. Kuhse, Oxford 2007, pp. 215–231.

[97] J. J. Walter, *Life, Quality Of,* [in:] *Encyclopedia of Bioethics*, ed. S. G. Post, vol. 3, Nowy York 2003, p. 1389.

is claimed that such life is not worth living.[98] On utilitarian grounds, human body and its parts can be seen as the subject used to maximize one's own preferences. Thus, one can treat one's own body as property and transfer rights to its use if only this would be consistent with the greatest happiness principle. In this approach, it is not important whether we ascribe property rights to human body, but whether human body and its parts are being used in an efficient way which is in accordance to people's preferences and maximizes social welfare.[99] Utilitarian thinking does not determine whether human body and its parts should be the subject of free market exchange, since the answer depends on the cost and benefit analysis, which may differ from case to case.[100]

4.4. The Lockean approach

According to John Locke, one of the fathers of modern liberalism, property rights belong to natural rights and are justified by the principle of self-ownership. Locke claimed that every person owns herself and her body and therefore has the right to the fruits of their work. [101] This reasoning gave rise to the idea that a person owns her body and all embodied fruits of her work which constitutes the property right. Being the owner of her body, a person has the right to do with her body and its parts whatever one wishes, as long as it does not violate moral sovereignty of other people (their liberty and integrity).[102] In other words, human body and its parts are alienable, have their price and their owner have them at her free disposal.[103] Lockean thinking was adopted by libertarian philosophers who defend the idea of a minimal

[98] See critique of these claims in: A. Maclean, *The Elimination of Morality. Reflections on Utilitarianism and Bioethics*, Routledge, Londyn, Nowy York 2004.

[99] M. Evans, *The Utility of the Body*, [in:] *Ownership of the Human Body. Philosophical Considerations on the Use of the Human Body and its Parts in Healthcare*, ed. H.A.M.J. ten Have, J. V.M. Welie, Dodrecht 1998, pp. 207–226.

[100] See P. Singer, *Altruism and commerce: a defense of Titmuss against Arrow*, "Philosophy of Public Affairs" 1973, No. 2, pp. 312–320; C. Erin, J. Harris, *An ethical market in human organs*, "Journal of Medical Ethics" 2003, No. 29, pp. 137–138; J. Savulescu, *Is the sale of body parts wrong?*, "Journal of Medical Ethics" 2003, No. 29, pp. 138–139.

[101] J. Locke, *Dwa traktaty o rządzie*, transl. by Z. Rau, Warszawa 2015, Treatise II, Chapter 5, §27 pp. 270–271.

[102] R. Nozick, *Anarchia, państwo, utopia*, transl. by M. Maciejko i M. Szczubiałka, Warszawa 1999, p. 205.

[103] D. Garcia, *op.cit.*, p. 72.

state whose intervention in human freedom should be limited to guarantee security and protect individual property of their citizens.[104] On the grounds of this approach, it is assumed that free market is the best mechanism of a just distribution of goods, including most precious ones such as human biological material.

4.5. The Phenomenological approach

Phenomenology contributed in a significant way to deeper understanding of human relation with the body. Maurice Merleau-Ponty distinguishes between body in an objective (physical) meaning and its phenomenal meaning.[105] In the latter meaning we are concerned not with *a* body, but with our own body. Our experience of our body differs in an important way from an experience of any objects which are external to us. This particular internal experience of our own body is an experience of our capacity to act and it leads to the conception of human embodiment in which our body is treated not as an external subject of inquiry but rather as a mode of our functioning, acting and experience. Also, our relation to the world is mediated in our body. Thus, our relation to our body cannot be expressed in ownership of our body but rather in existing through body.[106] My body is not mine. Since it's not external to me, it rather belongs to me as an integral part of being myself.[107] Both phenomenological and Thomist perspectives are combined in a personalist philosophy, which emphasizes integrity of a person.[108] According to this tradition, the language of property rights is simply inadequate to describe our relation to our body, which should be rather expressed in the language of solidarity and gift (donation).[109]

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[104] R. Nozick, *op.cit.*; K.W. Wildes, S.J., *Libertarianism and Ownership of the Human Body*, [in:] *Ownership of the Human Body. Philosophical Considerations on the Use of the Human Body and its Parts in Healthcare*, ed. H.A.M.J. ten Have, J. V.M. Welie, Dodrecht 1998, pp. 143–157.

[105] M. Merleau-Ponty, *Fenomenologia percepcji*, Warszawa 2001.

[106] J. Herring, P Chau, *My Body, Your Body, Our Bodies*, "Medical Law Review" 2007, No. 15(1), p. 42; see S. Toombs, *What Does It Meant to Be Somebody*, [in:] *Persons and Their Bodies*, ed. M. Cherry (ed.), Kluwer 1999.

[107] Z. Szawarski, *"Kupi żywe oko". Rozważania o etyce transplantacji,* "Etyka" 2000, No. 33, pp.162–164.

[108] P. Schotsmans, *Ownership of the Body: a Personalist Perspective*, [in:] *Ownership of the Human Body. Philosophical Considerations on the Use of the Human Body and its Parts in Healthcare*, ed. H. A. M. J. Have, J. V.M. Welie, Dodrecht 1998, pp. 159–172.

[109] Z. Szawarski, *op.cit.,* pp. 169–173.

4.6. The problem of the commercialization of the body in the context of surrogacy contracts

To sum up the above philosophical approaches, only on the grounds of libertarian and utilitarian approach it is possible to claim for property rights to human body and its parts. On all other philosophical grounds, which are dominating in continental jurisprudence, the commercialization of human body and its parts is forbidden, which is justified by special normative status of human body based on human integrity and human dignity. Therefore, defending the validity of surrogacy contracts on the grounds of such principles as the right to privacy and freedom of contracts, refers usually to the quasi-libertarian or quasi-utilitarian reasoning.

Yet, it is worth mentioning that surrogacy constitutes a special case, which cannot be reduced to mere body and body parts selling. There are some who claim that surrogacy is as justified as prostitution, since in both cases women are selling their bodies (or access to their bodies).[110] Yet, there are some significant differences in both cases, since in the case of surrogacy women give permanent access to their bodies for months. What is more, being pregnant is different from making use of one's own body in a sexual intercourse or making use of one's own body in physical labor, since in the case of pregnancy the whole body of the pregnant woman is involved entirely for a nine-month period in gestation of a child, not only some parts of her body for time to time. For the same reasons, the analogy between surrogates and wet-nurses who are breastfeeding babies is misleading.[111] There are also some who argue for an analogy between egg donation and organ donation or between gametes donation and blood donation. Neither of these analogies is correct, since gametes donation in the context of procreation results in creation of a new human being genetically related to us – our progeny. Donating organs does not result in creating new life but rather helps in keeping an existing person alive.

[110] Cf. Fabre, *op.cit.*, pp. 188–218.

[111] Cf. J. Robertson, *Surrogate Mothers…*, pp. 30–31; H.T. Krimmel, *op.cit.*, p. 35.

5. The concept of reproductive autonomy and its limits (the right to privacy, the right to self-determination, the right to self-expression, the right to decide about one's body and reproductive abilities)

A constitutional right of reproductive autonomy is defined by Ronald Dworkin as a right of women "to control their own role in procreation unless the state has a compelling reason for denying them that control".[112] Procreative freedom has transformed its merely negative meaning (*liberty from* the intervention of others, including a state, in one's own reproduction) to a much broader positive meaning (*freedom to* procreate). The concept of reproductive autonomy was extended from a right to control unwanted fertility, to a right to control unwanted infertility.[113] Thus, many authors understand reproductive autonomy as the choice of whether to procreate, with whom, when, and by what means, determining also the choice of what kind of children to have, and of whether to have children biologically related or not, as well as with what kind of procedure, etc.[114] Yet, this broad understanding of procreative autonomy may give rise to justified moral doubts. As some authors correctly note, the right to procreate certainly does not, in itself, give parents the automatic right to have access to and assistance in all procedures of creating children (including reproductive cloning, gene editing, genetic selection or surrogacy), neither it gives them the right to possess children of a particular genetic traits.[115] Procreative freedom is not an absolute right, for many restrictions are placed on it, within the contexts, for example, of adoption or reproductive cloning. It seems unjustified to derive a positive conception of the right from the negative conception of it, and even if one were adopted, legal interference in the positive conception of freedom can be subject to much greater restrictions than the negative conception of freedom. Let me shortly present different meanings of the concept of autonomy on the grounds of different philosophical doctrines to make it clearer.

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[112] R. Dworkin, *Life's Dominion. An Argument About Abortion, Euthanasia, And Individual Freedom*, New York 1994, p. 148.

[113] O. O'Neill, *Autonomy and Trust in Bioethics*, Cambridge 2007, pp. 57–58.

[114] A. Buchanan, D.W. Brock, N. Daniels, D. Wikler, *From Chance to Choice. Genetics and Justice*, Cambridge 2007, pp. 209–213; J. A. Robertson, *Children of choice: freedom and the new reproductive technologies*, Princeton 1996, pp. 152–153.

[115] L. Kass, *op.cit.*; I. de Melo-Martin, *Rethinking…*.; I. de Melo-Martin, *Sex selection…*, pp. 1–18.

5.1. The Kantian meaning (deontological approach)

"Autonomy" comes from two words: *autos* which means "self" and *nomos* which means "law", "governing". Thus, it may be defined as self-determination and it is understood as the foundation for such rights as: the right to self-expression, the right to privacy, freedom of conscience, freedom of religion, etc. The concept of autonomy was introduced to moral philosophy by Immanuel Kant. Kantian autonomy is not equivalent to mere freedom of choice or independence; it is rather understood as *rational autonomy*, where free choices reflect or follow from "self-knowledge, or of self-control, or of capacities to review, revise and endorse other desires."[116] He understands autonomy as a capacity to recognize and follow universal moral law. It means that autonomy is not freedom to do whatever one wants, but rather freedom based on principles, which manifest in life in which duties are met (a kind of self-legislation); it is expressed in action and derived from the authority of reason. For Kant, autonomy constitutes the ground of human dignity as it was mentioned before.

5.2. The Utilitarian meaning (consequential approach)

John Stuart Mill, to whom modern utilitarians usually refer, does not use the term "autonomy" in the context of moral philosophy, but rather the term "liberty".[117] Yet, his followers use the term "autonomy" in the meaning of individual freedom to satisfy one's own preferences. By liberty Mill understands reflective freedom of conduct and choice in order to satisfy one's own preferences, freedom from tyranny of the state and of the majority. Liberty is valuable on the grounds on this philosophy, since it contributes to the person's well-being and expresses one's own character. Liberty is aimed at promoting individual as well as social well-being. And it is limited by prevention of harm to others.[118]

[116] O. O'Neill, *op.cit.*, p. 33.
[117] J.S. Mill, *op.cit.*, pp. 11–124.
[118] J.S. Mill, *op.cit.,* pp. 21.

5.3. The Lockean meaning (libertarian approach)

John Locke also emphasizes the significance of individual freedom called liberty and his followers are called therefore libertarians. Locke assumes that since "men in the state are free and equal", thus "none might have a sovereignty over another except through a social contract".[119] He distinguishes between natural liberty of men and liberty in a society. The former one means that everyone is free from other people's will, yet they are all bound by natural law.[120] The latter one means to be subjected to the governance of the laws of the community, which is the result of a contract. Yet, the modern followers of Locke, libertarians, reject his idea of natural law and accept only those limits on liberty which are the result of social contract and which are aimed at guaranteeing security for all.[121]

5.4. The Neo-Aristotelian meaning (communitarian approach)

Aristotle does not use the notion of autonomy in his moral philosophy. Neo-Aristotelian and communitarian philosophers attempt to interpret this concept in term of his philosophy and define autonomy "as the capacity of humans to make self-determining choices based on their rational nature" and the moral claim to autonomy "derives from the more fundamental claim for preservation of the integrity of persons".[122] They give priority to moral integrity of a person over the principle of autonomy which cannot be understood and applied without any reference to who we are and what is our *telos* (aim and meaning of life). In other words, autonomy is understood as freedom aimed at fulfilling yourself according to your *telos* based on values. This approach gives emphasis on human character, motives and relations in which people act.

[119] J. Locke, *op.cit.,* Treatise II, Chapter. IV, § 22, p. 268.

[120] Ibidem. Treatise I, Chapter VI, §54, p.166; ibidem, Treatise II, Treatise I, Chapt. VI, §54, p.166; ibidem, Treatise II, Chapt. VI, §52–75, pp. 285–299, Chapt. VI, §52–75, pp. 285–299.

[121] Cf. Nozick, *op.cit*.

[122] E.D. Pellegrino, D.C. Thomasma, *The Virtues in Medical Practice*, New York, Oxford 1993, p. 131.

5.5. Reproductive autonomy and surrogacy

To sum up, the basic problem with argumentation in favor of surrogacy based on reproductive autonomy is that autonomy is understood as individual and unlimited freedom of choice, which is at odds with most of the philosophical interpretations of the concept given above. What is more, the problem lies in the fact that reproductive autonomy is understood to be an extension of individual autonomy, when it applies, by its very definition, to more than one party. Procreation is not an individual undertaking. One of the reasons for restricting autonomy can be its influence on the lives of others, and deciding about creation of a child undoubtedly exerts an influence on a third party – the child. The decision over whether the principle of procreative freedom should incorporate or exclude certain reproductive techniques like surrogacy requires a specific interpretation of this principle, which is usually implicitly accepted without providing additional arguments.

Undoubtedly, the desire to possess offspring is a strong preference for many people, but the decision to possess offspring should not be purely perceived as the fulfilment of egoistical desires. It should rather be perceived as the desire to *pass on* life bound up with a readiness to take responsibility for the life, which in turn requires the creation of the love-based relationships that are the key to the development of human life. Procreation involves more than mere self-fulfillment gained through a child. It also involves adopting the role of mediator in giving life. The deliberate and intentional separation of the role of giving life from the role of taking responsibility for the created life distorts the idea of parenthood and undermines the child-parent relationship.

The libertarian conception of procreative freedom presupposes that freedom of self-possession is a natural right that has absolute priority over other rights, and procreation is one of its manifestations. This standpoint fails to take into account the specific nature of procreation, which neither equates to individual freedom nor incorporates every aspect of positive freedom. It is difficult to concur that procreation is one of many forms of self-expression, as this would reduce the parent-child relationship to that of producer-product. Since procreation is a field of human freedom that, by definition, includes a third party (the child), we should be seriously considering whether the commercialization and commodification of this practice is impacting negatively on the parent-child relationship. Surrogacy tends to transform children into the products of contracts that parents enter into with surrogates and clinics that are meant to implement that process according to their preferences,

which would appear to undermine the foundations of our understanding of both procreation and parenthood.[123]

6. Consequential arguments in debate over surrogacy

The consequentialist ethical approach is concerned with evaluation of our actions and practices from the perspective of their consequences. Thus, surrogacy may be judged as morally wrong institution if it brings about more costs than benefits, as utilitarian philosophers would say. Yet, not all consequentialists are utilitarian thinkers. As it was mentioned above, proponents of surrogacy claim that it is justified by the principle of liberty, in particular, reproductive autonomy. The only limits to reproductive autonomy in its utilitarian and libertarian meaning are constituted by the prevention of harm to others. As proponents of this approach state, the burden of proof lies on those who claim for any restrictions on the reproductive autonomy. Moral distaste, as Robertson argues, is not enough to limit reproductive autonomy; one has to prove that particular kinds of ART, and in this case surrogacy, are harmful for children or women.[124] Thus, the consequentialist critique of surrogacy is concerned with harm, which such contracts may cause – potential harm to children and potential harm to women. Let me present both objections briefly.

6.1. Surrogacy and the problem of harm to children (the child's welfare)

One may claim that surrogacy contracts are morally wrong, since they are harmful for children who are the subject of such contracts and who are produced in their result. Potential harm, which is usually mentioned here, is either physical or mostly mental. Physical harm may be caused by the use of ART. The risk of ART, in particular with regard to IVF, as well as preimplantation genetic testing (PGD) for the health condition of children is uncertain.[125] The risk for an embryo or fetus was the main cause of adopting the precautionary principle and restricting the use of PGD or some

[123] L. Kass, *op.cit*.

[124] J. Robertson, *Surrogate Mothers…*, p. 33.

[125] E.B. Baart, D. Van Opstal, *Chromosomes in early human embryo development. Incidence of chromosomal abnormalities, underlying mechanisms and consequences for development,* [in:] *Textbook of Human Reproductive Genetics*, ed. K. Sermon, S. Viville, Cambridge 2014, p. 61–62; T. El-Toukhy

invasive kinds of prenatal genetic diagnosis (PND). It was also an argument used for more restrictive approach to surrogacy as it was mentioned above.[126]

Yet, the research results are not conclusive and the current mainstream approach to reprogentics is that if there is no evidence of the risk of harm for children the restrictions on the use of ART are unjustified.[127] Besides, the argumentation based on harm in the context of reproductive decisions is problematic from the moral point of view when the only alternative to the birth of a particular child was that the child was not born at all or another healthy child was born instead. When questioning the procreative decision as such, like in the surrogacy case, on the grounds of harm to children who were born as the result of surrogacy contract, one has to claim that it would be better for such children not to be born at all than to be borne by a surrogate and with the use of ART, which might result in genetic defects.

Let us consider the case of the so-called Baby Doe produced as the result of the surrogacy contract between Malahoff and Stiver. The child was born with severe disability caused by CVM virus and it was claimed that this happened due to medical negligence in the procedure of artificial insemination. In this case, the baby turned out to be the child of Mr. and Mrs. Stiver, conceived naturally despite the artificial insemination, which not only failed but also caused harm to the fetus. If there were no negligence, the child could have been born healthy. Therefore, both the mother and the child could claim compensation for prenatal harm. Yet, if the child were conceived with Malahoff's sperm as it was intended and in the same time affected by the virus and born sick, the situation would be more complicated since the only alternative for such a child would be not to be born at all. If the sperm of Malahoff was tested, it would not be used because of the virus and the insemination would not take place or would be postponed until the father would be free of the virus and then another healthy child would be conceived instead (this is the so called non-identity problem identified by Derek Parfit and broadly discussed in bioethical literature).[128] To claim for compensation on behalf of a sick child who would not have been born if the procedure were performed with due diligence was expressed in the so-called

et.al., *Effect of blastomere loss on the outcome of frozen embryo replacement cycles,* "Fertility and Sterility" 2003, vol. 79, No. 5, pp. 1106–1111; M.K. Smith, *op. cit.*, pp. 134–140.

[126] *Stiver v. Parker* 975 F.2d 261, 272 (6th Cir. 1992), p. 270.

[127] M.K. Smith, *op. cit.*, p. 134.

[128] D. Parfit, *Reasons and Persons*, Oxford 1987, p. 359.

wrongful life actions which were usually dismissed, with some controversial and broadly discussed exceptions.[129]

It is easier to identify potential mental harm of children borne as a result of surrogacy. Yet, the difficulty of objection against surrogacy based on harm remains the same as described above. Many authors claim that even if such a child would suffer from identity problems, from the feeling of being abandoned by his or her biological mother, it would be still better for him or her to exist and suffer than not to exist at all. This kind of suffering is not severe enough, as many authors claim, to make life not worth living (as it could be in the case of severe physical disability, pain, or mental retardation).

In the surrogacy contract, usually the candidates for surrogates are carefully checked. Yet, by contrast to adoption procedure, prospective parents are not checked whether they fulfill requirements for being the best possible parents. Thus, it may happen that they will abuse the child, or that they will not be fit for parenthood because of their age or health condition. The case of economic status is rarely discussed here since the surrogacy is so expansive that it is assumed that the parents are wealthy enough to guarantee decent future for the child. The reply to the objection of potential abuse is quite simple – we already have legal regulations protecting children in the case of domestic violence, parental negligence or any kind of abuse.[130] These regulations seem to provide a necessary protection in all cases and surrogacy does not constitute an exception that would require special attention.

Yet, the argument that commissioning parties who "order" a creation of child do not have to meet any standards of "good parents" when they take such a decision is worth of considering. One may claim that the same regards natural parents. Yet, the difference is that these people cannot be natural parents due to many reasons, which can affect their ability for providing good standard of care. It is enough to mention age and health conditions, which are both taken into account in adoption procedure. ART allow post-menopausal women to become mothers with the use of egg donors and surrogates. Among oldest women who became mothers thanks to IVF there are women who are around 67. The most absurd example was the idea of the husband of an actress Zsa Zsa Gabor who claimed that they wanted to use

[129] M. Soniewicka, *Regulacje prawne wobec rozwoju współczesnych technik kontroli prokreacji: analiza roszczenia wrongful life*, "Diametros" 2009, No. 19, pp. 137–159; M. Soniewicka, *Prokreacja medycznie wspomagana*, [in:] *Paradoksy Bioetyki prawniczej*, J. Stelmach, B. Brożek. M. Soniewicka, W. Załuski, Warszawa 2010, pp. 85–101.

[130] J. Robertson, *Surrogate Mothers…*, pp. 30–33.

a surrogate so she could become a mother at the age of 94.[131] Both advanced age and serious health impairments may adversely affect the abilities of such women to provide adequate care for their children. The same regards men in advanced age or with impairments, who would not be able to care for the children which they might decide to have with the use of surrogates. To prevent such situations, one does not have to outlaw surrogacy as such but may restrict the access to surrogacy to those who meet certain requirements similar to those given at adoption procedure, e.g. restriction for couples of certain age, in good health condition and with decent social-economic status, with no criminal records, etc.

6.2. Surrogacy and the problem of harm to women

The problem of surrogacy contracts attracted attention of many feminist writers primarily concerned with the effects of the practice for the status of women. Yet, there is no consensus among feminist writers in this subject. Some argue that surrogacy is another form of oppression and exploitation of women. Others claim that it is the form of their empowerment and expression of their liberation.[132]

The potential harm to women (surrogates) may result from the fact that they bear all the physical and health burden of pregnancy, which is connected with health (and even death) risks.[133] What is more, they may suffer from side effects of ART (in particular IVF procedures if they are also egg donors). Last but not least, they may also suffer anxiety and emotional distress after the birth of the child which they feel connected to and have to give away.

One may also argue that the surrogacy contracts just like organ sales may result in exploitation of economically disadvantaged women who will become surrogates for wealthy people in order to survive. This would result in a new form of slavery or create an economic underclass of women who would provide their bodies and reproductive capacities to deliver babies for the upper class. Taking into account the

[131] A. Duke, *Zsa Zsa Gabor to become new mother at 94, husband says*, CNN, 19 April 2011, http://edition.cnn.com/2011/SHOWBIZ/celebrity.news.gossip/04/14/gabor.baby/index.html (last accessed: September 2018).

[132] J.L. Nelson, H.L. Nelson, *op.cit.*, pp. 2293–2294; C.B. Cohen, *op.cit.*, pp. 2302–2303; Ch. Overall, *Ethics and Human Reproduction: A Feminist Analysis*, Boston 1987; L. Purdy, *Reproducing Persons: Issues in Feminist Bioethics*, New York 1996.

[133] I. de Melo-Martin, *Rethinking*…, pp. 251–306.

phenomena of reproductive tourism, this could bring about exploitation of women from poor countries whose only alternative would be to produce babies for people from the rich part of the world. This scenario seems not only to deepen the existing economic and social inequalities but also to create new forms of exploitation and dependence.

The common reply to this line of argumentation is that there are many different ways to protect the women and prevent their exploitation other than forbidding the surrogacy contracts and restricting their reproductive autonomy. Fabre argues that making contracts voidable would be the best solution to protect women from exploitation and harm.[134] Steinbock claims that surrogates, just like in the case of prenatal adoption, should have the right to change their mind after giving birth to a child and also that the background of the agreement should be taken into account in order to decide whether the woman was fully free to become a surrogate or whether she did it under social and economic pressure.[135] What is more, many authors claim that it is paternalistic to deny the women right to sell their body for their own good.[136] Instead they claim for the liberation of women through economic gain.[137] Purdy claims that pregnancy as such is a kind of biological oppression suffered by all women and this is the kind of labor which women do for free, thus, in her opinion, surrogacy which offers women payment for child bearing may result in empowering all women by emphasizing their labor and its significance.[138] According to Faber, this kind of labor constitutes an example of "labor of love" and does not have to exclude payment.[139]

According to Robertson, calculating all costs and benefits of the surrogacy contract, one may come into conclusion that all parties to the contract benefit from it.[140] The child benefits by its sole existence. The social parents benefit by having their own baby (genetically related to them or at least the one whose creation was their initiative), and a surrogate benefits financially, i.e., by getting paid and may also benefit by providing "the gift of life" if it was also her aim. According to most authors who take the consequentialist approach to the problem of surrogacy, the

134 C. Fabre, *op.cit*., pp. 192–218.
135 B. Steinbock, *Surrogate Motherhood,* pp. 45–50.
136 C.B. Cohen, *op.cit*., p. 2302. C. Fabre, *op.cit*., p. 202.
137 Ibidem.
138 L. Purdy, *op. cit*., pp. 90–91, 97.
139 C. Fabre, *op.cit*., p. 199.
140 J. Robertson, *Surrogate Mothers…*, p. 29.

problem is not whether surrogacy is right or wrong (and whether it should be permissible), but rather how it should be done (and regulated), so benefits would outweigh costs and harm would be prevented.[141]

6.3. Social consequences: undermining family structure

There are some authors who claim that surrogacy (and AID) is morally wrong because of the potential social consequences of its application for the institution of family.[142] One may argue that surrogacy (and AID) would undermine the traditional concept of family, accept intrusion of a third person in the marital community (which constitutes quasi adulterous arrangements),[143] promote single parenting, and create confused familial linage. Undermining the traditional structure of the family may result in instability of family[144] and therefore instability of a society. Other consequences may include increasing chances for incest between genetically related siblings or half-siblings who do not know each other.

In reply to this objection, such authors as Robertson argue that the traditional concept of family has been already undermined and deeply transformed in the 20th century and surrogacy is only a small part of a bigger picture in which one may include blended and patchwork families, single and gay parents, etc.[145] Yet, it is different to accept social changes which already have occurred from promoting these changes by new means of reproduction. As it was already mentioned, the case of adoption and the case of patchwork families is a response to the problem of unfortunate situations in which families never existed or cease to exist. The surrogacy (and AID) case is different since in such a situation people plan in advance to create such situations and make use of ART to make it happen which calls for different moral assessment. I will continue with this line of argumentation in the following sections.

Another significant difference between surrogacy and adoption is also worth mentioning here. In the case of surrogacy people arrange an asymmetry in parenthood

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141 Ibidem, p. 32. L. Purdy, *op. cit.*, p. 92.

142 Cf. H.T. Krimmel, *op. cit.*, p. 38.

143 Ibidem; C.B. Cohen, *op.cit.*, pp. 2300–2301.

144 E.F.S. Roberts, *"Native" Narratives of Connectdness: Surrogate Motherhood and Technology*, [in:] *Cyborg Babies: From Techno-Sex to Techno-Tots*, eds. R. Davis-Floyd, J. Dumit, New York 1998.

145 J. Robertson, *Surrogate Mothers…*, p. 28.

in most common cases in which the child is genetically related to one rearing parent only – usually the father.[146] This may bring about interfamilial tensions, which also occur in families with an adopted child, but in the latter case both parents are not genetically related to the child and stay in symmetrical relation to the adopted person. Let us consider a case of divorce between a couple that has a child being the result of surrogacy. If only the father is genetically related, yet both parents are considered legal parents, should the father's rights prevail if the question of custody of the child appears?

7. Deontological arguments in debate over surrogacy

On the grounds of the deontological approach, one formulates ethical objections claiming that such practices as surrogacy are not morally wrong because of the consequences to which they may lead but because they are **inherently wrong**. Deontological arguments rooted in Kantian philosophy are mainly concerned with the objection of the instrumentalization of children and women (surrogates) who are treated merely as means to an end and not as an end as such.

7.1. Instrumentalization and commodification of children

The objection of instrumentalization of children in surrogacy contracts is connected with the afore-mentioned problem of the subject of the contract. Selling babies or persons-to-be is identified with their commodification and instrumentalization.[147] Yet, from the moral point of view one may argue that commissioning parties are not treating children as mere means to achieve an end (to satisfy their preferences of having genetically related children or preferences to create "their own" children). These children are also an end in themselves, since their parents want them to be. Besides, in most of the reproductive decisions parents want to satisfy their preferences and take these decisions to realize different goals, such as: to have siblings for existing children (or the so called "savior siblings" who are conceived and born

[146] H.T. Krimmel, *op. cit.*, p. 38.

[147] R. Macklin, *What Is Wrong with Commodification*?…, pp. 106–121; D. Fox, *op.cit.*, pp. 162–166.

in order to be a tissue donor for their existing sick siblings);[148] to have somebody to love and who would love them; to have assistance when they become older; to have successors of their business or profession, etc. Some of these reasons may be considered as morally wrong and psychologically burdening for the children, some of them neutral or right. Yet, in most of these cases parents want also children as such, which means that they are not violating the humanity formula.[149] What is more, the reasons for creating children does not have to determine the attitude of parents to their children, neither their value.[150] Parents usually end up loving their children no matter of what was the reason to have them. And in the case of surrogacy and ART, one may assume, as Wilkinson claims, that parents who invested so much in creating a child would love it even more than parents of children created in natural procreation.[151]

The objection of the instrumental treatment of children remains sound when we look at the surrogacy from the perspective of a surrogate. If such a woman decided to get pregnant and deliver a baby not because she wanted the baby as such but because she wanted money which she could get by delivering the baby for somebody else, we can clearly see that such a woman would treat the baby as a mere means to an end. According to Krimmel, the separation of the decision to create the child from the decision to have and raise the child makes surrogacy morally wrong.[152] Thus he claims that only full surrogacy, just as AID, are morally wrong. In his opinion, partial surrogacy conceived with the gametes of the prospective social parents is morally right and no different from other kinds of help in nurturing a child:

> Using a surrogate mother as a host for the fetus when the biological mother cannot bear the child is no more morally objectionable than employing others to help educate, train, or otherwise care for a child. Except in extremes, where the parent relinquishes or delegates responsibilities for a child for trivial reasons, the practice would not seem to raise serious moral issue.[153]

148 S. Sheldon, S. Wilkinson, *op.cit.*, pp. 137–163.
149 Ibidem pp. 146–148.
150 M.K. Smith, *op.cit,* pp. 164, 192–193; S. Wilkinson, *Choosing tomorrow's children…*, pp. 122–124.
151 S. Wilkinson, *Choosing tomorrow's children…*, p. 125.
152 H.T. Krimmel, *op. cit.*, pp. 35–39.
153 Ibidem, p. 35.

Yet, he considers providing germinal material to be fertilized (both by a surrogate and by a donor) as a major ethical problem since "a person who is providing germinal material does so only upon assurance that someone else will assume full responsibility for the child she helps to create."[154] The author claims that it is morally wrong to separate the decision of creating a child from the decision of taking responsibility for the child. The justification for this argumentation given by Krimmel rests upon the claim that no one should be treated as a mere means to an end. He claims that in the case of full surrogacy as well as AID children are conceived not because they are wanted by their mother for their own sake but rather because they are useful to someone else who wants them. They are therefore conceived to be given away, they are intentionally and deliberately deprived of their biological mother (or parents if the child is conceived with gametes of the donors), which is unfair for the children. Claiming that this situation is analogous to adoption case is misleading, since in the case of adoption we are trying to make up for an unfortunate situation in which children happened to be, while in the surrogacy case this situation is arranged by the parties to the contract. As Krimmel aptly points out:

> It is one thing to ask how to make the best of a bad situation when it is thrust upon a person. It is different altogether to ask whether one may intentionally set out to achieve the same result.[155]

Replying to these objections, one may argue that those who take the decision to create a child are commissioning parties, not a surrogate, and they want also to take the responsibility for the child. Therefore, the child is created because it is wanted for the people who initiated the procedure and paid for it. According to Robertson, paying to the surrogate (and AID) for fertilization is just like paying her for gestation and is morally equivalent to renting a nurse or a day-care worker for a child.[156]

Yet, it seems that such analogies are misleading, both between partial surrogate and a nurse, and between full surrogate or AID and a nurse. A nurse is taking care of an existing child, a surrogate is helping to create a child which has a significant moral difference since only the latter one is partly responsible for the existence of the child and it does not make a moral difference whether she gave only herself (and

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154 Ibidem.

155 Ibidem.

156 J. Robertson, *Surrogate Mothers*…, p. 31.

her gestational powers) or both herself and her egg. In both cases, the child would have never been borne if she were not participating in its gestation and delivery. And in both cases a surrogate (just like the donors of germinal material) participate in creation of a child not because she wants the child for its own sake but because she can achieve another goal by creating a child – earn money, feel important, etc. Thus, at least one party of the contract is treating a child as a mere means to an end, which violates dignity of a child. Of course, there can be some exceptions, and some surrogates as well as germinal donors may want to create a child for its own sake too,[157] but it seems that such practices are mainly focused on allowing instrumental treatment of children by those who create them in order to make money on it. Therefore, some argue that only altruistic surrogacy contracts should be allowed and commercial ones should be outlawed.[158] Yet, altruistic surrogacy contract would not prevent other moral concerns – such as exploitation of women (they would even make it more vivid – e.g. coercion of family), or violating the integrity of motherhood, which will be discussed below.

7.2. Commodification and exploitation of women

Some objections against surrogacy regard the instrumental treatment of women who are reduced as surrogates to "baby making machines", "fetal containers", "living laboratories", "incidental incubators", "reproductive conduits", etc.[159] This objection was discussed above in its consequentialist interpretation. From deontological point of view, the calculation of costs and benefits does not matter here but only the problem whether women are used as a mere means to an end or not. It is worth repeating here that human dignity is inalienable and one cannot refrain from its protection herself. This means that one should not treat oneself as a mere means to an end, and thus consent is not a justification for instrumental treatment. The problem in surrogacy contracts regards whether surrogates are mere means to an end or rather an end in themselves, when they decide for gestating and delivering a baby for somebody

[157] J. Raymond, *op.cit*., pp. 7–11; P.J. Parker, *Motivation of Surrogate Mothers: Initial Findings*, "American Journal of Psychiatry" m1983, vol. 140, No. 1, pp. 117–118; E.F.S. Roberts, *op. cit*.

[158] J.L. Nelson, H.L. Nelson, *op. cit.*, p. 2293; J. Raymond, *Reproductive Gifts and Gift-Giving: The Altruisitic Woman,* "Hastings Center Report" 1990, No. 20(4), pp. 7–11.

[159] J. Robertson, *Surrogate Mothers…*, p. 32; J.L. Nelson, H.L. Nelson, *op. cit*., pp. 2293–2294; C.B. Cohen, *op. cit*., pp. 2302–2303; J. Raymond, *op. cit*., p. 11; E.F.S. Roberts, *op. cit*.

else. One may claim that surrogacy is not a mere job but rather a practice, which requires women to provide not only their bodies but wholly themselves. Therefore, it cannot be called a "job" but rather a practice that instrumentalizes women and therefore violates human dignity even if women voluntarily agree on this.

8. Neo-Aristotelian arguments in debate over surrogacy

Neo-Aristotelian objections against surrogacy do not have to be considered as contradictory to deontological arguments from human dignity but rather as supplementary arguments, which enhance deontological argumentation by providing a broader philosophical framework. This philosophical approach puts attention to the meaning and aim of human practices, such as procreation and parenthood, as well as to our motives and intentions, relations and context in which we act.

8.1. The meaning of motherhood (the problem of the integrity of motherhood)

The separation of sex from fertilization, of fertilization from gestation and delivery, and of delivery from child rearing not only transforms the meaning of motherhood as it was mentioned above, but foremost it undermines the integrity of motherhood.[160] The separation of pregnancy (biological parenting) and child rearing (social parenting) has been known for ages as an exceptional case in which women were not able or not willing to rear their own children and they were given them away. Yet, the disintegration of biological motherhood, which is now possible with the use of reprogenetics, is something very new and requires an in-depth moral consideration. By undermining the integrity of motherhood, we undermine the concept of motherhood as such, which becomes ambiguous and confusing as it was mentioned above. Surrogacy brings about the separation and multiplication of the roles of mothers, which may result in moral dilemmas and conflict over the custody

[160] Similar objection refers to embryo donation, see: M. Geach, *Are there any circumstances in which it would be morally admirable for a woman to seek to have an orphan embryo implanted in her womb?* [in:] *Issues for a Catholic Bioethics,* ed. L. Gormally, London 1999, pp. 341–346.

to a child. By constituting an ambiguous beginning of mother-child relationship[161] we undermine also the responsibility for the care of the child.

8.2. The meaning of procreation (the problem of commercialization and instrumentalization, integrity of procreation)

ART together with surrogacy significantly transforms procreation as we know it. They provide the separation of sex from procreation (which was previously made possible also by contraception); procreation from child-rearing (which was previously made possible also by adoption); procreation from marriage (which was previously broadly accepted). Christine Overall argues that the separation of procreation from sex in the case of surrogacy brings about personal and bodily alienation of women – destroys their personality and limits their autonomy (the possibility to express themselves and their individuality which takes place in natural procreation, in real human relations which result with conceiving a baby by contrast to contracts).[162] Overall follows Marxist reasoning in her feminist approach, yet her arguments can be also interpreted in a communitarian, neo-Aristotelian way. Alienation from personhood which is present in surrogacy,[163] means that procreation is not only depersonalized but also dehumanized, as Leon Kass and Paul Ramsey would argue.[164] Technological transformation of procreation, which provides the separation of procreation and sexuality and body, as well as the separation of different elements and stages of procreation, and finally separates procreation from responsibility for rearing children and undermines integrity of motherhood affects the way we understand ourselves, our significant relationships and fundamental moral concepts and social practices. There is some inconsistency in the line of argumentation in favour of all kinds of ART on the basis of the argument from promoting traditional family values as Sherman Elias and George Annas point out:

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[161] H. Watt, *The Ethics of Pregnancy, Abortion and Childbirth: Exploring Moral Choices in Childbearing*, New York 2016, pp. 112–113.

[162] CH. Overall, *op. cit*., pp. 126–128.

[163] C.B. Cohen, *op. cit*., p. 2302.

[164] L. Kass, *op. cit*.; P. Ramsey, *op. cit*.; President's Council on Bioethics, *Beyond therapy: biotechnology and the pursuit of happiness. President's Council on Bioethics*, Washington 2003.

> It seems disingenuous to argue on the one hand that the primary justification for non-coital reproduction is the anguish an infertile married couple suffers because of the inability to have a "traditional family", and then use the breakup of the traditional family unit itself as the primary justification for unmarried individuals to have access to these techniques.[165]

Commercialization of procreation such as in surrogacy contracts devalues children, as Elisabeth S. Anderson argues, by treating maternal bond (relationship) as a commodity; it also trivializes the understanding of pregnancy for women.[166] The new techniques of procreation including surrogacy may help in alleviating infertility problems and may increase the scope of reproductive choices but, at the same time, may also compromise the most important values of procreation, such as stability and certainty of child-parent relationship, responsibility and care, unconditional love of children and the idea of the gift of life.

8.3. The intentions, motives and the parent-child relationship

Just as in the deontological approach, neo-Aristotelian approach takes into account the intentions and motives which may affect and change the meaning of a practice in which we participate. Argumentation based on parental intentions draws attention to the fact that we are attempting to understand what procreation is by referring to the intentions of parents and the targets they set themselves when making reproductive decisions. The intentions of parents can influence the meaning ascribed to the relationship that arises from procreation. Let us consider the question how surrogacy contracts may affect the parent-child relationship and the way we view children.

According to Krimmel, if children are desired not for their own sake but for other purpose, this changes the way we view children – they become commodities and products of our control.[167] Depersonalization of motherhood, which is the central issue in surrogacy, results in this that children are made, not begotten.[168] And once they are treated as commodities, it may affect the attitude of parents to children if

[165] S. Elias, G. Annas, *Social Policy Considerations in Noncoital Reproduction*, "Journal of the American Medical Association 1986, No. 225(1), p. 67.

[166] E.S. Anderson, *op. cit.*, pp. 71–87.

[167] H.T. Krimmel, *op. cit.*, pp. 36–37.

[168] C.B. Cohen, *op. cit.*, p. 2301.

anything goes wrong and if the children do not meet the expectations of their parents. This could be the case of children borne disabled or with other genetic defects, as well as twins and triples if they were not expected. If one pays, one expects values, as Krimmel points out.[169] Thus, Michael Sandel argues that commodification of human gametes and embryos, as well as human body, and commercialization of such fundamental human practices as procreation corrupts the meaning of this practice and degrades the value connected with these goods and practices.[170] The commercialization of procreation may result not only in exploitation of women and abuse of children, but it may also change human attitude to children, relationships, family, and procreation; it may also change human motivation to act, resulting in transforming internally driven acts into externally driven acts according to the principle "*once a commodity, always a commodity*".[171] As Sandel and other communitarian thinkers claim, there are some spheres of human life, to which procreation certainly belong, which should not be market driven unless we want to degrade them and corrupt their meaning.

Surrogacy contracts assume that parent-child relationship is a matter of contract and therefore "mothers" just as "children" are interchangeable and replaceable. A surrogate can be any woman who meets certain conditions and is being replaced after delivery of the child by the "real" mother who ordered the child. The child who results from such an arrangement is transferred after delivery to those who initiated the procedure if everything goes right. According to the neo-Aristotelian approach, child-parent relationship is not a matter of a mere contract but also results from involvement in such a practice as procreation. And the greater number of people is involved in such a practice the more confused the relationship is, which may undermine parental responsibility and bring about familial and psychological tensions.

Let me invoke a vivid illustration given by Krimmel. The author refers to a dialogue found in a newspaper, between a surrogate and her nine-year daughter. When the daughter, who also had a half-brother Jeffrey, learned that her mother is pregnant with a baby which will be given away to another family, she replied to this news saying to her mother: "Oh, good. If it's a girl we can keep it and give Jeffrey away."[172]

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[169] Ibidem, p. 37.

[170] M. Sandel, *What Money Can't Buy. The Moral Limits of Markets*, New York 2012.

[171] Ibidem, pp. 10, 43–44; 215–220.

[172] H.T. Krimmel, *op. cit.*, p. 39. The author refers to newspaper account: Womb for Rent, Los Angeles Herald Examiner, Sept. 21, 1981, p. A3.

8.4. The problem of the identity of a child (vague and complicated familial bonds, access to genetic information)

Surrogacy is also objected to because it may bring about vague and complicated familial bonds as it was mentioned above. In particular, many complications arise when surrogates are related to women who will be social mothers, as it happens often in the case of altruistic surrogacy. Let us consider a case of a surrogate who is a sister or a mother to a woman who will rear the child. The surrogate will be at the same time an aunt and a mother for the child or a mother and a grandmother in the latter case. The problem also exists in surrogacy with strangers, since a child has always more than one mother and, in some cases, can have even six potential candidates for "parents", which makes his familial situation very complicated and produces a confused linage.[173]

Despite the afore-mentioned problems with potential incest or psychological burden, one may also mention the identity problem here. This problem regards also children who were conceived with the use of AID. The problem concerns the right to anonymity of the germinal donors, which may come into conflict with the right of a child to know one's own genetic identity, which can be of medical interest for a child. Besides, the identity problems that result from genetic manipulations (such as MRTs) or ART and surrogacy may affect the way one views oneself – how one understands who he or she is. In some cases, this kind of confusions of familial bonds may undermine one's own self esteem or may be an obstacle in understanding oneself. In particular, when a child views oneself as a product of a contract between many different parties from which some rejected any bond with him/her, while the others accepted him/her under certain conditions provided in a contract (such as genetic fitness). We do not have enough empirical studies on this very new subject. Yet, from the philosophical point of view, this situation seems worth of deliberation, and raises many serious moral doubts.

[173] P. Ramsey, *op. cit*.; L. Kass, *op. cit*. Cf. O. O'Neill, *op. cit*., p. 67.

9. Summary

In this paper, I presented the most important philosophical and moral issues concerned with the idea of contract pregnancy. Terminological disputes over the concept of surrogacy, which I presented, are rooted in different axiological backgrounds, which can be defended on various philosophical grounds. The most important moral and legal dilemmas, which were revealed in the landmark cases, can be also elucidated with the reference to the major philosophical doctrines, which I presented in this paper with reference to the problem of surrogacy. Most of the proponents of surrogacy contracts invoke the concept of reproductive autonomy and the principle of privacy (including the right to use one's own body and reproductive capacities). Yet, this concept just as our relationship with the body may be differently interpreted depending on the philosophical stance we take. Most of the arguments in favor of surrogacy are formulated from either libertarian or utilitarian perspective. The strongest arguments against the practice of surrogacy are provided within a deontological and neo-Aristotelian approach.

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Surrogate motherhood in France: ethical and legal issues

1. Introduction: What is surrogacy in France?

In France, for about a decade, the acronym "GPA" ("gestation pour autrui") has become very prevalent and refers to a plurality of practices whose common feature is that a woman, known as the "surrogate mother", is ready to accept pregnancy and carry a child, whilst committing herself to give the child up to a couple (married or not, heterosexual or homosexual) or a single person, known as the "commissioning" or "intending parent(s)."[1] Unfortunately, there are no reliable statistics on the number and circumstances of births of children born through surrogacy arrangements. Two reasons explain it. The first is related to the secret surrounding these births, especially because surrogacy contracts are prohibited in France. The second is that the judicial and consular authorities (for cases abroad) have difficulties in being informed and proving the use of surrogacy agreements. Moreover, the transcription of the birth certificate on French civil status records is not mandatory; some intending parents having used a surrogate mother abroad can return to France with the child by asking only for a travel pass. This then limits the possibilities of investigation. Thus, since 2008, only about 100 files have been processed by the prosecutor handling this service (for cases of pregnancy abroad), even if it can be assumed

[1] The following definitions are based on the glossary prepared by the Permanent Bureau of The Hague Conference on Private International Law (HCCH): *The desirability and feasibility of further work on the parentage / surrogacy project*, Annex A of Preliminary Document No. 3B, April 2014.

that this number is actually much higher. Despite these evaluation difficulties, it is possible to detail the practices observed.[2]

1.1. The portrait of intending parents

For women and men who cannot conceive children on their own or through assisted reproductive technology (ART), surrogacy is an alternative route to parenthood. These are most often married heterosexual couples, sometimes cohabitants or partners. But the demands made by male homosexual couples have recently increased. If they want children with a biological bond to them, surrogacy is the option which best meets the couple's wishes. Two other options are mainly rejected:

- the co-parenting with a woman who will be the child's biological and legal mother, or with a female couple, with one of the women being the biological and legal mother. This option is not satisfying for a male couple who does not want to share legal custody of the child with one or two women.
- the legal adoption, even if a married couple can now adopt a child since the law of 17 May 2013 authorizing same-sex marriage, is not considered the best solution. There are not enough children who can be adopted to satisfy all requests and social services may be reluctant to give preference to a homosexual couple rather than to a heterosexual one.[3] Also, some countries who accept international adoption refuse to hand over a child to a homosexual couple.[4] It is also said that adoption does not engender a "real" connection between parents and children (when "real" is defined by genetic lineage).

[2] The following developments regarding the surrogacy practices are the result of a research work carried out in 2017 by a team of jurists (of which I was part), doctors and sociologists: *Le "droit à l'enfant" et la filiation en France et dans le monde*, ss. la dir. de C. Brunetti-Pons, LexisNexis, 2018. Drawing on empirical research conducted by the authors and supplemented by secondary analyses of media, legislative and public accounts of surrogacy, the book engages with the key stakeholders involved in the practice.

[3] In June 2018, a French official, head of the adoption service in the Seine-Maritime department, sparked a major row by suggesting gay people came lower in the pecking order than heterosexual couples when applying to adopt children: https://www.lemonde.fr/societe/article/2018/06/20/le-defenseur-des-droits-va-enqueter-sur-les-pratiques-discriminatoires-du-service-adoption-envers-les-couples-homosexuels-en-seine-maritime_5318059_3224.html (last accessed: July 14, 2018).

[4] Some countries, including China or Russia, expressly stress their refusal of adoption by same-sex couples.

On the other hand, no case involving a female couple has been currently identified. These women generally opt for medically assisted procreation with a sperm donor and one of them carries the child. More recently, there have been cases of surrogacy where the intending parent is a single man[5] or even a single woman.[6]

1.2. Destination countries and procreative tourism

In the 1990s, some cases of surrogacy made in France were identified. Married heterosexual couples then resorted to a surrogate mother either through an association or in an intra-familial setting (for example, the case of two sisters, one of whom carried the child for the other). With the prohibition of surrogacy agreements in 1994, these cases have become rare. And this has pushed couples to go abroad to countries where surrogacy is allowed. Facilitated by the internet, the linking of people across borders has led to a booming and global reproductive tourism industry of which surrogacy has become a lucrative part.

Twenty years ago, couples were still heading mainly to the United States. However, quite soon, new destinations have been privileged: Ukraine and India in particular because of the lower cost of the procedures there. Generally, heterosexual couples go to Ukraine and single men mainly to Asia.[7] More episodically, other destinations are chosen, like Russia, Bulgaria, Greece or Canada.[8]

In most cases, the practice of surrogacy takes place entirely abroad (from conception to the birth of the child). However, some cases covering practices on French territory have been revealed. The usually observed scenario is that a couple brings a young foreign woman to France to carry a child following an artificial insemination carried out abroad (for example in Belgium). It is also agreed that the child will be handed over to the intending parents after the birth taking place in France.

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[5] Cass. civ. 1re, 13 Sept. 2013, n° 12–18.315, 12–30.138.

[6] CE, ord., 3 Aug. 2016, n°401924.

[7] *Le "droit à l'enfant" et la filiation en France et dans le monde*, op. cit., pp. 126–127: in this report, the working group attempted to provide a picture of the number and nature of the international surrogacy arrangements being undertaken globally, as well as the geographical scope of the phenomenon.

[8] Op. cit., p. 441.

1.3. The variety of reproductive techniques used

Relevant developments in medical and technological practices have facilitated the use of surrogacy. There are important differences depending on the cases analyzed. Male gametes may be those of the intending father or a donor. Female gametes may come from the gestational mother, the intending mother, or another woman. Whenever possible, intending parents wish to erase any link between the surrogate and the child. In most cases judged in France, the woman who bears the child isn't the "genetic" mother. Therefore, most often, conception takes place with the help of an egg donation, which supposes an *in vitro* fertilization (IVF). However, when the sponsor is a single man, the surrogate is often the biological mother. In this case, artificial insemination is the preferred technique.

To summarize, the conception of the child can result from:

1. IVF of the gametes of the intending parents who are in this situation the genetic parents of the child;
2. IVF (or insemination) using the would-be father's sperm (male partner or male single) and the eggs of the surrogate. In that case, the surrogate is both the genetic and the gestational mother of the child. The couple has only a partial genetic link with the child, by the male partner.
3. IVF using an egg purchased from a donor fertilized by the male partner's sperm, followed by an embryo transfer to the gestational mother, or, a mirroring situation, results from the fertilization of the oocyte extracted from the intending mother by sperm from a donor; the couple here also has only a partial genetic tie with the child;
4. IVF using a double donation of gametes (sperm and eggs), followed by an embryo transfer to the surrogate; the couple here has no genetic link with the child.

As a result, the unborn child may have no genetic connection with its intended parents, have only a partial one, or be the genetic child of them; while the surrogate mother may only perform a gestational role, or be the biological mother. In the most complex cases, the child may have up to six adults claiming parental rights over him or her: the genetic mother (egg donor), the gestational mother (surrogate), the intending mother, the genetic father (sperm donor), the husband of the gestational mother (presumption of paternity) and the intending father. This diversity of situations can obviously have possible repercussions, in the future, on family ties.

1.4. Lack of legal definition

It is probably this variety of cases that explains the absence of a legal and unitary definition of surrogacy in France. Only two expressions are used in the Civil Code.[9] Article 16–7 refers to "reproductive surrogacy" ("procréation pour le compte d'autrui") and "gestational surrogacy" ("gestation pour le compte d'autrui"), but does not suggest any definition of them. The former corresponds to the situation where the surrogate is both the biological and the gestational mother of the child and when the insemination is done with the sperm of the intending father or of a donor. The latter concerns the case where the surrogate is only a gestational mother and carries the embryo conceived *in vitro* with the gametes of the intended parents or after the donation of gametes. All in all, according to the French law, this lack of definition is ultimately irrelevant because whatever the situation, surrogacy is prohibited.

2. Prohibition in France

Surrogate motherhood has been prohibited in France since 1991, under the decision of the "Cour de cassation" (the France's highest court which has jurisdiction over civil, commercial and criminal matters, including civil status and parentage).[10] This prohibition was confirmed in the Bioethics Act of 1994 and is codified in Article 16–7 of French Civil Code. A surrogacy contract is null and void, and violations are punished by civil (1) and criminal sanctions (2).

2.1. Prohibition in Civil Law

The first surrogacy initiatives emerged in France in the 1980s, at a time when IVF was not practiced. In general, the child carried by the surrogate mother was first recognized, before birth, by the intended father. The parentage was thus easily established. It was then sufficient for the surrogate mother to give birth by asking for the

[9] The terms "intending parents" ("parents d'intention"), "carrying mother" ("mère-porteuse") or "surrogate mother" ("mère de substitution") are absent from the Civil Code.

[10] Cass. Ass. plén., 31 May 1991, D. 1991, p. 417, rapp. Y. Chartier.

secret of her identity ("anonymous childbirth" known as "accouchement sous X"[11]) and to indicate the name of the man who could take care of the child. For her part, the intended mother filed an application for adoption of her spouse's child. Once the judgment of adoption was issued, the maternity was lawfully established. The child was thus legally bound to his two intended parents.

To connect couples and surrogates and establish contracts, associations of intermediaries were created (for example, "Alma mater"). Since surrogacy was purely contractual, French judges had to think about the validity and the enforceability of such transactions regarding the principles of dignity and inalienability of the human body. By the mid-1980s, the decisions handed down invalidated the agreements[12] and associations of intermediaries.[13] The judges also frequently refused to issue the adoption of the child by the intended mother.[14]

In 1991, the *Cour de cassation*, sitting in a plenary session, came to a binding decision that would from then on inspire French lawmakers.[15] In a typical domestic surrogacy case, it has been ruled that an agreement by which a woman commits herself, even for altruistic reasons, to conceive and carry a child to be abandoned at birth, violates two unwritten principles of law concerning public policy.[16]

On the one hand, it denies the principle of unavailability of the human body which means that no part of it can be treated like a property. Surrogacy involves payment for a service (the service of pregnancy; "renting" of a womb) and for the baby itself (the purchase of a child or a "baby for sale"). It reduces children to the rank of commodities and ultimately of profit vectors and it exploits women by trading in pregnancy and maternity. And even if purely uncompensated forms of

[11] Since the Act of 8 January 1993, a woman who gives birth is allowed not to reveal her identity. An anonymous childbirth does not act as a barrier for the father to acknowledge the paternity of the child.

[12] TGI Aix-en-Provence, 5 Dec. 1984, Juris-Data n°1986–764821; TGI Marseille, 16 Dec. 1987, Juris-Data n°1987–600054; CA Paris, 19 Feb. 1988, Juris-Data n°1988–020741.

[13] TGI Paris, 20 Jan. 1988, Juris-Data n°1988–041202; TGI Créteil, 23 March 1988, Juris-Data n°1988–600527; Cass. civ. 1re, 13 Dec. 1989, Bull. I, n°387. The *Conseil d'Etat*, in the ruling of 22 January 1988 (*Association Les Cigognes*), also considers the activity of an association promoting surrogacy illegal.

[14] TGI Aix-en-Provence, 5 Dec. 1984, JCP 1986 II, 20561.

[15] Cass. Ass. plén. 31 mai 1991, op. cit.

[16] In France, public order measures are those covering mandatory rules which cannot be derogated from and which, by their nature and objective, meet the imperative requirements of the public interest. It is an essential limit of the liberty of freely formulating a contract. Even if "ordre public" is not defined by the Civil Code, Article 6 provides: *One may not by private agreement derogate from laws that concern public order and good morals*.

surrogacy exist (an altruistic model), the practice is still an example of invasive labor. It is physically intrusive, involving in some cases hormonal stimulation, embryo transfer, pregnancy and birth.

On the other hand, however, surrogacy contracts are contrary to the principle of the unavailability of the legal status of persons. The act of a mother who, by arrangement, surrenders or transfers her parental rights and duties, is illegal. Indeed, the information recorded in the civil status registers (birth, names, marriage, divorce and death) just results from events, the operation of law, judgments and administrative decisions, and may not be established or changed by private agreement. The birth certificate is filled in by the civil status officer based on the statement of anyone present at birth. The name of the woman who delivered the child is recorded as the mother, which establishes legal maternity.[17] Therefore, any replacement of the name of the woman who gave birth (the surrogate) by the name of another woman (the intended mother) is without effect.

As a consequence of these findings, the 1991 decision of the *Cour de cassation* ruled that the child born via surrogacy could not be adopted by the wife of the biological father since it would amount to misusing the institution of adoption.

Surrogacy became legally prohibited in the Act n°94–653 of 29 July 1994 "on respect for the human body"[18] known as "Bioethics Act". Consequently, legal provisions were inserted in the Civil Code. Article 16–1 emphasizes the principles of inviolability and non-commodification of the human body as well as its elements and products. Article 16–7 of the Civil Code affirms the prohibition: "All agreements relating the procreation or gestation for the benefit of another are null."[19] According to Article 16–9, this provision is of public order. In the field of parentage law, Article 323 of the Civil Code provides that "Actions regarding parentage may not be waived," which – under the principle of unavailability of the civil personal status – means

[17] Article 311–25, Civil Code: *Filiation is established, with respect to the mother, by the designation of the latter in the act of birth*.

[18] Bioethics act n° 94–653 of 29th July, O.J. 30th July 1994 (*Loi n°94–653 du 29 juillet 1994 relative au respect du corps humain*). Assisted reproductive technologies were also regulated by the Act n° 94–654 *on the gift and use of elements and products of the human body, medically assisted reproduction and prenatal diagnosis* (*Loi n°94–654 du 29 juillet 1994 relative au don et à l'utilisation des éléments et produits du corps humain, à l'assistance médicale à la procréation et au diagnostic prénatal*).

[19] This is an absolute nullity that can be invoked by any interested party as well as by the Public Prosecutor. The period of time to suit is five years from the discovery of the facts. But for lawsuits in filiation, the time-limitation is ten years.

that a woman cannot conventionally undertake to abandon the child she carries and renounce being a mother for another.

The bioethics Acts of 1994 were revised in 2004[20] and 2011.[21] The afore-mentioned provisions have not been modified. The prohibition of surrogacy persists, whether as fully commercialized models or as altruistic ones.

2.2. Prohibition in Criminal Law

Chapter VII of the French Penal Code dealing with offenses against children and the family contains section 4 relating to violations of parentage.[22] It is a question here of protecting, not the children as in most of the offenses of this Chapter VII, but of the civil status of the children, their filiation and identity. As we know, the desire of couples or singles to have a child sometimes leads them to resort to forbidden methods; therefore, the legislator, in the name of the protection of the institution of filiation, wanted to reach, not only the persons looking for children, but also the intermediaries by incriminating the incitement to the abandonment or to the adoption and the infringements of the child's civil status (a).

The commission of some offenses is also fostered by the practice of surrogacy. These include the offense of obtaining gametes for payment[23], artisanal insemination[24], disclosure of information allowing the identification of the recipient couple or the donor[25], or procuring human embryos against payment (Penal Code,

[20] Bioethics act n° 2004–800 of 6th August 2004, O.J. 7 August 2004.

[21] Bioethics act n° 2011–814 of 7th July 2011, O.J. 8 July 2011.

[22] The English translation of the Penal Code is available at: https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations (last accessed: September 2018).

[23] Article 511–9, Penal Code: "Obtaining gametes for payment in whatever form, other than payment for services rendered by institutions carrying out the preparation and the conservation of such gametes, is punished by five years' imprisonment and a fine of €75 000. The same penalties apply to acting as an intermediary to facilitate the procuring of gametes for payment in whatever form, or the supplying to third parties, for payment, of gametes provided by donation."

[24] Article 511–12, Penal Code: "Carrying out artificial insemination using fresh sperm or a mixture of sperm supplied contrary to article L. 673–3 of the Public Health Code is punished by two years' imprisonment and a fine of €30 000."

[25] Article 511–10, Penal Code: "The disclosure of information making it possible to identify both the person or couple who have donated gametes, and the couple that have received them, is punished by two years' imprisonment and a fine of €30,000."

Art. 511–15).[26] Even the offense of human slavery could be considered (b). Nevertheless, it must be remembered that those offenses when committed abroad by French citizens may not be prosecuted in France if the foreign country where the surrogacy took place, does consider it as legal (c).

a) Infringements of parentage rules

On the criminal front, two instances can constitute a criminal offense: the incitement to abandon and adopt a child and the substitution of a child. These are described at articles 227–12 and 227–13.

2.3. Incitement to abandonment and adoption

Article 227–12 provides that "the incitement of the parents or one of them to abandon a born or unborn child, made either for pecuniary gain, or by gifts, promises, threats or abuse of authority is punished by six months' imprisonment and a fine of €7 500 €; acting for pecuniary gain as an intermediary between a person desiring to adopt a child and a parent desiring to abandon its born or unborn child is punished by one year's imprisonment and a fine of €15 000; the penalties provided by the second paragraph apply to acting as an intermediary between a person or a couple desiring to receive a child and a woman agreeing to bear this child with the intent to give it up to them. Where the offence is habitually committed for pecuniary gain, the penalties incurred are doubled; attempt to commit the offences referred to under the second and third paragraphs of the present article is subject to the same penalties."

According to the above, the object of the incitement is to induce the parent to abandon his/her child. It is not a question here of the legal parent, but of the biological one; indeed, it does not matter whether the child born or to be born is not attached to his/her parent by a link of filiation. Most of the time, the incitement is intended to put pressure on the biological mother of the child so that it does not establish the parentage, in the context of anonymous childbirth for example. As for the abandonment, it aims at the delivery of the child to the intending parents or to an intermediary, but also the consent to the adoption if it was obtained under

[26] Article 511–15, Penal Code: "Procuring human embryos in return for any form of payment is punished by seven years' imprisonment and a fine of €100 000. The same penalties apply to acting of as an intermediary to facilitate the procuring of human embryos in return for any form of payment, and the supply, for consideration, of human embryos to third parties."

pressure. These pressures are reprehensible that they occur during pregnancy, or even before, or after childbirth.

As a result of the 1991 decision, the 1994 Bioethics Act created a new offense as regards intermediaries such as agencies, clinics or doctors. Acting for pecuniary gain as an intermediary between a person desiring to adopt a child and a parent desiring to abandon its born or unborn child is prohibited. This offense is broader than incitement to abandonment since it does not involve pressure on the parent's consent. To characterize the offense, it is sufficient to connect the intended parents with the biological parent as an intermediary and to do so for profit.

2.4. The substitution of a child

Article 227–13 punishes the "willful substitution, false representation or concealment which infringes the civil status of a child" with "three years of imprisonment and a fine of €45 000." Such an offense consists of simulating birth in such a way that it modifies the personal civil status of the born child. This article targets the hypothesis in which the intended mother is falsely attributed by the birth certificate a child that she did not give birth to. In other words, the surrogate would be considered to have concealed a birth, the intended mother to have simulated one.

b) Slavery and human trafficking?

On the other hand, some offenses are discussed. It is, in particular, slavery, which is a form of human trafficking. Some authors, in fact, have not hesitated to note the existence of a new form of trafficking through the provision of the woman and her body in the service of intending parents.[27] Since the introduction of the law n°2013–711 of August 5, 2013 which modernizes the notions of slavery and human trafficking, the above-mentioned question may arise. If, classically, slavery was defined as the situation of the person deprived of liberty, reduced to the state of a commodity, a property of another person (as such, exploitable and negotiable by said owner), the new Article 224–4-1 A of the Penal Code proposes a broader definition. According to it, slavery is now defined as "the exercise of one of the

[27] C. Brunetti-Pons, RLDC, Nov. 2013, pp. 41–45; M. Fabre-Magnan, *Les nouvelles formes d'esclavage et de traite, ou le syndrome de la ligne Maginot*, *D.*, 2014, p. 491; G. Mémeteau, L'esclave altruiste ou "La servante au grand cœur", RJPF 2018–4/1.

attributes of the right of property against a person." It is therefore no longer necessary to use the individual as a bargaining chip or to consider it as an object of property; it is enough to appropriate the "usus" (for example, the use of female uterus) or "fructus" (the enjoyment of female gametes or the unborn child) which constitute, alongside the "abusus", the three elements constituting the right to property. From this point of view, the possibility of a new form of slavery can reasonably be envisaged, although, currently, it has never been officially admitted, especially regarding the temporal factor: slavery involves usually an attachment dimension "in perpetuity". Surrogacy could therefore be described as slavery during the period of execution of the contract.[28]

c) Rarity of criminal proceedings

Whatever the classification chosen, it is regrettable that, in practice, criminal proceedings against the perpetrators of these offenses remain rare. They may indeed come up against problems of jurisdiction under French criminal law because of the material difficulties in observing the realization of a constituent element of an offense relating to surrogacy on the French territory. In principle, according to the territoriality rule of the criminal law[29], it only applies to offenses committed on the territory of the French Republic. Since surrogacy contracts were mostly performed abroad, procreative tourism could not fall under French law. By way of exception, however, French criminal law may be implemented whenever the criminal act has been committed by or against a French person. In accordance with the principle of personal jurisdiction, a French citizen can be prosecuted on the national territory for acts committed abroad, provided that the wrongdoing receives a criminal classification in French law as well as in the country where the surrogacy agreement has been passed. This is called the double-incrimination rule.

If the facts have been accomplished within a legal framework, criminal prosecution on the territory of the Republic will be impossible.[30] However, by definition, the countries to which French nationals turn authorize surrogacy. Consequently,

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[28] *Le "droit à l'enfant" et la filiation en France et dans le monde*, op. cit.

[29] Article 113–2, Penal Code: "French Criminal law is applicable to all offences committed within the territory of the French Republic. An offence is deemed to have been committed within the territory of the French Republic where one of its constituent elements was committed within that territory."

[30] Article 113–6, Penal Code: "French criminal law is applicable to any felony committed by a French national outside the territory of the French Republic. It is applicable to misdemeanors committed by French nationals outside the territory of the French Republic if the conduct is punishable under the legislation of the country in which it was committed."

whenever surrogacy is entirely performed abroad in a country that admits it, there can be no criminal proceedings against the intended parents. The inability of the French criminal law to apprehend such situations has also manifested itself through a case that gave rise, in 2004, to an order of non-suit by an investigating judge of Creteil.[31] In this case, a French couple had resorted to the surrogacy in the State of California. On their return to France, the intended parents requested, from the French consulate, the transcription of the American birth certificate to the French civil status. Authorities suspected a case of surrogacy; prosecutions were initiated for attempted simulation of children. But, all the facts having been done in a State which authorized this practice, it is logically that the investigating judge found the inapplicability of the French criminal law. This is different when the principle of personal jurisdiction applies because of the French nationality of the victim. In this case, the double incrimination rule disappears. But, in this hypothesis, a difficulty remains, that of the identification of the victim who, according to the case law, must be the direct victim. However, depending on the qualification chosen, it may be the child (the offense of abandonment or child simulation) or the surrogate mother (disclosure of information concerning her).

The French criminal law is not as helpless as it appears and has the technical means to apprehend most facts related to situations of circumventing the prohibitions of domestic criminal law. In fact, the principle of territorial jurisdiction does not presuppose that all the constituent elements of the offense were carried out on French territory. It requires, more simply, that at least one of them has been committed on the national territory or that the result of the offense has been found there. In most situations, at least one constituent event has been committed in France. As one author very rightly points out[32], the Internet age considerably favors the connection of these offences to French law: most contacts and contracts will have been initiated by this means. The result of these offenses is still noticeable in France. It is a question of behaving like the parent of the child born by surrogacy or in violation of the rules of the surrogacy and to establish a link of filiation. In other words, the modification of the baby's civil status or the establishment of parentage by a legal basis such as adoption is the very purpose of the offenses in question. Nevertheless, the implementation of prosecutions on this basis runs up against a major obstacle:

[31] TGI Créteil, 30 Sept. 2004, D., 2005, p. 476, V. Depadt-Sebag.

[32] Ch. Blanchard, Le droit pénal, in *La famille en mutation*, Arch. phil. Droit, Vol. 57, Dalloz, 2014, p. 349.

the secrecy surrounding these practices. To prosecute, it is still necessary for the judicial authorities to be informed of the existence of such facts. However, most of the time, this is not the case.

The difficulties raised are probably not the only reasons for the small number of prosecutions. More likely, there is a willingness not to prosecute or limit prosecution when it occurs. It suffices to note the sentences handed down against the perpetrators of these offenses, all of them being relatively weak: a four-month suspended prison sentence for the intended parent of the child carried by a young Togolese[33], a suspended prison sentence of between 18 months and up to 5 years in the case of trafficking of Roma babies[34] and a one-year suspended prison sentence given to a surrogate mother who was prosecuted for fraud, i.e., for selling her child to two different commissioning couples, leading the couple to whom she did not finally hand over the child to believe that he or she was stillborn.[35]

As far as the current state of law and legal reasoning are concerned, three amendments are desirable in order to improve and facilitate criminal prosecution.[36] The first would depend on an international initiative. As for the civilian part, it would be a matter of putting in place a common policy for the protection of human beings. This is advocated by an author who discusses the need for inter-state cooperation to fight against procreative tourism.[37] This cooperation could take the form of a convention with a universal vocation whose purpose would be to "lay the foundations for an instrument of cooperation, without rules of conflict of laws and / or conflicts of jurisdiction (…)."[38]

The second change may be in raising the quantum of the applicable penalties. This is one of the suggestions made by the drafters of the surrogacy report to the Law Commission of the Senate in 2016.[39] This could include, *inter alia*, criminalization

[33] TGI Nanterre, 7 April 2014.

[34] T. corr. Marseille, 8 April 2015.

[35] T. corr. Blois, 26 Jan. 2016. Both commissioning couples were also given a suspended fine sentence of 2 000 €. Currently, the two couples are still in conflict over custody of the child: TGI Dieppe, 23 March 2017; CA Rouen, 31 Mai 2018, n°17/02084.

[36] These three amendments were proposed by the research group on "the right to the child": *Le droit à l'enfant et la filiation en France et dans le monde*.

[37] H. Fulchiron, *La lutte contre le tourisme procréatif: vers un instrument de coopération internationale?*, J.D.I., 2014, p. 563.

[38] H. Fulchiron, ibid.

[39] Report Sénat n° 409, Y. Détraigne et C. Tasca, 17 Feb. 2016, *Défendre les principes, veiller à l'intérêt de l'enfant. Quelles réponses apporter au contournement du droit français par le recours à l'AMP et à la GPA à l'étranger?*

of offenses. The aggravation of the sentences would doubtless have only a symbolic significance, the maxima being only very rarely pronounced. But in any case, it could be more of a deterrent to curb the expansion of reproductive tourism. For that, the introduction in our law of a specific offense to the sale of children would undoubtedly be desirable. This crime exists in international law and sanctions could play on this basis (hierarchy of norms). But, currently, this offense is not enshrined in French domestic law.

Lastly, the third and last possible measure would be based on the removal of the dual criminality rule. In some areas, including sex tourism, this rule has already disappeared. So, this proposal is legally feasible. In practice, the abolition of this principle of dual criminality would greatly favor the prosecution of French citizens, even in cases where the totality of the offense was committed abroad. Thus, criminal law would become an effective tool for combating procreative tourism.

3. Effects of a Cross-border Commercial Surrogacy Arrangement in France

Recent decisions by the administrative and judicial courts have attempted to provide solutions for defining the legal status of a child born *via* a cross-border surrogacy, by attempting, on uncertain grounds, to release for some elements of his/her civil status, the modalities of reception of the filiation created abroad (1). However, the answer is not enough to ensure the maintenance in all cases of the relationship of the child with the intended parents, which leads to reflect on ways to develop the French law of filiation, while having aware of the upheavals it should suffer and the ripple effect of consolidating an illegal situation (2).

3.1. Travel document, nationality and transcription of birth certificate

Before analyzing in detail the evolutions of the case law and the solutions adopted, it is necessary to explain the different rules usually applied to recognition of foreign public documents and judgments. The personal status of the child born through a cross-border surrogacy can be determined in different ways. Sometimes the process of birth registration takes place only within administrative bodies, sometimes the approval of a judge is requested.

The difficulty is that the rules of recognition of a foreign act differ depending on whether it is a judgment, a civil status certificate or a public document.

3.1.1. Rules of recognition of foreign judgments in France

Rules to recognize a foreign ruling in France depend on the country where the judgment has been rendered. If the decision has been issued by a jurisdiction of a member State of the European Union (EU), which concerns a matter covered by a Regulation of the EU, the rules of recognition determined by that Regulation will apply. However, the *Brussels I Regulation*[40] explicitly excludes the personal status and capacity of natural persons from its material scope. And the *Brussels II Regulation*[41] excludes from the scope of parental responsibility the matters of parentage, adoption, emancipation and the name and forenames of the child even though they may be closely linked thereto.

Since European regulations cannot apply and also in cases where surrogacy has taken place in a country outside the European Union, the rules of recognition of foreign judgments are provided by the bilateral or multilateral treaties to which France is a party, or by domestic law. In France, the conditions of recognition and enforcement of decisions are not provided by the Civil Code or the Civil Procedural Code but have been determined by case law. Some of those are:

- foreign judgment shall not violate the international conception of French public policy;
- foreign judgment shall not be obtained by fraud.

3.1.2. Rules of recognition of foreign acts of civil status

According to article 47 of the Civil Code:

> Full faith must be given to acts of civil status of French persons and of aliens made in a foreign country and drawn up in the forms in use in that country, unless other records or documents retained, external evidence, or elements drawn from the act itself establish, after all useful verifications if

[40] Regulation (EU) n°1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[41] Regulation (EC) n° 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (also called *Brussel II bis*).

> necessary, that the act is irregular, forged, or that the facts declared therein do not square with the truth.[42]

Like the civil status certificate drawn up in France, the foreign birth certificate is an instrument of proof of the civil status of the child and it is nothing else. It only proves a status existing abroad and does not allow to affirm by itself that this status is valid or recognized in France.

It remains to be seen whether, in order to produce effects on our territory, it is necessary that the validity or recognition of the status should be confirmed. The question arises at each moment of the path of the intending parents in their relations with the administrative authorities, whether for the child to obtain a travel document, to acquire French nationality or to see transcribing the foreign document or judgment attesting to his birth on the French civil status registers.

In the current state of law, the answer varies according to the circumstances and the request made. Some effects are in fact recognized on the sole faith of the foreign certificate or judgment (a); others, on the other hand, are obtained only under the condition that what is stated corresponds to biological reality (b).

a) Recognition of effects in France on the faith of the civil status certificate drawn up abroad

3.1.3. Travel documents

To return to France the child born abroad, the intending parent(s) must obtain from the French consular authorities at best a passport, at least a provisional travel document that does not prejudge in any way the questions of filiation and nationality. Several consulates have relied on the prohibition of surrogacy to decline this request. For the appeal of such denials, the *Conseil d'Etat* (which is the highest court for administrative matters, including entry into the territory and delivery of passports) was led several times to rule.

By the first order issued on May 4, 2011[43], the *Conseil d'Etat* upheld an order of the Court of First Instance that enjoined the authorities to issue a provisional travel document (not a passport) allowing children born via surrogacy to enter the

[42] The English translation of the Civil Code is available at: https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations.

[43] CE, ord., 4 May 2011, n°348778.

French territory, on the basis of Article 47 of the Civil Code, in a case where the foreign civil status certificate was not misleading and where the biological father and mother wanted the children to be raised in France. On that occasion, the *Conseil d'Etat* pointed out that the circumstances by which the children conceived through a surrogacy arrangement that might be null and void according to the French public policy shall not have any consequences with regard to the obligation of the administrative authorities, in accordance with Article 3, paragraph 1 of the United Nations Convention on the Rights of the Child (UNCRC), to give primary consideration to the best interests of the child in all decisions concerning him.

On the other hand, by the second order of 8 July 2011[44], the *Conseil d'Etat* overturned the order of the Court of First Instance which had ordered the issue of a travel document, because of the contradictions between the documents produced and uncertainties concerning the identity of the mother and her desire to see the children taken to France. At first sight, the two decisions are opposed, one receiving the request for travel documents, the other rejecting it. In fact, they come together on the consideration of the interest of the child to leave the country where he was born when it is shown that the latter has no attachment there.

More recently, in an order of 3 August 2016[45], the *Conseil d'Etat* relied again on Article 3, paragraph 1 of the UNCRC and the best interests of children. In this case, the intending mother, applicant, argued that the Armenian birth certificate established the legal parentage between her and the child. French by filiation, the child could not, according to her, be denied access to French territory. To this claim, the Public Prosecutor, in refusing to register the birth certificate on the French registers of civil status, and the French consular authorities in Armenia to reject the application for a "laissez-passer", opposed both the existence of a surrogacy arrangement and correlatively the fact that the woman named in the birth certificate, not having given birth, could not be the legal mother of the child. Taking the view in the circumstances of the case that the best interests of the child involved not to be separated from the applicant, the *Conseil d'Etat* ordered the Minister for

[44] CE, ord., 8 July 2011, n°350486: "According to the facts, the doubts concerning the identity and exact will of the mother of the children were important because, on the one hand, there was a notarial act by which the alleged mother of the children had certified never having been pregnant, the other, a certificate of the intending father not having used the services of a surrogate mother. Both acts were contradicted by a letter from the hospital director. Because of these inconsistencies, the father could not prevent the administrative authorities from conducting checks in order to seek and preserve the best interests of the children concerned."

[45] CE, ord., 3 Aug. 2016, n°401924.

Foreign Affairs to issue, provisionally, a travel document allowing the child to enter the French national territory with the intending mother.

By taking such decisions, the *Conseil d'Etat* recognized that the child's superior interest prevails on the basis of the UNCRC. It also confirmed that public policy cannot be invoked to deny the effects of a foreign birth certificate even in cases of surrogacy. However, it recalls that this argumentation is valid only for the issue of a provisional travel document and voluntarily avoids the questions of the child's nationality and his/her parentage. According to the *Conseil d'Etat*, the dispute "raises a serious question of nationality that does not belong, in the absence of well-established jurisprudence, to the administrative judge to decide", but to the civil judge.

3.1.4. Nationality

In order to apply to a child born abroad the same personal law than his/her intending parents, the Ministry of Justice, in the circular of 25 January 2013[46], facilitated the issue of a French nationality certificate by inviting the Public Prosecutors and the court clerks not to obstruct the claims of the French parents, notwithstanding the suspicion of recourse to a cross-border surrogacy, and thus to stick to the mentions contained in the foreign document:

> The suspicion of recourse to an international surrogacy arrangement cannot be sufficient to oppose the refusal of applications for French nationality certificates when the foreign civil status documents attesting the parentage with a French citizen, legalized or apostilled except contrary conventional provisions, are probative in accordance with Article 47 [of the Civil Code].

The *Conseil d'Etat*, in a decision of 12 December 2014[47], confirmed the validity of the circular, regarding the granting of nationality certificates to children born abroad following international surrogacy arrangement. The *Conseil* stated that the only circumstance that a child has been born abroad as a result of an agreement

[46] Circ. n° NOR JUSC1301528C, 25 Jan. 2013 *Relative à la délivrance des certificats de nationalité française*: BO Justice n° 2013–01, 31 Jan. 2013, 1. See: J.-R. Binet, *Circulaire Taubira. Ne pas se plaindre des conséquences dont on chérit les causes*: JCP G 2013, 161; I. Corpart, *La controversée délivrance de certificats de nationalité aux enfants nés à l'étranger après une gestation pour autrui*: RJPF 2013, 3; C. Neirinck, *La circulaire CIV/02/13 sur les certificats de nationalité française ou l'art de contourner implicitement la loi*: Dr. famille 2013, p. 42.

[47] CE, 12 Dec. 2014, nos 367324, 366989, 366710, 365779, 367317 et 368861.

which, as a matter of French law (public order), is void, cannot, of itself, deprive that child of French nationality to which he or she is entitled, under Article 18 of the Civil Code and under the control of the judicial authority, when his or her filiation with a French is established. It also considered that a contrary approach would represent a "disproportionate interference" with the child's right to respect for his / her private life in accordance with Article 8 of European Convention of Human Rights (ECHR).

In doing so, the *Conseil d'Etat* releases from the right to the effective respect of the private life a "right to the nationality" and thus reduces the limits of public order in favor of the interest of the child who is concretely appreciated in view of his or her current situation. However, we cannot conclude from this argumentation the implicit recognition, in France, of the parentage between the child and the intending parent(s), although nationality is one of its effects. Nationality, even though it constitutes an element of the civil status and identity of the person, has no effect on the recognition of the parentage. Indeed, the certificate of nationality constitutes only the proof of the French status of a given person. Regarding this point, the decision of the *Conseil d'Etat* merely states that the issue of the nationality certificate is subject to the evidence of parentage while indicating that such verification must be carried out in consideration of Article 47 of the Civil Code and under the supervision of the civil judge. This is a reminder that the situation of the child remains precarious and the issue of a nationality certificate does not prejudge the stability of his/her personal status which can always be challenged.

b) The recognition of effects in France on the faith of the foreign birth certificate in conformity with the biological reality

Although optional, the transcription of a foreign birth certificate is a major issue for intending parents who commissioned a surrogacy. It allows the civil status registration in France and so hides the circumstances in which the child was conceived and born.

The problem is that the transcription of a foreign civil status document is not a simple operation of archiving in the French registers an act drawn up by a public officer or a foreign judge. It consists in the establishment of an act of civil status designed to ensure a faithful representation of the facts perceived by the law.[48] When

[48] B. Ancel, *L'épreuve de vérité. Propos de surface sur la transcription des actes de naissance des enfants issus d'une gestation pour autrui délocalisée, in Le droit entre tradition et modernité. Mélanges à la mémoire de Patrick Courbe*, Dalloz, 2012, pp. 1–9.

the French civil status certificate refers to the parents and especially the mother, it designates, in accordance with the traditional principles of the parentage law, the woman who gives birth. In other words, the mother who is mentioned in the French birth certificate can only be the one who was the surrogate and not the intended mother. The foreign act then sees its probative force denied when the facts declared there do not correspond to the truth.

This principle of truthfulness has notably led the *Cour de cassation* to refuse to transcribe the French civil status registers birth certificates or adoption judgments drawn up abroad in the case of surrogacy.

In the December 2008 ruling[49], the *Cour de cassation* annulled the transcription of the birth certificate of two children because their legal parents had commissioned the services of a surrogate mother in California. The Court so ruled even though the children had obtained their birth certificates in California and were U.S citizens. The *Cour de cassation* confirmed this annulment, holding that French citizens cannot go abroad to circumvent French surrogacy laws. Thus, French judges have held that a foreign document (the Californian birth certificate in this case) shall not be given the exequatur[50] if it is against French international public order or if it is fraudulent.

In its highly-commented decisions of 6 April 2011[51], the *Cour de cassation* decided that the refusal to transcribe a birth certificate is justified when established in execution of a foreign court decision contrary to the French international public order and the principle of unavailability of personal status. In these decisions, the *Cour de cassation* considered that such an annulment of the transcription does not deprive the children of their filiation towards their mother and father recognised under Californian law and does not prevent them from living with the applicants in France. Indeed, it does not infringe the children's right to respect for their private and family life (within the meaning of Article 8 ECHR) nor their best interests protected under Article 3, paragraph 1 of the UNCRC.

In two decisions regarding surrogacies in India dated 13 September 2013[52], the *Cour de cassation* hardened its position, based on different grounds. It attempted to

[49] Cass. civ. 1re, 17 Dec. 2008, n° 07–20.468: *Bull. civ.* 2008, I, n° 289.

[50] In France, an *exequatur* is a judgment by which a tribunal states that a decision issued by a foreign tribunal should be executed in France.

[51] Cass. civ. 1re, 6 April 2011, *Mennesson* case and *Labassée* case, RTD civ. 2011, 340, J. Hauser.

[52] Cass. civ. 1re, 13 Sept. 2013, RTD civ. 2013, 816, J. Hauser; H. Fulchiron, C. Bidaud-Garon, *Dans les limbes du droit. À propos de la situation des enfants nés à l'étranger avec l'assistance d'une mère porteuse*, D. 2013, p. 2349.

set up the most radical obstacle – fraudulent evasion of law ("fraude à la loi"[53]) – to oppose the establishment of a legal bond of filiation between a child born of such an agreement and its intended parents and to refuse the transcription of the birth certificate: *when the birth is the ultimate phase, in fraud with the French law, of a whole process including a surrogacy arrangement which is null under Articles 16–7 and 16–9 of the Civil Code*, the parentage established abroad cannot be registered on the French registers of civil status. Moreover, the court confirmed the cancellation, for fraud to the law, of the acknowledgement of paternity ("reconnaissance de paternité") carried out in France by the biological father.

To sum up, not only was transcription of the foreign birth certificate into the French register denied, but there was also no possibility for the intending father to establish his legal parentage in France by any other means, even if he was the child's genetic father.

But this argument of fraud to the law had to give way to the children's right to the respect for their private life guaranteed by Article 8 of the ECHR, and their conventional right to identity regarding their own biological father. In both judgments of 26 June 2014 (*Mennesson v. France* and *Labassée v. France*)[54], the European Court of Human Rights (ECtHR) observed that the French authorities, despite being aware that the children had been identified in the United States as the children of Mr and Mrs *Mennesson* and Mr and Mrs *Labassée*, had nevertheless denied them that status under French law. It considered that this contradiction undermined the children's identity within French society. The Court further noted that the case-law completely precluded the establishment of a legal relationship between children born as a result of – lawful – surrogacy treatment abroad and their biological father. This overstepped the wide margin of appreciation left to States in the sphere of decisions relating to surrogacy:[55]

> Given the importance of biological parentage as a component of each individual's identity, it could not be said to be in the best interests of the child to deprive him or her of a legal tie of this nature when the biological reality

[53] "Fraude à la loi" arises when a person, without openly violating the law, makes specific arrangements in order to evade it.

[54] ECtHR, 26 June 2014, n° 65192/11, *Mennesson v. France* et n° 65941/11, *Labassée v. France.*

[55] However, according to the ECtHR, the prohibition of surrogacy is not in contradiction with the ECHR and the refusal to transcribe a birth certificate drawn up abroad on the grounds that the birth was the result of surrogacy is compatible with the right to respect for family life.

> of that tie was established, and the child and the parent concerned sought its full recognition.[56]

Since their publication, the judgments of the European Court have generated a divergence of interpretation.[57] Some seemed to infer a general obligation of recognition of the foreign act, ordering to establish the child's filiation in all cases, especially regarding the intending mother, either by direct acknowledgement of the birth certificate, or through adoption. Others, on the contrary, have given it a more limited scope, considering that the European Court does not impose a direct and mandatory recognition of parentage established abroad by virtue of a law authorizing surrogacy, but just condemns the refusal to recognize and establish the children's legal relationship with their biological father.[58]

This second interpretation is now commonly accepted. The Court in fact only pronounced on the case which was submitted to it, namely the case where the paternal filiation established abroad corresponds to the biological truth. The case of the intending mother is therefore not mentioned, and the Court does not say on this if the children's right to respect to their private life and identity is infringed, in breach of Article 8.[59] It is up to the legislator to take a position.[60]

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[56] ECtHR, Press release, *Mennesson v. France*, § 97 et 98 et *Labassée v. France*, § 75 et 76.

[57] P. Bonfils et A. Gouttenoire, D. 2014, p. 1787; L.-L. Burgogue-Larsen, AJDA 2014, 1763; J. Hauser, RTD civ. 2014, 616; H. Fulchiron et C. Bidaud-Garon, *D.* 2014, p. 1773.

[58] H. Fulchiron, C. Bidaud-Garon, *Reconnaissance ou reconstruction? À propos de la filiation des enfants nés par GPA, au lendemain des arrêts Labassée, Mennesson et Campanelli-Paradiso de la Cour EDH*: Rev. crit. DIP 2015, 1.

[59] The ECtHR has confirmed its analysis in two recent decisions: ECHR, 21 July 2016, Nos. 9063/14 and 10410/14, *Foulon and Bouvet v. France*: JCP G 2016, 992, Y. Favier. – See also: ECtHR, 19 Jan. 2017, No. 44024/13, *Laborie v. France*.

[60] The *Mennesson* and *Labassée* cases are not yet closed. The law No. 2016–1547 of 18 November 2016 on the modernisation of justice in the 21st century has created a procedure for reconsidering a final civil decision on the status of persons whose ECtHR has held to be in breach of the Convention. The *Cour de cassation* gave for the first time an illustration of this examination procedure in two decisions taken on 16 February 2018 concerning the *Mennesson* and *Labassée* cases. In each of these two cases, judging that, by their nature and seriousness, the violations found result in harmful consequences for children, to which the just satisfaction granted by the ECHR did not put an end to, it grants the request for reconsideration. The proceedings have continued before the Plenary Session of the *Cour de cassation*. When asked about the need, under Article 8 of the Convention, for a transcription of birth certificates in so far as they designate the "intending mother", regardless of any biological reality, the Plenary Session of the *Cour de cassation* considered in two rulings of 5 October 2018 (n°10–19.053 et n°12–30.138), that the extent of the margin of appreciation available to the States Parties in this respect remains uncertain in the light of the case law of the European Court. It decided to stay the

The *Cour de cassation*, in plenary session, aligned itself with the case law of the European Court of Human Rights in the two rulings of 3 July 2015.[61] In both cases, a French citizen acknowledged his fatherhood of an unborn child in Russia: the birth certificate drawn up in Russia recognizes the man as the father and the woman who gave birth is recognized as the mother. The man then asked for the transcription of the Russian birth certificate into the French birth registers. But the Public Prosecutor opposed the transcription, suspecting the use of a surrogate mother. Relying on Article 47 of the Civil Code, the Court decides that an international surrogacy arrangement is not sufficient to prevent the transcription of the foreign birth certificate. The refusal could be based only on the irregularity of the act, its falsification, or the proof that the facts declared there do not correspond to reality.

Thus, civil status records drawn up abroad may be transcribed on the French birth registers if the paternal and/or maternal filiation they declare is truthful, i.e., that the man mentioned as the father is the biological one and that the woman declared to be the mother is the one who gave birth. If, on the other hand, the filiation mentioned in the foreign birth certificates does not correspond to the biological truth, the act cannot be transcribed.[62]

In line with these rulings, a judgment of the Rennes Court of Appeal, delivered on March 7, 2016, ordered only a partial transcription of a Ukrainian birth certificate designating as father and mother the intended parents, but rejected the mention of the maternal bond and ordered to maintain the "biological paternity", because of the impossibility of transcribing in the French registers a birth certificate which would indicate, as the mother, a woman who did not give birth.[63] This position was

proceedings on the merits of the appeal and, after giving detailed reasons, to request an advisory opinion from the ECtHR. The Court delivered it on 10 April 2019.

According to the judges, states are not required to register the details of the birth certificate of a child born through gestational surrogacy abroad in order to establish the legal parent-child relationship with the intended mother.

Adoption may also serve as a means of recognising that relationship.

[61] Cass. Ass. plen., 3 July 2015, nos 14–21.323 and 15–50.002: D. 2015, 1819, H. Fulchiron, C. Bidaud-Garon; D. 2015, 1919, P. Bonfils et A. Gouttenoire; RTD civ. 2015, 581, J. Hauser; RJPF 2015–9/20, I. Corpart; LPA 2015, n° 201, 6, M.-A. Frison-Roche. – See also: F. Chénedé, *L'établissement de la filiation des enfants nés de GPA à l'étranger*: D. 2015, 1172. – I. Corpart, *La gestation pour autrui de l'ombre à la lumière. Entre droit français et réalités étrangères*: Dr. famille 2015, p. 14.

[62] This is the case when the declared father is not the biological father or when the declared mother is not the one who gave birth, even though she would be the genetic mother of the child for having provided her own eggs.

[63] H. Fulchiron, *GPA: une nouvelle lecture a minima des arrêts* Labassée *et* Mennesson*: Dr. famille* 2016, p. 9.

confirmed in the same case by the *Cour de Cassation* in one of the several decisions concerning surrogacy taken on July 5, 2017.[64] The Court was led to clarify whether a couple could obtain the transcription to the French civil registry of the birth certificate established abroad when the woman who is designated as the mother has in fact not given birth to the child. The Court replied negatively to the question, invoking Article 47 of the Civil Code and recalled that it is not permissible to transcribe to the French civil registry foreign acts whose enunciations are not in conformity with reality. On the other hand, the designation of the intending father must be transcribed except in the case of falsification of the foreign act or in the case of disputed paternity. The Court concludes on this point that the partial transcription does not involve a disproportionate infringement of the child's right to respect for private life, as guaranteed by Article 8 of the ECHR in so far as the French authorities allow the child to live in/as a family.

3.2. Recognition and legal parentage

As previously recalled, the transcription of a foreign act on the civil status registers and the recognition of parentage that it testifies in French law cannot be confused. If the transcription has the advantage of concealing the circumstances of the conception and the birth of the child by providing the interested parties with the French civil status records, it does not guarantee the stability of its status (even if the fact to challenge the child's filiation after having admitted the registration of the foreign document would be inconsistent). In other words, birth certificates do not establish legal parentage, but simply operate as a rebuttable presumption of legal parentage, unless and until they are successfully contested. For these reasons, it is necessary that the intending parents establish a legal parentage with the child according to the rules usually applicable.

a) Laws applicable to the determination of legal parentage

In case of a birth certificate established abroad, the question of its recognition in France arises. Filiation is governed by the personal law of the mother and failing that by the personal law of the child.[65]

[64] Cass. 1re civ., 5 July 2017, n° 15–28.597.

[65] Article 311–14, Civil Code.

3.2.1. When the mother is known

It is necessary to refer to the national law of the mother on the day of the birth of the child. In this case, the foreign birth certificate designates the surrogate as the mother of the child. Paternal filiation must respect the rules of the State of nationality of the surrogate mother. The intended father recognizes the child (acknowledgement of paternity) in order to establish the parentage.

3.2.2. When the mother is unknown

This is the case when the foreign birth certificate lists the only intended parents as the parents of the child. It is then the personal law of the child that must apply. But the nationality of the child depends on his parentage. In this case, when the child has been recognized by his French intending father, he/she acquires the French nationality. The parentage is then governed by the French law.

b) The establishment of legal parentage

Until recently, the *Cour de cassation* had ruled on several occasions on the prohibition of establishing parentage between a child born of surrogacy abroad and his intending parents. The process of adoption, as plenary[66] as simple[67], has long been closed. Some couples have tried to invoke "possession of apparent status" ("possession d'état") to establish a legal maternal link. In French family law, possession of apparent status refers to the appearance of a given situation and serves as a proof of legitimacy.[68] Therefore, a child raised for years by a couple as their own child serves as a proof of parentage. Possession of apparent status must be continuous, peaceful, public and unequivocal.[69] In the case of surrogacy, it has been deemed equivocal because of the fraud to the law invoked.[70] The possibility of establishing parentage through voluntary acknowledgment was also excluded, both for the intending mother[71] and the biological father.[72]

Since then, the ECtHR decisions have led the jurisprudence of the *Cour de cassation* to evolve.

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[66] Cass. Ass. Plén. 31 May 1991, op. cit.

[67] Cass. civ. 1re, 29 June 1994, Bull. civ. n° 226.

[68] Conceptually, possession of apparent status gathers the elements enumerated in Article 311–1 of the Civil Code.

[69] Article 311–2, Civil Code.

[70] Cass. 1re civ., 6 April 2011. See also: Circular, 30 June 2006 on the reform of filiation, B.O. n°103.

[71] Rennes Court of Appeal, 4 July 2002, RG 01/02471.

[72] Cass. civ. 1re, 13 Sept. 2013.

3.2.3. Establishment of paternity

If the ECtHR, according to the *Mennesson* and *Labassée* judgments, did not intend to require France to recognise international surrogacy agreements on its territory and the filiation established abroad by virtue of a law which authorises surrogacy, it does not admit that the children, who are in no way responsible for the circumstances of their conception, are prevented from establishing lawfully their parentage with the biological father. The ECtHR therefore finds that "it cannot be said to be in the interest of the child to deprive him or her of a legal relationship where the biological reality of it has been established. (…) By thus obstructing both the recognition and establishment under domestic law of their parentage with their biological father, the respondent State overstepped the permissible limits of its margin of appreciation."

Therefore, nothing should prohibit the father of the child, declared as the legal father by the foreign birth certificate, to establish his paternity either by an acknowledgement of paternity or by the possession of apparent status.[73]

3.2.4. Establishment of maternity

The question of the legal establishment of the child's filiation arises in very different terms for maternity. In most Western legal systems, maternal filiation is organized around the essential principle that childbirth refers to the mother: "Mater semper certa est." The result is, in the case of surrogacy, a quasi-impossibility for the intending mother to recognize the child born as hers, Deceived, because not in conformity with the biological truth, acknowledgement of maternity could indeed be easily challenged. It is also difficult for her to argue about the existence of a possession of apparent status, which is vitiated by the nullity of the agreement to which she was a party and by the fact that she did not give birth. Finally, the establishment of maternity in court is excluded since it assumes the proof of delivery. Hence, it remains eventually the possibility of adoption.

As previously recalled, the 1991 decision of the *Cour de cassation* ruled that the child born of a surrogate mother could not be adopted by the wife of the biological father since it would amount to misusing the institution of adoption. If this reasoning has long prevailed, this is no longer the case today. The *Cour de cassation*, in one of the rulings of July 5, 2017, stands out openly from its past jurisprudence and states that: "The use of surrogacy abroad does not, in itself, prevent the child's adoption

[73] On the other hand, let us remember that the presumption of paternity cannot be applied here because of the impossibility of linking the child born to the biological father's wife.

by the husband of the biological father if the legal requirements of adoption are met and if it is consistent with the interests of the child."[74] The Court also indicates, in the two decisions delivered on the same day and relating to the transcription of the maternal link[75], that it is now possible for the wife to adopt the child born *via* surrogacy and whose filiation is established in France to her husband who is the biological father. It is thus possible for the child to be attached to both spouses (whether they are same-sex or different sex) by the recognition of a biological parentage for one and an adoptive filiation for the other.

If this solution allows the child to be legally bound to the intending parent, this remains within the limits of the rules of adoption in the unique context of marriage. In fact, the adoption of a child is only open to a married couple (or even to a single person).[76] Currently, the adoption of the child by the cohabitant or partner of the biological parent is impossible. The *Cour de cassation* recently recalled this rule in a decision of 28 February 2018[77], noting that the plenary adoption of the child by the concubine of the biological mother would erase the parentage with the latter who had not renounced this link. This erasure would be contrary to the best interests of the child.

Indeed, the adoption is also subordinated to the verification *in concreto* of its conformity with the interest of the child.[78] The Court of Appeal of Paris has given a recent illustration of the usefulness of the judicial review, in a decision of January 30, 2018 by which it refused the plenary adoption by the spouse of the father in the name of the child's interest. Admittedly, the judges do not exclude, as a matter of principle, any possibility of plenary adoption by the spouse of the biological parent. But they require a minimum of information about the birth and the biological mother, including the evidence that she has voluntarily given up the idea of establishing parentage with the child.[79]

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[74] Cass. civ. 1re, 5 July 2017, n° 16–16.455.

[75] Cass. civ. 1re, 5 July 2017, nos 15–28.597 et 16–16.901.

[76] Articles 343 and 361, Civil Code.

[77] Cass. civ. 1re, 28 Feb. 2018, n°17–11.069.

[78] Article 353, paragraph 1, Civil Code: "The adoption order is issued at the request of the adoptive parent by the tribunal de grande instance which shall verify within six months after reference to the court, whether the statutory requirements are fulfilled and whether the adoption is consonant with the interest of the child."

[79] Paris Court of Appeal, 30 Jan. 2018, n°16/18614.

Therefore, adoption is not always the solution to consider in surrogacy cases. It is necessary to be aware of its limits.[80] The process of adoption also leads to the accentuation of the difference between biological kinship and intending kinship that cannot be established simultaneously. It also raises the ambiguity of the nature of the maternal filiation and the conditions of the child's conception.

Finally, the jurisprudence of the *Cour de cassation* leaves aside two hypotheses in which the legal modes of parentage are difficult to transpose. First, this is the case of the intending father of a child with whom he does not share a genetic relationship[81] (the child having been conceived with the sperm of a donor). An act of acknowledgement that is not in accordance with the biological truth, such as an act of notoriety which states the possession of apparent status with regard to the child, could easily be challenged, which would run up against the right of the child to have a stable status. It is then the case of the foreign birth certificate which designates, in accordance with the law of the State which established it, two persons of the same sex as parents of the child. Currently, it remains possible to retrench, as before, behind the prohibition to create a dual mono-sexual filiation (except through adoption since the law of May 17, 2013). But the question of the admission of the same-sex parenting other than by the adoptive filiation, is more pressing in a context where the public authorities wonder about the opening of the conditions of access to the ART to the same-sex couples.

4. Current debates

Among assisted reproductive technologies, surrogacy is unquestionably the most controversial. Speeches on the subject, whether they appear in media, public events or scholarly writings, often reveal dichotomous positions. Differing voices are heard: voices of women who acts as surrogates, from academics that have spoken both for and against surrogacy, from people who see surrogacy as their only route to becoming parents, from media representations of surrogates, etc.

[80] The report of the 2016 Senate information mission on reproductive tourism rejects the recourse to adoption: Report Sénat n° 409, Y. Détraigne et C. Tasca, 17 Feb. 2016, *Défendre les principes, veiller à l'intérêt de l'enfant. Quelles réponses apporter au contournement du droit français par le recours à l'AMP et à la GPA à l'étranger?*

[81] See: ECtHR 24 Jan. 2017, *Paradiso et Campanelli c/ Italie*, n°25358/12.

Various scholarly articles and reports have offered analysis on issue from legal, ethical[82] or political perspectives.[83] Particularly, two of these stand out. The first is the common work of jurists, doctors, anthropologists and sociologists.[84] Achieved in 2014, this report, titled *Filiation, origins and parenthood*, has been written under the mandate of the Minister for Family and showed how difficult it is to have an elaborated debate on that matter. The group did not finally find a consensus on the legalization of surrogacy and only made a proposal to admit the total recognition in France of the filiation of the child born abroad via surrogacy.[85] The second, achieved in 2017 and titled *The "Right to the Child" and Filiation in France and in the World*[86], is based on court cases, comparative law and copies of surrogacy contracts (mostly concluded in the United States or in Eastern Europe) in order to discuss the questions of human reproduction and parentage. The conclusions reached by the working group of jurists, doctors and sociologists are to maintain the principle of prohibiting surrogacy in France and not to allow a complete transcription of the foreign civil status certificate when the intending parent is not genetically linked to the child. Finally, the group is in favor of drafting an international convention for the prohibition of surrogacy in order to avoid an excessive expansion of this market.[87]

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[82] See, in particular: S. Agacinski, *Corps en miettes*, éd. Flammarion, 2009; S. Dupont, *La famille aujourd'hui, entre tradition et modernité*, Ed. Sciences humaines, 2017; J.H. Déchaux, *Les défis des nouvelles techniques de reproduction: comment la parenté entre en politique*, *Les incidences de la biomédecine sur la parenté* (B. Feuillet-Liger et M.C. Crespo-Brauner, sous la dir. de), éd. Bruylant 2014, pp. 313–335; J.F. Mattéi, De la gestation pour autrui, *Mélanges en l'honneur de G. Mémenteau, Droit médical et éthique médicale: regards contemporains*, LEH Edition, 2016, pp. 271–280.

[83] See, in particular: M. Fabre-Magnan, *La gestation pour autrui, Fictions et réalité*, Fayard 2013; B. Feuillet-Liger, A. Aouij-Mrad, *Corps de la femme et biomédecine. Approche internationale*, (sous la dir. de), Collection Droit, bioéthique et société, éd. Bruylant, 2013; H. Fulchiron, J. Sosson, *Parenté, filiation, origine: le droit et l'engendrement à plusieurs*, Bruylant, 2013; F. Monéger, *Gestation pour autrui: Surrogate motherhood*, Société de législation comparée, (sous la dir. de), 2011; G. David, R. Henrion, P. Jouannet, C. Bergoignan-Esper (sous la dir. de), *La gestation pour autrui*, Académie de médecine, Lavoisier, 2011, p. 105; R. Sève, D. Fenouillet, *La famille en mutation*, Archives de philosophie du droit, tome 57, éd. Dalloz, 2014.

[84] *Filiation, origines, parentalité. Le droit face aux nouvelles valeurs de responsabilité générationnelle*, presided by I. Théry; general reporter: A.-M. Leroyer.
http://www.justice.gouv.fr/include_htm/etat_des_savoirs/eds_thery-rapport-filiation-origines-parentalite-2014.pdf.

[85] *Filiation, origines, parentalité*, p. 198.

[86] *Le « droit à l'enfant » et la filiation en France et dans le monde,* op. cit. A version of this work is accessible online: http://www.gip-recherche-justice.fr/wp-content/uploads/2017/07/GIP-rapport-final-mai-2017.pdf.

[87] *Le « droit à l'enfant » et la filiation en France et dans le monde*, p. 402.

Building up on these works, this chapter presents an analysis of the contours of the contemporary French policy discourse on the legalization of surrogacy (1) and on the recognition by French authorities of the legal parent-child relationship established abroad (2), with the goal to illuminate the social and political context within which ethical arguments about surrogacy are made.

4.1. Discursive context of reproductive ethics and surrogacy

In France, surrogacy is a revealing subject of tensions in the debate on bioethics and parentage. Most of the time, it remains the target of significant criticism. The most developed criticisms attack commercial surrogacy, as baby selling, exploitation of the surrogate, risks to offspring, or even human trafficking. For some, the practice harms the structure of the family as a basic social institution. But there are also claims for liberalizing surrogacy, often for societal reasons. Individual reproductive choice is frequently invoked by liberal theorists as an example of why the role of the state should be limited to preventing people from harming one another. The decision to procreate is an extremely private matter, so no interference of the state shall occur.

During each reform of the bioethics laws, there was a public debate on surrogacy. Surveys of the general population (i.e. people who are not directly engaged in such arrangements) are usually conducted to obtain and study his opinion. According to a survey conducted in March 2018, 55% of French people have been in favor of surrogacy, an increase of 16% since 2013. Of the 55% who favor it currently, 32% are unconditional in favor of surrogacy for heterosexual and homosexual couples, and 15% are only for heterosexual infertile couples[88].

Beyond surveys, which sometimes reflect very imperfectly the overall feeling of a population, it is especially the work done by parliamentarians and highest authorities that feeds the debates and the policy process. These had to be recently renewed at the beginning of 2018, with the announcement of the next revision of the bioethics laws, which should in principle lead to 2019.

Despite this renewal of discussions, the questions that the public authorities face are always the same: is surrogacy a normalized form of reproduction and if that is the case, which form could be admitted? Commercial? Or just an altruistic form?

[88] Survey BVA for *l'Obs*, conducted among a sample of 1019 French people interviewed on the Internet from 26 to 27 February 2018.

Can surrogacy ever be ethical? Should it be performed only on therapeutic indication in case of infertility? Is it possible to give the legal criteria for a surrogacy that we could frame in accordance with our fundamental principles? Is there a reproductive right? A right to the child? Because of the complexity of the arguments surrounding surrogacy, there is no straightforward answer.

Between 2008 and 2010, several parliamentarians proposed to strictly regulate in France the practice of surrogacy in specific circumstances. According to a report by a Senate commission in 2008[89], senators, who recommended allowing domestic surrogacy, argued that "it may seem odd that access to the ART techniques is open to the woman deprived of the opportunity to conceive but not to bear a child and denied to the woman deprived of the opportunity to bear but not to conceive a child." The report suggested to establish a legal framework (approval of a commission of the biomedical Agency, decision of the judicial judge, very precise regulation, no form of payment for the surrogate – just a compensation for expenses she would not otherwise have incurred but for the gestation) and to restrict access to surrogacy (just the gestational form) only to heterosexual married couple (or partners) whose wife could not carry a pregnancy to full term. At least one of the parents also had to be genetically linked to the child. As a result of this report, two surrogacy bills were introduced before the Senate in January 2010[90], but they have never been discussed. However, the subject was again debated during the revision of bioethics laws in 2011. But despite some attempts by some parliamentarians to pass amendments in favor of the surrogacy, the ban principle was not lifted.

Since then, reports from public institutions have followed one another to give an unfavorable opinion on the surrogacy legalization. Most of them recognize the risk that surrogacy arrangements wrongfully exploit participants, even though they are portrayed as a matter of free choice.

Thus, during the Estates General on Bioethics in 2009, citizens questioned were unanimously against any prospect of legalization of surrogacy.[91] The Parliamentary Office for the Assessment of Scientific and Technological Options (OPECST) was

[89] Rapport d'information de Mme Michèle André, MM. Alain Milon et Henri de Richemont, fait au nom de la commission des lois et de la commission des affaires sociales du Sénat n°421 (2007–2008), 25 June 2008: https://www.senat.fr/rap/r07–421/r07–4211.pdf.

[90] Propositions de loi n°233 et 234 (2009–2010) tendant à autoriser et encadrer la gestation pour autrui.

[91] EGB, Final Report, 1 July 2009, p. 43.

also opposed[92], as the National Academy of Medicine[93], the *Conseil d'Etat*[94], the orientation council of the Biomedicine Agency[95] and, lastly, the National Consultative Ethics Committee.[96]

More recently, in an opinion dated June 15, 2017 and in another one dated September 25, 2018, the National Consultative Ethics Committee recommends maintaining the surrogacy ban, in particular, because it leads to consider the body of the woman and the child as a commodity and finally the potential exploitation of women arising from inequalities of power and wealth between the contracting parties and the welfare and status of children born of surrogacy arrangements. The Committee remains attached to the principles justifying the prohibition: "respect for human beings, rejection of the exploitation of women, rejection of the commodification of children, inalienability of the human body and of the human being. (…) Considering, therefore, that there can be no such thing as an ethical surrogacy, CCNE's wish is that prohibition should be maintained and reinforced, regardless of the applicants' motivations, be they medical or societal."[97]

The *Conseil d'Etat* submitted a study on July 6, 2018 to the Prime Minister.[98] It underlines the contradiction of the surrogacy arrangements with the principles of unavailability of the body and the personal civil status. The practice implies, in fact, the exploitation of a woman for nine months for the benefit of third parties, with the risks inherent in any pregnancy and childbirth and the renunciation of her motherhood. According to the Vice-President of the *Conseil d'Etat*, this is

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[92] OPECST, AN n° 1325, Sénat n° 107, Rapport sur l'évaluation de l'application de la loi du 6 août 2004, 20 Nov. 2008, p. 156.

[93] Acad. nat. méd., Report, 10 March 2009.

[94] Rapp. Conseil d'Etat (CE), La révision des lois de bioéthique, 9 avr. 2009, p. 48.

[95] Avis du conseil d'orientation de l'Agence de la biomédecine sur la gestation pour autrui, Délib. ABM n° 2009-CO-38, 18 Sept. 2009.

[96] Comité consultatif national d'éthique (CCNE), avis n° 110 sur les problèmes éthiques soulevés par la gestation pour autrui, 2010: http://www.ccne-ethique.fr/en/publications/ethical-issues-raised-gestational-surrogacy-gs.

[97] CCNE, avis n°126 sur les demandes sociétales de recours à l'assistance médicale à la procréation (AMP), 15 June 2017, p. 39: http://www.ccne-ethique.fr/sites/default/files/publications/ccne_avis_n126_amp.eng_.pdf.
CCNE, avis n°129, Contribution du Comité consultatif national d'éthique à la révision de la loi de bioéthique 2018–2019: http://www.ccne-ethique.fr/sites/default/files/avis_129_vf.pdf.

[98] CE, Révision de la loi de bioéthique: quelles options pour demain?: http://www.conseil-etat.fr/content/download/138941/1406918/version/1/file/Conseil%20d%27Etat_SRE_étude%20PM%20BIOETHIQUE.pdf.

"a contractualisation of procreation incompatible with our model, including when presented as ethical."

4.2. Debates concerning the recognition of the filiation of children born via international surrogacy arrangements

There remains the question of the situation of children born abroad through surrogacy. The temptation is great to regard them as indirect victims of the faults committed by their parents. Is it right to deprive them (apart from the possibility of adoption) of the legal establishment of their maternal parentage with the intending mother?

One solution would be to recognize directly filiation as established under the foreign law and in accordance with its requirements. This proposition, frequently put forward by the promoters of a development of the French parentage law, would have the advantage of establishing simultaneously filiation with regard to the two intending parents, even having no biological link with the child.

This solution has been rejected by the National Consultative Ethics Committee in the afore-mentioned opinion (June 2017) and the *Conseil d'Etat* in a recently published report (July 2018). Concerning the recognition of the filiation of a child born abroad through surrogacy, when a probative civil status record establishes biological filiation with at least one of the French parents, the Ethics Committee supports a delegation of parental authority to the intended parent who has no biological connection to the child, since this procedure is true to the reality of the conditions of the child's birth. The Committee also recommends, in cases where the reality of biological filiation of a child born abroad is open to doubt, "that verification of genetic filiation by means of a DNA test be ordered before a foreign civil status record is transcribed as a French civil status document, so as to verify that there is indeed a biological link with at least one of the intended parents. The result and the situation should be open to examination. In the event of confirmation of child trafficking, the child could be proposed for adoption."[99]

The *Conseil d'Etat* also rejects the solution of recognizing directly the double filiation of children born via international surrogacy arrangements. Indeed, to

[99] CCNE, Opinion n°126, op. cit. p. 40. The Committee further recommends "that children's civil status records durably include the names and particulars of all those participating in the gestation agreement and that children are given access to the agreement which led to their birth so that they can 'construct their identity' and reconstitute their full personal history."

allow it would render meaningless the prohibition of public order of the surrogacy. On the contrary, the study recommends maintaining the solutions adopted by the recent jurisprudence of the *Cour de cassation*. The solution that the parent who is not genetically linked with the child, must adopt him/her, is appropriate and respects a balance between the interest of the child and the concern to maintain the ban on surrogacy.

These discussions and opinions ultimately lead us to reflect on what parentage and family relationships are today. Some argue that there is no need to distinguish between the one who gave his gametes or his flesh and the one who wished to found a family and take charge of education. Must a value be attached to genetic relatedness? Or to the only intention to have a child and to be a parent? Currently, being a parent is no longer necessarily restricted to a conjugal or even charnel relationship, nor does it automatically involve a male-female partnership. In today's world of reproductive technologies, many different people may be involved in creating a child: providers of gametes, providers of mitochondrial DNA, gestators and their partners or other providers of support, legally recognized parents, those intended to be legally recognized parents. This will inevitably lead one day to determination which form of kinship, whether based solely on intent ("parenté d'intention") or on carnal procreation, serves as the best foundation for filiation.

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Surrogate motherhood from the perspective of sociology and cultural anthropology

People are happy; they get what they want, and they never want what they can't get. (Aldous Huxley, *Brave New World*)

Now Sarai Abram's wife bare him no children: and she had an handmaid, an Egyptian, whose name was Hagar. And Sarai said unto Abram, Behold now, the Lord hath restrained me from bearing: I pray thee, go in unto my maid; it may be that I may obtain children by her. And Abram hearkened to the voice of Sarai. And Sarai Abram's wife took Hagar her maid the Egyptian, after Abram had dwelt ten years in the land of Canaan, and gave her to her husband Abram to be his wife. And he went in unto Hagar, and she conceived: and when she saw that she had conceived, her mistress was despised in her eyes. (Genesis 16, 1–4)

And when Rachel saw that she bare Jacob no children, Rachel envied her sister; and said unto Jacob, Give me children, or else I die. And Jacob's anger was kindled against Rachel: and he said, Am I in God's stead, who hath withheld from thee the fruit of the womb? And she said, Behold my maid Bilhah, go in unto her; and she shall bear upon my knees, that I may also have children by her. And she gave him Bilhah her handmaid to wife: and Jacob went in unto her. And Bilhah conceived, and bare Jacob a son. And Rachel said, God hath judged me, and hath also heard my voice, and hath given me a son: therefore, called she his name Dan. And Bilhah Rachel's maid conceived again, and bare Jacob a second son. And Rachel said, With

> great wrestlings have I wrestled with my sister, and I have prevailed: and she called his name Naphtali. When Leah saw that she had left bearing, she took Zilpah her maid, and gave her Jacob to wife. And Zilpah Leah's maid bare Jacob a son. And Leah said, A troop cometh: and she called his name Gad. And Zilpah Leah's maid bare Jacob a second son. And Leah said, Happy am I, for the daughters will call me blessed: and she called his name Asher. (Genesis 30,1–13)

1. Preliminary remarks

According to Marta Franaszek, "the practice of substitute motherhood existed already in antiquity. In the *Code of Hammurabi* one can find a record that allowed the infertile wife to offer her husband a slave, in order to beget a descendant who was then accepted as their own. In this case, when the slave renounced her parental rights to the born child, she was freed as a compensation. In the event of a refusal to surrender parental rights to the child, the slave girl was still deprived of freedom. Substitute motherhood is also mentioned in the Bible."[1]

Both anthropology and sociology deal with "a human being among people" comprehensively analyzing cultural and social relations. Obviously, this subject is so extensive and so much has already been written about the fact that today we are dealing more with sections of the social world than its entirety. If anything, we draw a general picture and lean on our own, often narrow, specialization.

In 1936, Stanisław Ossowski wrote: "The well-known biologist H.J. Muller predicts the possibility of transferring a fertilized human cell to another uterus, even to an animal uterus. If such an experiment was ever successful, if it was possible to outdo the old legends about Amaltea or the Roman she-wolf and grow human embryos in animal wombs, if you could compare a man bred in a human womb with his brother bred in a uterus, even a gorilla one, our knowledge about the role of the prenatal environment would increase immeasurably. For now, research must be limited to those situations in which the prenatal environment changes as a result of influences on the mother's body."[2] If then, already eighty years ago, an

[1] M. Franaszek, *Umowy o surogację*, http://www.prawoimedycyna.pl/index.php?str=artykul&id=1029 (last accessed: July 15th, 2018).

[2] S. Ossowski, *Dziedziczność i środowiska*, [in:] *Więź społeczna i dziedzictwo krwi*, Państwowe Wydawnictwo Naukowe, Warszawa 1966, p. 20.

outstanding Polish sociologist anticipated such a possibility, let us also try to assess the underlying phenomenon.

It is worth beginning with the definition of the English expression "surrogate motherhood" to give it an adequate, most culturally similar equivalent in Polish.

Let us, therefore, take a look at the English-language definition from the US National Library of Medicine / National Institutes of Health:[3]

> A "surrogate mother" is a woman who, for financial or other reasons, agrees to bear a child for another woman who is incapable of conceiving herself. In other words, she is a "substitute mother" that conceives, gestates and deliveres a baby on behalf of another woman who is subsequently to be seen as the the "real" (social and legal) mother of the child.
> Though the practice of surrogacy has already become a big market in western countries, it has also generated countless challenges for the law because it adds a third dimension to the meaning of motherhood.
> Like adoption, surrogacy separates the role of rearing mother from what the law has called the natural mother, but gestational surrogacy breaks the latter down into the roles of genetic mother and birth mother, leving two women with biological connections to the child.
> Because surrogacy tends to commodify and dehumanize people, and because of its legal, social, and psychological complications, it is obviously not wise to accept surrogacy as an alternative way of procreation.

The above shows that the Polish term, adopted as a translation of "surrogate motherhood" is not the best option. It does not reflect the complexity of the phenomenon. Therefore, I suggest using the term "surrogate pregnancy" in this study as the best choice among others, such as maternity in substitution, pregnancy *per procura* or foreign pregnancy. Here, I mean a narrowing down or even a detachment of the process of implementation of the embryo in the womb and carrying the baby to term and giving birth from the concept of motherhood, as a mother's psychological relationship with a child formed within her for nine months.[4]

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[3] Retrieved from: https://www.ncbi.nlm.nih.gov/pubmed/15460596 (last accessed: July 15th, 2018).

[4] See: M. Gracka-Tomaszewska, *Drogi do macierzyństwa. Reprezentacja siebie i reprezentacja dziecka w umyśle kobiety jako podstawa macierzyństwa*, Wydawnictwo Naukowe Scholar, Warszawa

However, the situation is different when "instead of using in vitro fertilization with the use of the donor's egg cells, the husband can artificially fertilize another woman who serves as a surrogate for a short time. After a week, the germ is washed out of the womb of the surrogate and implanted in the womb of the mother."[5]

A substitute pregnancy begins precisely when the embryo is placed in the uterus and ends when the child is born. It is worth noting that it occurs most often in four classic cases: a) a fertile father and a fertile mother who cannot give birth to a child, b) a fertile father and a sterile mother who cannot give birth to a child, c) a sterile father and a fertile mother who cannot give birth to a child, and, d) a sterile father and a sterile mother who cannot give birth to a child.[6]

A subsequent analysis of the subject will be offered in terms of social sciences: anthropology and sociology, in accordance with the current canon of concepts and the level of knowledge in these scientific disciplines.

2. The beginnings of human life in the biological perspective

From the point of view of natural sciences (biology, medicine), the beginning of human life is connected with the combination of male and female genetic material:

In the light of present knowledge, there is no doubt that human life is initiated as a result of the merging of two reproductive cells – male and female – into the form of a stem cell called the zygote, which at this moment begins to live its own rhythm. (prof. M. Rybakowa, MD, PhD, Human Development Committee of the Faculty of Medical Sciences, PAN, Warsaw-Krakow, *Life Service. Zeszyty Problemowe*, No. 2/3/1999)

After fertilization, i.e., the fusion of the ovum nucleus with the sperm nucleus (which happens in the fallopian tube, close to its mouth from the ovary), a completely new genetic quality – a new human being – is created that is completely different from the parental genotypes. The set of its genes in somatic cells will not change for the rest of their life. (prof. B. Suszka, PhD, a biologist, a research worker at the Polish Academy of Sciences)

2014 or *idem*, *Macierzyństwo – szanse i ograniczenia. Perspektywa psychologii osoby*, eds. A. Celińska-Miszczuk, L.A. Wiśniewska, Difin, Warszawa 2017.

[5] After: L. Stone, *Pokrewieństwo i płeć kulturowa*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2012, p. 377.

[6] Cf. Ibid., p. 370. The author of the study does not, however, take into account case d).

Human development begins with the combination of two cells – a female gamete, i.e. an egg cell (oocyte), and a male gamete – a sperm in fertilization. (prof. M. Troszyński, MD, PhD, "Obstetrics, Exercises", Handbook for Medical Students, PZWL Medical Publisher, Warsaw 2003, p. 69)

The connection of cell nuclei of the egg and sperm is the most important moment of fertilization – the emergence of a new organism (…) Since the nuclei of the eggs and sperm combine, the development of a new human is beginning. (Z. Bielańska-Osuchowska, "How life begins", Wydawnictwo Naukowe PWN, Warszawa 1994, p. 37)

The combination of an egg cell and sperm, or maternal and paternal gametes, gives rise to a separate life. A new man is formed, whose development takes place in the course of a human life. Thus, the embryo, a fetus, a new born, an infant, a child, an adult, an old man are the definitions of individual biological stages of development of the same man. (A. Marcinek, PhD, director of the R. Czerwiakowski Hospital of Obstetrics and Gynecology in Kraków, a regional specialist for obstetrics and gynecology of the Malopolska Voivodeship, *Life Service. Zeszyty Problemowe*, No. 2/3/1999).

Taking for granted the fact that after fertilization a new human being is created is no longer a matter of preferences or opinions. The human nature of this being from its conception to the old age is not a metaphysical claim with which one can argue, but merely an experimental fact. (prof. J. Lejeune, MD, PhD, head of the Department of Genetics at the R. Descartes University in Paris, quoted in: *Wiedza i Życie*, No. 11, 1986, p. 8).

An individual life, or ontogenesis, starts from the time of fertilization and lasts until death. (prof. H. Kędzia, MD, PhD, Medical Academy in Poznań, quoted in: *Perinatal Medicine*, edited by Prof. Z. Słomko, MD, PhD, State Department of Medical Publishers, Warszawa 1985, Vol. I p. 19)

Human life does not begin with the moment of birth, but from the moment of conception. (prof. J. Roszkowski, MD, PhD, a co-founder of the International Gynecological Society, a member of the Scientific Council of the Mother and Child Institute, quoted in: *Nurse and Midwife*, No. 12/1988, p. 15).[7]

Let us take note that other reasons, so strongly emphasized by social sciences, do not matter here.

[7] All quotes after: http://www.racjonalista.pl/forum.php/s,443385 (last accessed: July 15th, 2018).

3. The origins of human life in the cultural perspective

An exemplary list of other – anthropological and social – reasons is given here: "Whether insemination was a result of the fruit of love between two people in marriage"[8], in engagement, whether earlier or outside marriage, or was the result of "chance", "mishaps", "unreliable contraceptives" – in other words, feeling versus lack of feeling, it does not matter. Nor does it matter whether it happened by mutual agreement and consent or by the will and consent of only one of the partners of an intercourse (rape) – a positive emotion versus a negative feeling.

Whether the connection between both genetic materials, female and male, occurred in a fully conscious or unconscious way; for example, while intoxicated with alcohol or drugs, while unconscious after sustaining a strong blow or deliberate pharmaceutical treatment (narcosis), it does not matter. Whether the woman and man had a different skin color – "race", the term theoretically "empty" in social sciences but "fully significant" in practical social relations, does not matter. Whether the skin color was the same for both of them, or maybe they both had different interracial relations – it does not matter.

How old they were, whether they were peers, almost the same age, whether he was older than her, much older, or she was much older than him – age as a variable does not matter either. Whether they lived in a big city, a metropolis, a small town, in a tiny village; one of them or both – their place of residence as a variable is irrelevant.

Whether their social background was aristocratic, noble, intellectual, middle-class, peasant, or any other – a social background as a variable is meaningless. Whether they spoke the same language, similar language, different language – the language and the opportunity to communicate as a variable is irrelevant. Whether they both were religious or atheists, or whether one of them was religious and the other was not, what religion it was, what was their denomination – it does not matter. Did it happen at dawn, in the morning, at noon, in the afternoon, in the evening, at night, or maybe it was in spring, summer, autumn or winter, in Europe, Africa, Asia, one of the Americas or Australia, or maybe during a sea voyage on

[8] "The basic pattern is determined by a given fact (given to social research through biology), by the fact that each person has two opposite sex physical parents (…) All this is necessary for social research, but it is not the result of some discoveries. (If in some cases it was different, the science that would discover it would not be ex hypothesis social anthropology)", quoted after: Gellner E., *The concept of Kinship: And Other Essays on Anthropological Method and Explanation*, Universitas, Krakow 1995, p. 233.

one of the seas or oceans – natural conditions, natural environment or climate do not matter either. The intelligence level of both or one of the partners – intellectual features are irrelevant as well. Broadly understood physical attractiveness – physical features, attraction versus repulsion, do not matter. Sexual preferences of partners – sexual preferences, male or female homosexuality are also not a hindrance, they are meaningless. Physical defects, hidden or visible disability beyond of course, such which makes it impossible to fertilize, are also irrelevant. It is also irrelevant – for the initiation of a human life – whether the fertilization (connection of both genetic materials) occurred naturally, in the female genital organs, in an artificial way (by taking female and male cells), connecting them outside, and then placing them in the uterus, be it cells from the same woman and her life partner (her husband), coming from the same woman, but not her life partner (not her husband), coming from another woman and her life partner (husband) or from another woman, and not her life partner (not her husband).

The only thing that has been socially proven and biologically confirmed is incest (although here too, there are exceptions described in literature), "it is the one that transforms the biological conditions of pairing and procreation", states Claude Levy-Strauss[9], and adds "the ban of incest has managed to weave networks of affinity that give societies their supportive structure and without which no society would survive."[10]

4. Natural and unnatural conception in the biological perspective versus natural and unnatural conception in the cultural perspective

The conception of a human being from the biological point of view does not succumb to a division into natural and unnatural. The definitions, wording and examples used above clearly show that further considerations must focus on the cultural, anthropological and social aspects of surrogate pregnancy. Its broadest definition is "a voluntary embryo adoption, carrying pregnancy to term and giving the newly

[9] C. Levi-Strauss, *Spojrzenie z oddali*, Państwowy Instytut Wydawniczy, Warszawa 1993, p. 99. See also: B. Malinowski, *Małżeństwo*, [in:] *Seks i stłumienie w społeczności dzikich oraz inne studia o płci, rodzinie i stosunkach pokrewieństwa*, Państwowe Wydawnictwo Naukowe, Warszawa 1987, pp. 317–318.

[10] C. Levi-Strauss, *op. cit.*, p. 100.

born to a third party." A woman deciding to perform such a behavior can be called a "living incubator" or a "living tool." However, the situation is not so clear and simple. Neither a noble willingness to help our dearest (giving birth to a child for a daughter, sister or friend), nor the most generous financial gain will make a woman a soulless tool, in this case "soulless" means deprived of feelings.

It is the feelings that are the biggest anthropological, cultural obstacle for a woman used in the process of surrogate pregnancy to become similar to an automaton. Nearly nine months of a woman's life together with a child developing in her body will never remain without a trace in her psyche. This is the same with each pregnancy, every abortion or giving the child to adoption or leaving it in the "window of life." Can such a behavior be assessed in sociological terms? Certainly so, especially that the entire human culture dealing with the problems of kinship is based on the cultural equality of relationship and affinity. The parents and children of a man or a woman are relatives, but a spouse is not a relative. When I stand with my daughter or my son at the graves of my spouse's family, I know that her or his relatives are lying there, but not mine…

As far as the matter of adoption goes, I will ask whether my daughter who was once taken from an orphanage in the Vilnius region, or a son from my wife's first marriage, my relative or next of kin? They are not relatives (see: case of ancestors as above), but are treated as "relatives." Therefore, according to Ossowski, "When the institution of marriage excludes completely or partially from the range of conventional family relationships certain categories of individuals covered by the scope of natural genealogy, then an adoption is again an act that causes deviations in the opposite direction: through adoption, an individual is included in the family with whom he is not connected with any biological compounds whatsoever."[11] And even more clearly: "Adoption, which introduces a new individual to the birth line, is either a legal act, or a magical ceremony, which is supposed to artificially create a relationship with blood lines."[12]

To sum up, what is natural in a given society is the collective social consciousness undergoing changes in the historical process of changes in customs, norms, and cultural perspectives.

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[11] S. Ossowski, *Genealogia i genetyka*, [in:] *Więź społeczna i dziedzictwo krwi*, Państwowe Wydawnictwo Naukowe, Warszawa 1966, p. 92.

[12] Ibidem, p. 94. The author refers in this context to the biblical examples given in the introduction to this text, cf. ibidem, p. 95.

In a country with a multiplicity of customs, such as the United States, "the subject gained publicity only when Sarah Jessica Parker, the star of *Sex and the City*, confessed to hiring a surrogate. She managed to get pregnant, but she could not hold any. She had lost her pregnancies many times, but did not give up. In the end, however, she realized that she would not be able to cope with the problem of infertility herself. The more so because her husband, Matthew Broderick, began to betray the actress (…) She threw herself in the whirl of work and (…) she looked for a surrogate. In the end, she has found one! The surrogate mother, hired by Sarah, is a 26-year-old Michelle Ross from Ohio, who has already given birth to a child of a gay couple from New York (…) When Sarah and Matthew have made sure that the woman is healthy, has a healthy lifestyle and is able to carry the child to term, they decided to go for it. And they succeeded – on 25 June 2009, they became parents of twins."[13] At the end of this part of the discussion, let us list the alternatives of surrogate pregnancy:

a) the embryo comes from the mother and father (sociological parents) and is implanted in the surrogate womb. The genetic mother (a woman whose egg is a child's genetic material) who is different from the biological mother (a woman who has an implanted embryo and is having a baby after pregnancy) is known. The genetic father (a man whose sperm is a child's genetic material) is known.
b) the embryo comes from an anonymous donor and father (sociological parent) and is implanted in the surrogate womb. A genetic mother (a woman whose egg cell is a child's genetic material) who is different from the biological mother (a woman who has an implanted embryo and is having a child after the pregnancy) is not known. The genetic father (a man whose sperm is a child's genetic material) is known.
c) the embryo comes from the mother (sociological parent) and an anonymous donor and is implanted in the surrogate womb. The genetic mother (a woman whose egg is a child's genetic material) who is different from the biological mother (a woman who has an implanted embryo and is having a baby after pregnancy) is known. The genetic father (a man whose sperm is a child's genetic material) is unknown.

[13] J. Bielas, *Kobiece brzuchy do wynajęcia*, https://kobieta.interia.pl/archiwum/news-kobiece-brzuchy-do-wynajecia,nId,408140 (last accessed: July 15th, 2018).

d) the embryo comes from anonymous donors and is implanted in the surrogate womb. A genetic mother (a woman whose egg cell is a child's genetic material) who is different from the biological mother (a woman who has an implanted embryo and is having a baby after pregnancy) is not known. The genetic father (a man whose sperm is a child's genetic material) is unknown.

In the latter case, we deal with an adoptive parenting, but it is different from a natural adoption, and that is what I call a situation when future parents coexist with the child for nine months already in the prenatal phase in the company of a surrogate.

It is worth providing a clarification that you cannot talk about surrogate pregnancy when the genetic mother is simultaneously a biological mother. For in the case of an embryo coming from a surrogate and a father (sociological father), it is simply a motherhood with all its consequences.

5. Surrogacy laws in Poland

In Polish society, the question of "natural" or "unnatural" surrogate pregnancy will be related to the adopted legal solutions (common to all citizens) and the system of values adopted by it (not necessarily common to all citizens).

In the first issue, it is worth mentioning that the foundation of Polish legislation is the statement that "the motherhood of a specific woman is determined by the fact of the birth of a child by a specific woman. It is assumed that the mother of the child is the woman who gave birth to it and, consequently, was entered in the birth certificate as its mother."[14]

However, because social life often goes beyond the legal framework of the phenomena described, the legislator states that "a change in the civil status of a child is possible only as a result of the process of denying maternity of a woman entered as a mother into the birth certificate. The possibility to bring such an action results from the wording of Article 189 and Article 453 of the Code of Civil Procedure and Article 86 of the Family and Guardianship Code. In this situation, 'determining the motherhood of one of the women belongs to the court' (*but at the same time the*

[14] Parliamentary question No. 6054 regarding the so-called surrogate mothers. Retrieved from: http://orka2.sejm.gov.pl/IZ6.nsf/main/46ACAA48 (last accessed: July 15th, 2018).

legislator clarifies that) opting for the recognition of the motherhood of the donor of the egg can destabilize the child's once established civil status."[15]

Hence, the concept of surrogate motherhood (and not the concept of surrogate pregnancy as proposed here), defined in the situation "when a woman becomes pregnant and gives birth to a child without an intention of raising it and accepting any parental responsibility in the future, and in a contract concluded before the conception of a child with other persons obliges to the immediate release of the child at the time of his birth and a consent to adoption by her contractors or one of them. The purpose of surrogate motherhood is, therefore, to give birth to a child for another person (usually spouses who are referred to as 'sociological parents')."[16] In this legal situation, however, an adoption is admissible, although it is clearly inferior to the interest of "every child to maintain an emotional bond with his mother."[17]

The cited document also rejects, as from the legal point of view, all contracts for "renting the womb" are invalid, adding that "an agreement with a surrogate mother can become a source of legal conflicts between the parties if one of them does not want to conform to the contracts (i.e. when the child is born with defects or in the case of the death of sociological parents). Recognition of the above agreements as effective would have to entail the possibility of them being enforced. Meanwhile, taking the child away from the mother or forcing the sociological parents to accept the child has the character of a strictly personal act and in accordance with the civil law tradition cannot be forced on the debtor. The same would apply to the performance of other obligations under the contract, such as, for example, compliance with a certain lifestyle, undergoing periodic medical examinations. It would also be doubtful if you could claim damages in the event of one party's failure to perform the contract or breach of duties by the foster mother."[18]

At the end of the document, reference was also made to a criminal liability "of a person who practices human trafficking, even with their consent"[19] and after 1990, an adoption "made contrary to statutory provisions and for financial gains" became a criminal act.[20]

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15 Ibid.
16 Ibid.
17 Ibid.
18 Ibid.
19 Ibid.
20 Ibid.

Following Magdalena Kramska's study, I am discussing here Beata Grzybowska's case, the most well-known Polish surrogate mother. State courts are often being forced to settle disputes between a surrogate mother and social parents who are parties (let us emphasize that the social father will also be the biological father, and he will become the party in the dispute). The case concerns the determination of the child's origin and the granting of parental authority over it. Such is the case in the court in Warsaw and Beata Grzybowska – the surrogate mother and the biological father of the child – are parties to it. In 2008, Grzybowska agreed to give birth to a child for a married couple from Warsaw, accepting a remuneration of PLN 30,000. The parties concluded an oral contract that after the birth of the child, Grzybowska would give it to the married couple and would not have any claims towards the child. The surrogate mother underwent an in vitro method in one of the Poznan infertility treatment clinics; the egg cell of an anonymous donor and the seed of the man concerned were used to perform the procedure. The resulting embryo was transferred to the surrogate mother's system.

The situation became complicated when, after the birth of the child, Beata Grzybowska first gave it to the parents, at the same time renouncing her rights to take care of the child (yet she did not renounce her parental rights), and then she informed them that she wanted to recover her child and took legal steps respectively. In accordance with the previously presented norms of Polish family law, the mother of the child is the woman who gave birth to the child, and this is what was indicated in the birth certificate of the boy. The fact that the egg cell came from the germ cell bank was in this situation completely irrelevant, because even the genetic mother has no legal opportunity to apply to the court for a denial of a motherhood of a woman entered in the birth certificate. Court proceedings are, therefore, carried out between the surrogate mother and the biological father of the child. It is worth mentioning that Grzybowska never intended to deny the fatherhood of the man; her personally expressed wish was that he would become an active, contributing father to the child, while she would be his mother. The case is under way.

Once again, it is worth remembering that in the light of the Polish law, a mother is only the woman who gave birth to a child. The fact that this woman is not a child's genetic mother is legally irrelevant.

It is worth mentioning that a woman who decides to become a surrogate mother should not create a bond with a child, not to stroke the stomach (i.e. the developing child), not to listen to his heartbeat, not to look at the monitor during medical visits or see the child after giving birth. The question is whether it is possible. Is it possible

to dehumanize human, feminine, motherly feelings in this radical way? This is one of the greatest tragedies of this practice. And where is room here for the "maternal instinct", already referred to here. When there are known cases that after the childbirth these women "break contracts" and fight for the right to a child, because "an agreement" is one thing, and "a child and his feelings" ("and my feelings") is something else, a big something else.

Patrycja Szyja cites two examples of such attachments, all the more worth mentioning, which are related to health complications of children: "Loud is the case of Pattaramon Chanbuy, who decided to give birth to a child for a couple from Australia." She decided to do it for financial reasons, she had to provide for her two own children. Pattaramon was pregnant with twins, everything was fine until it turned out that one of the children had Down's syndrome. After the delivery, the parents took only one of the twins – a girl, and they abandoned the sick boy. Pattaramon decided to take care of Gammy – "I have decided to take care of Gammy. I love him, he was in my belly for nine months." Thanks to her determination, love and help from kind people, the woman managed to raise the necessary money to bring up her son.

Crystal Kelley, who became a surrogate of a couple in the United States, found herself in a similar situation. Unfortunately, when it turned out that the child would be born with serious defects, biological parents proposed an abortion, and they even wanted to give Crystal USD 10,000. The woman, however, did not agree to the procedure. She left for Michigan, gave birth to a child and found him a foster family.[21]

To this day, surrogate motherhood was not the subject of any of the cases pending before the European Court of Human Rights. This may be due to the fact that if techniques of medically assisted procreation are used to impregnate a surrogate mother and this is the case in Europe, these activities belong to the so-called grey area. However, it happens more often that they are made outside our continent, for example, in India. When such a case goes before the Court, it seems to be only a matter of time. Especially when the attorney Maria Wentlandt-Walkiewicz, representing Beata Grzybowska, announced that in the event that the court takes the woman's children (the one she gave birth to as a surrogate mother and two others), she intends to appeal to a court in Strasbourg.[22]

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[21] P. Szyja, *Surogatka – czyli „brzuch do wynajęcia"*, http://www.twojaeuropa.pl/4691/surogatka-czyli-brzuch-do-wynajecia (last accessed: July 15th, 2018).

[22] M. Kramska, *Problematyka prawna zastępczego macierzyństwa – regulacje prawnomiędzynarodowe i krajowe*, http://www.prawoimedycyna.pl/?str=artykul&id=688 (last accessed: July 15th, 2018).

6. Surrogate pregnancy in the consciousness of Polish society

In the studies published by the Centre for Public Opinion Research in 2008, on the admissibility of in vitro fertilization, the majority of Poles (60%) considered that a married couple who cannot have children should be allowed to have access to fertilization outside the woman's body. The opposite opinion was slightly more than a quarter of the respondents (26%).[23] Obviously, the problem areas of the in vitro fertilization and surrogate pregnancy do not fully coincide, but most certainly their common denominator is a compassion for couples without an offspring.

Therefore, it is worth presenting this research, because – as the authors write – "regardless of the changing context of the research, in the last dozen or so years the majority of society havw consistently approved of the extracorporeal fertilization and embryo transfer as a form of infertility treatment."[24]

It can be hypothesized that the main conclusion from the research, i.e., "the acceptance of the use of in vitro fertilization (IVF) prevails in almost all socio-demographic groups. An exception are people most involved in religious practices (practicing several times a week), among whom there are slightly more opponents of IVF (39%) than its supporters (36%). The degree of acceptance of the extracorporeal fertilization is also influenced by age and education of the respondents, i.e., it is more often accepted by younger and more educated respondents. Older and poorly educated people and rural areas residents are more cautious in their opinions and a relatively large part of them do not know what to think about the use of this method"[25] and their conclusion – "recent discussions on the ethical aspects of the in vitro fertilization have led to a decline in social acceptance of the use of this method, however, they did not change the grounded theory that it should be admissible and at least partially reimbursed by the state"[26] – will coincide with the social opinions on surrogate pregnancy.

It is worth noting that the "uncontested" arguments for, i.e., a chance of having children by infertile spouses and getting out of the situation of health

[23] Cf. Raport CBOS [CBOS survey report], BS/11/2008, *Opinie o dopuszczalności stosowania zapłodnienia pozaustrojowego* January 2008, http://www.cbos.pl/spiskom.pol/2008/k_011_08.pdf (last accessed: July 15th, 2018).

[24] Ibid.

[25] Ibid.

[26] Ibid.

contraindications threatening pregnancy, and arguments against, i.e., killing or freezing forever, almost "for all eternity" of unnecessary embryos – remain the same…

In a survey conducted in 2009, among 107 midwives, Edyta Gałęziowska and Renata Bogusz from the Faculty of Nursing and Health Sciences of the Medical University in Lublin, established learning the opinion of the representatives of this specific professional group on the causes of surrogate motherhood and its consequences. As they stated the basis of their research was the fact that "despite the achievements in infertility treatment, medicine, in some cases, is still helpless – not every couple can give birth to their desired child. However, it turns out that people who crave an offspring overcome these obstacles as well, using, for example, the so-called surrogate motherhood, i.e., entering into a contract with a woman who will give birth to their child."[27]

In the opinions of the surveyed midwives, "women becoming surrogate mothers (…) make decisions primarily for financial reasons, i.e., a payment for the birth of a child (89.7%). The most frequent problems appearing after the birth of a child by the surrogate mother were: refusal to give up the child to the ordering parents (59.8%) and psychiatric problems that may appear in a surrogate mother even many years after the childbirth (29%), only a few percent pointed to possible legal problems."[28] The authors conclude that "the midwife community presents different opinions on surrogate motherhood – demonstrating a lack of strong support and opposition to such practices. The results indicate low knowledge of the surrogacy law."[29]

7. Surrogate pregnancy in the teaching of the Roman Catholic Church

In the encyclical letter *Humanae Vitae*, the Pope Paul VI warned that all forms of artificial birth control open "a quick and easy way both for marital infidelity and the

[27] E. Gałęziowska, R. Bogusz, *Przyczyny i konsekwencje podjęcia decyzji o zastępczym macierzyństwie w opinii położnych*, agro.icm.edu.pl/agro/element/bwmeta1.element.agro-4d263352…/fulltext838.pdf (last accessed: July 15th, 2018).

[28] Ibid.

[29] Ibid.

general fall of morals"[30] and added "if the obligation to pass on life does not want to leave human self-will, it is necessary to recognize some impassable limits of human power over one's own body and its natural functions; boundaries that no one has the right to cross, neither a private person nor a public authority."[31]

It is also worth referring to an important, if not the most important, signpost for a large Polish society – the social doctrine of the church, for example the Instruction *Donum Vitae* ("On Respect for Human Life in Its Origin and on the Dignity of Procreation." Answers to Some Current Issues *Donum Vitae*) from 1987, which explicitly states that surrogacy is morally "unacceptable for the same reasons that reject the artificial heterologic fertilization, because it opposes the unity of marriage and the dignity of giving birth to a human being. Surrogate motherhood has objective deficiencies in relation to the duties of maternal love, marital fidelity and responsible motherhood. It offends the dignity and right of the child to being conceived, to the period of pregnancy and upbringing by his own parents and introduces, to the detriment of families, the division between the physical, psychological and moral factors that constitute it."[32]

Directly referring to and continuing the previous one is the Instruction of the Congregation for the Doctrine of the Faith *Dignitas Personae* from 2008, concerning certain bioethical problems. It states that "the proposal to use them (embryos) in the 'therapy' of infertile couples is ethically unacceptable, for the same reasons that make wicked both artificial heterologous fertilization and all forms of surrogate motherhood; such a practice would create various further medical, psychological and legal problems."[33]

8. India, a known and specific case

India is on the opposite pole of the phenomenon of surrogate pregnancy. The practice of commercial surrogate pregnancy has been thriving there since it was legal

[30] Pope Paul VI, *Encyklika Humanae vitae. O zasadach moralnych w dziedzinie przekazywania życia ludzkiego*, Stowarzyszenie PAX, Warszawa 1982, p. 21.

[31] Ibid., p. 23.

[32] https://opoka.org.pl/biblioteka/W/WR/kongregacje/kdwiary/zbior/t_2_19.html (access: July 15th, 2018).

[33] http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20081208_dignitas-personae_pl.html (access: July 15th, 2018).

in 2002, and, therefore, India has seen a rapid development of this phenomenon conditioned by both supply and demand for surrogate services.[34]

The French reportage *Babies Made in India* of 2009, broadcast by Polish Television presents several stories and cases of children born as a result of surrogate pregnancy. These are usually win-win transactions (this is actually the film's message). Americans, because they have beloved offspring, Indian doctors, because they have employment and earnings, surrogates, because the standard payment of EUR 4,000 is fifteen years of work in this country; and the trouble? They usually result from the necessity to circumvent the law in the countries of origin of biological parents.[35]

As Bożena Walerjan from the Medical University of Lodz describes it, "on the one hand, couples from almost all over the world, looking for surrogate mothers, choose India because of the four times lower costs (including medical procedures, legal fees, surrogate care and her remuneration) compared to expenses even in the United States. What's more, the doctor, who runs a clinic in India in which artificial procreation is performed, claims that foreigners perceive Indian women as not addicted to alcohol, smoking or drug use. Then there is no shortage of qualified and competent medical staff in this country.

Indian women conclude commercial surrogate motherhood contracts willingly. The financial issue plays a significant role here as well. Most women receive a payment equal to a few or even a dozen or so years of income. Explaining the reasons why they become surrogate, they stress their difficult living conditions and the need to maintain their own children. There are also declarations that they do it for altruistic reasons, wanting to help desperate women without a chance to experience motherhood. This leads to a conclusion that their motivation is in fact double, and this in turn provokes to pay attention to potentially dangerous areas of this phenomenon.

Although no one controls the surrogacy practice in India and the official statistics are not maintained, there is a growing concern about the development of this specific 'business.' The biggest concerns are, among others: lack of legal regulations,

[34] It is worth noting that surrogate pregnancy is legal, among others, in Great Britain (from 1998), Greece (from 2000), Finland and Belgium (from 2007). These countries have clearly defined the conditions of surrogate pregnancy or trade in egg cells, for example, they guarantee reimbursement of infertility treatment costs, after: *Brzuch do wynajęcia*, https://kobieta.onet.pl/dziecko/ciaza-i-porod/ciaza/brzuch-for-rent/855yctz (access: July 15th, 2018).

[35] *Babies Made in India*, Babelpress 2009 (Polish TV version). See. also: U. Beck, E. Beck-Gernsheim, *Miłość na odległość. Modele życia w epoce globalnej*, Wydawnictwo Naukowe PWN, Warszawa 2013, pp. 218–223.

which results in the lack of protection of surrogate mothers; the development of reproductive tourism and with it the threat of 'economic exploitation' and 'biological colonization' of Indian women, which may result from the fact that wealthy women from Western countries will look for surrogates in poor countries;[36] the need and the consequences of a psychological deficit and emotional support for poor surrogate mothers – and the emergence of competition among clinics, also in neighbouring countries, which will lead to further reduction of costs to the detriment of surrogates."[37]

This situation may soon change, because, as Angelika Lech writes: "the Surrogate Bill 2016 has been approved and will be subject to discussion in the parliament later this year. The Foreign Affairs Minister Sushma Swaraj announced yesterday that the proposed act is aimed at counteracting the employment of Indian women as surrogates by foreigners and people who want to raise a child alone and homosexual couples.

If the law is passed, India will be among the majority of countries in the world in which the practice of commercial surrogate pregnancy is illegal, and thus punishable – CNN Money informs. According to the draft of the new law in India, surrogate pregnancy will be possible, but it will not be a trade and this option will be available to Indian couples only, who have been in a relationship for more than 5 years and who cannot have their own children. This will be a so-called altruistic surrogacy already practiced in several countries around the world.

According to Minister Swaraj, there are currently over 2,000 places in India offering services related to the use of surrogate mothers and 'hiring' their belly. For a long time, the practice has aroused much controversy and unrest, mostly due to the issue of abandoning children. Most often it was the result of the future parents' resignation or the disclosure of a disease or infirmity with which the child was born."[38]

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[36] The phenomenon of the use of surrogates in the context of the division of the world into the rich and the poor, *recte*: the used and the abused is described in his study by L. Stone, *op. cit.*, pp. 382–384.

[37] B. Walerjan, *Nowe dylematy medycyny – zjawisko macierzyństwa zastępczego w perspektywie społeczno-etycznej* cejsh.icm.edu.pl/cejsh/element/bwmeta1.element…/2009_02_Walerjan_35_44.pdf (last accessed: July 15th, 2018).

[38] A. Lech, *Będzie zakaz "wynajmowania" surogatek w Indiach?* https://www.bankier.pl/wiadomosc/Bedzie-zakaz-wynajmowania-surogatek-w-Indiach-7474810.html (last accessed: July 15th, 2018). Cf. also T. Verma, *What are the surrogacy laws in India: Here is everything you need to know*, https://indianexpress.com/article/research/karan-johar-surrogate-children-yash-roohi-what-are-the-surrogacy-in-laws-in-india-here-is-everything-you-need-to-know-4555077 (last accessed: July 15th, 2018).

9. In vitro treatments and surrogate pregnancies in other parts of Europe and the world

According to P. Szyja, "most treatments are carried out in Brazil, where the trade in eggs is prohibited, however, in vitro treatments are legal, what is more, they are cheaper than in other countries, and the level of the procedure is considered high. Spain is regarded a pioneer in assisted reproduction. About 40% of 20,000 Europeans departing to receive artificial insemination reach Spain. The European Union allows the donation of an egg or sperm but forbids their trade. Spain has cleverly managed to circumvent this ban, namely, 'you do not pay for an egg, but for a cumbersome donation process that requires time and hormone therapy.' For this reason, donors receive EUR 900 in compensation. It is similar in the United Kingdom, where the compensation is GBP 250. While, in countries such as Germany or Italy it is completely forbidden, but in the USA everything takes place legally, and the prices of eggs reach USD 40 thousand."[39]

However, from the content of the interview of Catherine Vincent ("Le Monde") with psychoanalyst Genevieve Delaisi de Parseval, we learn that "at present, according to estimated data, every year 300 to 400 French couples seek this type of assistance abroad. Such semi-legal practices carry various types of risks that could be minimized in the case of well-administered surrogate pregnancies. It is best if the transaction takes place between two women who know each other. It is often assumed that during pregnancy both ladies frequently meet each other."[40]

10. Surrogate pregnancy in mass culture

Women who act as surrogates under pressure are one of the main threads of the famous dystopian novel *The Handmaid's Tale* by Margaret Atwood. The novel has been filmed (1990) and televised (2017). The main character, Freda, along with other women qualified to perform the "handy" functions (so are called surrogates in the novel), is trained to perform this function in a special training camp. Then she is assigned to the married couple of Commander and Serena Joy, on whose behalf she is to give birth to a child, who is the biological child of the Commander and

[39] P. Szyja, *op. cit*.
[40] *Brzuch do wynajęcia*, *op. cit.*

Freda; the child is conceived in a natural way but completely devoid of eroticism or passion, in the presence of his wife.[41]

In the novel, the act of fertilization (sexual intercourse of the Commander and Freda), takes place, on the one hand, completely devoid of any emotions, veiled body, except for the abdomen, a "raw", "technical" sexual act, on the other, Freda lies between the legs of Serena Joy referring strictly but symbolically to the sexual act of the spouses, but also (in some distant sense and meaning) to the couvade syndrome.

And although this practice applies to men, the recent literature on the subject also describes the case of an African-American woman who during her twin sister's pregnancy suffered from "the couvade syndrome."[42] Here you can see the closest analogy to both characters: Freda and Serena Joy, in this novel.

And although the book is a kind of a political fiction, a criticism of all totalitarian practices rooted in the socio-religious background (the uniqueness of rules, the subordination of selected individuals to the community), the introduction of the topic of female exploitation has a deeper meaning and is an ideological basis for the vision of the "new times" that, let us hope, would never come.

In 2012, *An Extraordinary Surrogacy Story. Bringing in Finn*[43] by Sara Connell was published. The author narrates her repeated attempts to get pregnant and give birth to a child, all ending up with failures. Sara Connell and her husband Bill have been fighting for their parenthood for seven years. During this time, they underwent a two-year acupuncture treatment and seven cycles of artificial insemination with three hundred injections, they lost two twins in the fifth month of pregnancy and survived one early miscarriage. The author recounts in painful detail various treatments used during these attempts and simultaneously the profound bond that blossomed between mother and daughter. In February 2011, after 39-week-pregnancy, 61-year-old Kristine Casey became a surrogate mother for… her own grandson. Kristine Casey became pregnant thanks to the in vitro method, and the gametes of her daughter and son-in-law formed an embryo that developed without hindrance. The delivery took place by a caesarean section and without any complications. Thus,

[41] After: https://en.wikipedia.org/wiki/Matka_zastępcza (last accessed: July 15th, 2018).

[42] After: https://en.wikipedia.org/wiki/Kuwada (last accessed: July 15th, 2018).

[43] S. Connell, *Surogatka. Jak moja mama urodziła mi syna*, Wydawnictwo Nasza Księgarnia, Warszawa 2014.

as a surrogate, she became the oldest woman in Illinois who gave birth to a healthy child. It is worth adding that she had previously had three of her own children.[44]

Less evocative are novels: *Norma* by Sofi Oksanen, where surrogacy, from the perspective of wealthy Western women looking for surrogate mothers in Georgia or Ukraine, is presented unilaterally as a shameful and criminal phenomenon[45] and *The Surrogate* by Louise Jensen in which an important topic of surrogate pregnancy offered by a friend was dominated by the convention of a perfect psychological thriller and a multidimensional game of negative emotions.[46]

The adventures of a gay couple who have just started living together and plan to have a child with the help of a surrogate mother have also become the subject of the first part of the triptych *Identikit*, a spectacle produced by Nomantinels, an independent theatre from Bratislava (Slovakia). Men and a woman accidentally met by them, agree that she will give birth to their child, conceived by an artificial insemination, whose biological father will be one of them. All three become friends and the woman gets pregnant; but later she meets another man with whom she wants to get involved permanently and decides to tell him that he is the biological father of the child, keeping the rest of the story secret. Therefore, she breaks the contract with the gay couple and leaves them.[47]

11. Critical analysis of the literature on the subject

In this part of the text it is worth describing studies directly referring to the discussed issue. These are *Argument against Surrogate Parenthood* by Herbert T. Krimmel and *Surrogate Mothers: a Newer Edition of New Dilemmas* by John A. Robertson;[48] both authors are professors of American law (Southwestern Law School in Los Angeles and the University of Texas School of Law in Austin, respectively).

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[44] A similar case – Bonny, who was the donor of the egg cell for her infertile sister Vicki: "the egg cell has been fertilized with the seed of Vicki's husband and implanted in her uterus. A baby boy Anthony was born. His genetic mother is also a social aunt; Vicki, who is his social mother, but a genetic aunt, gave birth to him" describes Linda Stone, *op. cit*., p. 381.

[45] S. Oksanen, *Norma*, Wydawnictwo Znak, Kraków 2018.

[46] L. Jensen, *Surogatka*, Burda Publishing Polska, Warszawa 2018.

[47] After: https://pl.wikipedia.org/wiki/Matka_zastępcza (last accessed: July 15th, 2018).

[48] H.T. Krimmel, *Argument przeciwko rodzicielstwu zastępczemu*, [in:] *Początki ludzkiego życia*, ed. W. Galewicz, Universitas, Kraków 2010, pp. 337–349 and J.A. Robertson, *Matki zastępcze: nowsza odsłona nienowych dylematów* [in:] *ibid*., pp. 351–368.

The first author begins with – in his opinion – the fundamental question: "is it ethical to give birth to a human being with the intention of giving him up in someone else's hands"[49], because he considers both surrogate pregnancy and artificial insemination as ways of drifting apart from duties resulting from a responsibility for a child born. However, if the other case (anonymous sperm donor) fulfills the initial condition, then in the situation of surrogate motherhood… it is usually not so. Genetic parents (if both egg cells and sperm are theirs), one of the genetic parents (if only either the egg or the sperm are theirs), or both only and exclusively "sociological" parents (deciding for living nine-months pregnancy with a child who develops "along with them" though neither the egg cell nor the sperm is theirs) are in consequence, after birth and handing them the child over, his social mother and father. And it is pointless to argue about the superiority of social parenthood over genetic (biological) parenting. Parents (caregivers) who deal with the child from his first days in the world are the most important. Therefore, it is worth, once again, clarifying the terminology and ask about surrogate pregnancy and surrogate motherhood, the latter limiting to the social role after the birth of the child.

Another case (an anonymous egg donor), similar to the argument of an anonymous semen donor, actually plays a role of a genetic parent to a biologically co-created child, but this is not an obstacle in upbringing and socialization. Many people were brought up not by their fathers (with their knowledge or not), a smaller proportion of them not even by their mothers, but they grew up, became adults and gave life to the next generation.

Raising financial arguments for surrogate pregnancy contracts also does not stand up to criticism, because in many educational institutions (orphanages, foster families) caregivers do not work voluntarily and for free.

In turn, the institution of a conscious single-parent family (most often a female single-parent family) is popular in the social world and, therefore, the author's reasoning that "an unmarried woman can use the method of artificial insemination with the donor's sperm (…), just as an unmarried man can benefit from the contract of surrogate motherhood if they want an offspring, but not a spouse. In both cases, the child is intentionally deprived of a mother or a father. This is a move that, in my opinion, is fundamentally unfair to the child"[50], and also will not find a reference in this respect in an increasingly complicated social world.

[49] *Ibid*., p. 337.
[50] Ibid., pp. 338–339.

The issue of adoption is similar. An analogy between an adoption and the world of motherhood after surrogate pregnancy is that a child having two parents, regardless of their relationship with the child: a) whether begotten and born by them, b) whether begotten and born as a result of surrogate pregnancy), c) whether begotten by one of them and born as a result of surrogate pregnancy, and d) whether not begotten by any of them and born as a result of surrogate pregnancy, if only he is loved and well looked after he has identical chances for a happy life and conflict-free achievement of adulthood.[51]

It is difficult to argue with the author who writes that it is blameworthy to treat the child as an object, but he gives an example of a couple who "conceived a child with the idea of using him as a marrow donor for his siblings" or cloning people with the intention of using them as organ transplant carriers for a moment they do not have to be related with the issue of surrogate pregnancy described here.[52]

Is it socially desirable to "give birth to a child you do not want"?[53] Of course, it is not, but such cases of "undesirable" pregnancy, or a child conceived as a result of rape have always accompanied us.

There are other worries that something may go wrong, the child will not be healthy, or as we have expected and what then? These ethically complex dilemmas are frequent and distressing in social life, and they are also argued regardless of the phenomenon of surrogate pregnancy.[54] The same happens with the issue of eugenics, and thus it should also be omitted here when contemplating the issues of surrogate pregnancy.

It also seems that Krimmel makes the wrong final conclusion: "Perhaps a sterile couple prefers to bring up a child related to the husband than have an adopted child, in no way related biologically either to her husband or wife. But does this marginal benefit, in the category of joy that new parents can experience, outweigh the potential losses that they will suffer, whether themselves, or the child conceived as a result of a surrogate pregnancy contract, or other people?"[55]

There is no room for considering the basics of human culture and cases of noble surrogate parenting, starting with the example of Saint Joseph, but the essence of ownership is just having something (and even someone) of your own. If the "own"

[51] Cf. ibid., p.340.
[52] Cf. ibid., pp. 341–342.
[53] Ibid., p. 342.
[54] Cf. ibid., pp.343–344.
[55] Ibid., p. 348.

parents are so important for the child, then the "own" child is also so important to the parents. My child, my son, my daughter, my mother, my father, my family are one of the pillars of human culture. Like my neighborhood, my town, my country, my homeland…

Obviously, if I happen to discover that it is not my child, not my father, it is a dramatic experience; if we cannot have children we experience drama, we try for it, if we do not raise our children, we raise your child (e.g. from the previous relationship), not ours, but yours and I am with you, and so… ours. If we do not have and we cannot have children, we are trying to get an adopted child, not mine, or not yours at the beginning of the upbringing process, but then, after all, ours, already ours till the very end…

Yet, on the other hand, as C. Levy-Strauss writes: "the family cannot be justified either by the instinct of procreation or the maternal instinct, or emotional ties between a husband and a wife and between a father and children, or a combination of all these determinants (…) in the human world a family could not exist if there was no society first, that is, a multitude of families recognizing the existence of bonds other than blood ties."[56]

Seen also here, this gradability of ownership, as related to the issue of surrogate pregnancy, has its social justification and application.

But what could be the real argument against surrogate pregnancy? The argument based on the teaching of the Roman Catholic Church, which can be expressed in the following words: "those who do not live in a marriage, regardless of their sexual preference, are obliged to maintain sexual abstinence."

Well, this ban is not enough, because the surrogate pregnancy arises as a result of the collection of reproductive cells, and their in vitro connection and implementation. Of course, other sins play a role here (even against marital purity), but "sexual abstinence" can be observed.

In his analysis, John A. Robertson used a term "collaborative reproduction," stressing that on the one hand, gamete delivery, carrying pregnancy to term and raising a child by a third party (third parties) are a kind of interference and manipulation of the natural process, according to many, should not take place at all, and on the other hand, he emphasizes social acceptance for processes almost identical, like adoption, artificial insemination or patchwork families.[57]

[56] C. Levi-Strauss, *op. cit.*, pp. 98–99.

[57] Cf. J.A. Robertson, *op. cit.*, p. 351.

The author rightly emphasizes, citing Erik Erikson, that "although the strong desire to have a child often seems selfish, one should not forget how deeply the desire to breed offspring is rooted in our psychosocial and biological condition."[58] These desires and property issues (my, mine) have already been mentioned above. He also adds, when discussing the problems of the child's identity, that the most important thing is that "without surrogate pregnancy contract, it would not be born at all."[59]

The negative effects of the surrogate pregnancy, analyzed by him, differ little, though fundamentally, from the adoption process. This difference is obviously the pregnancy itself binding in an integral way a pregnant woman with her child. And here – J. Robertson believes – a huge role may be played by a lawyer and a well-structured contract. At the same time, he cites a research on women who have lived this experience and they maintain that a sense of loss, depression or sleep disorders lasted from four to six weeks. However, it is worth remembering that the range of this study was small.[60]

Not differentiating between the situation of an adopted child from a child born as a result of surrogate pregnancy, who learn about their "past", the author focused on possible selfish goals recalling the classic work of Aldous Huxley *The Brave New World*, where genetic engineers design dream descendants.

First of all, however (and despite its ingenuity), it is only an artistic vision of the future, and secondly, in the situation of surrogate pregnancy, it is not (does not have to be) connected with an interference in the embryo cells.[61] Similarly, as J. Robertson argues, the case of "exceptionally instrumental and soulless approach to reproduction in response to the birth of a less perfect child is not a situation typical to surrogate pregnancy only."[62]

As the author sums up the key problem of reproduction techniques, including surrogate pregnancy, "it is not the intentional separation of biological parenting from the social parenting, but the way of carrying out this separation and the resulting relationship with a third party. If the participation of a third party is discreet and limited, the cooperative reproduction is easily tolerated"[63], because – he adds in

[58] Cf. ibid., pp. 354–355.
[59] Ibid., p. 355.
[60] Cf. ibid., p.357.
[61] Cf. ibid., p. 360.
[62] Ibid., p. 362.
[63] Ibid., p. 367. Cf. U. Beck, E. Beck-Gernsheim, *op. cit*., pp. 224–226.

the end – "as in the case of many human endeavors what really counts in the end is not that something is done, but how we get down to it."[64]

12. Evaluation of the phenomenon and the forecast

The desire to have a child in other way than completely natural (and as such we understand a voluntary procreation by both spouses) has provided us with many new possibilities for interpreting what motherhood and parenthood are. First of all, separating the function of genetic parenting from biological and sociological parenting causes a lot of ethical and social controversies and dilemmas.

As far as the transfer of genes is concerned, the situation seems to be the most straightforward, empirically verifiable and thus close to science-based, verifiable research. In the matter of biological motherhood, too, *paremia mater semper certa est* determines that the mother is a woman who gave birth to a child.

As far as sociological parenting is concerned, we have also known for a long time that the "more important socially" is the parent who raised the child, not the one who sired it (implied father), or the one who gave birth to it (implied mother). Naturally, it is difficult to put both these aspects on one plane, the child in the "window of life" will have sociological parents, and the identification of the mother and the father will only be possible when a comparative genomic base of all biologically mature citizens of the country is created.

This is already possible in Iceland, where "a group of scientists from Icelandic research institutions and deCODE genetics company have used the latest data – the whole genome sequencing of more than 2,500 people and detailed genealogical trees of all Icelanders – to create the genetic base of the whole country. This means that they know the genes of every Icelander and can, at the push of a button, predict who is at the risk of contracting breast cancer or the ovaries, and, therefore, there is a great chance to prevent such diseases through preventive mastectomy or ovariectomy. For the first time in history, doctors have access to the genetic base of the whole country, but for now this situation is ethically doubtful – in the database there is information about the genes of people who have never passed samples for research and did not even know that such research were conducted. Therefore, for now, the information from the database will not be used, although talks with the

[64] Ibid., p. 368.

Icelandic health care service are already being conducted to use the genetic database to warn all those more vulnerable to severe illness"[65], probably in the more or less foreseeable future it will also be possible in Poland.

I am writing "probably", although we always remember the importance of the social factor. If such an initiative does not meet with a positive social response, it can never reach the implementation ceiling. What I suggested earlier was obligatory, legally enforceable, collection of a genetic material from people being buried in Polish cemeteries as anonymous NN female, male, or even NN without a sex determination.[66]

A still totally different aspect of the described phenomenon is the "sociological infertility" of male homosexual couples, because many people from this group would prefer a surrogate mother to adoption, because it is thanks to this, the child could be genetically connected with one of them.[67]

It is worth noting that in Poland this is a rare or even non-existent phenomenon. According to the 2013–2014 data by the Institute of Psychology of the Polish Academy of Sciences, approximately 12% of women and 5% of men in single-sex relationships bring up children. Not only that, this upbringing does not enjoy social acceptance, which in Poland is only 11%.[68]

And most importantly for the issue discussed here, we do not have any data on whether any of these children came into the world thanks to surrogate pregnancy[69], and only this topic, not bringing up children by same-sex couples controversies, we take into consideration here.

13. Final conclusions

Let us remember that if, as a society, we clearly define our stance on a particular matter put it in the legal system, it will be accepted in our country. The definition

[65] *Naukowcy mają DNA całego kraju*, http://www.geekweek.pl/news/2015-03-29/naukowcy-maja-dna-calego-kraju_1654658 (last accessed: July 15th, 2018)

[66] M. Boruta, *Nazwisko: tożsamość i więzi rodzinne. Interdyscyplinarne konteksty socjologii rodziny*, Wydawnictwo Naukowe Akademii Pedagogicznej, Kraków 2008, p. 226.

[67] *Brzuch do wynajęcia*, *op. cit*. See also: L. Stone, *op. cit*., pp. 386–387.

[68] https://pl.wikipedia.org/wiki/Rodzicielstwo_osób_LGBT (last accessed: July 15th, 2018).

[69] Ibid.

that the mother is a woman who has given birth virtually closes the discussion on the legality of surrogate pregnancy.

Similarly, the definition of a family will change, because it will cease to be a social group built around a married couple (a woman and a man) who give birth to a child. Of course, it was not a model unknown in history, but a marginal one. Nowadays, this margin is getting bigger.[70]

Bronisław Malinowski wrote about this almost a hundred years ago: "without a deeper understanding of kinship, it is impossible to grasp the organization, the way of thinking and the general character of human culture from its humble beginnings to the highest development"[71], because neither the starting point nor the point of arrival are impossible for a precise definition we can currently only describe the phenomenon. As Sławoj Szynkiewicz writes: "kinship is the whole of social ties, behaviors and concepts subject to their cultural generalization, which arise around the widely-understood process of social reproduction and apply the terminology of kinship."[72]

Similarly, Ernest Gellner believes that "relationships of social kinship must coincide with the corresponding relationships of physical kinship only in the majority of cases, but not always"[73] and adds "the analysis of the structure of kinship also contain descriptions of certain relationships that as relationships do not coincide at all, and in any case directly, with any relationship of physical affinity"[74], concluding: "the type of convergence or lack thereof is a part of what anthropologists understand by the structure of affinity of society, and not by something what is accidental and sociologically irrelevant."[75]

As summarized by S. Ossowski, "we must agree that 'human nature' is the resultant of three factors: biological heritage, natural environment and culture, that is, the social environment. In the course of history, as a person learns to transform nature for his purposes more and more effectively, and as his cultural heritage grows, the

[70] Cf. U. Beck, E. Beck-Gernsheim, *op. cit*., pp. 232–233.

[71] B. Malinowski, *Pokrewieństwo*, [in:] *Seks i stłumienie…*, *op. cit*., p. 411.

[72] S. Szynkiewicz, *Pokrewieństwo. Studium etnologiczne*, Wydawnictwa Uniwersytetu Warszawskiego, Warszawa 1993, p. 93.

[73] E. Gellner, *op. cit*., p. 226.

[74] Ibid.

[75] Ibid., p. 227.

importance of the second factor decreases, while the third factor becomes more and more important."[76]

The phenomenon of surrogate pregnancy and its social consequences described above does not extend beyond these definitions, and yet a man is born thanks to it. It does not die and is born (!). It is for us – people – the basic welfare and a condition of existence.

Human, "eternal" notion of motherhood, divided only into biological and social motherhood, "individual motherhood", as Bronisław Malinowski[77] often emphasizes, has been, before our eyes, divided into genetic, biological and social one.[78] Criticism of this phenomenon, for example from Janice Raymond, he author of the book *Women As Wombs*, is based on a patriarchal "medical fundamentalism", which defined both the problem of infertility and the remedy for it (new reproductive techniques), which caused "the appropriation of the female body by male scientific experts."

Raymond believes that the fragmentation of motherhood – a conceptual wedge that these techniques drive between a woman and the fetus – results in a loss of women's control over reproduction and he summarizes: "Reproductive techniques and reproductive contracts increase the rights of fetuses and potential fathers while they question the only right that women retained from old times immemorial – the right to be a mother."[79]

Perhaps in the future the progress in medical sciences will do its work and free us from social and ethical dilemmas, such as those mentioned above. Because if we can already create a new life outside the mother's body, maybe we will also be able to construct an artificial uterus or an incubator, perfect enough to allow the child a healthy, calm, nine-month development.

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[76] S. Ossowski, *Rasa czy kultura*, [in:] *Więź społeczna i dziedzictwo krwi*, Państwowe Wydawnictwo Naukowe, Warszawa 1966, p. 237.

[77] Cf. B. Malinowski, *Rodzicielstwo jako podstawa struktury społecznej*, [in:] *Seks i stłumienie…*, *op. cit*., pp. 364–368 and *idem*, *Pokrewieństwo…*, *op. cit*., pp. 422–425.

[78] Cf. L. Stone, *op. cit*., pp. 384–386.

[79] After: ibid., p. 389.

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Surrogate motherhood – terminological considerations. Three perspectives: theory and philosophy of law, legal doctrine, and public debate[1]

1. Introduction

Regarding the creation and application of law, the concept of surrogate motherhood refers to a number of questions: axiological, legal, and political. Therefore, it is a part of the fundamental debate of the philosophy of law on the relations between law and morality. The predominance of axiological issues results from the nature of the problem, which is inherently related to philosophical and ethical issues. They mainly amount to the questions of maternity, human dignity, and the limits of reproductive rights. When transposed to the context of law, including the philosophy of law, and in particular legal doctrine (civil, family, criminal law), they become more tangible and normative. They can be questions relating to the process of creating or applying law.

2. The issues of terminology

Surrogate motherhood is not a legal concept. It is a judicial concept applied in the doctrine and case-law to refer to various circumstances – personal configurations and motivations – relevant from the perspective of the law. It is mainly used to refer to the following factual states, involving various types of kinship (or lack of it) of the child with the surrogate mother and its future parents:[2]

[1] The present text constitutes an English summary of a scholarly paper originally written in Polish.

[2] M. Franaszek, "Umowy o surogację", http://www.prawoimedycyna.pl/index.php?str=artykul&id=1029 (last accessed: September 2018); Kramska M., "Medycznie wspomagana prokreacja. Standardy

I. natural insemination:
   1. the intended future father's sperm and the surrogate's egg;
   2. donor sperm and the surrogate's egg;
II. *in vitro* insemination:
   1. the intended parents' egg and sperm;
   2. the intended mother's egg and donor sperm;
   3. donor egg and the intended father's sperm;
   4. anonymous donor cells.

These various configurations result in terminological difficulties. They also open up a discussion on axiological issues, as well as on the legal diversity of different circumstances in the context of assisted reproductive technology. The purpose of valuation is to establish why particular practices, jointly referred to as surrogate motherhood, are allowable or prohibited. From a medical perspective, surrogate motherhood does not constitute a separate artificial fertilization method. Its character does not result from the technology itself, but the circumstances of its application.[3] Its common, definitional feature is basically the fact that a woman becomes pregnant and gives birth to a baby with no intention of raising it or assuming any parental responsibility in the future, and in the pre-fertilization agreement concluded with third parties (referred to in literature as the baby's "social parents"), she agrees to immediately give up the baby upon birth and express her consent to the baby's adoption by both or one of the counterparts.[4] The afore-mentioned description, however, is neither binding, universal, uniform, nor unequivocal. In particular, from the perspective of the law, it has to be more precise, especially that it refers to a complex and significant phenomenon.

międzynarodowe i europejskie", http://www.bibliotekacyfrowa.pl/Content/43837/011.pdf (last accessed: September 2018), p. 133.

[3] P.F. Silva-Ruiz, "Macierzyństwo zastępcze – przegląd prawno-porównawczy", *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 1991, No. 10–12, p. 123; M. Safjan, *Prawo wobec ingerencji w naturę ludzkiej prokreacji,* Warszawa 1990, p. 135.

[4] M. Safjan, "Prawne problemy zastępczego macierzyństwa", [in:] *Prawne problemy ludzkiej prokreacji*, ed. W. Lang, Toruń 2002, p. 292; T. Smyczyński, ed., *System Prawa Prywatnego*, Vol. 12, Prawo rodzinne i opiekuńcze, Legalis 2011, p. 215, B. Walerjan, "Nowe dylematy medycyny – zjawisko macierzyństwa zastępczego w perspektywie społeczno-etycznej", *Annales. Etyka w życiu gospodarczym*, 2009, No. 2, Vol. 12, p. 35; M. Wałachowska, "Macierzyństwo zastępcze w systemie common law", *Państwo i Prawo*, 2003, No. 8, p. 98; R. Tokarczyk, *Prawa narodzin, życia i śmierci. Podstawy biojurysprudencji*, Zakamycze 2002, p. 179.; M. Safjan, *Prawne…*, p. 292; M. Soniewicka, "Dylematy zastępczego macierzyństwa", http://www.ptb.org.pl/pdf/soniewicka_macierzynstwo_1.pdf (last accessed: 16 July 2018); T. Rucki, "Medyczne uwarunkowania wspomaganego rozrodu", [in:] *Wspomagana prokreacja ludzka. Zagadnienia legislacyjne,* ed. T. Smyczyński, Poznań 1996, p. 60.

The multiplicity of circumstances must be taken into account – both in the creation and in the application of law. Therefore, it is necessary to point to possible factual states and criteria that enable the classification of a particular situation as surrogate motherhood. The task of formulating an adequate (be it legal or case-law) definition is the more difficult that there are a number of factual states and manifold concepts used in the case law, doctrine and public debate, related to the question at hand. The abundance of concepts results from the medical diversity of the phenomenon as well as the distribution of emphasis and axiological stances. In the last case, the mere use of specific concepts may manifest the approval or disapproval of such reproduction practices, and a more or less critical (liberal, libertarian, conservative) attitude towards them.

By adopting specific definitions and solutions – constitutional or statutory – it becomes a question of freedom and the related function of law, which can have a more or less paternalistic nature. Thus, it refers to the discussion of the existence and significance of values in law, which is fundamental in the philosophy of law. The adoption of certain assumptions determines the shape, interpretation, and purpose of specific legal institutions and terms. One must not forget that the legislator's silence can – and sometimes should – be construed as meaningful. It is usually related to the extension of the sphere of permissibility. In the question at hand, it would express endorsement of the broad extent of reproductive freedom, including practices known as surrogate motherhood. The permission would result from the acknowledgement of the existence of a universal and unrestricted right to have offspring, supported by the right to take advantage of any "treatments" facilitating the process.[5] In this case, reproductive freedom would justify a broad definition of such practices, encompassing various configurations.

The application of the *in dubio pro libertate* principle may, however, be limited due to other principles, whose value and significance are deemed superior. In case of surrogate motherhood, usually the rules of social coexistence, the principle of the child's best interests, or the principle of legal certainty of the status and origin come to play. In individual cases, as the rules of the law, they can get primacy, restricting the contractual and reproductive freedom of legal bodies. The justification will refer to the adopted hierarchy of values, based on axiological assumptions, which entails the protection of certain values to a larger extent than reproductive freedom. So far,

[5] M. Fras, D. Abłażewicz, "Reżim prawny macierzyństwa zastępczego na tle porównawczym", *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*, 2008, Vol. 6, p. 110.

such interpretation has been the basis for judicial decisions in surrogate motherhood cases. Due to the lack of direct regulations in the Polish law, as well as other legal orders, it has been necessary to validate the interpretation by drawing upon the values contained in legal acts on care, adoption and parental responsibility.

3. *De lege lata*, *de lege ferenda*

Regardless of whether the decision on the permissibility of surrogate motherhood is made in the process of creating or applying law, one should remember that the legal system is designed as an axiological and normative whole. This must be taken into account in the legal, doctrinal, and case-law definitions. Thus, it is necessary to look at surrogate motherhood from a broader perspective of assisted reproduction and the related solutions. The stance of legal systems on surrogate motherhood may follow several axiological directions. First of all, based on purposive assumptions, the legislator may conclude that the given cases cannot be regulated favorably by linking acts of coercion to specific behaviors. These are not cases of loopholes because the facts and their consequences fall beyond the applicable law. This is a question of creating rather than interpreting law. It is related to the issue of sources of law, which raises the question of whether they are exhausted in the positive law or originate outside of it. According to J. Wróblewski, this can be referred to as a "negative decision" involving the declaration of lack of legal consequences.[6] After all, law can assume a positive or negative stance toward all facts. This loophole can be only closed by interpretation. Closing the loophole can be legal, but it can also be *contra legem*. Secondly, the legislator may decide to introduce a regulation, which can, however, have various provisions. For example, agreements can be made valid and enforceable. Or on the contrary, any surrogate motherhood agreements can be prohibited. Finally, an interim solution may be adopted, which now functions in line with the *legis latae* principle, namely qualifying all surrogate motherhood agreements as null and void, which means they are not binding but have no legal consequences.

At present, medically assisted reproduction is regulated by the Infertility Treatment Act of 25 June 2015 (Journal of Laws Dz. U. 2017, item 865). However, it does not mention surrogate motherhood. Its inadmissibility was determined in the case-law of Polish Courts by applying Art. 58 of the Civil Code and recognizing

[6] J. Wróblewski, *Teoria prawa ludowego*, Wydawnictwo Prawnicze, Warszawa, 1959, pp. 299–300.

the practice as contrary to the law and the rules of social coexistence. It is assumed and widely accepted that the service referred to as surrogate motherhood has its intrinsic characteristics, escapes regulatory framework, and comes down to having certain non-property rights which must not be the object of legal transactions as they involve the child's best interest.

The lack of statutory solutions (including a legal definition) not only hinders the process of handling cases but also complicates the public debate. Presently, the doctrine, case-law and public debate mostly use a single term, although the situations it refers to have various descriptions and are incomparable in terms of personal configurations and motivations, which affect the moral judgement and the content of the created law. Therefore, it seems that equating them (also from the perspective of legal consequences) finds no justification from the point of view of such legal rules as the proportionality and fairness principles.

Due to lack of legislation on surrogate motherhood, and considering its significance and problems arising from the legislator's silence, ways of its regulation must be investigated. The lack of regulation means that the burden of assessing factual states is transferred to the discretionary sphere of the judiciary, carried out based on constitutional principles and general institutions of civil, family and criminal law. This results in singular, individual handling of every case, but it can also obscure the principles of the uniformity of jurisprudence and legal predictability, which are paramount and linked to the guarantees of a legal state. Judgements made in such circumstances often involve disambiguation of the legislator's silence. Determining the intentions seems to be the key to establishing the direction of interpretation. It shall be based on references to legal rules and the accepted constitutional and statutory axiology. If, however, it is assumed that lack of regulations is not intentional, but merely an oversight or an expression of the legislator's falling behind with the social changes, the recommendation will be to amend the law. Until it is amended, any judgements will be passed based on legal principles applied in accordance with the hierarchy adopted by the court in the given case.

Thus, in the face of regulatory and axiological uncertainty resulting from the lack of regulations, the postulate to introduce them seems justified. First of all, this will require a categorization of practices jointly referred to as surrogate motherhood. Defining is not only a technical issue related to the correctness of a particular definition, but a more basic problem. Defining involves giving meaning and classifying according to the image of reality, including legal reality and its values. In the case of surrogate motherhood, we can assume a wide range of possible solutions, from

the liberal, that allow such behaviors, to the more interim or restrictive, involving even criminal liability.

The starting point is the statement that the concept currently in use is inadequate due to lack of relation between dictionary definitions of motherhood and the idea of surrogate motherhood. Motherhood is defined primarily by means of the experiences and emotions connected to childbirth. These are the feelings which are part of the developing relationships and bonds. It is assumed that a surrogate mother is not meant to manifest them, because according to the agreement, she is to give up the baby. This is facilitated by the fact that such maternity bonds, understood as a sense of attachment (maternal bond), do not develop. Giving birth to a child – one of the foundations of motherhood – is merely a clause in the agreement rather than a part of developing bonds. Furthermore, motherhood is defined by means of the obligations or duties characteristic of a mother. Again, surrogate motherhood contradicts the idea of "real motherhood", because the basic obligation of a mother (parents) is to personally take care of the child.

Considering the common and legal concept of "motherhood" and "surrogate motherhood", it has to be emphasized that in determining its essence, referring to such services as "motherhood" is ungrounded. It has little in common with motherhood.[7] Obviously, it is modified by the adjective "surrogate", but it is not sufficient to make the term adequate. Anyway, "surrogate motherhood" is not the only term used in this context. There are a number of them referring to various aspects of the subject. They stem from different traditions and legal orders. However, it is not possible to establish clear criteria for their usage. Most often, in the context of surrogate motherhood, the following concepts and terms are used, referring to various aspects and participants of the relationship: surrogate mother, contract mother, surrogate, third-party reproduction, intended parents, contract pregnancy, assisted reproduction, biological, genetic and social parenthood, surrogate birth, woman/womb for rent, *Ersatzmutter*. The terms have different statuses. Some are legal, some judicial, and some purely journalistic. The thing that they have in common is the reference to situations created by means of legal instruments, whose meaning is brought down to the division of the mother's role between at least two women.

[7] https://sjp.pwn.pl/szukaj/macierzy%C5%84stwo.html (last accessed: 22 May 2018); https://sjp.pl/macierzy%C5%84stwo (last accessed: 22 May 2018); https://sjp.pwn.pl/szukaj/zast%C4%99pcze.html (last accessed: 22 May 2018).

The afore-mentioned remarks speak undoubtedly for the introduction of new, clear regulations that fulfil a specific purpose, and are consistent with the axiological assumptions of the system and the principles of the legislative technique. The exact sameness of surrogacy and in vitro fertilization technology requires the introduction of additional legal restrictions taking into account the circumstances that allow/require a given situation to be deemed as surrogacy. It seems necessary to create regulations for typical situations which the doctrine and case law deem as cases of surrogacy, provided all is carried out with due diligence. The definition of surrogate motherhood must be based on the identification of certain personal configurations (different technical aspects, above all the method of impregnation). Precise terminology and consistency with the rules is paramount in establishing the limits of operation of the legal bodies that determine what is and what is not lawful, including types of activities that will circumvent the law.

When it comes to the type of definition of surrogate motherhood, it could be a denotative definition, listing all or some of the elements of the denotation. It would be necessary to establish the scope of the definition of surrogate motherhood, i.e., what legal acts it refers to. Definitions can limit or broaden the meaning of the existing name. A definition of surrogate motherhood that would entirely or partially change its existing meaning would be a stipulatory definition. Some authors suggest looking at surrogate motherhood from the perspective of the character and content of the surrogate motherhood agreement, using basic concepts, institutions and categories of civil law, in particular the law of obligations. However, this is controversial, mainly due to the determination of the subject of the surrogacy obligation. Is it the child, or granting one's womb to another woman in order to implement the embryo, or *in vivo* fertilization and then giving birth to the child?

When it comes to the inclination of legislation, it seems that it should rather be restrictive, because the scope of interference in human nature is much broader than in case of artificial fertilization. Moreover, from the perspective of axiology adopted by the legal system, it is unacceptable to complicate the child's legal situation as a result of civil law transactions and to bring it down to a subject of an agreement. Prohibition of such practices would be an example of limiting/abolishing contractual freedom provided for by the legal system. So, the answer to the question of whether surrogate motherhood should remain in the legally protected sphere as a manifestation of reproductive freedom, should be no. It is due to the afore-mentioned values, which are rooted in the principles of family and civil law.

4. Summary

Defining is beneficial for the majority of unclear or ambiguous concepts.[8] Surrogate motherhood and other concepts that are supposed to express the essence of such practices are undoubtedly examples of such concepts. If the requirement of precision is observed in defining, and the complexity of the issue is taken into account, we should assume that the idea of surrogate motherhood involves a statement of the parties of the agreement in the form of one party's commitment to submit herself to a specific medical procedure (specifying possible configurations of germ cell origin), which shall result in her becoming pregnant, and then to give birth to a child and give it up to the other party, including the relinquishment of parental rights to the newborn, and the other party's commitment to effect a payment and accept the child. Such a definition would combine elements of purely medical character with volitional aspects in the form of parties' statements with specified content. It could be universal and apply both to the broadly understood civil law and to criminal law. Assuming a common definition is adopted throughout the entire legal system, the minimum requirements of accuracy and precision would constitute the requirements characteristic for regulations of the criminal law, being more restrictive and by their very nature entering the sphere of rights and freedoms.

Regardless of the final shape of the definition, we should bear in mind that terminological considerations are crucial. They influence the way rights and obligations are defined as well as how the limits of legal protection are established. They also affect the social awareness-raising and the tendency of acceptance or lack of it for the practices of medically assisted reproduction. It is also noteworthy that the legal approval of certain actions entails the assumption of their admissibility, and in consequence the belief that it is acceptable and perhaps even good. Therefore, the legislator must not make a hasty decision. Such awareness is facilitated by the philosophy of law, which is a general, external, descriptive, and normative reflection on the law.[9]

[8] J. Wróblewski, *Teoria…*, p. 88.

[9] J. Zajadło *Po co prawnikom filozofia prawa?*, Wolterskluwer, Warszawa 2008.

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The phenomenon called "surrogate motherhood" and the sociological approach – current (casuistic) and future (general) perspectives

1. Introductory remarks

Contemporary science helps plenty of women to become mothers. Medicine provides a possibility to identify their fertile and infertile days. What is more, it allows finding out the reason of the procreative failure in numerous cases. There are also some techniques that help to avoid health problems, which prevent a woman from getting pregnant. The second solution is currently promoted very often. Press releases or TV news frequently provide information on the methods for infertility treatment. There are also some first reports regarding the situation of children deprived of their genetic identity. Psychologists, educators, as well as sociologists will increasingly address the issue of surrogate motherhood – surrogacy. There are also some works referring to relationships between mothers and children who they gave birth to and who are strange to them from the biological point of view. A similar search shows a paradoxical situation. On the one hand, today the doctors can help a woman; they can offer certain actions which can potentially help her to become a mother. On the other, the answer to the question "Who is the mother?" has never been so difficult.

A relationship between a woman and an unborn child is of a unique character. Regardless of the content of the disputes related to, among others, a legal status of an embryo, it is indisputable that pregnancy is an exceptional period for human development. The emotional connection emerging during pregnancy cannot be

repeated in any other relational situation.[1] The emergence of surrogate motherhood is reshaping a similar approach. There is the term "motherhood" adopted here on the one hand. This requires paying attention to a figure of a mother, a woman, who will give birth to a child. However, the term "surrogate" makes it necessary to modify the approach. This is because we are talking about temporary and momentary motherhood. Is a surrogate capable of entering into a mother's role in a similar relationship? Is she the actual mother, or is her task only to "let her uterus"? Is it possible to establish a relationship with a child that is biologically alien to a given person? Perhaps no other scenario is possible? Perhaps a woman a woman becomes the mother of the child she is pregnant with in a "natural" way? Does the emergence of the surrogacy phenomenon force us to take a critical look at a similar thesis?

2. Purpose and methods of work

The presented paper is an attempt to reflect on the phenomenon of surrogacy, understood as surrogate motherhood. An increasing number of analyses devoted to the ethical and legal look on the phenomenon of surrogacy can be noticed in the literature of the subject. There are fewer studies which deal with this subject from the point of reflections presented by representatives of social sciences. It is particularly true when it comes to psychologist, teachers and sociologists. The surrogate motherhood is an issue, which – as indicated – directs us towards a unique relationship between a woman and a child. It is a special situation. A child will not be a descendant of the mentioned woman. A psychological perspective is automatically highlighted here. Some questions arise on emotions experienced by participants of similar procedures, especially of a surrogate. But how to present a similar picture from the pedagogical perspective, namely in relation to the interaction between the woman and the child? There is also a third dimension of the reflections. It is the sociological context of surrogate motherhood. Is the surrogacy slowly becoming a standard? Can a child be ordered? Should the concept of motherhood be redefined? Further works will be based on a research scheme proposed by Jerzy Apanowicz. This author

[1] A similar look is seen in lyrics of popular musical works. The relationships between a mother and a child are perfectly reflected in the song by the Bajm band, "Dwa serca, dwa smutki" ["Two hearts, two sorrows"]. It was written by the singer of the above-mentioned band, Beata Kozidrak, just after she gave birth to her first child. Source: *Informacje o utworze, Dwa serca, dwa smutki*, http://pl.bajm.wikia.com/wiki/Dwa_serca,_dwa_smutki (last accessed: 11 May 2018).

proposes the theoretical and research analysis to be founded on the following elements: "addressing a problem which arises from practice, assumption of particular hypotheses based on previous theories and output from empirical research, logical criticism and verification of the existing (applicable) theories, presentation of new diagnostic, therapeutic or forecasting claims."[2] Adoption of the following research methods will be helpful in implementation of that task: analysis of literature and documents, monitoring of mass media (including websites), secondary data analysis. It will be also helpful to use the biographical method and analysis of particular cases.[3]

3. Motherhood

It is worth beginning the analyses and reflections on the social and psychopedagogical approach to the phenomenon of surrogacy from a presentation of ways in which the figure of a mother is seen in the contemporary world.

Melchior Wańkowicz describes a woman giving birth to a child in this way*: Mom is soft hands. Mom is melodious voice, kissing the hit spot. Mom is pure good and pleasure. Something that is good to have around, somewhere in the horizon, at any moment.*[4] The word "mother" has a unique character which demonstrates the qualities noticed by the mentioned writer. "the Polish Mother", "Mother Earth", "Birth Mother", "Breastfeeding Mother", "Mother of God". Each of these terms refers to the sphere which may be called *sacrum*. A mother is a special figure in the life of every human being. A woman as a mother gives birth to a child. This applies to every human being living in the world. In this aspect, Juliusz Słowacki stated: "A mother figure stands in the darkness, as if heading towards a rainbow gate. Her turned face looks over her shoulder, and you can see she is looking at her son."[5] The "maternal gaze" recalled by the poet is not very precious for a child. In this respect,

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[2] J. Apanowicz, *Metodologia ogólna*, Wydawnictwo Diecezji Pelplińskiej, Gdynia 2002, p. 35.

[3] M. Krajewski, *O metodologii nauk i zasadach pisania naukowego*, Płock 2010, p. 23., M. Furmankiewicz, P. Ziuziański *Internet jako źródło danych epidemiologicznych,* in: "Rola informatyki w naukach ekonomicznych i społecznych. Innowacje i implikacje interdyscyplinarne", Z. E. Zieliński (ed.), Wydawnictwo Wyższej Szkoły Handlowej Kielce 2013, p. 379, and A. Dąbrowski, *Metoda studium przypadku, krok po kroku,* "Studia socjologiczne", issue 4, 2017, p. 253.

[4] M. Wańkowicz, *Ziele na kraterze*, PWN Warszawa, 1993, p. 21, after *Nasza dwójka,* "Polska The Times", issue 16, 2014, p. 1.

[5] J. Słowacki, *Do matki*, after Wici harcerskiej Kanady, ZO Zwiazku harcerstwa Polskiego, Canada, issue 180, 2008, p. 2.

Anna Kamieńska emphasized that "A home is not the walls, ceilings and floors, but the hands of our mom."[6] Erich Fromm had already developed a similar approach earlier. This author highlights that the "Mother is warm, she is food, mother is a blessed state of satisfaction and security (…). You don't have to do anything to be loved – the love of the mother is unconditional (…). You don't need to earn it."[7]

Similar quotations are only a small part of reflections, sentences and citations that reflect the specific character of motherhood. The unique picture of the mother is presented by Wanda Półtawska. The writer and doctor mentioned here, while analyzing the significance of a mother, repeatedly pointed to the fact that every woman is inevitably called to motherhood. The afore-mentioned author drew a similar conclusion, among others, from the observation of games which young girls prefer. She described a behavior of her granddaughter in one of her publications. During their visit on the playground, the daughter lifted a toy soldier/robot from the ground. A boy had played with it before. The girl immediately started tugging the toy. Showing the uniqueness of the mother's figure, Półtawska concludes: "The beauty of motherhood – goodness embodied. Goodness and generosity, readiness to give one's own blood for the life of a child. If the child lives, it lives safely in the mother and establishes some deep contact with her. In her opinion, there is no nobler thing for a woman than being a "Mother."[8] In her reflections upon motherhood, the afore-mentioned author, as a doctor, concludes that a female body is still a mystery in this respect. According to the researcher, the gynecological and obstetric knowledge indisputably indicates that the female body is de facto subordinated to the procreation processes. Półtawska notes that for numerous years each month the woman's body reacts in a way that can be described as "having hope for conception."[9] Sławoj Maciejewski, sharing the same view, is right to point out that "[t]he desire to be a mother is so deeply rooted in the psyche of almost every woman that she will do everything she can to become the mother. The trials books, since their very existence, include descriptions of trials where women are accused of stealing – abduction of a child. They do this to feel as a mother at least for

[6] After D. Kowalski, P. Kowalska, *Obrazy małej ojczyzny jako sny we współczesności*, Opole 2009, p. 3.

[7] E. Fromm, *O sztuce miłości*, after Ed. *Dostrzegaj pozytywy*, "O!Rewelacja- pozytywny kwartalnik rodziny", issue 1, 2013, p. 1.

[8] W. Półtawska, *Samo Życie*, Edycja Świętego Pawła, Częstochowa 2007, p. 32 and W. Półtawska, *Z prądem i pod prąd*, Edycja Świętego Pawła , Częstochowa 2008, p. 66.

[9] W. Półtawska, *Samo Życie*, op. cit., p. 24.

a moment, to be able to hug a baby and cuddle it to their heart, knowing that they can be burnt on a stake or imprisoned for numerous years." The quoted author also stresses an interesting psychiatric perspective. There are some examples of women, who after the death of a child experience some psychotic conditions, totally wiping the occurrence. The similar conditions show how the motherhood is emotionally embedded in femininity.[10]

Here, the second side of the discussed issue is also worth mentioning, namely the child's perspective. The anthropological research on primary communities shows that a figure of a mother is a necessary person for both a child and a local community. The mother is the guarantor of the child's development. This is one of the reasons why some primitive peoples developed a mechanism of "safeguarding motherhood." It is an action intended to avoid a situation, when a child would be left without care of a woman. For this purpose, a woman familiarizes her child, for example, with her sister or other female relative from the earliest years of its life, who will take care of the child in case the mother is gone. In this context, the term "sociological motherhood" can be found in the literature of the subject. We are talking here about a special role of a woman who is the only guardian of the child's development for a certain time after the birth.[11] This role is afterwards continued. According to Parsons, "It can be stated that a comprehensive language of emotional communication develops between a mother and a child. Only when a child has mastered the language at a relatively high level can it be said that it has learned to love its mother and to depend on this love. Therefore, we are dealing with a transition from "dependence through pleasure" to "dependence through feeling". One of the most important aspects of learning to love and be loved is the internalization of a common culture – symbolism of expression, which enables children to express their feelings and communicate them to their mother, and to understand their mothers' feelings towards them.[12]

[10] S. Maciejewski, *Prokreacja medycznie wspomagana,* "Medycyna wokanda", issue 1, 2009, p. 78.

[11] B. Malinowski, *Macierzyństwo, pokrewieństwo,* in: "Wiedza o kulturze, Antropologia kultury", A. Mencwel (ed.), Wydawnictwo Uniwersytetu Warszawskiego 2001, p. 243

[12] T. Parsons, *Osobowość, a system społeczny,* in: "Wiedza o kulturze, Antropologia kultury", p. 208.

4. Prenatal psychopedagogy in relation to mother-child relations

The above reflections on motherhood are worth being extended to include the notion of relationships between a woman and an unborn child. As it has been stressed several times already, the analyzed notion of surrogacy is related to plenty of doubts. They refer, among other things, to the essence of the relationship, which exists between the surrogate and the biologically alien child that she is supposed to give birth to. Already some initial notes on the unique role of a woman as a birth mother direct us towards a relationship which develops during pregnancy. The surrogate motherhood enters this sphere with new questions which were signaled in the introduction. It is necessary to characterize a specific bond between a woman and her child in the prenatal period in order to attempt to answer those questions. Here, it is necessary to refer to the sphere presented by prenatal psychology and pedagogy.[13]

At the beginning, it is justified to point to the view expressed by Emilia Lichtenberg-Kokoszka. In her opinion, we cannot say about a future child of future parents during pregnancy. This author concludes that "the conception of a child itself begins a new stage in life of each family member."[14] This researcher adds that the time of pregnancy is, by definition, a crisis period. It is related to numerous and dynamic changes. These changes occur in a woman's body. They touch upon the bio-psycho-social sphere. A relationship emerges from the first moment of realizing the "blessed condition". Lichtenberg-Kokoszka claims: "While speaking of a child in the first intrauterine phase of life, it should be stressed that it learns easily and quickly, and with its responses to the educational influence of parents, it encourages them to get to know it as it is – in all its uniqueness. Calling a conceived being a child, not a fertilized egg, an embryo or fetus, stresses the emotional relationship between parents and their descendant, and apart from the medical, it provides the relation

[13] It is worth presenting the term prenatal psychology and pedagogy: "The issues of human upbringing in the prenatal period are dealt by prenatal pedagogy and psychology. As interdisciplinary sciences, they study the "reality of a womb" of a woman, i.e. the child itself, its parents and the mutual relations between them (…) Prenatal psychology, dealing with the study of child's development before and around birth, confirmed that a childhas the ability to communicate with the environment already in the prenatal phase, and is ready to enter into a dialog with its parents. IT is said that parents are often no ready to enter into a dialog, a relationship.", after U. Tataj–Puzyna, D. Sys, *Znaczenie pierwszej relacji w życiu człowieka,* "Fides et Ratio", issue 3, 2014, p.17.

[14] E. Lichtenberg-Kokoszka, *Ciąża zagadnieniem biomedycznym i psychopedagogicznym*, Wyd. Impuls, Kraków 2008, p. 11.

also with a social or even pedagogical aspect."[15] The researcher adds that while looking at pregnancy, we cannot see only its medical character. During this process, both the parents and the unborn child can establish communication. The mentioned author, based on the works by Włodzimierz Fiałkowski, recalls that there are two stages of contact with a conceived child: "At first, it is a monolog from the child, and then a full dialog between a woman, a man and the child."[16] A similar approach is presented by other representatives of social sciences. Maria Wojaczek emphasizes that the "Whole process of development and establishment of relationships with a child that is about to be born is a multidimensional phenomenon. However, three most important elements occurring at that time can be listed: treating a child as a separate being, ascribing certain features and qualities, undertaking interactions with a child". As the cited author points out, the period of pregnancy characterizes a dynamic connection of "phenomena." The more aware the parents of an unborn child are of their roles, the stronger is the bond with their child.[17] This view is shared by Dorota Kornas-Biela. This author, while discussing the subject of pregnancy from the perspective of prenatal psychology and pedagogy points out that personalities of a woman and a man exert some significant influence on how the pregnancy is experienced. The researcher adds that the time of pregnancy is a unique moment in a woman's life. During this process, a woman experiences a union with another person, unknown in other cases. This union can have some significant impact on the female personality.[18]

There is a dominating view among the psychologists according to which a prenatal relationship refers to both the physical and emotional spheres. The first one refers initially to a woman. She is the first one to learn that she is pregnant. This condition has some direct influence on her everyday functioning. It is also the mother who begins to feel the actions of the child's body inside her own body. However, the emotional relationship with a child does not only concern the woman. Also, the father of the child may experience certain thoughts when thinking about pregnancy and the developing child.[19] There may be ideas, fears and hopes. As Ewelina Popławska and

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[15] Ibidem, 14.

[16] Ibidem, 17.

[17] M. Wojaczek, *Kształtowanie się zmian i percepcja poczętego dziecka w poszczególnych etapach ciąży*, "Piel. Zdr. Publ.", issue 2, 2012, p. 76.

[18] D. Kornas-Biela, *Psychodynamiczny nurt w psychologii prenatalnej: wybrane problemy z obszaru prokreacji*" Przegląd Psychologiczny", issue 2, 2003, p. 190.

[19] R. Łukasik, H. Woś, *Kontakt z dzieckiem nienarodzonym,* "Problemy pielęgniarstwa", 2013, vol. 21, issue 1, p. 139

Sylwia Śliwowska remind, the first pregnancy has special impact on the functioning of the whole family, which can be called here a system. Even before the birth, we can see the emergence of two subsystems showing the relationship between a mother and a child, and a father and a child. According to the researchers, "The formation of an emotional bond with a child is therefore a process based on the gradual creation of a child's image as a separate being, equipped in individual qualities, which the parents have some specific feelings for, and which they can make contact with." The mentioned researchers also draw attention to an important phenomenon. As we can read in one of the works of the said authors, "When a pregnancy is planned and accepted, these feelings are usually positive. However, it cannot be excluded that the attitude towards the conceived child is indifferent or even negative. This usually concerns women with low self-esteem, lack of confidence in themselves and their bodies. The emotions that accompany pregnancy are constantly changing, so it is possible that even these negative feelings may turn into positive ones within the course of time. Sometimes, however, this does not happen until after the child is born.[20]

The outlined context directs towards a phenomenon that should be described as prenatal relationship dynamics. In the first trimester, thoughts of a child are related to the subject of its health. Therefore, in a similar situation, the first ultrasound test is so important. Although it concerns a child at a very early stage of pregnancy, it is at the same time the basis for providing an answer to a key question: *Is there pregnancy? Is it going well?* As Maria Wojaczek reminds, "The second trimester is the time of the emergence of fantasies, dreams and ideas about the appearance of a child, the parents' attribution of certain psychological features most often based on observed movements. (…) The mother learns the child by observing its movements and activities. Various forms of searching and establishing contact with a child can be observed. The most frequent form of contact are conversations in mind and aloud, stroking and touching the child through the abdomen. The third trimester is a time when, above all, a woman more and more often imagines the time of birth

[20] After E. Popławska, S. Śliwowska, *Więź emocjonalna z dzieckiem w okresie prenatalnym*, "Fides et ratio", issue 2, 2011, p. 32. It should also be noted that the relationship of a woman with a conceived child is directly related to her hormonal functioning during the pregnancy. See: J. Jaśko-Ochojska, *Traumatyczne przeżycia matki ciężarnej a zdrowie jej dziecka*, "Dziecko krzywdzone, Teoria, badania, praktyka", issue 3, 2016, p. 123.

as a special moment related to positive (meeting the child) and negative (concerns of complications) feelings.[21]

Finishing this part of the study, it is worth paying some attention to the figure of a father of the conceived child. The prenatal relationship with a dad is not of a direct nature. However, as it turns out, it is also important. Urszula Tataj-Puszyn and Dorota Sys remind of the existence of the so-called couvade syndrome (French *couver* – to sit, lie). These authors remind that in some men whose wives/partners expect a child, psychosomatic symptoms characteristic of pregnancy may be observed. According to Dorota Kornas-Biela, the pregnancy symptoms at men most often emerge when expecting the first child. It is pointed out that strong anxiety can be crucial here, which are then suppressed by some fathers, what can lead to occurrence of psychosomatic symptoms. However, emergence of a positive relationship is significant for a child according to some researchers. A child can establish a contact with a dad by listening to his voice and feeling his touch. Similar behaviors contribute to establishment of a closer relation between a dad and a child, what in turn correlates with a high level of security in the child and its mom.[22]

5. Surrogacy as a social phenomenon

When describing the word "surrogacy", Władysław Kopaliński emphasizes that it means an ersatz, a substitute, an artificial or makeshift product, or a replacement for something natural, (Latin *Surrogatte*, to choose someone else as a substitute).[23] This word is defined by the Polish Language Dictionary in a similar way. A surrogate is a "substitute product, a makeshift, an ersatz."[24] Currently, in order to find

[21] Cf. M. Wojaczek, *Kształtowanie się zmian i percepcja poczętego dziecka w poszczególnych etapach ciąży,* "Pielęgniarstwo i Zdrowie publiczne", issue 2, 2012, pp. 74–75. The literature includes results of research pointing to some special meaning of actions undertaken by midwives who take care of a woman giving birth. These activities may have a direct positive impact on the development of emotional relations between a mother and a child during pregnancy. The involvement of the above-mentioned experts during childbirth is equally valuable, as it has a direct impact on the reduction of anxiety experienced by a woman. See Marta Konkel et al., *Więź emocjonalna między matką a dzieckiem*, "Problemy pielęgniarstwa", issue 1, 2015, pp. 99–103.

[22] Ibidem.

[23] W. Kopaliński, *Słownik wyrazów obcych i zwrotów obcojęzycznych z almanachem*, Świat Książki, Warszawa 2000, p. 480.

[24] B. Dunaj (ed.) *Słownik Współczesnego Języka Polskiego*, Wydawnictwo Wilga, Warszawa 1996, p. 1077.

out more about the subject we are interested in, we most often direct our attention towards materials coming from the Internet. Although similar sources are often not of a scientific nature, they pose some key materials that allow usto adopt a given standpoint on a certain topic.[25]

As it turns out, media (including those online ones) provide easy access to information indicating that famous music and movie stars also used the services offered by surrogates, and these were for example: Kim Kardashian, Sarah Jessica Parker and Matthew Broderick (…), Nicole Kidman and Keith Urban, as well as the singer, Ricky Martin.Also homosexual couples use assistance of surrogate mothers, e.g. Elton John and David Furnish have a son named Zachary Jackson Levon, who was born by a surrogate.[26] In the interviews, the celebrities often refer to the figures of surrogate mothers. A model, Tyra Banks, during one of here statements said: **We thank the angelic woman, who carried a wonderful boy for us**. A similar confession was made by an actress, Nicole Kidman, **She's been the most amazing woman in the world to do that for us**.[27] The problem of surrogate motherhood is also reflected in the interests of scientists who represent various disciplines of knowledge. It is necessary to show the positions of researchers who perceive the contexts of surrogate motherhood, which are important for the society.

Mariusz Ciszek emphasizes that the problem of surrogacy is not only significant from the perspective of human procreation but also a broadly understood human safety. Apart from such topics as abortion, in vitro or insemination, it is surrogate motherhood that is nowadays an increasingly common topic in legal and social debates. Furthermore, Ciszek reminds us that this is a particularly sensitive subject for human fertility. Thus, the ethical assessment of similar procedures may vary.[28] An example of a research presentation of the discussed problem can be found in

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[25] Alicja Łaska-Formejster points out that for several years now the Internet portals that have been the main source of information on health in her research on the public perception of patients' rights. See more, B. Kmieciak, Review: Alicja Łaska-Formejster, *Pacjent w sieci zależności. Społeczny kontekst praw i autonomii pacjenta*, Łódź: Wydawnictwo Uniwersytetu Łódzkiego 2015, "Przegląd Socjologiczny", issue 1, 2017, pp. 169- 174.

[26] A. Stopka, *Surogacja. Dlaczego Kościół mówi nie, op. cit.*

[27] Article: *5 gwiazd, którzy skorzystali z usług surogatek. Dziś to szczęśliwi rodzice, https://www.eska.pl/hotplota/news/5-gwiazd-ktore-skorzystaly-z-uslug-surogatek-dzis-to-szczesliwi-rodzice-aa-tYcP-5aCZ-hSvL.html* (last accessed: 10 June 2018).

[28] M. Ciszek, *Moralne dylematy ludzkiej prokreacji w aspekcie rozwoju biomedycyny molekularnej i komórkowej (Wybrane zagadnienia z zakresu bioetyki, bioprawa i biobezpieczeństwa),* in: "Bjoiuriyprudencja, Księga pamiątkowa dedykowana Profesorowi Romanowi A. Tokarczykowi", Z. Władek, eds., Wydawnictwo Polihymnia Lublin 2013, p. 174.

the analysis by Robert and Marcin Kotzbach. The mentioned researchers presented surrogacy as one of the elements related to the phenomenon of procreation. In their opinion, the characteristic feature of surrogate motherhood is its temporary character. A woman, by deciding to become a surrogate, must be also be aware that the child she gives birth to must be handed to another couple. According to the mentioned experts, it is possible to identify the main reasons for using such services. These are "primary or secondary infertility, inability to carry to term, a severe heart disease (…), severe first-degree diabetes (insulin-dependent), psychogenic fear of pregnancy and childbirth." The cited authors underline that surrogacy inevitably raises certain questions and concerns. These concerns are especially present in the legal and social reality of Poland. On the one hand, a woman who gives birth to a child will always be formally recognized as its mother. The previous arrangements made by the donors of the reproductive cells and the surrogate mother are not of any formal relevance in a similar situation. And on the other, it is forbidden to derive financial benefits from procreation services within the territory of Poland. In other words, a child and its conception cannot be the subject of a commercial contract.[29]

However, as it turns out, the existence of a similar ban does not automatically remove for example the companies offering this type of service abroad, from the social reality. Looking for information on surrogacy on the Polish Internet, an advertisement of one of the companies that specializes in similar procreation services can be encountered. Attention is drawn to the possibility of using an egg cell deposited by an anonymous donor. The client can also decide to use the "surrogate motherhood" service. This service is ultimately provided in Ukraine, and it embraces such actions as:

> Consultation and coordination of your program by the Program Coordinator of our agency;
> Selection of a surrogate mother from our database;
> Cost of an up-to-date medical examination of the surrogate mother;
> Cost of preparatory drugs for a surrogate mother;
> Protocol of preparation for biological parents including meetings with the doctor, consultations and coordination of preparations;
> Meeting with candidates for a surrogate mother;

[29] R. Kotzbach, M. Kotzbach, *Niektóre współczesne problemy prokreacji*, "Postępy andrologii On Line", issue 1, 2014, p. 9.

> Drawing eggs collection, and embryo development in our partner clinic;
> One attempt to transfer embryos to a surrogate mother's organism;
> Prenatal care (medicines, medical examinations and coordination of pregnancy by a doctor from our partner clinic);
> Hospital fees;
> Final compensation for the surrogate mother;
> Legal fees: contracts, registration of a child and obtaining a birth certificate, preparation of documents for the embassy, etc.;
> Monthly payments and all compensations for the surrogate mother;
> Agency commission for the use of the database and coordination of the program.[30]

The literature of the subject also presents other examples of surrogacy as an element of another company's proposal offering its services in Poland. In 2010, the District Prosecutor's Office in Ostrów Wielkopolski conducted proceedings, the subject of which was the commercial matching of parents who wanted to have a child with women who considered the so-called private adoption. It is about an action in which a person who gives a child for adoption somehow chooses a specific couple, which is a part of the procedure. First of all, this action is free of charge, and it takes place after the childbirth. In the few situations of this type described in Poland, the existence of official and judicial control can be described. Participation of a private company is excluded. The Public Prosecutor's Office referred to above has undertaken a preliminary investigation based on a similar advertisement: *Dear all, we are intermediaries in rental of surrogates. We operate in the field of renting surrogates, and pregnant woman come to us. All ladies who we cooperate with are from Poland. We are currently at a disposal of several women who will be happy to give birth to your baby. The whole procedure from the moment of signing the contract until the adoption process is completed lasts up to 18 months. Please contact us by phone* […]. *We are fully liable from the moment of* signing *the contract with our company until the private adoption case is completed in the court.* While describing the case in question, Małgorzata Pomarańska-Bielecka points out that the author of the quoted announcement – as indicated by the information taken from the case

[30] Information taken from the website of Successful Parents Agency, which advertises its services in Poland, source; http://www.successful parents.com/en?gclid=EAIaIQobChMI3Yf6lvrj2wIVjMmyChoqXQItEAAYASAAgLTEfD_BwE (last accessed: 11 June 2018)

file – also made contact with women who would be interested in a possible private adoption. However, their actions were intended to create a state characteristic of surrogacy. It was stressed on the one hand that medical, legal and psychological care over a pregnant woman would be provided. On the other, it was pointed out that a pregnant woman expecting a child can count on the material and financial care of her child's future parents. The issue of procreation and adoption services commercialization also appeared in the case. The quoted intermediary collected fees for matching pregnant women and parents, who were willing to adopt a child. Małgorzata Pomarańska-Bielecka stressed that "In accusing the author of the announcement, the prosecutor just emphasized that the illegality of their activities consisted, among other things, in the fact that they did not have the status of an adoption and care centre, and they still carried out actions which only such facilities are entitled to. (…) if they had not received any benefits from their intermediary operations, they would not be subject to criminal liability, what means the violation of the centre's monopoly is not illegal."[31]

Similar situations reveal a socially significant area related to doubts which arise from emergence of surrogate services. Marek Kumór points out that this type of activity is inevitably connected firstly with the commercial character of reproductive services. Secondly, this is an example of strangers entering in the unique relationships between a child and its parents. With regard to the first aspect, we can see that a child becomes a part of the contract. The intentions of its emergence are secondary in this context. It is a fact that the expected child is mentioned as a part of the contract. Kumór believes that his child is treated as an object not a party of action on this stage. It may turn out that the child fails to meet some specific expectations. This author adds: "In surrogate motherhood, not only is the child treated objectively and instrumentally, but also the woman is reduced to the function of a "machine for giving birth". As the researcher points out, surrogate motherhood is deprived of features and conditions characteristic for the mother's behavior, such as: maternity love, fidelity to the child's father and responsibility for the expected child. The woman is obliged to take care of its health not because of her relationship with the child, but because of the content of the concluded contract. Interestingly, there may be a fear of civil and not moral responsibility, which is inscribed in the widely

[31] After M. Pomarańska-Bielecka, *Adopcja ze wskazaniem i zagrożenia z nią związane. O granicy między handlem dziećmi a stosowną korzyścią majątkową należną rodzinie biologicznej oddającej dziecko do adopcji,* "Dziecko krzywdzone. Teoria, badania, praktyka". Issue 2, 2015, pp. 102–103.

understood parental care.[32] The subject of the relationship directs us towards the second important area, which raises doubts during the provision of the surrogacy service. Other persons are introduced into a natural relationship between a conceived child and the parents. These are parents who "order" a child and a person intermediating the transaction. As it was stressed in the previous part of the paper, the prenatal period has an inestimable impact on, among others, development of the child's mental health. The appearance of a surrogate mother, only temporarily performing her function, may lead to significant deficiencies in this area.[33] This view is shared by, among others, Janusz Szymborski. In his opinion: "The dangers to the psyche of both future parents and the surrogates are not fully understood. Further research is needed to assess the health implications for children conceived in this way." The mentioned author adds that the Polish legislation speaks about a mother as a person giving birth to a child in a precise manner. Attention was also paid to the fact that a child cannot be the subject of a contract made between specific persons.[34] Similar formal decisions are only an apparent obstacle preventing the use of the services of surrogates, which, as indicated, can be performed outside the borders of a given country. This view coincides with the observation of non-governmental organizations pointing out that, among other the Council of Europe – referring to the surrogate motherhood themes in recent years – failed to issue any opinion which would completely condemns such actions. In subsequent communications, no attention was paid to the fact that the commercial nature of similar activities may violate, for example, standards set out in the text of the European Convention on Human Rights.[35]

To sum up the social reflection presented in this part of the paper and related to the surrogacy phenomenon, it is worth drawing attention to the accurate observation expressed by Ewa Włodarczyk. According to the mentioned researcher of educational phenomena, there was a clear change in attitudes related to the social perception of the family and motherhood in the last decades. The author formulates a similar diagnosis. "The dynamics of cultural transformations, including values

[32] See in this context: L. Petrażycki, *O ideale społecznym i odrodzeniu prawa naturalnego* [in:] *O nauce, prawie i moralności. Pisma wybrane*, PWN, Warszawa 1985, p. 157.

[33] M. Kumór, *Wymiar moralny wspomaganego rodzicielstwa,* "Rocznik teologiczny", issue 3, 2016, pp. 143- 144.

[34] J. Szymborski, *Uwagi o stanie przestrzegania praw dziecka w Polsce*, "Zeszyty Naukowe. Pedagogika", issue 3, 2010, p. 13.

[35] J. Gajos, *Rada Europy odrzuciła legalizację surogacji,* "Newsletter Bioetyczny", issue 29, 2016, pp. 5–6.

and models of cultivating them, in confrontation with trends and behavioral actions, naturally generates some specific tensions resulting in numerous confrontational situations. This is also the case today in our native social experience of the value of motherhood (e.g. the severity of the conflict of attitudes towards in vitro treatments) or, more broadly, in the values of family life, which, while subject to a process of global cultural change, undergo, at least in their traditional form, a thorough transformation, if not erosion. The quoted researcher points out that the groups defending the attitudes referred to as "traditional" take numerous actions to stop the erosion mentioned by Włodarczyk. However, in her opinion – which is difficult to disagree with – the modification of the social perception of e.g. motherhood has undergone a significant transformation. Its sign is for example the acceptance of non-standard family relationships, which were not encountered in the society beforehand.[36] A similar observation is confirmed by the previous analyses which show the social context of the surrogate motherhood. Katarzyna Bagan-Kurluta points out that in recent decades, among others in the American society, there has been a significant change in the way of how the single parents are perceived. The above was accompanied by a high level of acceptance of assisted reproductive procedures (in vitro). The author refers to some important statistical data concerning contracts related to surrogate motherhood, as well as the economic value of the surrogate services market: "It is impossible to determine the number of contracts made globally. According to American sources, it is 25 thousand, but it is rather just the US territory. Data from five agencies specializing in international surrogacy provided the committee with a basis for its claim that the 'market' has grown enormously: compared with 2010 and 2006, it has increased by almost a thousand percent. According to estimates, the surrogacy market in India is worth approximately $400 million. The mass opening of obstetric clinics for surrogates was already recorded in India in 2009. The value of this market sector was estimated at that time for $500 million, prefiguring even more dynamic growth – regarding the relatively low costs of services provided by the surrogates ($6–10k) and poverty in India (35% of the society lives for less than 1

[36] E. Włodarczyk, Młodzież wobec macierzyństwa i jego kulturowej kreacji, Wydawnictwo Naukowe UAM, Poznań 2009, pp. 9–10. See also in the context of in vitro fertilization using the in vitro technique. B. Kmieciak, *Socjopedagogiczny kontekst dyskusji dotyczącej prawnego usankcjonowania metod zapłodnienia pozaustrojowego*, in: "Człowiek w zdrowiu i chorobie. Promocja zdrowia i rehabilitacja", ed. R. Żarow, T. III Wyd. WSD Tuchów Tarnów 2010, pp. 148–158.

dollar per day)."[37] There is an increasingly more dominating view among the Indian researchers that there are no objective premises that would suggest a negative character of surrogate motherhood, under a condition that a woman acts totally according to her free will. Existence of some important social changes is stressed, including the important factor of women emancipation.[38] Therefore, it is currently hard to clearly state that surrogacy poses a social threat. We do not know its exact scope. It is, however, without any doubt that emergence of the possibility to use the surrogacy services led to a significant drop in the number of families choosing adoption.[39] As it turns out, the results of the research can be seen in the literature in a way directly related to the phenomenon of surrogacy. In 2013, Edyta Gałęziowska and Renata Bogusz decided to examine the attitude of midwives to surrogacy. Midwives are experts focused on the health of pregnant women in a special manner. The majority of respondents (out of a group of 107 persons) assessed the surrogate motherhood phenomenon negatively (almost 40%). Acceptance for these activities was expressed by 22% of the respondents. The results of persons indifferent to the subject and those who had no opinion were at a similar level. According to the majority of respondents, the society (Polish in this case) is dominated with a negative assessment of the surrogacy phenomenon and the surrogates themselves. In the vast majority of cases, the negative ethical evaluation of surrogate motherhood is considered as the reason for such attitudes. Most of the midwives (64%) considered that the main reason for the concept of similar activities was primarily procreative failure, including the lack of success of the in vitro procedure. As the authors of the study emphasize, "Among the conditions encouraging women to decide about surrogate motherhood, the respondents almost unanimously mentioned the financial considerations (89.7%). The following categories were rarely selected: altruism (3.7%) or a sense of mission to be fulfilled (2.8%); lack of opinion (3.8%). At the same time, the clear majority of respondents gave negative opinions on surrogate motherhood implemented by women in order to obtain financial benefits (72.9%). Few evaluated them positively, claiming that, like any other socially useful measure, it should be paid for (4.7%). Every fifth surveyed person did not have their own opinion on the subject (22.4%)". What is important for further analysis is that nearly 6% of respondents noticed that

[37] After K. Bagan-Kurluta, *Macierzyństwo zastępcze a adopcje – symbioza czy konkurencja?*, p. 292–293.

[38] S. Ghosh, B. N. Ghosh, *Outsourcing Babies: A Discourse on Surrogacy and The Attitude of Today's Youth In India,* "Journal of Rural and Community Affairs", Vol. I, 2016, pp. 175–177.

[39] K. Bagan-Kurluta, *Macierzyństwo zastępcze a adopcje*, p. 294.

during the surrogacy procedure the problem of their unwillingness to return a child to the "ordering" parents might appear.[40] However, as it turns out, altruistic forms of surrogacy are highly accepted, e.g. in Bulgaria (73%), and the results of analyses carried out at 12 universities in the United Kingdom are at a similar level. An even higher percentage of positive responses is reported by Australian students (89.5%).[41]

6. Surrogacy: between emotions and a contract

Agnieszka Kamyk-Wawryszuk, who studied the subject of motherhood from the pedagogical point of view, pointed out that we are talking not only about a unique relationship in this context, but above all about a special privilege that a woman experiences. Giving birth to children has been recognized as a special reason for pride and joy for centuries, often requiring sacrifices. The researcher draws attention to the fact that "Being a mother is related to the individual experiences of a woman experiencing motherhood". In today's world, it is motherhood that significantly determines the role of women in the family and in society.[42]

The woman's natural predispositions and desires to become a mother may be related to emergence of a barrier making implementation of this goal impossible. Thus, the assisted reproduction methods are seen as an action which allows to omit such a kind of difficulties. Some researchers and commentators believe that the in vitro procedure is an element which supports the natural processes between spouses. Such interventions are to result in conception of a child, being a descendant of its own parents.[43] In the case of surrogacy, these observations must be additionally verified. Already during the successive stages of activities carried out in the premises of in vitro clinics we can realize that we are talking about interference of a special nature, which is often also difficult for the woman herself. On the one hand, the patient not only has the desire to have a child, but she also experiences some suffering caused by particular medical interventions. However, on the other hand, there is some strong

[40] Cf. E. Gałęziowska, R. Bogusz. *Przyczyny i konsekwencje podjęcia decyzji o zastępczym macierzyństwie w opinii położnych*, "Medycyna Ogólna i Nauki o Zdrowiu", vol. 19, issue 3, 2013, p. 302.

[41] R. Krastev, V. Mitev, *Altruistic surrogacy – ethical issues And demographic differences in public opinion,* "Acta Medica Bulgarica", No 2, 2017, p. 47.

[42] A. Kamyk-Wawryszuk, *Samotna adopcja narracja matek*, Wydawnictwo UKW, Bydgoszcz 2016, p. 7.

[43] W. Ostrowski, J. Limon, *Zapłodnienie in vitro w leczeniu niepłodności – propozycja rozwiązania problemu w Polsce,* "PAUza Akademickie", issue 24, 2009, p. 2.

internal motivation that can be notices. The desire for emergence of a relationship which is unique for a woman. Such a picture is completely alien to reality in which a surrogate finds herself. First of all, it must be stressed that we most often talk about a situation where a surrogate mother is strange for the biological parents and the baby she is meant to conceive. In the prenatal period, it will be harder for a vivid and permanent interpersonal relationship between a surrogate and a conceived child to appear. It can be even concluded that development of a similar bond may violate the contact established between the woman and the ordering couple.

Surrogacy is inseparably connected with a contract/agreement. The most common example which shows the commercial character of surrogacy is India. It is suggested that the procedures of surrogate motherhood within the territory of that country are promoted by state authorities. As noted by Marek Andrzej Libensztein, "Indian surrogates are very common among well-off couples from around the world, who do not have children. Furthermore, there are also some specialist clinics who provide intermediation services in this area, inviting couples from the whole globe. It is estimated that Indian surrogates give birth to around 25k children annually, and the market of such services is worth about 2 million US dollars. Moreover, the cost of a such a procedure in a clinic in India is much lower than in a similar clinic in Europe or the USA, and the possible compensation of a surrogate for giving birth to a child can be compared to a 10-year income in rural regions of the country."[44] However, similar socioeconomic observations made by the researchers fail to reflect the mentioned phenomenon fully. Journalist more and more often present information indicating that the situation of Indian women who decide to become surrogate mothers is almost slavish. Dr. Radheu Sharma from the Council of Medical Research said in his statement for "The Telegraph" that it is unknown how many children are born as a result of surrogacy at present in India. However, there is an increasing amount of information which raises concerns among those who analyze the phenomenon of surrogacy. In 2012, the information on 30-year-old Premila Vaghela spread around the world, who died while pregnant with a child ordered by an American couple. Anindita Najumdar, investigating the phenomenon of surrogate motherhood in India, pointed out in an interview with the Guardian that the way in which surrogates are treated in India is far away from the standards of respect for human rights. During the conversations, it was stressed that surrogate mothers are often sent to so-called special surrogate homes, where their freedom

[44] Ibidem, p. 307.

is limited. The slavish nature of similar procedures is also confirmed with actions that directly harm the health of surrogate mothers. The concluded contracts include, among others, a consent for multiple hormonal stimulation, implantation of several embryos in the uterus and application of selective abortion. The content of the contracts cannot be overestimated here. It should be borne in mind that these contracts in India are often made between well-educated and rich citizens of the Western countries and poor women who undertake similar activities in order to for example save their families endangered with extreme poverty. These women often have lower education than the clients, employees and owners of the in vitro clinics.[45]

It should be noticed that while researching the "surrogate motherhood", the issue of motivation of the mentioned "clients" ordering the children, which is still not analyzed enough. Referring to this topic, Jacek Pawłowicz drew attention to the specificity of the language, which already dominated on the Polish Internet a few years ago, bringing together the people interested in the topic. According to the author, the statements refer first of all to the own needs, desires and dreams of women, who are willing to become mothers. These statements are dominated by questions about the legal possibilities of procreation in a given country. Questions arise about the quality of services in a particular clinic. Pawłowicz concludes that an attitude of crossing a border of acceptance for a particular solution can be encountered multiple times. First, in vitro procedural steps are taken. Afterwards, the use of foreign reproductive cells is possible. At the end, a strange woman is hired as a birth mother. According to the mentioned researcher, hubris triumphs here.[46] Certainly, the comment expressed by Pawłowicz may arouse clear controversy. It could be concluded that the experience of infertility is a unique state, triggering – especially in a woman – some special suffering. However, regardless of the above, we enter the area of strictly commercial character in similar situations. In this context, Oktawian Nawrot points out what follows: "It seems, as shocking as it may sound, that we are dealing here with nothing more than a standard specific task contract. Thus, a biological mother is a party accepting an obligation to implement a given task – giving birth to a child in this case – while the ordering couple has the duty to pay for implementation of that task. Furthermore, it can be stated that in this case, the ordering party provides the material necessary to implement the task. Following this line of reasoning, it may be stated that the ordering party is entitled to certain

[45] Cf. T.P. Terlikowski, Faktura na zabijanie, Wydawnictwo Niecałe, Bytom 2013, pp. 42–43.

[46] J.J. Pawłowicz, *Łono w leasingu,* "Collectanea theologica", No4, 2005, p. 144.

claims towards the biological mother, arising from the warranty for physical defects of the *thing*, both hidden and revealed, what can be clearly seen in the warranty clause included in the contract characterized above. This would mean that if the *developed thing* has any defects, the ordering party will be entitled to withdraw from the contract or possibly to demand a lower price."[47]

In this context, surrogacy may be seen firstly as an example of strictly professional actions, which allow some women to gain particular income for the provided service. However, these actions are often associated with the phenomenon of coercion and exploitation. On the other hand, we see here a new form of luxury activity that only a part of the population can afford. In the last few years, a similar conclusion was reached by two researchers: Antoni Olak and Antoni Krauz. These scientists decided to examine the students of the University of Rzeszów in 2014–2015. Special attention was paid to the subject of surrogate motherhood. The majority of respondents (81%) gave a negative opinion on the phenomenon of surrogacy. It is worth quoting a few important statements:

- "Such a type of services violates the women's dignity as a mother, who is treated as a rental facility, a disposal tool,
- Motherhood should not be interfered with, a biological and a physical mother are the same person. According to the biological nature of human development, there is only one mother, and a child cannot have two mothers at once,
- Awoman who is a *surrogate*, becomes a commodity for sale. It is unethical, unacceptable, immoral, contrary to human nature in the motherhood,
- Such a woman is treated as an object. As *a surrogate,* she performs some services on request, i.e. at first, she carries a child under her heart, then she gives birth to it and gives it back as a product, a commodity."[48]

Similar opinions are fully in line with the socio-ethical analysis carried out by Andrzej Zwoliński in the field of surrogate motherhood. In his view, such terms as 'trade', 'exchange', "profitability", "goods", etc. can only relate to objects. A human being cannot be a participant, an element of proceedings related to exchange or obtaining benefits. The author adds that "Thinking about a child as a property of

[47] (original writing) After O. Nawrot, *Macierzyństwo zastępcze -aspekty moralno-prawne,* "Etyka", issue 33, 2000, p. 178.

[48] A. Olak, A. Krauz, *Surogatka to Już zawód, banał czy globalne społeczne zapotrzebowanie,* "Kultura Bezpieczeństwa Nauka – Praktyka – Refleksje", issue 21, 2016, pp. 187–188.

parents reifies it, makes it an object, sometimes even a commodity, which can be offered to others."[49]

7. Surrogacy – a complexity of relationships

The above-mentioned contexts should be complemented with a psycho-pedagogical perspective. There is no doubt that procedures related to surrogate motherhood are connected with the emergence of economic relationships among the participants of the entire procreative procedure. The emotional perspective in its broadest sense cannot be overlooked here. While analyzing the content of announcements related to surrogacy services, a significant thread tends to be omitted. We are talking about psyche of a biological mother – a woman who gives birth to the child. As emphasized in scientific and media discussions, the subject of physical exploitation of surrogates is emerging increasingly more often. However, there are not enough analyses and in-depth reflections on a unique relationship which is inevitably established between the surrogate mother and the child she carried in her own body. Jacek Jan Pawłowicz is right to emphasize that "[m]aternity is connected not only with the birth and upbringing of a child, but also with pregnancy. There is a natural bond emerging during the pregnancy between the unborn child and the mother – highly important for both of them. It is known that the fetus reacts to the activity of the mother's heart, as well as to her emotions, moods and movements. There is a subtle and complex emotional-motor interaction between the mother and the baby she carries in her womb, and it plays a vital role in the development of the fetus.[50] This observation fully reflects the situations we have seen in countries where the surrogate motherhood is permitted. The case of Crystal Kelley can serve as an example here. This woman decided to give birth to a child for an American couple. During the ultrasound examination, some significant fetus defects were found out. The ordering married couple demanded – under the contract – that the woman terminates the pregnancy. However, the woman did not agree to that, eventually fleeing to another state.[51] A similar situation is described by Marta Soniewiecka. It refers to the first such case in the USA, directly related to the issue of surrogate motherhood. This

[49] A. Zwoliński, *Dzieci jako towar,* "Labor et Educatio", issue 1, 2013, p. 94.
[50] After J.J. Pawłowicz, *Łono w leasingu*, *op. cit*., p. 147.
[51] T.P. Terlikowski, *Faktura na zabijanie*, *op. cit*., p. 45.

case is known in the literature as the Baby M case. The mentioned author described a dispute, which emerged between Mary Beth Whitehead and William and Elizabeth Stern. These persons made a contract in 1985, an element of which was giving birth to a child, free of charge. This child was to be fertilized by combining an egg cell of the surrogate – Mary Beth – and the semen of William Stern. At one point, however, the surrogate mother changed her mind. After giving birth, she fled with the child, hiding from the Sterns who were looking for her. A similar scenario appeared in an equally famous case of Johnson vs. Calvert. Here, the child was conceived by fertilizing the reproductive cells of spouses who signed a contract with a surrogate, who eventfully also did not want to give the child to the ordering couple. According to Marta Soniewiecka, this woman pointed out that despite any biological kinship, an important interpersonal relationship emerged between her and the child.[52]

An element that connects the mentioned situation is a radical attitude of the mother carrying the child. Regardless of whether the child was her biological descendant or not, a desire to keep a constant contact with it appeared on a certain stage of the pregnancy. These women not only wanted to give back the money they had received for the service. At a given moment, they also decided to flee, to hide, and absolutely protect the unborn child. Such an attitude may be perceived as natural in the case of Baby M: Mary Beth was the biological mother of the child. The situation of Crystal Kelley and Ann Johnson deserves particular attention. These women, as the judges pointed out in their decisions, were only carriers of the child covered by the contract. Within the course of the pregnancy, their relationship with the child intensified significantly, which led them to undertake protective actions, characteristic for a parent who devotes themselves totally to the child.

In this respect, we cannot forget about another type of behavior of the surrogate mothers. We are talking about a complete lack of relationship with the conceived child, and then with the born child. This is perfectly illustrated by the case that emerged in 2007 in the United States. It concerns the lawyer, P.G.M., and his niece, J.M.A., who decided to give birth to his child using his semen and an egg cell of an anonymous donor. In this case, it turned out that a woman suddenly changed her mind regarding the execution of the surrogacy contract. She originally agreed to give birth to a child for $20,000. Subsequently, she changed her mind unexpectedly,

[52] M. Soniewicka, *Prokreacja medycznie wspomagana* in: "Paradoksy bioetyki prawniczej", (eds.) J. Stelmach, B. Brożek, M. Soniewicka, W. Załuski, Oficyna Wolters Kluwer Business, Warszawa 2010, pp. 103–110.

and required $120,000 from the father of the child. It became apparent in the proceedings that her decisions were motivated by financial reasons and she expected a higher profit for her services.[53]

The presented case shows the phenomenon that can be surprising. This is because a completely disturbed relationship is demonstrated. A pregnant woman – from the perspective of her behaviors – shows a passive attitude towards her child. This attitude clearly reflects the meaning of the term "surrogate mother", i.e., a person who is only a temporary point on the way to the child's development. This is the context that proves to be the most surprising. As it has been pointed out plenty of times, it is difficult to imagine a closer, more symbiotic relationship than the relationship between a pregnant woman and her child. However, as it turns out, the studies carried out by Tod D. Pizitz in the USA point out that similar behaviors may be a common phenomenon in the case of surrogates. The researcher and his team analyzed the results of psychological tests of candidates for surrogate mothers. Most of the respondents attempted to present themselves in a very positive light. They even tried to convince that they would be good surrogate mothers. Interestingly, they presented certain behaviors that are often characteristic for men during conversations: self-confidence, assertiveness, low level of anxiety, high self-esteem. The candidates treated being a surrogate mother as an exclusive element of the contract. The overwhelming majority of women were willing to give up their children after childbirth.[54] So how does a similar attitude affect a child's development?

While analyzing numerous contexts of the theme of surrogacy, it is worth paying attention to the fact that there are still discussions on the impact exerted by extracorporeal fertilization on the physical development of a child conceived by an in vitro method. It is not hard to get acquainted with the results of research indicating a higher risk of prenatal development disorders in a child conceived in an unnatural manner. In these types of analyses, attention is first drawn to the manner a spermatozoon is pushed into an egg cell. It is suggested that some epigenetic damage may occur at this stage.[55] However, as it turns out, it is much more difficult to reach

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[53] K.B. Kurluta, *Czyje dziecko, czyje? Kilka uwag o pochodzeniu dziecka na tle umów macierzyństwa zastępczego,* "Miscellanea historico- iuridica", issue. 15, Vol. 1, 2016, pp. 260–264.

[54] T.D. Pizitz, J. McCullaugh, A. Rabin, *Do women who choose to become surrogate mothers have different psychological profiles compared to a normative female sample?*, "Women and Birth", 2012, pp. 4–6.

[55] J. Bątkiewicz-Brożek, *In vitro się zemści,* „Gość Niedzielny" 2011, issue 42, p. 15. S. Cebrat, *Nauka, pseudonauka i ART*, "Nauka" 2011, issue 1, pp. 105–114, M. Bielecka, *In vitro to nie tylko szczęście,* "Gazeta Wyborcza", http://poznan.wyborcza.pl/poznan/1,36001,13490528,In_vitro_to_nie_tylko_szczescie__

analyses showing the impact of similar procreational activities on the psychological development of the child. The emergence of the subject of surrogate motherhood complicates further deliberations in some sense. This is because we are dealing with the appearance of a child, who was conceived artificially and born by an alien woman who did not necessarily establish an important emotional relationship with it. In this respect, Oktawian Nawrot draws attention to the existence of some clear threats. As the indicated researcher emphasizes: "In the first place, therefore, the risk is related to the effects of the separation of genetic and biological parenthood. Moreover, we are currently not able to determine the influence of the mother-to-child attitude on the child's development during the prenatal period. We do not know how a child will be affected by the fact that the birth-giving woman thinks about it only in terms of goods or, to put it less harshly, by the fact that she will be obliged to give it back to its genetic parents at birth. Nawrot notices that there are no reliable data on the future mental condition of the children born by a surrogate mother – and this does not give the right to leave this notion untouched. The author, while referring to, among others, psychoanalytical studies, points out that the emotional dryness of the mother during the pregnancy may cause a disturbance in the child's development. This condition may be also reinforced by the awareness of being a subject of a contract: "So the message that you were not only born by a woman other than the one you previously considered to be your mother, but that you were also set to be born and taken care of by *your parents* at a certain price, can have even more devastating consequences. Nawrot stresses that this situation is completely different from the one when we observe a child sent for adoption. In such a case, the roles of all persons are defined. In the case of surrogacy, it is unknown what will be better for the child's psyche already when making an entrance to the Registry of Vital Records: to record the personal data of biological parents or to attach the information on being born by an alien woman.[56] Emotions are also of key importance in the action of an adoptive nature mentioned by Nawrot. A future parent passes from a negative state of awareness of their own infertility to a positive period, when they understand they can become a gift to a specific child. The end of a similar evolution is the so-called equilibrium when parents are aware of the

ale_i_ryzyko.html (last accessed: 25 June 2018). See also A. Havrylyuk, V. Chopyak, A. Nakonechnyyj, M. Kurpisz, *Nowe aspekty niepłodności partnerskiej: czynnik męski*, "Postępy Higieny i Medycyny Doświadczalnej" 2015, issue 69, pp. 1228–1238.

[56] O. Nawrot, Nawrot, *Macierzyństwo zastępcze -aspekty moralno-prawne*, *op. cit.*, pp. 183–184.

necessary waiting time for a child. This is a key state that does not only give hope.[57] The emotional aspect indicated in this approach is important during, among others, the analysis of the behavior of candidates for adoptive parents. It is noted in the literature that parents who adopt a child should in principle continue to participate in the meetings of support groups. The lack of emotional bond with the child may result in the disturbance in its cognitive, emotional and social sphere.[58] The optics perceived in the surrogacy procedure is different in this case.

Returning directly to the figure of a surrogate mother in this place, it is worth noting that the term of the so-called "intimate works" appears in the literature of the subject. It is supposed to concern the conscious and voluntary provision of services by a woman, such as, for example, care for an alien, newly-born child, or giving birth to a child and giving it to an alien person. However, Elina Nilsson highlights that the phenomenon of surrogate motherhood gives rise to natural doubts related to the disturbance of natural relations between mother and child. The researcher decided to analyze the statements of women who decided to become surrogates. Most of the respondents surveyed in the Philippines indicated that they were pregnant with their own child. It was natural for them that this was their descendant. Opinions have emerged indicating that, thanks to the financial support, surrogate motherhood allowed them to experience their pregnancy consciously and calmly. A common element for the speeches of women is the fear. It is of some specific basis here. It refers to concerns of their own and the child's health. This health condition is presented as an element of contact. The women feel obliged to take care of their well-being, not because of their own worries, but because they are afraid of violating the contract. In addition, the need to protect one's health was reiterated numerous times, due to the higher risk of pregnancy miscarriage (in vitro) and the fears of future parents. Unfortunately, this state of affairs is linked to the occurrence of negative consequences. First of all, the surrogate mothers usually have no influence on e.g. the number of implanted embryos. Second of all, they are constantly being told that they must be emotionally separated from their children, which will make it easier for them to give the child back to the ordering persons. The studied surrogates state that they prepare to a similar and difficult moment, at the same time stressing that they feel some enormous anxiety related with impossibility to

[57] M.A. Bieńkowska, *Rodzicielstwo adopcyjne – doświadczanie skrajnych emocji w fazie decyzji o adopcji,* "Miscellanea Anthropologica et Sociologica", issue 17, 2016, pp. 23–24.

[58] M. Posłuszna-Owczarz, *Zdrowa rodzina adopcyjna – to znaczy jaka?*, *op. cit.*, p. 77.

give back somebody who a relationship was established with. The concerns are also related to occurrence of disappointment towards the ordering parents. It is about a situation when, e.g., the insemination or extracorporeal conception procedure fails. The surrogates' statements include their hope to get a second chance. The similar conditions are accompanied by a feeling of guilt of the future surrogate mothers. There is also a feeling of embarrassment among surrogates, who often do not know the ordering parents personally, who – even if appear – do not establish any relationships with the woman.[59]

A context of unique character of relationships is developed by Hillary L. Berk. This author, on the one hand, emphasizes that a contract for surrogate motherhood is an ordinary business agreement. On the other, the researcher is right to see that we are dealing with a unique form of interaction in the case of surrogacy. It is of a double nature. It does not only concern contact with persons ordering a child. It also applies to communication with the child. Therefore, these emotions become a special element of this contract. While researching the attitude of American lawyers to the topic of surrogate motherhood, Berk noticed two interesting phenomena. First of all, they are increasingly more often specialized in the art of controlling the emotions of the surrogacy procedure participants. Second of all, he clearly pointed to the actions seen by the attorneys, intended to control the behaviors of a pregnant woman. The future parents undertake numerous actions to have systematic access to information related to the surrogate mother's behavior. This action is called "risk management". Furthermore, the attorneys observe certain behaviors called "womb jealousy." The couples (including the same sex couples) often treat the surrogates coolly, at the same time manifesting some jealousy and suffering rooted in their infertility. Interestingly, similar states lead to numerous elements in surrogacy contract, which can be described as "emotional." The surrogate mother must, for example, refrain from feeding the child (but she must provide the milk), she must not take care of the child, and must avoid any activity that could lead to the establishment of any relations. While analyzing the surrogates' statement, Berk suggests that the most difficult time for them is a moment after giving birth to the child. In their statements that followed, they stressed that they needed to control their own emotions continuously. They kept repeating to themselves – in a specific internal monolog – that they were not the mother of the child. One of

[59] E. Nilsson, *Women's Experiences of Commercial Surrogacy in Thailand*, Upsala Universitet, 2015, pp. 43–55.

the respondents emphasized the irrationality of the situation, when this was not her, but the future parents of the child who received congratulations after the birth in the hospital room.[60]

When analyzing numerous studies on psychological contexts of surrogacy, Olga B.A.van den Akker emphasizes that the motive that influences the willingness to use it is not only the desire to have a child, but also a descendant, who will be related to the parents. However, there is a negative context of surrogacy here. This is the fear of parents receiving a child from the surrogate mother. According to majority of research results, the parents are not willing to inform the child of how it was brought to the world.[61] There is also a need to note the issue of biological (already living) children of the women who decide to become surrogate mothers. In her research results published in 2017, Mary P. Riddle drew attention to this aspect of the discussed issue. It turns out that the conclusions of the analyses are extremely difficult to summarize. Theoretically, the assessment of surrogacy by children aged 4–10 years is not negative. However, there are some significant doubts concerning how the children understand this matter. While researching some individual statements, we can see that there are plenty of messages, where children pay attention to the experienced anxiety. This anxiety is related to the form of a relationship between them and the children born by their mother.[62] Vasanti Jadva, together with her team, conducted a study on the perception of surrogacy in surrogate mothers' families, pointing out that most of them are positive. The majority of the respondents (over 30 women in Great Britain) indicated that this topic was discussed in the family. According to the surrogates, the opinion of their biological children on those issues was good to a large extent. Jadva's research also shows that the majority of British women who choose to become surrogate mothers do not have the problem of emotional suffering associated with separation from the child. A part of the respondents stressed that they had contact with the born child for some time after the birth.[63] However, it turns out that such positive observations are not made by surrogate mothers who undertake to become surrogates in Asian countries. Hoda Ahmari Tehran, who

[60] L. Berk, *The Legalization of Emotion: Managing Risk by Managing Feelings in Contracts for Surrogate Labor,* "Law & Society", No. 1, 2015, pp. 160–173.

[61] O.B.A. van den Akker, *Psychosocial aspects of surrogate motherhood,* "Human Reproduction Update", Vol. 13, No. 1, 2007, pp. 56–57.

[62] M.P. Riddle, *An investigation into the psychological well-being of the biological children of surrogates,* "Clinical psychology & neuropsychology", issue 4, 2017, p. 8.

[63] V.Jadva et al. *Surrogacy: the experiences of surrogate mothers,* "Human Reproduction", Vol. 18, No. 10, 2003, p. 2201.

interviewed Iranians who were giving birth to children for an alien person, noticed that their pregnancy was constantly associated with fear for their child's health and with a kind of "reminder" that they were not "real mothers". These women were afraid of informing others (including their biological children) of their actions. What is more, they felt that their communities did not accept their actions. Tehran, while analyzing the results of research on mental health of women who are surrogates, suggests that the majority of them did not face any considerable emotional problems. It turns out that the percentage of postnatal depression cases is not higher in the surrogate mothers. However, it must be noted here that individual statements made by the surrogates suggest emergence of some specific feelings related to lack of full self-determination, thus the motherhood identity disorders emerge. The women who are surrogate mothers do not see the purpose of their actions.[64] In referring to similar experiences of women, Teuta Vodo also draws attention to the already mentioned aspect of thoughts related to the potential disability of the conceived child. A part of the studied women points out that this anxiety is related not only to the care of the child but also to the concern that the future parents might resign from the surrogacy. Furthermore, the researcher stresses that no connection between the surrogate motherhood and emotional problems in identified several analyzes cannot be recognized as an argument proving a safe character of similar actions. The previous psychosocial search and investigations were based on small research attempts. Furthermore, they most often omit the mental development of children born in a similar manner.[65]

It must be added at the end of this part of deliberations that the psychosocial analysis of the developmental situation of children born by surrogate mothers is related to emergence of some significant difficulties. There is no doubt that the state of emotional functioning of a pregnant woman influences the development of a conceived child. A part of the studied surrogates stresses the emerging feeling of sadness. At the same time, however, it is mixed with the perceived good related to surrogate motherhood. It is about helping to bring a child into the world.[66]

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[64] A. Tehran et al. *Emotional experiences in surrogate mothers: A qualitative study*, "Iranian Journal of Reproductive Medicine". Vol. 12, No. 7, 2014, pp. 476–477.

[65] T. Vodo, *Altruistic Surrogacy, European Christian Political Movement*, Amersfoort 2016, pp. 4–6.

[66] R.J. Edelmann, *Surrogacy: the psychological issues,* "Journal of reproductive and infant psychology", No. 2, 2004, p. 130.

8. Summary

Currently, there is no dispute in the literature as regards the surrogacy as a concept. It is obvious that we talk about actions where a woman gives birth to a different people's child. This action can be of a commercial or altruist nature. There is no doubt that there is an increasing acceptance for this subject in a growing number of countries. Research results in India, but also in Russia and Great Britain, suggests that surrogate motherhood triggers less and less negative emotions. However, it is worth remembering that surrogacy is still automatically associated with human trafficking. It is not only about a child, the conception of which is a part of a commercial contract. It is about women, who decide to undertake a similar action in relation to their strive for some significant compensation. We should remember at this point that the term of "altruist surrogacy" is a specific model of perfect relationships. Its assumption is that a woman will consciously and voluntarily decide to give birth to a child that will be then raised by other persons. It is a starting point for this phenomenon. It can develop differently. A surrogate mother may be pregnant both with her own child or with a child of an alien woman: an anonymous donor, or a woman asking her to give birth to a child. In such cases, the altruist surrogacy model assumes that regardless of kinship, the surrogate mother – after giving the birth – will give the child back to a couple expecting it. However, it is completely overlooked that a woman's pregnancy may automatically lead to the establishment of an important relationship with her child, which may be biologically alien. As it was indicated above, the prenatal period has a unique character for both the pregnant woman and her child. It is impossible to turn the emotions off. It is also impossible to make this condition indifferent for the child. It is worth noting here that the parents who "order" the child do not participate in a prenatal relationship. It should also be added that participation in the procedure may be related for the surrogate herself to some permanent changes in the body. This is not so much about the dangers of in vitro fertilization, but about the phenomenon of microchimerism, i.e., the exchange of cells between mother and child observed at the prenatal stage. Marzena Zajączkowska states in this context: "It seems that microchimerism is connected, among others, with prenatal human development, as maternal cells were found in the adult offspring; also in the organisms of mothers there was the presence of offspring cells that developed in their uteruses (if mothers gave birth to

sons, there were cells with the Y chromosome detected in their bodies)."[67] Therefore, an extremely complex situation may appear in the case of surrogacy. A woman may give birth to a biologically alien child, whose cells may become a permanent element of her body. If we add that the surrogacy may take a fully commercial form, then answering this question: *Who is the mother of the child?* remains highly difficult. This is a key question. This is because it is the source of most of the controversies associated with surrogacy. Previous psychological and sociological research proved that there are many cases where women do not want to fully fulfill their contracts, wanting to keep their babies.

Psychosocial assessment of surrogacy has several levels. The first refers to the question about the mother expressed above. Emergence of surrogacy caused that the word mother is accompanied with new terms: biological mother, sociological mother, surrogate mother, etc. Numerous court ruling, among others from the USA, suggest that the key role is ascribed to a woman who decided to have the child. In this context, the surrogate is treated just as a carrier. In other words, she is not the mother of a child. In this respect, a woman is treated as a biological incubator. A similar approach has two consequences. First of all, we deal with treating a woman subjectively. Second of all, there is the conceptual complication. The most natural relationship in its essence becomes complicated. In this case, there may be a significant disorder of identity both on the part of the adolescent child and the women participating in the procedure.

It is also worth referring to the second level of psychopedagogical and sociological considerations. The surrogate motherhood is a topic that is increasingly being researched. The results of analyses prove that in most of the studies surrogate mothers fully accept the situation they find themselves in. They stress that they can deal with any potential negative emotions. In their opinion, also these actions do not complicate the relationships within their families. This topic is also positively referred to by representatives of the countries where the surrogacy was legalized. However, as it turns out, a more accurate analysis of statements suggests that there is a different reality. In-depth interviews with the surrogates clearly point to the fact that the women are continuously accompanied by fear: of themselves, of the child, of other persons' opinions, including their families. The child appears on the

[67] After M. Zajączkowska, *Wychowanie człowieka zaczyna się w łonie jego matki,* "Fides et ratio", issue 1, 2016, p. 11 see also: J. Rak, *Mikrochimeryzm, płeć i choroby autoimmunologiczne*, "Kosmos", issue 1, 2008, p. 26.

one hand as someone close and on the other as a part of the contract. There are also reflections on the specificity of relations with the child's future parents. They are strange not only emotionally but also physically: they even avoid any contact.

To sum up this sphere of deliberations, it must be stressed that the social evaluation of surrogacy is of a heterogeneous character. It is seen differently in the social research than during an anonymous conversation. In fact, it is difficult to find examples of altruistic surrogacy in the analyses. To a large extent, it is connected with the emergence of a contract in which the surrogate mother is to avoid establishing a deeper relationship with the child. In this place, the surrogacy should be demonstrated in at least two images. The first one is related to the community of highly developed countries, where a woman decides to conclude a contract, the subject of which is a child. Both the woman and the ordering persons can have some specific knowledge about the phenomenon. They can use the services of lawyers or consulting firms. A partner relationship may appear here. A surrogate is treated in a subjective way. Her body is significant here. She consciously consents to this. The second picture is different. It regards such countries as India. In those places, the surrogate mothers are hired by persons who are in a much better economic, educational and legal position. There is no cooperation here. A surrogate tends to be anonymous for the couple. In this context, a child is purchased as a commodity, from a woman who is neither a partner for the ordering parents nor a party to the actions.

It is currently impossible to make a single consistent assessment for the surrogacy phenomenon. As it was pointed out, it is seen as an additional and acceptable possibility in the countries where such procedures have been available for years. The link between assisted reproductive procedures and surrogacy motherhood is clearly recognized at a moral level. The consent to a similar action (i.e. in vitro), especially in the Western culture, is related to a clear acceptance of a standpoint that the desire to have a child entitles to take actions which may be radical. When it comes to the Asian countries, it may be concluded that adoption of similar practices is connected with the perceived economic profit. The emotions experienced by individuals are insignificant here.

The psychopedagogical perspective, which has already been mentioned several times, is unfortunately equally difficult to assess in a context of surrogacy. There is no doubt that prenatal development of a person is of key importance both for them and their parents. A relationship which emerged in this period is still a significant notion of research. However, what are the changes that take place when a pregnant woman who carries a child is not its biological mother? How will a child contact the

parents who once ordered it? These questions remain unanswered. The research in this area has been conducted most often on small research samples so far. What is more, it should be noted that numerous variants of relationships may appear during the surrogacy procedure, which hinder a full evaluation of this phenomenon. There are plenty of areas which have not be analyzed yet. We are talking, among other things, about the emotional level of functioning of children born by mothers. We can be sure today that this action is not indifferent for this sphere, and this state of affairs will not be changed by the perceived increasing acceptability of the analyzed phenomenon.

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The lawfulness of the institution of surrogate motherhood from the standpoint of political and legal doctrines

1. Introduction

The decoding of the conception of what constitutes a human being as understood (usually implicitly) by a given legislator is of key importance for the admissibility of the institution of surrogate motherhood in a given legal system. At the same time, a given legislator's approach to surrogate motherhood is just one of the manifestations of an anthropology adopted by this legislator, whose effects are simultaneously discernible in regulations pertaining to abortion, euthanasia, capital punishment, war with terrorism, organ transplantation, civil law commercial transactions in human organs, or in vitro fertilization. Therefore, concrete legal solutions are determined by whether a human being is considered a subject or an object, and consequently, if the adopted notion is that of subjectivity – which biological entity is worthy of being called "human." For example, the "dispute over abortion" is in fact a dispute over whether a foetus ought to be granted human rights or not; similarly, the supporters of the abolition of capital punishment are generally in favor of "liquidating" dehumanized "terrorists" in the event of a threat of a terrorist attack. Therefore, the subject of this article is to present different outlooks on what constitutes a human being in the context of the existing legal solutions concerning surrogate motherhood.

2. From Socrates to Christianity

It would be a truism to conclude that throughout history, the perception of what constitutes a human being has changed in the fields of philosophy or natural sciences. However, referring to Mirosław Krąpiec's observation, it could be noted that a common element of these deliberations was the pre-scientific, personal, and physical experience of being "human," which resulted in an intellectual need to explain the purposefulness of one's existence and one's position among other biological creatures. A human being could be therefore perceived in two ways – as part of "nature" or as a being endowed with a certain non-natural element. The former approach is naturalistic in character and emphasizes, on the one hand, the biological aspects that make humans similar to animals, and on the other hand – the human "soul" in its Socratic sense, i.e., the ability to use language (which is the tool of cognition and reflection), self-awareness, the need for social interaction, the ability to understood good and evil, and the ability to create and use technology.[1] The latter, anti-naturalistic approach assumes that a human being constitutes a peculiar personal self which is placed in matter (nature), but which is not derived from matter – it is this special combination of the physical and the non-physical that renders man unique and exceptional.[2] Throughout the history of the human thought to date, these two approaches have come to prominence in different configurations and to varying intensity.

The period of Greek and Hebrew antiquity was dominated by the naturalistic approach to the notion of humanity. In the Jewish tradition, it is particularly evident in the arduous process in which the idea of the immortal soul penetrated the theological consciousness, as demonstrated by the dispute of the Sadducees and the Pharisees over resurrection, or by the ultimate rejection of the orthodox and inspired character of the Books of the Maccabees. Although anti-naturalistic tendencies in the Jewish thought did exist, they were never dominant. Similarly, according to the ideas developed by the Ionian school, which emerged in the early days of the Greek tradition (and were continued in the Roman one), a human being was considered

[1] The soul for Socrates was identified with "our consciousness when it thinks and acts with our reason and with the source of our thinking activity and our ethical activity (…) it is the conscious self, intellectual and moral personhood." G. Reale, *Historia filozofii starożytnej*, Vol. 1. *Od początków do Sokratesa*, Wydawnictwo KUL, Lublin 2000, p. 317.

[2] Cf. M. Krąpiec, *Człowiek i prawo naturalne*, Wydawnictwo KUL, Lublin, 1986, pp. 127–129.

an element of the cosmos[3], and consequently – an element that was not qualitatively disparate from other elements of the world with respect to *arche*, i.e., the original element or elements constituting being. Even after the anthropological revolution initiated by the sophists and continued by Socrates (and the subsequent schools that emerged in the post-Socratic tradition), a human being as a biological being and a human being reduced to the soul were principally elements of one nature, which perhaps differed in random elements, but were consubstantial with the world at the rudimentary level. This approach is clearly visible not only in the atomism of Democritus of Abdera or the thoughts of Epicurus and Lucretius, which chronologically preceded the sophists, but also in the views of Aristotle (ζῷον λόγος ἔχων and simultaneously ζῷον πολιτικόν) or the stoics, which are less obvious in this context. In their conceptions, too, a human being was understood as an entity combining *psyche* (mind) and the body (the biological aspect), who becomes the full subject of philosophical reflection only in conjunction with the cosmos. The exceptionality of a human being perceived in this way was therefore justified in the context of the material cosmos rather than supernatural or transcendent beings/gods. For them, self, whose sources they were unable to identify, was a unique but temporary (temporal) work of the cosmic nature. It was not until Plato's revolution revealing the intelligible world that an important departure from this conception towards anti-naturalism emerged: the discovery of "idea" made it possible to use rational arguments to incorporate the world of Orphic beliefs into the reflection on humanity.[4] In this way, the human self could be identified (unlike in Socrates' thought) with an independent, immortal, almost god-like being that, although being connected with the matter of the human body, was an autonomous entity with respect to that body (the body as a prison for the soul). Over the course of the subsequent intellectual transformations, this approach made it possible to add importance to the human

[3] It is worth recalling that "cosmos" originally meant "order." Heraclitus of Ephesus was a precursor of the later meaning of the word as a "world order." Cf. G.S. Kirk, J.E. Raven, M. Schofield, *Filozofia przedsokratejska. Studium krytyczne z wybranymi tekstami*, PWN, Warszawa-Poznań 1999, p. 164. Interestingly, the original meaning of order also covered the political and legal order of the *polis*. Hence the conclusion that comparing the political and legal order with natural order became the foundation of philosophy. Cf. T. Scheffler, *Tales i początki filozofii* in E. Kozerska, M. Maciejewski, P. Stec (eds.), *Historia testis temporum lux veritastis, vita memoriae, nuntia vetustatis. Księga Jubileuszowa dedykowana Profesorowi Włodzimierzowi Kaczorowskiemu*, Wydawnictwo Uniwersytetu Opolskiego, Opole, 2015, p. 84.

[4] Unlike G. Reale, *Historia filozofii starożytnej.* Vol. 2. *Platon i Arystoteles*, Wydawnictwo KUL, Lublin 1996, p. 363.

psyche by perceiving it in transcendental terms and justifying its dominance over nature, or even the need to break free from its confines.

At this point, it ought to be stressed that the Greek and Roman traditions did not undertake reflection on the human person, which was treated as a thing among other things.[5] It presumably stemmed from the fact that both in the Ancient Greek and in Latin the words denoting a person (πρόσωπον/persona) originally signified a theatrical mask. A thesis exists in literature on the subject that the Latin term was derived from the Etruscan word *phersu*, which denoted a mask used in religious rituals. A similar mask (known as a *persona*) became popular in Roman theatre, but it seems more likely that the term *persona* was derived from the verb *personare* ("speaking through something"), which described the specific manner of speaking, distorted by the mask. In the evolution of ancient theatre, the mask first performed an acoustic function (the voice of truth, nature, divinity spoke from underneath it) and gradually came to represent a person or character in a given drama.[6] In this way, a *persona* could become connected with the fictitious or ostensible behavior of its wearer. It was due to this identification that in the times of Cicero the word *persona* started to be used metaphorically to denote the intellectual construct known as a "legal person" today[7]. Meanwhile, the Greek word πρόσωπον was derived from a verb signifying (in simplified terms) "the ability to see and be seen." In simplified terms, because over time the verb ceased to refer solely to the sense of vision and started to be used metaphorically, to mean understanding or comprehension. Thus, realizing something was determined by the fact that it was "close to the eyes", situated "in front of one's eyes", or "face to face." This specific meaning of the term πρόσωπον was used by Demosthenes and Aristotle to denote the frontal part of the head below the eyebrows, i.e., the face. It was probably because of this fact that the word used to denote the face, i.e. the part of the human body that individualizes us most evidently, would be later used to create a notion that makes it possible to separate that which is individual from that which is common to the species. This process was accomplished to the greatest effect in the field of Christian theology and philosophy.

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[5] M. Sadowski, *Godność człowieka i dobro wspólne w papieskim nauczaniu społecznym (1878–2005)*, E-Wydawnictwo WPAiE UWr, Wrocław, 2010, p. 15.

[6] J. Grzybowski, "Człowiek jako osoba w metafizyce św. Tomasza z Akwinu", *Warszawskie Studia Teologiczne*, vol. XVI, 2003, pp. 202–203.

[7] For more on this point, see: R. Szubert, "Metapher der Person im juristischen Diskurs", *Glottodidactica*, Vol. XLII/2, 2015, pp. 101–116.

In the early days of Christianity, alongside the Greek word *prosopon* and the Latin word *persona*, the pertinent vocabulary was enriched with notions derived from philosophy that could potentially signify a person – *hypostasis* and *ousia*. Based on the dispute concerning the character of the Holy Trinity, considerable difficulty in interpretation was posed especially by the words *persona* and *hypostasis* ("the underlying substance; that which is underneath"). Since the days of Plotinus, the latter term would also be used to denote a being that has been emanated from the Absolute. Importantly (especially because of the numerous misunderstandings that ensued), *hypostasis* was later identified with the Latin word *substantia*, which signified, among other things, an independent or isolated being. Despite these apparent semantic differences, in the language of Christian theology it gradually became accepted that the words *persona* and *hypostasis* are equivalent in the sense that they could be understood as "existence", "individuality", "singularity", in particular with reference to each of the three persons of the Holy Trinity viewed separately. Meanwhile, the word *ousia* (essence, substance) became identified with *physis* (nature), so that its potential connection with the concept of a person as an individualized being was ultimately blurred.

3. Naturalism and anti-naturalism – up to the present

As suggested above, patristic and medieval philosophy creatively developed the Greek-Roman notions pertaining to a human by enriching them with the results of theological disputes. For example, the early Christian philosopher Tertullian (2nd–3rd c. AD) supplemented the classical identification of a human being with reason (in keeping with the spirit of Aristotle's teleology) with the Christian, linear perception of time by writing: "That also is a human being, which is about to become one, just as every fruit exists already in the seed."[8] In this way, reason was combined with a reflection on existence in time and the changeability of the ontic features of a person. In the culture of Western Christianity, an important role for specifying and differentiating between the notions of person (*hypostasis, persona*), substance (*ousia*) and nature (*physis, esentia*) was performed by Boethius. He defined nature as the totality of all things that can be apprehended by the mind, as the power to act

[8] Q. S. F. Tertulliani, *Apologeticus Adversus Gentes pro Christianis*, [in:] T. H. Bindley (ed.), Merton College, Clarendon Press, Oxford, 1890, p. 31.

and the essence of all things. In the case of a person, he concluded (while referring to Cicero[9]) that it can only be a substantial, individual, self-existent, rational being, with the provision that rational nature does not constitute a person unless it is a separate individual substance ("an individual substance of a rational nature"[10]). As we can see from the above, this definition referred to any separate rational being, therefore not only to humans, but also to God and angels. This reasoning has consequences even in today's linguistic habits, for example, in using the formulation "human person" in legal language to differentiate (often without realizing it) between humans and other potentially reasonable beings. An important aspect of Boethius's approach to the notion of a person (which is not directly present in the definition itself) was that the emphasis was put not only on intellectual cognitive abilities, but also on the fact that reasonableness is a peculiar act of love and freedom in making decisions.[11] Let us note that, following in the footsteps of Boethius, Thomas Aquinas also assumed that "[a] person signifies what is most perfect in all nature – that is, a subsistent individual of a rational nature."[12] Importantly, by referring to Aristotle's category of philosophy and to numerous earlier theologians, Thomas provided an explanation of who a human is in accordance with the Christian thought. To put it simply, in his opinion a human being is the unity of soul and body according to the principle of a relationship between *actus* and *potentia*, i.e., a combination of form and matter. A human being constitutes a complete being in which both elements form substantial unity by means of a single act of existence. According to Thomas Aquinas, a human being is a peculiar world containing consciousness and spirit, which enables him to overcome matter and search for God. Man belongs to natural and supernatural orders[13] and cannot be reduced to the purely biological sphere. This understanding of a human being was significant because of the influence of the philosophical synthesis created by Thomas Aquinas on Western culture. It contributed to the fact that one

[9] S. Wroński, "Charakterystyka klasycznej definicji osoby u Boecjusza i jej punktu wyjścia", *Studia Mediewistyczne* 19 (1978), pp. 109–115; M. Ferdynus, "Poszanowanie osobowego wymiaru człowieka czynnikiem postępu biomedycyny", *Studia Sandomierskie*, 20 (2013), Vol. 2, p. 136.

[10] Quotation after J. Teichman, "The Definition of Person", *Philosophy*, Vol. 60, No. 232 (April 1985), p. 175.

[11] For more, see: W. Granat, *Personalizm chrześcijański. Teologia osoby ludzkiej*, Księgarnia Św. Wojciecha, Poznań, 1985, p. 58; and M. Koszkało, "Indywiduum a osoba. Rozważania Boecjusza, Ryszarda ze św. Wiktora, Jan Dunsa Szkota", *Filo-Sofija*, No. 23, 2013/14, pp. 76 and subsequent.

[12] St. Thomas Aquinas, *The Summa Theologica*, I, q. 29, a. 3, resp., https://dhspriory.org/thomas/summa/FP/FP029.html#FPQ29OUTP1 (last accessed: October 2018).

[13] J. Grzybowski, *op. cit.*, p. 202 and subsequent pages.

of the crucial aspects of the debate over the essence of humanity was the question about whether a biological creature belonging to the Homo sapiens species ought to be called human at all stages of biological transformations. It also provided an impulse for the emergence of contemporary Christian personalism, which is probably the most interesting anti-naturalistic school of thought nowadays. For example, Jacques Maritain, a neo-scholastic and co-creator of personalism, repeated after Thomas Aquinas that a human person is an individual substance of an intellectual nature whose unique character is determined by the close combination of two elements – the signified, i.e., the material, and the signifier, i.e., soul. In his opinion, the combination of the two generates a special ontological status of man in the world, which could be expressed using the term "dignity." Thus, a human person is not endowed with dignity by external circumstances (e.g. society or legislator), but it is a constituent of each human being from the moment of their creation. Maritain connected the collapse of the Western civilisation in his time precisely with the rejection of the truth about man as a material-spiritual unity, and therefore – with the rejection of his personal character. The functioning of totalitarian systems illustrated the horrible consequences of reducing a human being to matter, and subsequently – of objectification.[14] A similar idea was propagated by Emmanuel Mounier, another leading 20th-century personalist, who emphasised that perceiving humans solely on the naturalistic plane deprives them of the power to control reality. Only by understanding a human being as a combination of matter and the non-material is it possible to perceive full humanity because, on the one hand, it makes a human being rooted in nature, and on the other – it enables a person to overcome barriers imposed by nature. Mounier concluded that the human person exceeds in his essence the biological and social factors, and it is only Christian metaphysics that is capable of providing this transcendence.[15] Karol Wojtyła, a personalist who was one generation younger, wrote in an analogous spirit in his book *Person and Act*: "A human being does not only intercept messages which reach him from the outside world and react to them in a spontaneous or even purely mechanical way, but in his whole relationship with his world, with reality, he strives to assert himself, his

[14] J. Maritain, "Osoba ludzka i społeczeństwo", [in:] Idem, *Pisma filozoficzne*, Wydawnictwo Znak, Kraków 1988, pp. 327–345. Cf. L. Wciórka, "Personalizm Jacques'a Maritaina a Vaticanum II", *Chrześcijanin w świecie* (1983), Vol. 1, pp. 55–61.

[15] Cf. E. Mounier, *Wprowadzenie do egzystencjalizmów oraz wybór innych prac*, Wyd. Znak, Kraków 1964, p. 133. Cf. J. Czarkowski, "Osoba – społeczeństwo – rewolucja w personalizmie E. Mouniera", *Acta Universitatis Nicolai Copernici*, *Filozofia*, 6 (130), 1982, pp. 17–46; M. Ferdynus, *op. cit.* p. 138.

'I', and he must act thus, since the nature of his being demands it."[16] According to Wojtyła, the main aspect of human nature is his "psyche" understood not in medical or cultural terms, but in transcendental ones. In Wojtyła's opinion, without being rooted in the non-material sphere, the principle of charity or the prohibition against using fellow human beings as a means to an end (rather than an end-in-itself) has no rational and convincing basis. For that reason, each human person is more than the sum of all the cells or biological processes making them up; therefore, a human is an unrepeatable value that does not pass away.[17]

The anti-naturalistic current outlined above does not have a dominant position in public discourse today and is less influential than various naturalistic versions of reflection on man. A change in the approach to the subject in question occurred in the 17th century, when the cult of science emerged. Although René Descartes still deliberated on the soul and the relationship between humans and God, in his reasoning the human psyche would again acquire Greek – not Christian – characteristics. It is true that to remain – as he thought – within the Christian paradigm, he used the categories of *res cogitans* (mental substance) and *res extensa* ("extended" or material things) to describe reality[18], yet he perceived soul not only as a constituent part of the body, but as something more tangible, which he situated in a concrete part of the body – the pineal gland. In his view, soul was primarily the seat of thoughts, and only then – of feelings and emotions. Due to Descartes, the temptation to reduce the reflection on soul to mind while reducing humans to mental processes acquired legitimacy again. As he confidently declared, "I am therefore, precisely speaking, only a thinking thing, that is, a mind (*mens sive animus*), understanding, or reason, terms whose signification was before unknown to me. I am, however, a real thing, and truly existent; but what thing? The answer was, a thinking thing."[19]

A reference to mind would after that again become a key notion for a reductionist understanding of a human being. Even if, as it happened in Thomas Hobbes's conception, mind in the natural state was unable to control self-preservation and self-interest, it remained a constituent feature of a person. However, there was no room for transcendence and eschatology here. The process of a peculiar return to the Socratic way of perceiving a human being became so strong in the course of the

[16] K. Wojtyła, *Osoba i czyn*, Wyd. Znak, Kraków 1969, pp. 308–309.

[17] K. Wojtyła, *Rozważania o istocie człowieka*, Wyd. Znak, Kraków 1999, pp. 95–97.

[18] R. Descartes, *Zasady filozofii*, Wyd. Antyk, Kęty 2001, p. 48.

[19] R. Descartes, *Medytacje o pierwszej filozofii. Zarzuty uczonych mężów i odpowiedzi autora. Rozmowa z Burmanem*, Wyd. Antyk, Kęty 2001, p. 50.

17th century that it also influenced John Locke, a deeply believing Christian, who did not hesitate to state that "**Self** is that conscious thinking thing – whatever substance made up of (whether spiritual or material, simple or compounded, it matters not) – which is sensible or conscious of pleasure and pain, capable of happiness or misery, and so is concerned for itself, as far as that consciousness extends."[20] For Locke, therefore, a person is someone who has an awareness of their own existence and memory, which allows them to remain aware of their identity and use past memories to influence future actions and thoughts. One may venture to say that in Locke's conception, being a human is not a state, but a process of becoming – through contact with the environment and by learning from experience.

Let us note that this way of thinking – identifying a human person not only with some general reason, but with individual self-awareness – has been accepted in many countries today in laws specifying the conditions for determining death, particularly with regard to the possibility of organ procurement for transplants. A dead person is one whose brain does not show bioelectric activity, and in some legislations even a person whose gray matter (consciousness) does not show such activity. It is worth noting here that this identification of the human person with consciousness has also opened the way for the development of the so-called posthumanism, or a conception that implies the possibility of questioning the relationship between the notion of humanity and the biological aspect of a human's existence. For example, one can recall the view put forward by Ray Kurzweil, a representative of this intellectual school. In his opinion, at the current stage of civilizational development, it is still necessary to identify a human being with the system composed of self-awareness, the brain and the nervous system extending to the whole body (carrier 1.0). In his opinion, a human is a combination of consciousness and all that allows it to be generated: that is, an amalgam of software and hardware. However, Kurzweil emphasised that thanks to technology (in his opinion, technological development is both a component and an effect of the evolution of the natural world), it will be possible to copy consciousness and sustain it on more advanced carriers: first on a modified, improved biological carrier (carrier 2.0), and then on a carrier with a significant non-biological component that would allow systematic replacement of damaged components, thus making hardware immortal (carrier 3.0). In this way, ultimately, there will appear intelligence of a non-biological basis, which will

[20] J. Locke, *An Essay Concerning Human Understanding*, twenty-seventh edition, London 1836, p. 230.

be endowed with the ontological status of a person. Nevertheless, Kurzweil pointed out that a posthuman being created in this way would be a peculiar continuation of a biological being – a copy of the former biological person, not the same person. They will have a common starting point, but the existence of biological beings and posthuman beings with different carriers of consciousness (and thus different ways of perceiving the external world) will lead to the emergence of dissimilarities between these entities. Nevertheless, in his opinion, the differences between biological and non-biological intelligence will turn out to be irrelevant in the future, because by replacing biological people, posthuman beings will simply become people, retaining the key feature of humanity: rationality generating self-awareness.[21] It is difficult to determine whether it was intentional, but the concept presented by Kurzweil seems to be in harmony with Locke's view postulated over 300 years ago: "For, supposing a rational spirit be the idea of a man, it is easy to know what is the same man, viz. the same spirit – whether separate or in a body – will be the same man."[22]

As we have seen, modern and contemporary naturalism seeks to reduce a human being to reason and self-awareness. One of the most well-known proponents of this approach is the Australian bioethicist Peter Singer. In his opinion, worthy of being human are only those beings who can think and act rationally, are autonomous, feel pain or pleasure, make physical and interpersonal contacts and are able to bear responsibility for their deeds. Importantly, however, Singer does not use the fact that it is possible to distinguish the category of living creatures called people to derive some special rights for them. In his opinion, from the point of view of morality, people should be considered at the same level as animals, because despite having reason, people are primarily animals. Recognition of this biological community – as Singer claims – results in equal interests of and an equal approach to different individuals representing different animal species. Consequently, one's approach should not result from which species a given being represents, but from the ability to feel (suffering, pleasure), the awareness of one's existence, and from the necessity of sacrificing a lesser good for the greater good. Singer therefore postulates the need to replace anthropocentrism with biocentrism, which would prevent discrimination against animated beings on the grounds of which species they represent ("speciesism"); treating the species as the basic feature determining moral status (similarly to sex or race) would be a manifestation of irrational collective egoism.

[21] G. Hołub, "Transhumanizm a koncepcja osoby", *Ethos* 28 (2015), No. 3 (111), pp. 83–94.

[22] J. Locke, *op. cit.*, pp. 235–236.

Singer also emphasises that it is not so much life itself that has a fundamental value, but its quality, which is determined by utilitarian categories of lack of suffering and the ability to experience pleasure. This ethical stance allowed Singer to justify the admissibility of abortion, killing crippled children, euthanasia, sacrificing embryos for research on stem cells (he denies them the attribute of humanity due to lack of awareness and thus the inability to feel fully) or experimenting on people and animals in the event of their loss of the ability of sensual feeling or consciousness.[23]

Let us note – as we mentioned at the beginning – that contemporary discussions regarding the lawfulness of the institution of surrogate motherhood (and the limits concerning the provision of such services) revolve, in a more or less explicit way, around the problem of the possibility or impossibility of defining the humanness of the party to/subject of surrogate motherhood contracts. Indeed, even assuming that surrogate motherhood would be limited only to a specific "lease" of the surrogate mother's womb (akin to the services provided by a wet nurse or a babysitter) to a genetically alien zygote (embryo), two questions remain open: who is a party to the contract (the zygote [embryo] on whose behalf the parents sign the contract, or the parents, in which case the zygote [embryo] is only the subject of the contract) and what is the scope of protection for the zygote (embryo) – such as for a child, an animal, an object or perhaps some other? These questions revolve around the issue of the beginning of the legal subjectivity of a human being and, if it is recognised that a zygote should be denied such subjectivity, determining the legal status of a being that does not yet have this subjectivity.

In archaic law (e.g. the Code of Hammurabi), the foetus, similarly to children, was treated as the property of the father (who had absolute power over the offspring). The law regulated the effects caused by a third party's actions (causing the death of a pregnant woman or miscarriage): the type of the talion penalty or the amount of the financial penalty (which was in fact compensation for the loss of a child or the possibility of having children) depended on the social status of the pregnant woman, the degree of guilt of the offender and the advancement of pregnancy. In Assyrian law, in turn, causing a miscarriage in a woman belonging to the social elite was a crime against the state. At the same time, removing the foetus with the father's consent was not punishable, but if the woman had consciously removed the foetus without the father's consent, she faced the death penalty. In the laws of Jewish tribes, the

[23] For more, see: P. Singer, *Animal Liberation: A New Ethics for Our Treatment of Animals*, Random House, New York, 1975.

foetus was not treated as a human. There existed solutions similar to those used in the Code of Hammurabi (except for the fact that the so-called Covenant Code did not specify the social status of a woman). Therefore, the injured party was the man as the owner of the fruits of the woman's labor, which included pregnancy. According to the biblical law, it was assumed that the human foetus becomes a living being when it receives "the breath of life" (draws the first breath); up to this point, the foetus was treated as a part of the mother's body. It was therefore assumed that the child received personhood when it was disconnected from the mother. Nevertheless, although the status of an unborn foetus was not identical with a human being, the fact of conception was a reason for joy, seen as a blessing of God for the whole family. It was not until the Old Testament had been translated into Greek (The Septuagint) that Jews, under the influence of Aristotle, began to adopt the view that a foetus receives "the breath of life" and becomes a human being in the mother's womb. To summarise, it could be concluded that the first legal regulations of the ancient East did not perceive the *nasciturus* (unborn) as a legal subject because it was not subject to legal protection in its own right. The foetus was treated as a part of the mother's body and its existence was considered in the context of the father's interests. A similar situation existed in the Hellenic world (except for Aristotle and the Pythagoreans), where almost all Greek philosophers believed that animation takes place at the moment of birth. The foetus was not considered a human being and it was not entitled to legal protection.[24]

In Roman law, the concept of *persona* was used both in its narrow sense, to refer to citizens, and more broadly, with reference to all human beings, including foreigners, slaves, and children. A human being was a person who was born alive whereas a conceived and unborn baby was part of the mother's body. Foetuses that at birth were at least seven months old and had a human shape were considered viable. The child's birth was not only a biological fact but also a legal and social one. Punishment for foeticide depended on the qualification of the action: either as damage to the mother's body (against her will) or violation of the father's rights (against the father's). Therefore, the *nasciturius* was not considered a separate person, but, due to the use of legal fiction involving the application of the effects of a live birth retroactively, the foetus could obtain property rights (but not liabilities) and

[24] O. Nawrot, *Nienarodzony na ławie oskarżenia*, Toruń, 2007, pp. 15–26 and 37, http://www.academia.edu/2357963/Nienarodzony_na_%C5%82awie_oskar%C5%BConych (last accessed: 28 August 2018).

a special guardian could be appointed to look after the foetus's interests (*curator ventris*). On this basis, the medieval legal doctrine constructed the maxim *Nasciturus pro iam nato habetur, quotiens de commodis eius agitur* (The unborn is deemed to have been born to the extent that his own benefits are concerned).[25]

Nowadays, in regard to scientific discoveries concerning the stages of biological development of beings belonging to the Homo sapiens species, there is no consensus among lawyers, ethicists and doctors (especially embryologists) on determining the moment when a being ought to be called a "person" and enjoy the resulting legal protection. The dispute primarily concerns the pre-embryonic (fertilised ovum, zygote) and embryonic phase (implantation in the uterine wall) of human development. For example, supporters of the in vitro method suggest that the status of a person should be granted at a later moment than the act of fertilisation. Thus, artificial insemination would not be subject to moral evaluation from the perspective of the embryo because the decision of parents (or other entities deciding to perform artificial insemination) would be purely technical (similar to the decision to undergo treatment) and would not affect other existing people. This justification functions in contemporary empirical bioethics, in which the status of a person with all the resulting rights and obligations depends on the occurrence of certain biological, emotional and consciousness-related symptoms. To exist as a person is to both perceive and be perceived (a reference to G. Berkeley), and to be able to think about one's thinking (a reference to Descartes). Regarding the findings of embryology, they also argue that the preembryo phase (i.e. before the implantation of the embryo) should be considered pre-human, because it is not known how many embryos will ultimately develop into a zygote, and that not the entire zygote will turn into a foetus (a part of it becomes the placenta). Another argument is that many fertilised ova die before the end of pregnancy, so the formation of a zygote cannot be considered a separate human life; at most, it could be classified as a pre-embryo or pre-person.[26]

The aforementioned Peter Singer noted in this context that in medicine, due to scientific and technical progress (including in particular the development of new technologies in the field of procreation), Hippocrates' ethics or Catholic bioethics should not be applied today. In his opinion, the development of biomedical sciences

[25] K. Kolańczyk, *Prawo rzymskie*, LexisNexis, Warsaw, 2001, pp. 177–178.

[26] B. Zapart, *Problemy oraz argumenty filozoficzne i etyczne w dyskusji nad metodą in vitro. Studium porównawcze wybranych stanowisk bioetycznych*, Katowice, 2011, pp. 129–130 and 134–136, https://www.sbc.org.pl/dlibra/show-content/publication/edition/100683?id=100683 (last accessed: 14 September 2018).

indicates that the phenomenon of a sanctified "life" from conception is a myth, and the zygote, just as the male and female gametes, is just a "genetic material" that does not have any moral attributes. Therefore, from the point of view of science, neither an embryo nor a foetus, and not even an infant, can be called persons, because these are not – as mentioned earlier – intelligent and self-aware beings. Furthermore, as he emphasised, the idea that every human being has the right to life because of human biological characteristics would implicitly suggest that belonging to a given species is the basis of rights, and this would be a manifestation of "speciesism"[27], similar to racism. Interestingly, Singer, arguing with the Christian postulate of recognising people as persons from conception, referred to the position of the Australian Catholic theologian Father Norman Ford, who used the fact that for some time the embryo could still be theoretically divided into identical twins to conclude that in the early phase the embryo is just a cluster of cells, not an individual being. In Ford's view, that proves that the life of a human individual does not begin at the moment of conception, but about fourteen days later, when the possibility of the formation of twins has already disappeared.[28] To be precise, however, it is worth noting that Singer used Ford's view only instrumentally, because in his opinion – as we mentioned above – on the 14th day after fertilisation the embryo does not obtain the status of a person. Singer's argument comes down to concluding that the moral value of a foetus depends only on the parents' attitude: on whether they want this child or, for some reasons (e.g. sickness or social considerations), they would like to terminate pregnancy or give the child to someone else (e.g. to adoptive parents or give up for medical experiments). Importantly, he did not modify this view even when he admitted that there does exist a phase in foetal development when it begins to feel pain. Theoretically, the foetus should then deserve the same protection against suffering as he postulated for animals. For some unknown reasons, however, this kind of postulate does not appear in Singer's reasoning. Of particular significance in this context is Singer's conclusion that thanks to advances in biological sciences animals are more similar to humans than mentally disabled Homo sapiens representatives, and therefore animals deserve better protection than severely disabled

[27] J. Synowiec, "Peter Singer i etyka chrześcijańska. Charlesa Camosy'ego próba znalezienia gruntu do współpracy", *Logos i ethos*, No. 2(39), 2015, DOI: http://dx.doi.org/10.15633/lie.1541, pp. 159–162 (last accessed: 15 September 2018).

[28] P. Singer, *O życiu i śmierci*, PIW, Warszawa 1997, p. 107.

foetuses or infants.[29] As we can see, Singer connects the potential rights of human beings before birth (and after, if the infant is not capable of conscious, independent life of the right "quality" and free of suffering) with social recognition. Subjectivity is therefore something external and relative, since the granting of subjectivity can be withdrawn at any time. It is worth recalling in this context that Singer also advocated the idea of honouring the basic rights of apes (the right to life, freedom and lack of suffering) because, in his opinion, they meet the basic criteria for recognising their status as a person: they have self-awareness, manifestations of intelligence can be observed in their behaviour, they can learn sign language, they are capable of reflection and deep emotions, and they display complex social behaviours. Singer therefore claims that once a being has achieved the status of a person, it should automatically be granted certain fundamental rights. In the case of beings that do not meet the definition of a person, their potential rights are a matter of convention developed in the utilitarian spirit. Therefore, issues related to surrogate motherhood can be a subject of ethical considerations only if they concern the social relations between existing persons. A zygote, embryo or foetus are only the objects of real decisions made by real people. Consequently, this reasoning opens the door to treating contracts relating to surrogate motherhood as private law contracts, with the option of state interference due to the utilitarian paradigm.

On the margins of Singer's remarks, it is worth stopping for a moment to consider one of the aspects of the attitude to a child in Western culture. *Prima facie,* it could seem that what we see is the full and absolute affirmation of a child as a human being. This observation is supported by the public narrative on paedophilia or the attitude to children as victims of wars and terrorism. However, if we take into account the fairly widespread acceptance of the introduction of euthanasia for minors in the Netherlands and Belgium or the resolution of the British court in the Alfie Evans case, it appears that the question of children's humanness is not so obvious. In particular, the last-mentioned of these cases clearly shows that the potential dignity of a human person is conferred on a child not as an inherent right, but as an external right granted not even by the parents, but by public and social institutions (hospital and court). Although at the verbal level, the death of Alfie Evans was allegedly in his best interests, the court's decision in this case was determined by the utilitarian conviction of the judges that life in suffering is worse than not being alive and

[29] For more, see: M. Ciszek, "Petera Singera relatywistyczna koncepcja bioetyki jako krytyka etyki tradycyjnej", *Filozofia Nauki* 11/3/4, 2003, pp. 111–119.

therefore that "the right to life" depends on the assessment of external institutions. It is striking that Alfie Evans was treated like a sick or old animal that should be put to sleep to ease his suffering. There was one important difference between putting an animal to sleep and Alfie's death: the decision to discontinue the so-called life support procedures condemned Alfie Evans to a slow death by hunger and thirst, which is not done in the case of animals. Therefore, we can hypothesise that in this case we were dealing not even with animalisation, but rather with the reisation of a biological being belonging to the Homo sapiens species, and that the basis for this approach could be sought in the economisation of interpersonal relations (the costs of care for the patient). The correctness of this hypothesis could also be supported by the similarity of the solution adopted in the case of Alfie Evans to the decision that was made in the Terri Schiavo case.

A similar view regarding the lack of unambiguity in perceiving a child as a human being can be found in the works of Polish culture expert and economist Michał A. Michalski. The researcher noted that when making a division into adults and children, legislators treat the latter as "incomplete" or "not full" people (in terms of legal capacity or criminal liability). As he shows, it results from the adoption of subjective criteria and attributes, such as the quality of life (also raised by P. Singer), age or the acquisition of skills dependent on a given stage of human development (as reflected in the term *homo oeconomicus*). According to M.A. Michalski, a child could be perceived, for example, as an asset or wealth (as an "employee" or as a provision for old age), but also as a cost to the family and society (as a consumer and "burden" on individual consumption), which is connected with treating children in terms of profit and loss (cost of ownership) and influences the potential parents' positive or negative decision concerning reproductive matters. However, a child could also be part of state policy: children are, after all, future employees who will pay social security contributions or potential soldiers. Moreover, a child in a society can also be seen from the psychological perspective, as an heir to family possessions and name, or the fulfilment of personal needs related to motherhood and fatherhood. In this context, Michalski put forward the thesis that nowadays we see a tendency that parents or the family environment decide not to play an active role in the development of the child's personality and to avoid taking responsibility for his upbringing (transferring these tasks to the state and social organizations). Consequently, parents increasingly often believe that their social role vis-à-vis children is limited to providing them with security and satisfying their consumption needs. Therefore, in Michalski's opinion, the process of child-adultisation and adult-infantilisation

occurs, which in turn entails the economisation of interpersonal relationships at the level of the family. For this reason, economic and advertising actions play an ever greater role in the process of socialising children: the consumer world has become the basic factor shaping their personality. In Michalski's opinion, "marketisation" of the public sphere, from the media to various organisational structures (also non-economic ones), makes the market determine the way in which the entire society functions. As he emphasised, this phenomenon, based on the feedback principle, further adds to the undervaluation of non-commercial social roles and the overvaluation of attitudes and activities in which market criteria form the basis of all interpersonal relations. Michalski noted with great concern that it is precisely these cultural changes, which lead to children becoming an element of market forces, that pose the danger of accepting attitudes that allow instrumental treatment of children, which often deprives them of their dignity (trafficking of children or using them as sexual objects). He went on to say that this disturbing phenomenon manifests itself in a eugenic policy that makes it possible to evaluate life on the basis of its quality. As a result, there emerges a consent to the "production" of children with certain characteristics expected by the ordering parties (parents) and an ethical justification of child-design practices and the production of "super-children."[30] In this way, as Michalski stressed, the sector of anti-procreation and procreation services was created, in which the process of procreation is clearly separated from the sexual act (because procreation assumes a technical and dehumanised character) and in which the child actually becomes a commodity. Due to the last-mentioned phenomenon in particular, it has become possible to "order" or "buy" children, which in turn has resulted in surrogate motherhood and adoption services becoming an important component of the market for procreation services.[31]

In the context of surrogate motherhood and genetic modification of offspring, the German philosopher Jürgen Habermas made interesting observations in his famous work entitled *Die Zukunft der menschlichen Natur. Auf dem Weg zur liberalen Eugenetik?*[32] The starting point for him was the conclusion that "the decoding of

[30] For more, see: R. Green, *Babies by Design: The Ethics of Genetic Choice*, Yale University Press, 2008.

[31] A. Michalski, "Dzieci rynku…Rynek dzieci…Osoby czy zasoby?", *Annales. Etyka w życiu gospodarczym*, Vol. 15, 2012, pp. 75–84, http://www.annalesonline.uni.lodz.pl/archiwum/2012/2012_michalski_73_87.pdf (accessed: 15 September 2018).

[32] J. Habermas, *Die Zukunft der menschlichen Natur Auf dem Weg zur liberalen Eugenetik*?, Suhrkamp Verlag, Frankfurt am Main, 2001. Quotations in this paper have been taken from: *The Future of Human Nature*, Polity Press, 2003.

the human genome opens up the prospect of interventions that cast a peculiar light on a condition of our normative self-understanding." The level of knowledge and technology in genetics and science that has been achieved (e.g. in vitro fertilisation, the possibility of inducing pregnancy after menopause, in both cases also using sperms and egg cells genetically alien to the pregnant woman, genetic research of embryos and the resulting ability to modify them genetically, the possibility of creation of a zygote that will have specific genetic traits) prompted Habermas to ask: "Do we want to treat the categorically new possibility of intervening in the human genome as an increase in freedom that requires normative regulation – or rather as self-empowerment for transformations that depend simply on our preferences and do not require any self-limitation?" In other words, Habermas asks whether there is a contradiction between human dignity and practices that allow, on the one hand, negative selection (eliminating embryos with genetic "flaws"), and on the other hand – genetic engineering intended to create or even design future human beings, which could lead to radical changes within the species itself. As we see here, Habermas describes a fundamental fear about whether the development of science and technology will not lead to the objectification of man by transforming him from a person into a subject of other people's manipulation. He would therefore like to introduce a division into admissible methods of treatment (negative eugenics) and procedures aimed at "improving the process of evolution" through the will of third parties, which would lead to the creation of a new man (positive eugenics).[33]

Liberal eugenics is not able to make a rational distinction between permissible and ethically unacceptable procedures on the human genome before and after fertilisation, according to Habermas. In his opinion, it results from the fact that the liberal world absolutises and glorifies the idea of freedom of research and science and the concept of ethical pluralism based on individual freedoms of beliefs. And while Habermas does not question the very principle of individual freedom to make moral choices and the necessity of developing science and technology, he expresses a serious reservation about perceiving them as absolute values. This would lead to instrumental treatment of man, to blurring the difference between a human being (a consequence of chance in nature) and a thing (a manipulated work), thus destroying the possibility of being a person and subordinating humans to biotechnology. According to Habermas, individual subjectivity is based on the experience of being in a body, not just on self-awareness. The development of medical

[33] Ibid., pp. 19 and 28.

technologies that makes it possible to manipulate a human body without his prior consent poses a threat to the autonomous perception of self by an individual who has been manipulated by an external entity. Habermas says that the awareness of being designed by someone else must necessarily translate into the experience of self as a product, as something alien to oneself, because interference in the genome determines the future of an individual and prevents him from critically looking at his nature, his corporality and mentality. Habermas emphasises that such a person will never achieve the freedom resulting from the genetic lottery. In addition, he notes, genetic programming will give rise to paternalism and lead to the elimination of egalitarianism, depriving citizens of the right to freely determine their future (the selection of an embryo with a specific genetic material will impose a predetermined nature on the future individual). He views such genetic manipulation with suspicion due to the history of Germany. However, it is worth adding in this context that although Habermas considers the phenomenon of making an irreversible decision about the composition of the other person's genome to be dangerous (because it undermines the individual right to autonomous actions and judgments), he simultaneously accepts the view that the embryo (foetus) is not entitled to the absolute right to have its life protected. In his opinion, the right to life (understood as a human right) should be applied only to persons, because only persons can be subjects of fundamental rights. We become persons only when we enter the whole system of social and public relations in an active and reactive way, that is from the moment of birth. Therefore, defending the integrity of the genome is not an inherent right of the individual, but it is derived from the ethical self-knowledge of a species striving to preserve the crucial elements constituting this species. Without this unity of human nature, the coherence of inter-personal relations would be disrupted and, consequently, the existing consensus that people create a moral community would be invalidated. Thus, because the status of a person is not granted at conception, Habermas considers negative eugenics permissible because it either prevents damaged embryos from being placed in the mother's body or leads to abortion. However, in the case of positive eugenics, he raises a serious objection that it could lead to changes that would threaten the integrity of the species or significantly determine the future fate of a given individual by taking away the authorship of his own life.[34]

[34] See more in the quoted work by Habermas, and moreover: J. Białowarczuk, "Czy zagrożona tożsamość gatunkowa?", *Humanistyka i Przyrodoznawstwo* 10 (2004), pp. 278–285; Z. Krasnodębski, *Zakupy w genetycznym supermarkecie*, http://www.newsweek.pl/europa/zakupy-w-genetycznym-supermarkecie,45848,1,1.html (accessed: 1 July 2018), O. Nawrot, *Na krętych ścieżkach bioetyki – „etyka*

It is noteworthy that Habermas is more concerned about the impact of eugenics on the intergenerational relationships resulting from the parents' potential to deprive their offspring of the right to autonomously shape their own "biography" based on corporality than about denying individuals the right to have a future by killing them at the stage of being embryos or fetuses. This objectification opens the door to accepting the institution of surrogate motherhood, albeit with limitations resulting from the ethical self-knowledge of the species and the autonomy of an individual who will be born as a result of agreement of external entities.

Peter Sloterdijk, another German philosopher, approached Habermas' concept in a polemical manner (although in keeping with the naturalistic paradigm too). In his opinion, the development of humanity has been based on self-breeding and self-domestication of people. It has been done for centuries using cultural means developed by classical humanism, under which enlightened, civilized breeders (superhumans) domesticated unenlightened, non-civilized people (the bred). He also noticed that a human being as such, a universal human, does not exist. There exist specific people shaped by various factors, which the breeders try to control. By defending *animal rationale*, humanism made it possible to avoid reducing people only to their biological aspect, but at the same time it set models to be used when shaping – or taming – people. Sloterdijk claims that an important feature of the "human zoo" is the inseparability of the state of breeding and of being bred, because the breeders themselves are also subjected to the processes of breeding, although masked by the lofty words of cultural biopolitics. According to Sloterdijk, the modern post-humanist world is merely a natural extension of the model of "man-breeding", which no longer pretends to have the Renaissance aspect of "raising the culture". At a time of globalization and the scientific and digital revolution, genetic tools are used to enable the human species to pass from the fatalism of the randomness of birth to optional prenatal selection. For Habermas – as Sloterdijk pointed out – this approach drew on the sinister side of German culture, but nevertheless these activities were a fact, although Renaissance techniques of domination over the shaping of people had been abandoned in favor of new, more effective methods. In the modern world, the subjectivity of a human being is thus dependent on whether he agrees to symbolic acts of self-taming, which involve the systematic performance of bodily and psychological practices. In this way, the old ethical and religious systems have been

gatunku" Jürgena Habermasa, http://www.academia.edu/2546253/Na_kr%C4%99tych_%C5%9Bcie%C5%BCkach_bioetyki_-_etyka_gatunku_J%C3%BCrgena_Habermasa (accessed: 1 July 2018).

replaced by various types of laboriously repeated sets of physical, relaxation and psychological actions (practices in place of faith), and *Homo sapiens* has transformed into *Homo repetitivus* (the repeating human). The rising popularity of sport in the 20th century was one of the clearest manifestations of this phenomenon, which in a paradigmatic manner embodied the idea of self-creation of the individual, with all the ensuing paradoxes.[35] In this way, contemporary culture provides a justification to people who, in their desire to preserve their own existence (being immune to external and internal threats), take actions to transform their own bodies and thereby initiate the process of mutual objectification. It paves the way for accepting the institution of surrogate motherhood in its broad sense.

Among the anti-naturalistic positions, the most internally consistent position regarding human subjectivity and, consequently, the institution of surrogate motherhood, has been developed in the social teaching of the Catholic Church. The first firm comment in this subject appeared as early as in 1897, when the College of Cardinals on behalf of Pope Leo XIII strongly condemned artificial procreation in the form of insemination, although no justification was provided for this objection. However, it is very likely that the College of Cardinals based its decision on the Catholic vision of a human being as a substantial unity of soul and body, which makes it unacceptable to reduce this second element only to a set of tissues, organs and functions and thus to identify a human with an animal body. This irreducibility resulted from the recognition of the soul as a "form" of the body that animates it and makes it human. According to the Catholic teaching, the soul and matter are not two natures united, but their union forms a single nature[36] which, being in "the image of God", receives the dignity of the human person.[37] This theological approach to the problem could be found in statements made half a century later by Pope Pius XII. During the Fourth International Congress of Catholic Doctors (1949), he noticed that artificial insemination outside of marriage, as well as heterogeneous insemination (using the sperm of a stranger), was immoral due to its incompatibility with natural law. It resulted from the will of God, according to which, firstly,

[35] P. Sloterdijk, *Rules for the Human Zoo: A Response to the Letter on Humanism*, translated by Mary Varney Rorty, Environment and Planning D: Society and Space, 2009, Vol. 27, pp. 12–28; A. Smrokowsk-Reichmann, "Między homo immunologicus a homo repetitivus. Koncepcje antropologiczne Petera Sloterdijka – notatki na marginesie Du mußt dein Leben ändern", *Przegląd Filozoficzny – Nowa Seria*, No. 2 (82), R. 21, 2002, pp. 442–452.

[36] The Catechism of the Catholic Church (hereinafter: CCC), nn. 365.

[37] Ibid., nn. 364. Cf. Paul VI, *Gaudium et Spes*, nn. 14.

sexual acts should only take place within a sacramental relationship, and secondly, there should be an inseparable bond between the sexual act and conception. Only in this way is it possible to protect the dignity of the spouses and of the child; and only this model of family provides the proper educational environment, serves the good of the child and guarantees true kinship. According to the pope, actions contrary to the ones described above lead to the dehumanization of the process of transmitting life. Therefore, from the point of view of the Church's teaching, only those medical interventions that were conducive to the procreative act of the spouses were to be allowed.[38] Interestingly, in this approach, artificial insemination between spouses could be acceptable, as could surrogate motherhood in which a woman other than the mother received the embryo, provided that the sperm and ovum would come from people bound by the sacrament of matrimony. Pope Pius XII was of the opinion that the desire to have children is good in itself, but he opposed artificial insemination in marriage due to the "dehumanization" of the procreation process.[39] In this context it is worth recalling that Karol Wojtyła later adopted a similar stance, according to which the natural consequence of the sexual drive of a married couple is the perpetuation of the Homo sapiens species. Rejection of the purposefulness of the sexual drive would therefore equal the rejection of the material from which "love comes and which shapes it."[40]

While doubts concerning the potential acceptability of surrogacy and extracorporeal fertilization within the sacramental marriage may have appeared even half a century ago, nowadays, when the appropriate technologies enabling such activities have already been developed, the Church's teaching has practically resolved them negatively. The Church has therefore adopted a premise that the desire to have children, though good in itself, cannot be fulfilled by methods that reduce a human being (human person) to an object or an ordinary copy of the species. The Catholic Church rejects the thesis about the so-called delayed ensoulment (soul and body become one only after a certain period of time from the fertilization of the ovum)[41] and assumes that ensoulment occurs exactly at the moment of fertilization, and the embryo is a human being and a person with rights equal to that of a human

[38] S. Olejnik, *W kręgu miłości chrześcijańskiej*, Warszawa, 1985, pp. 264–265. M. Ciszek, "Sztuczne zapłodnienie z perspektywy bioetyki rodziny", *Studia Ecologiae et Bioethicae*, No. 4, 2006, pp. 162–163.

[39] Cf. M. Ciszek, *op. cit.*, p. 262.

[40] K. Wojtyła, *Miłość i odpowiedzialność*, wyd. Towarzystwo Naukowe, Lublin 1986, pp. 51–52.

[41] T. Ślipko, *Granice życia: dylematy współczesnej bioetyki*, wyd. WAM, Kraków, 1994, pp. 151–152.

being.[42] This anthropological approach assumes that the human genome not only has a biological significance, but also possesses anthropological dignity, which has its basis in the spiritual soul that pervades it and gives it life."[43] Thus, a human being is perceived in both material and supramaterial space, which makes it possible to state that the identity of a human being concerns every stage of its development, "from the moment of his conception"[44] (which disregards the historical theological disputes regarding the moment of connection of the soul with body[45]) until natural death. An instruction of the Congregation for the Doctrine of the Faith reads: "From the time that the ovum is fertilized, a new life is begun which is neither that of the father nor of the mother; it is rather the life of a new human being with his own growth. It would never be made human if it were not human already. To this perpetual evidence … modern genetic science brings valuable confirmation. It has demonstrated that, from the first instant, the program is fixed as to what this living being will be: a man, this individual-man with his characteristic aspects already well determined. Right from fertilization is begun the adventure of a human life, and each of its great capacities requires time … to find its place and to be in a position to act."[46] Starting from this assumption and referring to the teachings of Pius XII, the Congregation for the Doctrine of the Faith stated in a 1987 document explaining the Church's approach to surrogate motherhood that it is morally illicit "for the same reasons which lead one to reject heterologous artificial fertilization: for it is contrary to the unity of marriage and to the dignity of the procreation of the human person. Surrogate motherhood represents an objective failure to meet the obligations of maternal love, of conjugal fidelity and of responsible motherhood; it offends the dignity and the right of the child to be conceived, carried in the womb, brought into the world and brought up by his own parents; it sets up, to the detriment of families, a division between the physical, psychological and moral

[42] Cf. M. Ciszek, *op. cit.*, p. 164.

[43] John Paul II, *Badania nad genomem ludzkim. Przemówienie do uczestników IV Zgromadzenia Plenarnego Papieskiej Akademii „Pro Vita"* (24.02.1998 r.) [in]: W trosce o życie: wybrane dokumenty Stolicy Apostolskiej, wyd. Diecezji Tarnowskiej Biblos, Tarnów 1998, p. 297.

[44] *Donum Vitae* – Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation, issued by the Congregation for the Doctrine of the Faith on 22 February 1987 and addressing bioethical problems from the Catholic point of view, http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html (accessed: 3 November 2018).

[45] F. Mazurek, *Godność osoby ludzkiej podstawą praw człowieka*, Wyd. KUL, Lublin, 2001, p. 247.

[46] Sacred Congregation for the Doctrine of the Faith, *Declaration on Procured Abortion*, 12–13: AAS 66 (1974) 738.

elements which constitute those families."[47] In the opinion of the Congregation for the Doctrine of the Faith, there is no doubt that the inviolable right to life of "every innocent human individual" and the right of the family and of the institution of marriage to integral and autonomous existence should constitute fundamental moral values that ought to be observed by secular societies and their legislation. The Congregation emphasized that "[f]or this reason the new technological possibilities which have opened up in the field of biomedicine require the intervention of the political authorities and of the legislator, since an uncontrolled application of such techniques could lead to unforeseeable and damaging consequences for civil society. Recourse to the conscience of every individual and to the self-regulation of researchers cannot be sufficient for ensuring respect for personal rights and public order. If the legislator responsible for the common good were not watchful, he could be deprived of his prerogatives by researchers claiming to govern humanity in the name of the biological discoveries and the alleged 'improvement' processes which they would draw from those discoveries. 'Eugenism' and forms of discrimination between human beings could come to be legitimized: this would constitute an act of violence and a serious offense to the equality, dignity and fundamental rights of the human person."[48]

As we can see, the position presented by the Congregation for the Doctrine of the Faith is based on the opinion (contested by the orthodox legal positivism, which is dominant in the Polish legal discourse, for example) that legal regulations created by the state should be connected with the "moral law" in keeping with "rational principles." The aforementioned document reads: "The task of the civil law is to ensure the common good of people through the recognition of and the defense of fundamental rights and through the promotion of peace and of public morality. In no sphere of life can the civil law take the place of conscience or dictate norms concerning things which are outside its competence. It must sometimes tolerate, for the sake of public order, things which it cannot forbid without a greater evil

[47] Donum vitae, *op. cit.* By "surrogate mother" the document means two situations: 1) when the woman who carries in pregnancy an embryo implanted in her uterus and who is genetically a stranger to the embryo because it has been obtained through the union of the gametes of "donors". She carries the pregnancy with a pledge to surrender the baby once it is born to the party who commissioned or made the agreement for the pregnancy and 2) when the woman who carries in pregnancy an embryo to whose procreation she has contributed the donation of her own ovum, fertilised through insemination with the sperm of a man other than her husband. She carries the pregnancy with a pledge to surrender the child once it is born to the party who commissioned or made the agreement for the pregnancy.

[48] Ibidem.

resulting. However, the inalienable rights of the person must be recognized and respected by civil society and the political authority. These human rights depend neither on single individuals nor on parents; nor do they represent a concession made by society and the State … It is part of the duty of the public authority to ensure that the civil law is regulated according to the fundamental norms of the moral law in matters concerning human rights, human life and the institution of the family."[49] Thus, taking as its starting point the statement that an objective moral law defining fundamental human rights exists above the conventional law of the political community, the Congregation for the Doctrine of the Faith concluded that legislation should prohibit the existence of "embryo banks", "post-mortem insemination" and "surrogate motherhood." These phenomena are contradictory with the dignity of the human person by treating the embryo and the people who participate in them in an instrumental way.

In this context, it is worth recalling that from the point of view of the Catholic Church, the implantation of embryos raises fundamental ethical concerns, primarily due to the fact that during their extracorporeal creation, a larger number of them are usually "produced" and not all of them are used in the insemination process. As a result, "excess" embryos are killed (sometimes in the process of scientific research) or frozen. According to the official teaching of the Church, the lack of unequivocal recognition of embryos as humans and treating them as clusters of cells makes it possible to manufacture them, destroy or experiment on them freely. It is also emphasized that the procedure of selecting embryos leads to the dangerous path of eugenics, where attempts are made to "improve the human" by eliminating those who were *a priori* considered to be carriers of "defective" traits. In the context of in vitro research, a number of dangers arise: genetic manipulation (and in particular attempts to create human-animal hybrids), human cloning or embryo trade. In the Church's view, the meaning of the institution of parenthood is undermined in this way, because it creates an impression that having a child is a claim against the state (especially by single people or by people living in non-marital homosexual or heterosexual civil unions or registered partnerships); this claim can also extend to post-mortem fertilization and surrogate motherhood. For the Catholic Church, artificial fertilization and surrogate motherhood are therefore unacceptable because of the inherent human dignity, which is absolute in character and which other values

[49] Ibidem.

should be subordinated to.[50] From the point of view of human dignity, in vitro fertilization techniques reduce a human to a "thing produced" and allow him to be regarded as an object of civil law transactions. In the opinion of the Church, this is fully manifested in the case of surrogate motherhood, because the commitment to give birth to a child that will be later returned to the commissioning party means a radical separation of pregnancy from motherhood and reduces the pregnant woman to the function of an incubator. It violates the dignity of the child and his right to be the absolute work of his parents, from conception through pregnancy and childbirth to upbringing. Thus, as the Church claims, surrogate motherhood destroys a natural bond between the child and the mother in whose womb the child was conceived.[51] To summarize: the Catholic Church assumes that medical practices and legal regulations must have an axiological basis that recognizes human dignity as a fundamental value, because it is a *sine qua non* condition to exclude the use of violence against the weak, defenseless and silent. It acknowledges that the human embryo is a person from the moment of conception, because even if it is impossible to determine the moment of the union of the soul and the body, in such a fundamental issue it should be assumed that a person is an integral corporeal-spiritual being from the first stage of development. An embryo is therefore a subject and not a thing, and parents (even if only as a sperm or egg donor) are not its owners. Nevertheless, due to the dignity of the child, the act of creation of life and the parents' sexual act should not be separated. In vitro fertilization negatively affects human relationships, and the technical approach to the act of love depreciates the dignity of a human being. While ruling over nature in accordance with God's plan (Gen. 1, 28), people do not have power over another person only because it is in the embryonic phase. A human being does not belong to the world of plants or animals, but to the world of humans. Thus, when making arbitrary decisions about embryos, a human being acts contrary to inalienable, natural human rights that precede conventional laws.[52] This applies to both non-therapeutic actions at the genome level and the treatment of embryos as an object of civil law contracts of surrogate motherhood.

[50] M. Bilska, "Granice medycyny", *Znak*, No. 635, 2008, http://www.miesięcznik.znak.com.pl/6352008malgorzata-bilskagranice-medycyny (last accessed: 22 June 2018).

[51] M. Nawrot, "Macierzyństwo zastępcze- aspekty moralno-prawne", *Etyka* 30, 2000, p. 187; Zapart, *op.cit.*, pp. 104–105.

[52] M. Bilska, *op. cit.*

4. Between theory and practice

So far, we have presented selected, representative doctrinal approaches to the issue of subjectivity (its existence, lack or limited character) of the embryo and the influence of the adopted position in this matter on the degree of acceptance of the institution of surrogate motherhood. Now we would like to examine several normative acts and statements of judicial authorities to determine how the (usually implicit) anthropological assumptions affect the contents of these acts and judgments. First, let us refer to the Davis v. Davis case, which took place in the USA in the early 1990s. The dispute focused on the claim of Mary Sue Davis regarding the possibility of implantation of her own embryos cryopreserved during the marriage. The biological father, Junior Lewis Davis, objected by saying that he preferred to keep them cryopreserved until he decided whether or not to allow Mary Sue's request. The trial court in Maryville, Tennessee, adjudicated that it is impossible to identify phases in human development during which the transformation into a human takes place, and thus it is impossible to lawfully determine the moment when an embryo transforms into a human being. The court also noted that the fertilized cells have a unique DNA code that exists from the moment when the two gametes are joined. Furthermore, because it is different from the parents' DNA and because the unique DNA of the new being is the basis for its existence, the court decided that the embryos are subject to legal protection, similar to that of any other person. Hence, in the ruling, the court granted the biological mother custody over the frozen embryos and ordered that the implantation procedure be carried out. The Court of Appeals adopted a different position. First of all, the view that a pre-embryo is a person, i.e., a legal subject, was rejected. The Court of Appeals assumed that a cluster of non-heterogeneous cells resulting from the division of the zygote is simply a biological tissue, which is important for the parties not because of its subjectivity but because of its potential to transform into a child. In this way, the court accepted that, firstly, "tissue" may be the subject of ownership rights, and secondly, that its fate affects the rights and freedoms of the parties, which should be taken into account in the judgment. In this way, the Court of Appeals came to the conclusion that Junior Davis has "a constitutionally protected right not to beget a child where no pregnancy has taken place" and that "there is no compelling state interest to justify ordering implantation against the will of either party." In addition, the decision of the Court of Appeals emphasized that both parties had an equal right to the fertilized ova.

The Supreme Court of Tennessee ultimately agreed in principle with the position of the Court of Appeals, albeit with some modifications. The starting point was the acceptance of the notion that it is possible to define the concepts of zygote, pre-embryo and embryo, and that it is therefore permissible to introduce legal distinctions in relation to these biological entities. Consequently, the first stage of cellular differentiation and the transit of the embryo into the uterus is a physiological process in the mother's body and this stage should be called pre-embryonic. In the opinion of the Supreme Court, it is only when an embryo is implanted in the uterus wall (10–14 days after fertilization) that it is possible to determine that an embryo has been created. The court consequently decided that a pre-embryo should not be granted the same protection as an unborn child. In the case of the pre-embryo, however, the Supreme Court concluded at the same time that although it is not yet a person, neither is it "property": pre-embryos "occupy an interim category that entitles them to special respect because of their potential for human life."[53] This finding led the Supreme Court to conclude that "disputes involving the disposition of pre-embryos produced by in vitro fertilization should be resolved, first, by looking to the preferences of the progenitors. If their wishes cannot be ascertained, or if there is dispute, then their prior agreement concerning disposition should be carried out. If no prior agreement exists, then the relative interests of the parties in using or not using the pre-embryos must be weighed. Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the pre-embryos in question. If no other reasonable alternatives exist, then the argument in favor of using the pre-embryos to achieve pregnancy should be considered. However, if the party seeking control of the pre-embryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail."[54]

As we could see, the main point of contention between the decision of the trial court and the decisions of the Court of Appeals and the Supreme Court came down to the issue of subjectivity of the "pre-embryo." Refusing to grant the status

[53] *Supreme Court of Tennessee, Davis versus Davis*, 842 S.W.2d588, Knoxville, 21 June 1992, https://law.justia.com/cases/tennessee/supreme-court/1992/842-s-w-2d-588–2.html (last accessed: 13 September 2018); cf. also: http://biotech.law.lsu.edu/cases/cloning/davis_v_davis.htm; and J. Ostojska, *O problemie podmiotowości prawnej embrionu in vitro*, w: http://www.prawoimedycyna.pl/index.php?str=artykul&id=1038. (last accessed: 13 September 2018).

[54] https://law.justia.com/cases/tennessee/supreme-court/1992/842-s-w-2d-588–2.html (last accessed: 13 September 2018).

of a person to the pre-embryo (but also to embryos and fetuses, as evidenced by the fragments of the justification of the Supreme Court ruling that have not been quoted here) allowed the case to be considered only from the point of view of the rights and interests of the donors of genetic material. This opens the legal path to concluding surrogate motherhood contracts, because it eliminates any fear of treating such obligations as a manifestation of human trafficking, which is prohibited. Admittedly, one could question the thesis put forward by the Supreme Court of Tennessee that a pre-embryo is entitled to respect because of their "burgeoning potential for life," but this formulation does not have any consequences other than the fact that a pre-embryo (analogously to an embryo and a fetus) shall not be granted the status of being a human and the resulting subjectivity. In this approach, all potential rights of a pre-embryo (also of embryos or fetuses) could only be derived from the will of external entities (be it the donors of genetic material or the legislator, to the permissible extent of interfering with the right to privacy). Thus, the lawfulness of surrogate motherhood contracts becomes solely a matter of the rights and freedoms of born persons and the potential limitations imposed by the state due to some specific interests of the political community.

The tribunals of European communities also tend to treat embryos as objects (although it is not normally expressed literally). The European Court of Human Rights (ECtHR) in its ruling on the destruction of embryos in vitro (Evans v. The United Kingdom[55]) found that Article 2 (defining the right to life) of the European Convention for the Protection of Human Rights and Fundamental Freedoms does not explicitly define the concept of a human being, and therefore does not specify when human life begins and at which moment it becomes protected by the Convention. Decisions in this respect should be resolved at the level of state legislation, which can either protect embryos or allow their objectification. As an example of a regulation protecting embryos, the ECtHR recalled the German model resulting from "Embryonenschutzgesetz,"[56] which defines the human embryo as an isolated zygote and which prohibits the creation of embryos for purposes other than reproductive aims.

[55] Judgement of The European Court of Human Rights of 10 April 2007, Evans v. The United Kingdom, application 6339/05, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22evans%20v.%20the%20united%20states%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001–80046%22] (last accessed: 13 September 2018).

[56] To learn more about this law, see: K. Wojtowicz, *Die Eizellspende de lege ferenda. Die Legalisierung der heterologen Eizellspende aus rechtsvergleichender Sicht*, Verlag Dr. Kovač, Hamburg, 2018, pp. 47–58.

This solution is said to express the German law principle of protecting the human dignity of the embryo, which is treated as a prohibition against its objectification. It is also consistent with the position of the German Federal Constitutional Court, according to which the protection of human dignity is immanently connected with the right to life, and this creates the obligation to protect the embryo regardless of whether it is in the mother's body or outside it.[57] A different model, which is equally admissible under the Convention according to the ECtHR, was introduced by the British on the basis of the "Human Fertilisation and Embryology Act." This solution does not provide legal protection for the embryo and allows the possibility of using it for the purpose of procreation or research. In the British legal system, the embryo does not have independent rights or interests and cannot claim – or have claimed on its behalf – a right to life under Article 2. What follows from the ECtHR's judgement is that the protection of the embryo is determined by the will of the state – a party to the Convention – and is expressed in its legislation. National legislations that do not protect embryos are not in conflict with Article 2 of the Convention, even if they allow the destruction of embryos. Let us note that, as it was the case in the judgement of the Supreme Court of Tennessee, the ECtHR fully accepts the view that the subjectivity of embryos does not result from their existence (their subjectivity is not "inherent") but is an expression of the will of an external entity – the state. This position, allowing the objectification of embryos, opens the way to the legalization of surrogate motherhood contracts.

An analogous approach can be found in the judicial decisions of the Court of Justice of the European Union (CJEU). A reference could be made to the 2011 ruling in the Oliver Brüstle v. Greenpeace eV case (case C-34/10[58]) concerning the interpretation of Article 6(2)(c) of the so-called patent directive (Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions). In the justification of the judgement, the CJEU referred in the first place to the preamble and Article 5(1) of the Directive, recognizing that the principle of the dignity and integrity of the human person prohibits the objectification of the human body, at the various stages of its formation and development (including germ cells), because the human body cannot be patented,

[57] Judgement of the Federal Constitutional Court of 28 May 1993, case 2 BvF 2/90.

[58] Judgment of the Court (Grand Chamber) of 18 October 2011 on the interpretation of Directive 98/44/EC – Article 6(2)(c), reference for a preliminary ruling: Bundesgerichtshof – Germany, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CJ0034 (last accessed: 14 September 2018).

and consequently research methods that violate the dignity of the human body cannot constitute patentable inventions. The CJEU simultaneously highlighted that, in accordance with the provisions of Article 5(2) of the directive, the law allows research intended to isolate elements from the human body or to produce them by means of a technical process, even if "the structure of that element is identical to that of a natural element" because of their importance in treatment of diseases. Moreover, in the opinion of the CJEU, it is apparent from the contents of the Directive that it is possible to patent an invention based on an element isolated from the human body (or otherwise produced by a technical process that is susceptible of industrial application) even if the structure of this element is identical to the construction of a natural element. However, such an invention can only be patented provided that the rights conferred by the patent do not extend to the human body and its elements in their natural environment, because the Directive stresses the need to exclude the possibility of granting patents on inventions whose commercial exploitation offends against *ordre public* or morality. Although it was not explicitly articulated, the position of the CJEU could be summarized by stating that the judges wanted to stress that patents should not be granted in a situation in which the body of a person would be objectified through its appropriation.

Before we move on to how the embryo was defined by the CJEU, it is worth mentioning briefly the opinion of an Advocate General of the CJEU, preceding the CJEU's judgment in this case.[59] It contained a very characteristic rhetoric, which was later repeated by the CJEU. The Advocate General presented considerations regarding the status of an embryo only in the context of legal regulations and on the basis of "objective" scientific data. This procedure is worth attention, because it was based on false premises assuming, firstly, that it is possible to create legal provisions in isolation from ideology (the very assumption of ideological neutrality of law is ideological), and secondly, that scientific theses are "true" or "objective" by design. In the latter case, it is likely that both the Advocate General and the judges of the CJEU adhered to an understanding of what science is akin to that preached more than a century ago by the representatives of the Vienna Circle. One must notice, however, that the approach adopted by them may provide psychological comfort and hence it was justifiable. As a result, the Advocate General's opinion included solemn reservations that he did not "intend to decide between beliefs or to impose them" or

[59] http://curia.europa.eu/juris/document/document.jsf?docid=81836&text=&doclang=EN&part=1&occ=first&mode=LST&pageIndex=0&cid=3176658 (last accessed: 14 September 2018).

that the definition of what constitutes an embryo in this case concerned the human body (which the Directive grants protection "at the various stages of its formation and development"), not the appearance of life. In his opinion, the current state of knowledge in this respect did not lead to indisputable conclusions in this matter; moreover, providing an answer to the questions about the beginning of life would unnecessarily situate a judgement on a "technical" problem (of patentability) in the sphere of ethics, to which various solutions are applied in the individual member states. It was therefore impossible, according to the Advocate General, to provide a definition of life; all he could do was to conclude that embryos are cells (both before and after implantation) that hold within them the capacity for subsequent division, which will ultimately lead to the birth of a human being. Thus, in his opinion, the concept of a human embryo "applies from the fertilization stage to the initial totipotent cells and to the entire ensuing process of the development and formation of the human body. That includes the blastocyst." He added that "taken individually, pluripotent embryonic stem cells are not included in that concept because they do not in themselves have the capacity to develop into a human being." Another telling reservation presented by the Advocate General in this context was the following: beings created by means of in vitro fertilization can be legally categorized as embryos (and, consequently, be granted the protection of their physical integrity) as long as the fertilization was not performed to enable a couple to bring children into their family. In this way, he stressed the need to clearly separate the conclusions resulting from the patent directive from ECtHR judgements regarding abortion, because the use of embryos for industrial or commercial purposes should not be compared with national laws "which seek to provide solutions to individual difficult situations." It clearly illustrates the assumption that the rights or legal protections of an unborn human being do not result from its original rights, but are fully dependent on the will of external entities.

Based on the abovementioned remarks, the CJEU assumed that the concept of a human embryo applies "from the fertilization stage to the initial totipotent cells and to the entire ensuing process of the development and formation of the human body. That includes the blastocyst. In addition, unfertilized ova into which a cell nucleus from a mature human cell has been transplanted or whose division and further development have been stimulated by parthenogenesis." The judges also clarified that it is for the national courts to determine whether a stem cell obtained from the human embryo at the blastocyst stage (about 5 days after fertilization) is a "human embryo" as defined by Article 6(2)(c) of Directive 98/44.

Furthermore, they concluded that "the exception to the non-patentability of uses of human embryos for industrial or commercial purposes concerns only inventions for therapeutic or diagnostic purposes which are applied to the human embryo and are useful to it," which prohibits the use of one embryo to the benefit of another embryo. The judges interpreted that the quoted article of Directive 98/44 means that "an invention must be excluded from patentability where the application of the technical process for which the patent is filed necessitates the prior destruction of human embryos or their use as base material, even if the description of that process does not contain any reference to the use of human embryos."[60] To be precise, it is worth adding here that the judges' opinion was modified and clarified a few years later in a judgement pronounced in the case International Stem Cell Corporation v Comptroller General of Patents, Designs and Trade Marks (judgment of the Grand Chamber of 18/12/2014, Case C-364/13; ECLI: EU: C: 2014: 2451). The CJEU focused on the idea that the concept of an embryo can only be applied to a zygote or a group of cells "capable of commencing the process of development of a human being." Consequently, the judges assumed that "an unfertilized human ovum whose division and further development have been stimulated by parthenogenesis does not constitute a 'human embryo', within the meaning of Article 6(2)(c) of Directive 98/44/EC, if, in the light of current scientific knowledge, it does not, in itself, have the inherent capacity of developing into a human being."[61]

What characterized the judges' approach in this case as well was a safeguarding measure that the presented attempt at providing a definition had a strictly legal character, to be used mainly for the needs of the "technical directive," taking into account the current state of science, and that legal effects for other areas of human life should not be derived from it. This confirmed the recognition of a human being as a subject of protection because of the physical integrity granted by law in the context of economic and scientific activities, but on the other hand it stressed the principle that member states of the European Union had a freedom to adopt solutions concerning embryos to an extent that was not prevented by the EU normative acts and the principle that rights do not precede the legislators' decision – on the contrary, the rights exist on the basis and within the limits set by these decisions. In this way, the lawfulness and the framework of the institution of surrogate motherhood fall

[60] Judgment of the CJEU of 18 October 2011, ECLI:EU:C:2011:669, *op cit*.

[61] For more on the topic, see: D. Lubowiecki, "O Europejskiej Konwencji Praw Człowieka", *Przegląd Prawniczy Uniwersytetu Warszawskiego*, R. XV, No. 1, 2016, pp. 80–90.

within the domain of legislative solutions that are strictly dependent on the dominant doctrinal (ideological) views of who a human being is.

5. Final remark

Depending on how much a human being is perceived as a person, it is possible to limit or exclude the lawfulness of surrogate birth; and conversely, the extent to which a human being is perceived as an individual or a representative of the species determines the scope of admissibility of civil law contracts in the field of surrogate births. Additionally, one could also point to the existence of a clear relationship between the admissibility of surrogate motherhood procedures by law and the dominant ethical convictions (connected with anthropological assumptions): the more the legislating elites express some version of utilitarianism, the wider the admissibility of surrogate birth procedures. It is also noteworthy that the restrictions on the lawfulness of surrogate motherhood procedures often (especially in Europe) are correlated with restrictions imposed by the state both in terms of owning one's body (e.g. the possibility of selling organs or blood) and with reference to the monopolization or control of adoption procedures. All of this indicates that we are living in the bowels of the Hobbesian Leviathan who is not only the owner of the bodies of his subjects, but also the master of their life and death. In the latter case, the Leviathan achieves his aims simply by imposing a new meaning on our understanding of words.

CHAPTER II Filiation as a result of surrogacy contract: (non)acceptance under internal law and (non)recognition of foreign law

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Surrogate motherhood in the Baltic states

1. Introduction

The Baltic States – Lithuania, Latvia and Estonia – restored their independence in years 1990–1991. During 1940–1991 the legal system of each State was modeled on common law principles of USSR. The methods of in vitro fertilization (IVF) were subject to examination and research for over 30 years, and in February 1986 the first IVF child was born in the Research Center for Obstetrics, Gynecology and Perinatology of the Medical Center in the Academy of Sciences in Moscow.[1] In the Baltic states the first children born using assisted reproductive technologies in the mid-1990s. The first legal regulation of artificial insemination procedure for medical reasons was issued by the Ministry of Health of the USSR in 1987.[2] Surrogacy was not regulated in USSR.

In the Russian Federation, the first regulation related to surrogacy was introduced in 1995. Article 51 par. 4 of the Family Code states that: "(…) The married persons who have given their consent in written form to the implantation of an embryo in another woman for bearing it, may be written down as the child's parents only with the consent of the woman who has given birth to the child (of the surrogate

[1] Е. Г. Малиновская, *Правовое регулирование суррогатного материнства в Российской Федерации и в Республике Беларусь*, "Семейное и жилищное право" 2007, No. 2, p. 29.

[2] Приказ Минздрава СССР от 13 мая 1987 № 669, "О расширении опыта по применению метода искусственной инсеминации спермой донора по медицинским показаниям", http://zakon.7law.info/base48/part8/d48ru8985.htm (last accessed: 1 July 2018).

mother)."[3] The complete regulation of the surrogacy was introduced in the Russian Federation as late as 2011–2012.[4] The unrestricted and vast regulation of surrogacy was in fact introduced in most post-Soviet countries: Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russian Federation and Ukraine.[5] The Baltic States did not follow this example. There is no common approach in regulation of this problem in the Baltic States. Each State has its own approach to artificial insemination, IVF and surrogacy regulations due to historical background, political changes, development of medicine, as well as religion and traditions. The States also balance between protection of fundamental rights and prohibition of human trafficking.

The first regulation of the problem was introduced in Estonia with the Artificial Insemination and Embryo Protection Act of 1997. It was followed by Latvia with the Sexual and Reproductive Health Law of 2002. The regulation of the problem in Lithuania was achieved with the Law on Assisted Fertilization adopted in 2016.

2. Surrogacy arrangements in the national laws of the Baltic States

To some extent the problems of surrogacy are similar in the Baltic States. Nevertheless, in order to emphasize the differences and to explain national approaches to the issue the processes in all the examined states are presented for each state separately.

2.1. Lithuania

2.1.1. Regulation of assisted reproductive technology

Surrogacy arrangements are usually linked with the ART.[6] Initially, the issue of the assisted reproduction had to be regulated by the new Lithuanian Civil Code. How-

[3] Family Code of the Russian Federation No. 223-FZ of 29 December 1995 (with amendments), http://www.jafbase.fr/docEstEurope/RussianFamilyCode1995.pdf (last accessed: 14 July 2018).

[4] See also: I. Berger, *Macierzyństwo zastępcze w świetle przepisów prawa Federacji Rosyjskiej*, Instytut Wymiaru Sprawiedliwości, Warszawa 2017, pp. 5–6.

[5] Cornell Law School, *Should Compensated Surrogacy Be Permitted or Prohibited?*, International Human Rights Policy Advocacy Clinic and National Law University, Delhi, Cornell Law Faculty Publications 2017, p. 24, http://scholarship.law.cornell.edu/facpub/1551, p. 24 (last accessed: 7 July 2018).

[6] V. Todorova, *Recognition of Parental Responsibility: Biological Parenthood v. Legal Parenthood, i.e. Mutual Recognition of Surrogacy Agreements: What is the Current Situation in the MS? Need for*

ever, because of the difficult discussions and inability to find common solution in the time of its drafting, it was decided to regulate the issue of the ART in a separate legal act.[7] The Law on Assisted Fertilization[8] (hereinafter referred to as the LAF) was finally adopted in 2016 and came into force in 2017.[9] Adoption of the Law was accompanied by extensive discussions of lawyers, politicians, health care specialists and the Catholic Church. The main issues, that raised these discussions were fertilization using donor's reproductive cell, the duty to keep the unused embryos for an indefinite period of time and the number of embryos that can be created at one time.

None of those discussions was related to surrogacy. However, the LAF is the first Lithuanian law that makes a direct reference to surrogacy arrangements. A complete prohibition was introduced in the Article 11 of the LAF. Lithuanian LAF prohibits any surrogacy arrangements, both altruistic and paid. Pursuant to the provisions of Article 11 of the LAF any civil transactions where a woman undertakes to become pregnant, to give birth to a child and then to deliver the child to another person or persons, resigning from her maternity rights to a born child are null and void. It is worth mentioning that there were two parallel draft LAFs and both of them – in some regards significantly different – included a prohibition of surrogacy. During the discussions on the provisions of the LAF, prohibition of the surrogacy seemed to be obvious and nobody of the parliament members or other working committees objected to including it to the new law. Nevertheless, in its opinion on the draft law the Department of the European Law noticed, that this kind of a prohibition falls outside the scope of the proposed regulation.[10] The objection was not accepted, because according to the authors of the draft law surrogacy is possible only through assisted fertilization, thus it is within the scope of the drafted law.

Some of the Lithuanian parliament members suggested even to go further and to include the rules on criminal and administrative responsibility for violation of the provisions of the LAF, particularly the ones on the prohibition of surrogacy. In the initial versions of the draft law only civil commercial transactions regarding

EU Action?, 2010, p. 12, http://www.europarl.europa.eu/RegData/etudes/STUD/2010/432738/IPOL-JURI_NT(2010)432738_EN.pdf (last accessed: 20 July 2018).

[7] V. Mikelėnas, *Šeimos teisė*, Vilnius 2009, p. 327.

[8] Translation of the name of the law is provided on the official website of the Lithuanian Parliament (Seimas): http://www.lrs.lt/sip/portal.show?p_r=16386&p_k=2&p_t=165959 (last accessed: 22 July 2018).

[9] The Republic of Lithuania Law on Assisted Fertilization, 14 September 2016, Law No. XII-2608.

[10] Dėl Lietuvos Respublikos Pagalbinio apvaisinimo įstatymo projekto atitikties Europos Sąjungos teisei, 14 September 2010, Conclusion No. XIP-2388.

surrogacy were prohibited. This means, that potentially, parties could agree on altruistic surrogacy.

The analysis of the other rules provided by the LAF lead to a conclusion that it would not be possible to enforce the surrogate arrangement even if it was concluded. The LAF stipulates that assisted fertilization can only be performed for the married woman or woman living in a registered partnership. Moreover, the ART can be used only after confirmation that other ways to conceive are or would be ineffective. The Law allows using donor's reproductive cell in a very limited number of situations. Namely, when the cell of a spouse or a partner are damaged or insufficient and cannot be used, as well as in cases where there is a high risk of transmitting a disease causing severe disability. In any case donation is confidential. However, the identity both of the donor (or donors) and the child under certain circumstances could be revealed. Nevertheless, this does not allow to establish parenthood of the donor.

2.1.2. Civil law

The Lithuanian Civil Code[11] is the main legal act regulating issues of the contracts and other transactions, family and succession issues. Initially, rules on the assisted fertilization were included in the Civil Code. However, this issue, at the time of drafting the new civil code caused a lot of controversy. Discussions on these matters could have led to the delay of the adoption of the code. At that time the old Civil Code[12] of 1964 was in force. The provisions of it did not fit in the post-soviet society and market, thus they needed to be changed. Therefore, in order to have the new code adopted as fast as possible, the legislator resigned from regulating of many disputable issues. Among the others, were issues of the assisted fertilization. Nonetheless, it is worth mentioning, that the draft provisions of the prohibition of the surrogacy arrangements were much more precise than those included in the LAF. Pursuant to the Article 3.157 of the draft civil code, any transaction in which one woman undertakes to get pregnant, to deliver a child, to resign from her mother's right and, finally, to give a child to another woman is null and void as contrary to good morals and public order, regardless of whether they are paid or unpaid. Therefore, there could not be any doubts on whether only commercial surrogacy arrangements or also altruistic surrogacy is invalid.

[11] Civil Code of the Republic of Lithuania, 18 July 2000, Law No. VIII-1864.

[12] Civil Code of the Lithuanian Soviet Socialist Republic, 7 July 1964, Law No. 19–138.

Despite the fact that explicit legal prohibition of the surrogacy arrangement was introduced only in 2016, when the LAF was adopted, this kind of prohibition can be presumed from the other provisions of the Lithuanian Civil Code. First, the rules on the contract are relevant in this regard. Only valid contracts can be pursued and enforced. According to the Article 1.78 of the Lithuanian Civil Code if the nature of nullity of the transaction is clearly indicated in the law, the transaction is null irrespective of the fact of existence of a court judgement in this regard. Any transaction that does not correspond to the requirements of mandatory statutory provisions or is contrary to public order or moral norms shall be null and void. Moreover, Lithuanian Civil Code is strict in this regard. Article 6.157 provides that the parties to the contract are not allowed to modify, restrict or abrogate of an effect or application of the mandatory rules of law, irrespective whether the rules are determined by national or international law.

Article 3.5 of the Civil Code provides a specific provision for family relations. It states that in exercising their family rights and duties, persons must act in compliance with the laws, mutual respect, as well as principles of good morality. Civil code clearly prohibits to abuse family rights, for instance to use them in such a way as would inflict harm on other person or violate or restrict the other persons' rights or interests protected by law. The doctrine explains that in contradiction with public order would be contracts imposing on a person conclusion of the fictive marriage, restricting person's right to marry, and forcing parents to resign of their rights and duties regarding their children.[13]

Article 2.25 of the Civil Code stipulates one of the most important provisions regarding human body. It provides the right to inviolability and integrity of the person. The Article states that a natural person is inviolable. Any intervention into human body requires his or her written consent. In the case of castration, sterilization, abortion, operation or removal of organs of an incapable person needs an authorization of the court. The law provides that human body or its part cannot be subjects of commercial contracts. Moreover, any such contract will be deemed null and void because it will be contradictory to public order. For instance, conclusion of the commercial contract regarding human genetic material could be considered as violating public order.[14] However, this prohibition does not apply to the

[13] Idem., p. 186.

[14] *Lietuvos Respublikos Civilinio kodekso komentaras. Antroji Knyga. Asmenys*, ed. V. Mikelenas, Vilnius 2002, p. 78.

compensation of the costs incurred by the person in connection with, for instance, transplantation of organs or collection of genetic materials.[15]

Despite the fact that Civil Code in the adopted version does not explicitly prohibit surrogacy arrangements it seems that the rules presented above are in contradiction with, at least, for-profit surrogacy arrangements. In case of such an arrangement, intending parents pay the surrogate for the particular use of her body, which in the light of the Lithuanian law shall constitute violation of public order. Whereas, one could have doubts whether this includes also altruistic surrogacy, which does not provide for any payment for the surrogacy. Nevertheless, systematic analysis of the drafting of the code and its further application leads to a conclusion that any kind of surrogacy would be recognized as contrary to public policy and good morals, irrespectively whether it would be paid or altruistic.

2.1.3. Criminal law

The fact that, pursuant to the provisions of civil law and LAF, surrogacy arrangements are null and void it does not mean that such an arrangement will constitute a crime. Despite some suggestions, presented during drafting the LAF, the Lithuanian Penal Code[16] was not changed and the matters related to surrogacy arrangements were not penalized. Some experts presenting their opinion in public discussions or in media[17] notice that surrogacy arrangement is a crime according to the Lithuanian law. However, there is no explicit rule regarding the issue at stake in the Penal Code, unless it can fall within the scope of the provisions on trafficking in human beings. According to the Article 147 of the Lithuanian Penal Code trafficking in human being is a crime punishable by imprisonment for a term of two up to ten years, and in some cases even for the term of twelve years. The Code does not express this directly but the Article 147 is being explained as a strict prohibition for surrogacy arrangements. For an act to be considered a crime under the above-mentioned legal rule, it should fulfill several conditions. First, there should be an adult victim (person of eighteen or more years old) and second, a person should perform one of the following acts: selling, purchasing, or otherwise transferring or acquiring, recruiting, transporting or holding a person captive by physical violence or threats. The offender could also deprive a victim of the possibility to resist. He can do it by

[15] This could be for instance travel expenses, payment to for the medical services.

[16] Penal Code of the Republic of Lithuania, 26 September 2000, Law No. VIII-1968.

[17] Popular Lithuanian website: https://www.delfi.lt/sveikata/sveikatos-naujienos/lietuvoje-plinta-skelbimai-apie-gimdos-nuoma-surogatine-motinyste.d?id=62248707 (last accessed: 20 July 2018).

using the victim's vulnerability or dependence or deceit, or by taking or paying money (or other benefits) to a person who controls the victim. Moreover, one of the most important issues in this regard is the consent of the victim.[18] According to the Code, a person who is aware of or seek that the victim's organ, tissue or cells would be taken is also considered a crime. The commentary to this provision explains that, among others, this crime includes selling or purchasing sperm, ovum, embryo, embryo cells or other genetic material.[19] The most problematic in case of surrogacy arrangement is the issue of the person's consent. Thereby, it is important to analyze whether the offense could be attributed if there was a consent of the victim. In a legal literature is being explained that freedom of a person to make a decision could be understood twofold: as a physical freedom and a freedom of will.[20]

Specific circumstances can influence a person's freedom of will. Thus, the consent of a person will not be an essential factor in the elimination of the criminality of the act in all the cases. Sometimes a victim could have agreed to be exploited because of the difficult financial situation, family problems or social exclusion.[21] Consequently, in the case of surrogacy arrangement it is important to prove that the decision to become a surrogate was not made freely.[22] The offender could use dependence or vulnerability of the woman. For instance, the spouse or other family members could persuade, directly or indirectly the woman to become a surrogate. Vulnerability of the woman means, that she is in such a difficult financial, family or social situation that she will have to accept to become a surrogate. Main factors that indicate vulnerability of a woman are the following: lack of work, poor education, the duty to raise children that the woman already has, her financial commitments.[23] If the offender is aware of those factors and uses them to persuade the woman in order to take advantage of her situation and benefit financially, then his behavior could be classified as a crime.

The next element that needs to exist in order to consider surrogacy arrangement as trafficking in human being is exploitation of the person. This element is usually

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[18] *Lietuvos Respublikos Baudžiamojo kodekso komentaras. Specialioji dalis (99–212 straipsniai)*, vol. 2, ed. G. Švedas, Vilnius 2009, p. 163.

[19] Idem., p. 170.

[20] O. Fedosiuk, *Prekybos žmonėmis nusikaltimo normos naujausios redakcijos (2005 m. birželio 23 d.) aiškinimo ir taikymo problemos*, "Jurisprudencija" 2007, vol. 8(98), p. 55.

[21] Idem, p. 58.

[22] E. Monstytė, *Ar atlyginti̇ną surogaciją galima prilyginti prekybai žmonėmis*?, "Teisės apžvalga / Law Review" 2014, No. 1(11), p. 49.

[23] Idem, p. 50.

analyzed together with the issue of the vulnerability of a woman, particularly with her financial situation. One of the Lithuanian authors emphasizes that the surrogate never bears all the costs related to pregnancy and childbirth.[24] The woman receives a certain salary irrespective of the stage at which the pregnancy stops, so is difficult to talk about exploitation in this regard. Finally, the same author concludes that a subject of the surrogacy arrangement is not purchasing or selling a child, which would constitute a crime under the Article 157 of the Lithuanian Penal Code.[25] If a miscarriage occurs during the pregnancy or in case of a stillbirth, the surrogate is not obliged to refund, she receives all the salary according to the agreement. Moreover, the salary is paid for the service that woman provides, not for the child. Therefore, it is not possible to claim that the child is a victim of trafficking in human beings.

Since there is lack of case law in this regard, it is difficult to presume, whether in terms of criminal law each case of surrogacy arrangement will be considered as a crime of trafficking in human beings. Analysis shows that it will depend on the individual situation of the surrogate mother and her consent to participate in an arrangement. However, it should be also noted, that lack of unambiguous answer to the question whether it is trafficking of human beings or not does not make the surrogacy arrangement legal in Lithuania.

2.2. Latvia

In Latvia, assisted reproduction is regulated by the Sexual and Reproductive Health Law (hereinafter referred to as the SRHL) of 2002.[26] The Law does not contain any rules on the surrogacy arrangements. Moreover, it is more liberal comparing to the Lithuanian law. It allows to perform artificial fertilization for heterosexual partners but does not require them to be married and it also allows to use assisted reproductive technologies for a (single) woman. In the case if for the artificial fertilization applies a single woman, the fatherhood of the child is determined according the rules of the Latvian Civil Law (Article 146 par. 2).[27] As the father of the child is considered

[24] Idem, p. 59.

[25] Idem, p. 63.

[26] Sexual and Reproductive Health Law, 31 January 2002, "Latvija Vestnesis" 27 (2602).

[27] The Civil Law of Latvia, of 28 January 1937, "Latvija Vestnesis" 41, 20.02.1937. English translation available: www.vvc.gov.lv/export/sites/default/docs/LRTA/Citi/The_Civil_Law.doc (last accessed: 14 July 2018).

the husband (or in some situations a former husband) of the mother. In case when a child is born to an unmarried woman the filiation of the child shall be determined upon the voluntary recognition or by a court proceeding. Forasmuch the law does not provide strict prohibition of the surrogacy arrangements, theoretically persons can agree upon such an agreement. However, in the certificate of birth of the child as the mother will be indicated a woman who gave birth to a child (in accordance with Article 146 par. 1 of the Latvian Civil Law). Moreover, it can be noticed, that during drafting the Sexual and Reproductive Health Law it was introduced a rule referring directly to surrogacy arrangements, but the draft law that reached the Latvian Parliament did not contain this rule any more.[28] Article 13 of the draft law[29] allowed to use assisted reproductive technologies in order to have a child born from a surrogate mother. In this case, a prerequisite to use ART was a written agreement between surrogate mother, intended parents and the medical institution pursuant to which intended parents take an obligation to register the child and raise it as their child. Article 16 of the draft law clarified that a potential surrogate mother could be a healthy woman aged from 20 to 40 years. The rule reveals that the Latvian legislator does not perceive surrogacy arrangements as an institute completely incompatible with Latvian legal order. Nevertheless, the rule, as probably too controversial, was excluded from the final text of the law.

Latvian Civil Law does not contain any particular restriction to conclude a contract regarding human organs. Nevertheless, there is a general rule provided in the Article 1415 of the Civil Law which states that the transaction, purpose of which is contrary to religion, laws or moral principles, or which is aimed at circumventing the law is void. It is worth mentioning that in 1992 the Latvian Civil Law that had been adopted in 1937 was reinstated.[30] Moreover, this is not a new law but an amended law that was adopted in 19th century.[31] Therefore, the Law is being amended for

[28] The discussion on surrogacy arrangements in public media: http://rus.delfi.lv/archive/surrogatnoe-materinstvo-v-latvii.d?id=7079673&all=true (last accessed: 24 July 2018).

[29] A draft Law on the Sexual and Reproductive Health (Iedzīvotāju seksuālās un reproduktīvās veselības likums). "Latvijas Vēstnesis" 6.09.2000, No. 311/312 (2222/2223) https://www.vestnesis.lv/ta/id/10408 (last accessed: 25 July 2018).

[30] J. Kārkliņš, *The Development of the General Latvian Contract Law after the Renewal of Independence and Future Perspectives in the Context of European Commission`s Solutions for Developing Unified European Contract Law*, "Juridiskā zinātne / Law" 2013, No. 5, p. 151.

[31] J. Kārkliņš, *Latvijas līgumtiesību modernizācijas galvenie virzieni*. Doctoral thesis, Rīga: Latvijas Universitāte, 2006, p. 6.

several times already. The main amendments that affected family and inheritance law were introduced in the first half of the 1990s.[32]

Latvian Criminal Law[33] also contains a general rule devoted to trafficking in human beings. The content of the rule is almost the same as in Lithuania. It does not include any references to surrogacy arrangements. It can be considered that the human trafficking does not apply to surrogacy arrangements. The previous analysis revealed that Latvia is the most likely to allow in the future the surrogacy arrangements. This leads to the conclusion that criminalization of the surrogacy in Latvia rather would not take place.

2.3. Estonia

In Estonia, surrogacy has been prohibited since 1997, when the Artificial Insemination and Embryo Protection Act (hereinafter referred to as the AIEPA) entered into force on July 7, 1997[34], along with the change into the provisions of the Criminal Code in force at the time.[35] The § 120 of the Criminal Code states: "Transfer of a foreign ovum, or an embryo created therefrom to a woman with a violation of an Artificial Insemination and Embryo Protection Act, as well as transfer of a foreign ovum, or an embryo created therefrom to a woman, are punishable by a fine or a deprivation of the right to work or perform certain professional activity." This provision is considered to be the first express regulation of surrogacy in Estonia.[36] The reasons to introduce this prohibition were clarified by the explanatory letter as follows: "a bit different is the second scenario of surrogacy, namely a situation, where woman carries a child for 9 months, gives birth, and then gives the child away. This scenario assumes that a genetic mother or a spouse of a genetic father and mother

[32] K. Balodis, *The Latvian Law of Obligations: The Current Situation and Perspectives*, "Juridica International" 2013, vol. XX, p. 69.

[33] The Criminal Law of Latvia, of 17 June 1998, "Latvija Vestnesis" 199/200 (1260/1261), 8 July 1998.

[34] Artificial Insemination and Embryo Protection Act of 11 June 1997, RT I 1997, 51, 824, https://www.riigiteataja.ee/en/eli/ee/530102013057/consolide/current (last accessed: 14 July 2018).

[35] Criminal Code, 7 May 1992 (entered into force on 1 June 1992), RT I 1999, 38, 485 (in force until 22 February 1999), https://www.riigiteataja.ee/akt/77448 (last accessed: 14 July 2018).

[36] K. Lubja, *Surrogaatlus põhiõiguste kontekstis ja surrogaatturismiga kaasnevad õiguslikud probleemkohad*, Tallinn 2017, http://dspace.ut.ee/bitstream/handle/10062/57251/lubja_ma_2017.pdf (last accessed: 6 July 2018), p. 25.

giving birth (possible for remuneration) agree on a child being given away after its birth. Instrumentalization of a child, its transformation into commercial object and also separation of a child from a woman, with whom it had a certain psychological and physical connection during pregnancy period might be considered as circumstances that affect human dignity and give grounds to prohibit surrogacy in this scenario. In case of ordinary ovum donation, there is no giving away of a child or agreement about it."[37] The main rationale for prohibition of surrogacy was to ascertain that the relationship will not transform into human trafficking.

2.3.1. Criminal Law

In 2002, the new Penal Code[38] introduced § 132 (1) stating that: "Transfer of a foreign ovum, or an embryo or fetus created therefrom to a woman whose intention to give away the child after birth is known is punishable by a pecuniary punishment". In 2015, the similar provision was added in relation to legal entities (2): "The same act, if committed by a legal person, is punishable by a pecuniary punishment." This provision expressly prohibits surrogacy in Estonia[39], and imposes a punishment. In accordance with this provision the punishment is foreseen for the medical employee or institution, which conducted the procedure. The Penal Code criminalizes only when it is known that the procedure was conducted, and it is evident that the woman who is going to give birth to a child will give it away. If the procedure is carried out in Estonia there are no consequences for surrogate mother or intended mother. As already mentioned above the main reason to prohibit surrogacy is existence of danger that surrogacy will become a "paid service" and the state could contribute to human trafficking and use of children as "commercial objects". It should be mentioned that

[37] See: § 144 of the Draft Act and Explanatory Letter 119 SE I, p. 91, https://www.riigikogu.ee/download/5dc2a0c4–864b-31e6-bbb1-b888d0f999d0 (last accessed: 14 July 2018). See also: A.E. Vaher, M. Skuin, *Andrei Sõritsa: jääb arusaamatuks, miks surrogaatemade kasutamine Eestis keelatud on*, "Naistekas" 13 October 2011, http://naistekas.delfi.ee/kodu/lapsed/andrei-soritsa-jaab-arusaamatuks-miks-surrogaatemade-kasutamine-eestis-keelatud-on?id=59756272 (last accessed: 11 July 2018).

[38] Penal Code of 6 June 2001 (entered into force on 1 September 2002), RT I 2001, 61, 364, https://www.riigiteataja.ee/en/eli/521082014001/consolide (last accessed: 14 July 2018).

[39] L. Oja, *Reproduktiivõigused – asendusemadus Eestis*, "Teemaleht", 9 September 2013, No. 16, p. 2, https://www.riigikogu.ee/wpcms/wp-content/uploads/2015/01/Teemaleht_16_2013.pdf (last accessed: 7 July 2018).

before total ban of surrogacy in Estonia, there were no scandals or other negative experiences related to it.[40]

2.3.2. Family Law

The provisions of the Penal Code correspond to the regulations in the Family Law Act. § 83 of the Family Law Act states that "the woman who gives birth to a child is the mother of the child"[41]. This provision expressly excludes the right to become a mother, if a child was born by another woman, even if the biological material was taken from another woman.[42] This regulation does not offer an answer to the question how to define a woman who gave her ovum and entered into a surrogacy arrangement (intended mother). The Estonian legislator took the approach that the woman who cannot carry pregnancy to term and give birth shall not be considered as the mother of the child. The wish of the woman to become the mother is not relevant for this provision, even if she is genetically connected to the child. This provision also does not take into consideration that a woman who uses her reproductive rights and becomes pregnant, gives birth, might not wish to be a parent to the child.[43] On the other hand, a woman can give up her parental rights. The doctrine considers that the main goal of this provision is to prevent "rent of uterus."[44] The regulation suggests negative connotation of surrogacy, as it is not possible to define without a term "rent". This position is difficult to agree with, as rent is temporary use of an object or real property for specified payment, in principle transmitting this definition to human body or its parts is not legally correct or understandable.[45] It should be noted that in accordance with the Estonian doctrine the "surrogacy as

[40] Opinion of Ivo Saarma, head of the private clinic: K.-R. Tigasson, *Arvamusring: Kanda last teise eest – poolt ja vastu*, "Eesti Päevaleht" 26.10.2009, http://epl.delfi.ee/news/arvamus/arvamusring-kanda-last-teise-eest-poolt-ja-vastu?id=51180875 (last accessed: 14 July 2018).

[41] Family Law Act of 18 November 2009 (entered into force on 01 July 2010), RT I 2009, 60, 395, https://www.riigiteataja.ee/en/eli/503042014006/consolide (last accessed: 14 July 2018).

[42] The Family Law Act also defines a father of the child. In accordance with the § 84 of the Family Law Act "(1) The man by whom a child is conceived is the father of the child. It shall be deemed that a child is conceived by a man:

1) who is married to the mother of the child at the time of birth of the child;

2) who has acknowledged his paternity or

3) whose paternity has been established by court.

(2) A court shall not identify a person whose sperm has been used for artificial insemination as a father of a child."

[43] L. Oja, *op. cit.*, p. 2.

[44] K. Lubja, *op. cit.*, p. 26.

[45] Idem., p. 26.

a service" might be different in its forms, and payment for "surrogacy service" does not constitute an obligatory element of surrogacy.[46] Additionally, it is considered that elimination of payment for surrogacy, allows not using the term "rent."[47] The legislator when criminalizing payment for "surrogacy service" also prohibits surrogacy based on altruistic motivation, and forgets that surrogacy in essence should be voluntary.[48] Situation when a woman agrees to pregnancy with another biological material, as well as to give up a child upon birth, is from legal point of view a special legal relationship and it would be impossible to place it into the traditional legal category. Therefore, it should be agreed that there is no sense of talking about "rent." The surrogacy arrangements should be regulated in a separate legal act.

2.4. Law applicable to surrogacy arrangements in the Baltic States

There is no information of any cases related to surrogacy examined in the courts of Estonia, Latvia or Lithuania. Private international laws of none of three states contain any provisions about the law applicable to surrogacy arrangements. We could assume that the Estonian and Lithuanian courts would apply to surrogacy arrangements law of the country with which it is more closely connected.[49] This solution allows parties to protect their rights more effectively and makes outcome more predictable. Article 19 of the Latvian Civil Law indicates that obligations rights and duties arising from the contract, if the parties have not agreed otherwise, are subject to the laws of the state where the obligation is to be performed. If it cannot be determined where the contract is to be performed, then the law of the place where the contract was entered into applies.

The courts of all the three states in the light of surrogacy prohibition when determining law applicable to surrogacy arrangements apply restrictions on use of foreign law, (e.g. public order § 7 of the Estonian Private International Law Act[50] and, respectively § 1.11 of the Lithuanian Civil Code, and § 24 of the Latvian Civil Law, provisions of general application in Estonian law (§ 31 and § 32 (3)). In prac-

[46] Idem., p. 26.
[47] Idem., p. 26.
[48] Idem., p. 26.
[49] K. Lubja, *op. cit.*, p. 28.
[50] Private International Law Act of 27 March 2002 (entered into force on 1 July 2002), RT I 2002, 35, 217, https://www.riigiteataja.ee/en/eli/513112013009/consolide (last accessed: 14 July 2018).

tice the courts of Estonia, Latvia and Lithuania might solve disputes applying the public policy clause and mandatory rules. Mandatory are usually the provisions of administrative, constitutional or criminal laws. Nevertheless, civil law also contains this kind of rules. The wording of the mandatory rules is usually very restrictive and clearly indicates that some kind of transaction is forbidden or the parties are not allowed to include some provisions in their contract. Lithuanian authors explain contradiction to public order as contradiction to mandatory rules provided in Constitution, administrative and other laws, contradiction to moral norms.[51] It is worth mentioning that the contradiction to public order will not only mean the conclusion of the contract that is explicitly forbidden by the law but also it includes situation where the object of the contract is a crime or the concealment of the criminal act.

In case of Estonia of great importance is § 132 of the Penal Code, and therefore the agreement might be void in accordance with § 87 of the Civil Code.[52] In accordance with the legislation both of Estonia, Latvia and Lithuania it is not allowed to enter into the agreement, if it is against good faith or public order, as well as if it is against the prohibition stated in the law – § 86 and 87 of the Estonian Civil Code, § 1.80 of the Lithuanian Civil Code, § 1415 of the Latvian Civil Law.

3. Situation of the child born from a surrogate mother abroad

Differences in surrogacy regulations, even among the Member States of the European Union, could lead to circumvention tourism, where couples or individuals, who are restricted by their domestic law travel to other countries, which permit surrogacy, in order to become parents.[53] Current legal regulations offer an opportunity for couples from the Baltic States to benefit from surrogacy arrangements abroad, and then to come and live with a child in their home country. The most common destinations are Ukraine, Georgia, Russia and India. Due to the relatively low costs Ukraine and Georgia are a preferable destination. Additional factor is proximity to Estonia, and then the Estonian couples prefer Ukraine. In these countries, the surrogate mother

[51] *Lietuvos Respublikos Civilinio kodeks komentaras. Primoji knyga. Bendrosios nuostatos*, ed. V. Mikelenas, Vilnius 2001, p. 184.

[52] General Part of the Civil Code Act of 27 March 2002 (entered into force on 1 July 2002), RT I 2002, 35, 216, https://www.riigiteataja.ee/en/eli/530102013019/consolide (last accessed: 14 July 2018).

[53] C. Fenton-Glynn, *International surrogacy before the European Court of Human Rights*, "Journal of Private International Law" 2017, Vol. 13, No. 3, p. 547.

does not have any rights to the child.[54] According to the opinion expressed in the Latvian public media, these are not individual cases but hundreds of Latvian people using this kind of services.[55] Lithuanian press does not provide any information about Lithuanian nationals who (at least probably) entered into this kind of transactions. Official Lithuanian institution are also silent in this regard. One of the Estonia newspaper articles mentions without revealing the name of the person that there is a case when Estonian couple has three children born in Ukraine by a surrogate mother.[56] There is also a newspaper article that describes a situation, when the Estonian couple travelled to Ukraine and concluded a surrogacy arrangement with a Ukrainian woman.[57] Unofficially it is being told even that doctors for the women, who suffer difficulties to have their own children by themselves, suggest to look for a surrogate mother abroad.[58] However, there is no official statistics in this regard. The public media articles stipulate that the payment to surrogate mother will amount to 15 000–30 000 EUR, plus 400 USD for every month of pregnancy. Additionally, all treatment and medical bills were covered by the intended parents.[59] The initial surrogate mother procedures costs are already 5 000–6 000 EUR and even if they are not successful, the money is not returned.

There are several issues can arise when the couples from the Baltic States enter into the surrogacy arrangements abroad, once the child is born and given to the intended parents. Namely, it is needed to determine, who are the child's legal parents and if the adoption is needed, what are the legal consequences which flow from such determination. Moreover, it is required to establish what is the nationality of

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[54] K. Ibrus, *Asendusemadus on raha eest lubatud vaid üksikutes riikides*, "Eesti Päevaleht", 19 September 2012, http://www.w3.ee/openarticle.php?id=1461469&lang=est (last accessed: 14 July 2018).

[55] Found on popular Latvian websites: https://rus.lsm.lv/statja/novosti/obschestvo/dlja-vi-nashivanija-svoih-detey-bogatie-latviyci-nanimayut-ukrainskih-surrogatnih-materey.a225455/; http://www.mixnews.lv/ru/society/news/217406_ltv7-latvijskie-pary-is4ut-surrogatnyx-materej-v-rossii-i-ukraine-opros/ (last accessed: 24 July 2018).

[56] K.-R. Tigasson, *op. cit*.

[57] K. Irbus, *Eesti perekonnale last kandev asendusema pandi Ukrainas vangi*, "EestiPäevalehtDelfi" 17.09.2012, http://epl.delfi.ee/news/eesti/eesti-perekonnale-last-kandev-asendusema-pandi-ukrainas-vangi?id=64974282 (last accessed: 11 July 2018).

[58] Found on a Russian website devoted to surrogacy: http://суррогатные-матери.рф/surrogatnoye-materinstvo/24-strani/strani/835-surrogatnoe-materinstvo-v-latvii.html (last accessed: 24 July 2018).

[59] For the indication of the number of surrogacy cases in Ukraine for Estonian couples, see also: K.-R. Tigasson, *op. cit.*; J. Madison, *Asendusemaduse seadustamine Eestis tooks inimkaubanduse*, Eesti Konservatiivse Rahvaerakonna, "Pressiteade", 6 June 2017, https://ekre.ee/jaak-madison-asendusemaduse-seadustamine-eestis-tooks-inimkaubanduse/ (last accessed: 14 July 2018).

the child. Finally, the child born abroad should be brought to its new country, thus the migration issues arise.

Thereby, the following issues need to be assessed below: a) receiving a travel document for a child to travel to Estonia, Latvia or Lithuanian; b) registration of the child in one of those states, and c) citizenship acquisition. In practice combination of laws in the country where the surrogacy is allowed, e.g., Ukraine, and legal provisions about birth registration and citizenship in Baltic states, allows Estonian, Latvian and Lithuanian couples to benefit from surrogacy abroad. As to the issues mentioned above, the following should be considered:

3.1. How to take a child born by a surrogate mother abroad to the home country of the intended parents?

In the case where surrogacy has taken place abroad the first issue that arises is bringing the child to the home country of the intended parents. The birth certificate is a not a valid travel document. Therefore, in order to bring the child that was born abroad the intended parents from the Baltic States have to acquire for their child either the national passport or ID card or the temporary travel document, e.g., in Lithuania – Personal Return Document[60] (hereinafter referred to as PRD) and in Estonia – Certificate of Return. The Latvian law does not provide a direct answer how to bring the child born abroad to Latvia. Nevertheless, according to the information provided by the Latvian consulates in different countries the procedure is the same as in case of the loss of the identity document.[61] Thus, a Return Certificate is being issued for a child.

According to the Lithuanian rules on issuance of the PRD for the child, whose both parents or one of the parent is Lithuanian national, and the child does not have any other travel document, can be acquired the PRD.[62] In order to obtain the PRD parents or one of them have to submit to the Lithuanian Embassy or the Consulate the following documents: application form, photos of the child, birth certificate (properly confirmed), documents of both parents or of one of them confirming

[60] Asmens grįžimo pažymėjimas.

[61] For instance, Latvian consulate in Lebanon: http://www.latvia.gov.lb/category/2/Consular-Information.html (last accessed: 25 July 2018).

[62] Order of the Minister of Foreign Affairs of the Republic of Lithuania on approval of the description of the procedure for issuing of Personal Return Certificate of 18 June 2008, Order No. V-141.

possession of the Lithuanian citizenship. Consulate officers do not check the correctness of the information provided in the birth certificate. This leads to a conclusion that Lithuanian citizen or citizens would not face any particular difficulties to bring a child born by a surrogate in a foreign country to bring to Lithuania. The procedure in Estonia is like the Lithuanian one, although in Latvia there is no explicit reference to a new born child in the regulation about the Certificate to Return.[63] The parents need to apply for an Estonian citizenship or a Certificate to Return in the Embassy or Consulate of Estonia. If in the foreign birth certificate one of the parents is an Estonian citizen, the child will obtain a travel document that allows the child to travel to Estonia. If the child is born in Ukraine the registration of a child takes place in the Civil Registry Office.[64] In the birth certificate the genetic parents are entered. The birth certificate is drafted on request of the parents. The following documents are required in Ukraine: a) document confirming the fact of a child being born by a surrogate mother; b) document confirming existence of genetic relation between spouses (or one of them) and embryo; c) notarized written consent of the surrogate mother for entering of the spouses as parents of a child born by her. Due to the fact that the intended parents are entered to the birth certificate, there is no information about surrogacy cases in Estonia. There are also no cases of establishing child origin in Estonia[65], as well as Latvia and Lithuania.

3.2. Registration of birth and issuance of the birth certificate

The procedures in each Baltic State are as follows:

3.2.1. Lithuania

Birth certificate of the child born abroad should be registered in one of the Lithuanian Civil Registry Offices. The rules on registration are provided in the Law on

[63] Procedure on form and issuance of Certificate to Return of 10 September 1998, https://www.riigiteataja.ee/akt/76090 (last accessed: 14 July 2018). Information sourced from the Internet page of the Consulate of Estonia in Egypt refers to the usual procedure of the return with a child to Egypt, http://www.kairo.vm.ee/est/konsulaarinfo/lapse_sund_egiptuses (last accessed: 11 July 2018).

[64] M. Zeniv, *Macierzyństwo zastępcze w prawie ukraińskim*, Instytut Wymiaru Sprawiedliwości, Warszawa 2017, p. 8.

[65] K. Lubja, *op. cit.*, p. 29.

Registration of Civil Status[66] and the Rules on Registration of Civil Status.[67] Pursuant to the Article 3 of the Law on Registration of Civil Status a civil registry officer can refuse to register the civil status act if its registration does not comply with the requirements established by this Law or would be contrary to the public policy established by the Constitution of the Republic of Lithuania and other laws. If civil status was registered or approved abroad Lithuanian citizens must notify the Civil Registry Office of this fact. In this case, a foreign civil registry act is being recorded in Lithuanian Civil Registry Office according to the Rules on Registration of Civil Status. The Civil Registry Office can refuse to record foreign civil status act if it would be contrary to public policy order.

If the child was born to Lithuanian nationals or one Lithuanian national abroad and this fact was not registered in a proper foreign institution, it can be registered in Lithuanian Civil Registry Office. In such a case, the Rules on Registration of Civil Status require a person to submit a document, issued by the foreign health care or the other responsible institution, which contains name of the mother of the child and place and date of the birth of a child. This means, that in case, where there is no foreign birth certificate the mother of the child will be the surrogate mother. In this case birth of the child could be registered in Lithuanian Civil Registry Office only if the mother or the father (or both) is Lithuanian national. The father of the child in this case could be a man who recognized the child or the husband (or in some cases – former husband) of the mother.

Birth registered in a foreign state is recorded in the birth record. The data on the child and his or her parents in the birth record are transcribed from a document issued by a foreign authority confirming registration of the birth. If the document does not contain the data regarding the father of the child, civil registry officer enters the data in accordance with the Lithuanian Civil Code, including conflict-of-law rules.

The Civil Registry Office does not check whether the data in the foreign certificate is correct or not. Despite the fact, that the Office has a possibility to check if record of the foreign certificate complies with the public policy order, it uses it only in exceptional cases when the contradiction is obvious. Usually this applies to

[66] The Law of the Republic of Lithuania on Registration of Civil Status of 3 December 2015, Law No. XII-2111.

[67] The Order of the Minister of Justice of the Republic of Lithuania on the approval of the Rules on Registration of Civil Status and forms of the civil registry acts and other documents of 28 December 2016, Order No. 1R-334.

the issue of names. Pursuant to the Lithuanian law, names of Lithuanian national shall be written in accordance with the rules of Lithuanian language. It means, for instance, that letters that do not exist in Lithuanian alphabet cannot be used. This practice is rooted in several decisions issued by the Constitutional Court and the Supreme Court of the Republic of Lithuania. Nevertheless, according to the newest case law all the records from the foreign civil status documents are being rewritten by the Lithuanian authorities without making any changes in them. This leads to a conclusion, that if according to the foreign birth certificate the parents of the child are intended parents, this will be also recorded in Lithuanian civil registration. If, according to the foreign birth certificate, the mother of the child is a surrogate mother – the same data will be recorder in Lithuanian registration. In other words, the transcription of the foreign act on civil status is rather automatic and does not require neither determination of an applicable law or a check of the accuracy of the information that is recorded in a foreign document. As far, there is no real practice regarding transcription of the foreign birth certificate of the child born to surrogate.

3.2.2. Latvia

Registration of a civil status in Latvia is regulated by the Law on Registration of the Civil Status Documents of 2012[68] and the Regulations on Registers of Civil Status Documents.[69] According to the Article 35 para. 3 of the Law on Registration of the Civil Status Documents, at the request of the interested person the registrar enters into the birth registry about the birth that was registered abroad. The laws do not specify further procedures in this regard. The abovementioned law allows to refuse registration of the civil status document if it is in contradiction with this Law or the other laws (Article 4 para. 1 (1)).

3.2.3. Estonia

Upon arrival to Estonia registration of the child is required. It is worth mentioning that birth of a child is registered in Estonia, if the child is born in Estonia, the residence of a parent of the child is in Estonia or a parent of the child is an Estonian

[68] The Law on Registration of Civil Status Documents of 21 November 2012, "Latvija Vestnesis" 197 (4800), 14 December 2012.

[69] The Cabinet of Ministers Regulations on Registers of Civil Status Documents of 3 September 2013, Regulations no. 761, "Latvija Vestnesis" 181 (4987), 17 September 2013.

citizen (§ 21 (1) of the Vital Statistics Registration Act).[70] In accordance with the § 33 of the Population Register Act: "Upon the preparation of a person's status as the subject of the population register, data on the person prescribed in subsections 24 (2)[71], (3)[72] or (4)[73] accordingly and subsection 24 (5)[74] of this Act shall be entered in the population register if: 1) a medical birth certificate is prepared concerning a new-born child or foundling […]." If the birth of a child is already registered in a foreign state, it is not registered in Estonia (§ 21 (1) of the Vital Statistics Registration Act). In order to enter the data about the birth of the child to the Population Registry in Estonia it is required to present documents in Estonian, Russian or English[75] legalized and with an apostille. This requirement (legalization, apostille) does not apply to documents issued in Latvia, Lithuania, Poland, Russian Federation, and Ukraine. The data can be registered in the local municipality, Tallinn Vital Statistics Office or Estonian Consulate abroad. In practice when registering a child in Estonia if in the birth certificate it is stipulated that the mother is an Estonian citizen, then the procedure is straightforward, and there are no legal grounds to deny inscription to the Population Registry.

In accordance with the § 26 (1) of the Population Register Act:[76] "The source documents for entering data in the population register are: 1) medical birth certificates; 2) birth registration; 2^1) birth entries." The § 32 (1) of the Population Register

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[70] Vital Statistics Registration Act of 20 May 2009 (entered into force on 1 July 2010, partially on 22 June 2009), RT I 2009, 30, 177, https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/525062018017/consolide (last accessed: 14 July 2018).

[71] § 24 (2) Population Register Act:
Data on a new-born child are:
1) sex;
2) date of birth;
3) personal identification code;
4) data specified in clauses 21 (1) 1)–10) of this Act on the mother of the new-born child or a reference to the mother's data in the population register.

[72] § 24 (3) Data on a foundling.

[73] § 24 (4) Data on an applicant for a residence permit or right of residence.

[74] § 24 (5) All data specified in §§ 21 and 22 of this Act collected on a person specified in clause (1) 4) of this section shall be entered in the register among the data on the person preparing the status of the subject of the population register.

[75] Ministry of the Interior, *Kuidas registreerida lapse sünd*, https://www.siseministeerium.ee/sites/default/files/dokumendid/synniregister_voldik_2011.pdf (last accessed: 14 July 2018).

[76] Population Register Act of 31 May 2000 (entered into force on 1 August 2000, partially on 1 January 2001), RT I 2000, 50, 317, https://www.riigiteataja.ee/en/eli/525062018015/consolide (last accessed: 14 July 2018).

Act stipulates that: "A person is registered in the population register as a subject if an Estonian Vital Statistics Office has registered his or her birth pursuant to the Vital Statistics Registration Act or if at least data provided for in clauses 21 (1) 1)–9) of this Act are collected in the population register concerning the person and: 1) data of a document certifying the birth of the person are entered in the population register and Estonian citizenship is entered in the population register as the data on the citizenship of at least one of his or her parents […]." Pursuant to the § 21 of the Population Register Act the personal data to be entered in the Population Register are: 1) surname or surnames; 2) given name or given names; 3) sex; 4) date of birth; 5) data on the place of birth (according to the administrative-territorial division valid at the time of birth); 6) personal identification code; 6^1) personal identification code of a foreign state upon existence thereof; 7) data on citizenship; 8) existence and term of an alien's residence permit and work permit or right of residence; 8^1) existence and validity of e-residency[77]; 9) data on residence; 9^1) contact details.

In accordance with the § 42 of the Population Register Act: "(1) The residential address of the mother of a new-born child entered in the population register shall be entered in the population register as the residential address of the new-born child together with the data of the medical birth certificate or birth entry." If the mother does not have a place of residence in the state registry – the address is not entered.

3.3. Nationality of the child

The Baltic States have introduced acquisition of their citizenships in the following legal acts:

a) the Law on Citizenship in Lithuania[78];
b) the Citizenship Law in Latvia[79];
c) the Citizenship Act in Estonia.[80]

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[77] RT I, 31.12.2015, 31 (entered into force on 1 January 2016) (last accessed: 11 July 2018).

[78] The Law of the Republic of Lithuania on Citizenship of 2 December 2010, Law No. XI-1196.

[79] Citizenship Law of July 21 1994, https://likumi.lv/ta/en/en/id/57512-citizenship-law (accessed: 11 July 2018).

[80] Citizenship Act of 19 January 1995 (entered into force on 1 April 1995), RT I 1995, 12, 122, https://www.riigiteataja.ee/en/eli/513012017001/consolide (accessed: 11 July 2018). The Estonian citizenship is also acquired in accordance with the § 5 (21): "At the written application of an adoptive parent who is an Estonian citizen, by decision of the governmental authority authorized by the Government of the Republic, a minor alien child is deemed to have acquired Estonian citizenship by

Pursuant to the provisions of these regulations[81] citizenship is acquired by birth by: 1) a child at least one of whose parents holds citizenship at the time of the birth of the child, regardless whether it was born on the territory of the State or abroad; b) any child who is born after the death of his or her father who, at the time of his death, held citizenship. Thus, the child receives citizenship if at least one of the parents is or was (if died) citizen of the relevant state. Moreover, the citizenship of the child shall be recorded in the document certifying the child's birth. Thus, to prove citizenship of the child is sufficient to prove that one of the parents is or was (if died) citizen of the state. This means, that in case if in the birth certificate a surrogate mother is entered as the mother and she is not a citizen of Lithuania, Latvia or Estonia, this does not preclude for the child to obtain Lithuanian, Latvian or Estonian citizenship.

A procedure under which the Office of Citizenship and Migration Affairs in Latvia accepts and examines applications and registers a child born abroad as a citizen of Latvia is established by the Cabinet Regulation on Procedure for Registering a Person as a Citizen of Latvia of September 24, 2013.[82] The documents required for citizenship are: a) application with indication of the child's name and surname in Latvian, date of birth, ethnicity; place of residence, contact information; b) a document confirming the birth of a child (a birth certificate or an extract from the Birth Register); c) personal identification document of a parent or both parents; d) personal identification document of a child (if any). A document confirming the birth of a child should be translated into the official language (except for the documents in English, German, French or Russian) and legalized pursuant to the procedure established by law. Legalization of the document is not required for public documents issued in Member States of the European Union, Member States of the European Economic Area or the Swiss Confederation and intended for use in Latvia. This also applies to the countries Latvia has entered into bilateral agreements on legal assistance in civil, family and criminal matters (Belarus, Kirghizstan, Russia, Moldova, Ukraine, and Uzbekistan). The documents are submitted to the following

birth, provided the adoptive parent was an Estonian citizen at the time of the birth of the child." This provision entered into force on 1 January 2016, RT I, 3 February 2015.

[81] Article 14 of the Law on Citizenship, article 2 (1) of the Latvian Citizenship Law, § 5 (1) of the Estonia Citizenship Act.

[82] The Information is from the Internet page of the Office of Citizenship and Migration Affairs of the Ministry of Interior of Republic of Latvia: http://www.pmlp.gov.lv/en/home/services/citizenship/registration-if-citizenship/registration-of-citizenship-of-a-child-born-abroad.html (last accessed: 11 July 2018).

institutions: 1) the Office of Citizenship and Migration Affairs (in person or by post) or 2) the Embassy or Consulate of Latvia. A decision on granting citizenship, updating data in the Population Register and assigning an identity number or refusal to grant citizenship is taken within one month from the day the Office of Citizenship and Migration Affairs receives all the necessary documents. The procedures of the citizenship acquisition are similar in Estonia and Lithuania.

4. Discussions on surrogacy issues in the Baltic States

The impulse to start discussions about surrogacy agreements was common in the Baltic States, namely it referred to their regulation in the relevant legal acts. The legislators were aware of the issue and the fact that it can raise some uncertainties in the future. The discussions started in late 90-ties and they their results were as follows:

a) in Lithuania, at the time when the civil code was being drafted the legislator was sure that surrogacy had to be prohibited and proposed to include into a civil code a very strict rule in this regard. However, these provisions met the same fate as the other provisions related to assisted reproductive technologies, they were considered too controversial to be included in the code. This issue was raised again during the works on a new law on assisted fertilization. Initially legislator planned to include only a prohibition of the commercial surrogacy, but later it was decided to prohibit any civil transactions related to surrogacy. The need to prohibit surrogacy arrangements was obvious to the legislator, thus there were no deeper discussions in this regard.
b) in Latvia, there was no certainty that surrogacy need to be prohibited, as mentioned above – it can be noticed when analyzing the draft law on the Sexual and Reproductive Health from 2000 included detailed regulation about surrogacy arrangements. The final version of the law does not contain this provision, because ethical and religious grounds, as well as arguments that surrogacy leads to human trafficking prevailed.[83] This did not nevertheless lead to criminalization of surrogacy.

[83] В. Стиебре, *Почему в Латвии запрещено суррогатное материнство?*, "Press", 30 July 2015, No. 30, http://press.lv/post/pochemu-v-latvii-zapreshheno-surrogatnoe-materinstvo/(last accessed: 20 July 2018).

c) in Estonia, the intention to prohibit surrogacy was explicitly expressed by introducing the AIEPA and amendments to the binding Criminal Code in 1997. The consideration about psychological and physical connection between a surrogate mother and a child were important in the discussion, though the decisive factor to take this approach was to prevent human trafficking.

Discussions about surrogacy arrangements in Lithuania and Latvia are very limited. The Lithuanian and Latvian legal doctrines also do not devote too much attention to this issue. Usually, questions regarding surrogacy arrangements are only raised within a broader topic, for instance while speaking about family law or assisted reproductive technologies. For instance, researchers of the Research Custer of the Vytautas Magnus University in Kaunas (Lithuania) "Human Relations in Bioethics" represent surrogate motherhood as an ethical problem of the assisted reproductive technologies.[84] Public discussions in this regard are also seldom, though are often accompanied with reference to the demographic situation and decrease of population in these states. The articles in press mostly refer to foreign practices regarding surrogacy.[85]

Unlike in Lithuania and Latvia, in Estonia the discussion about the surrogacy and its legalisation were resumed approximately in 2008, when it was questioned if the prohibition of surrogacy violated fundamental rights, namely if becoming a mother constituted such right. The surrogacy was analyzed in Estonia as a fundamental right by the Chancellor of Justice.[86] There was an application lodged in 2009 to the Chancellor of Justice that claimed violation of fundamental rights when surrogacy is not allowed in Estonia for a person who for medical reasons cannot carry pregnancy to term. The application was made by a woman, who could not carry pregnancy to term for medical reasons, but had proper ovum reproduction. The Chancellor of Justice received a question: why the surrogacy is prohibited in Estonia and if in exceptional cases it is possible to apply for a special permission to carry out the relevant procedure.[87] The main question was if the AIEPA in conjunction with the Penal Code provision about surrogacy allows women who are not able to

[84] Surrogacy is on the list of ethical problems related to ART: http://bioetika.lt/nevaisingumas/dirbtinio-apvaisinimo-etines-problemos/ (last accessed: 29 July 2018).

[85] *Neįtikėtina: už vienos organo nuomą – tūkstančiai dolerių*, 20 April 2016; http://www.technologijos.lt/n/mokslas/zmogus_ir_medicina/S-54354 (last accessed: 29 July 2018).

[86] The Chancellor of Justice: http://www.oiguskantsler.ee/ (last accessed: 14 July 2018).

[87] Surrogacy admissibility case No. 6–1/090998.

carry pregnancy to term to fulfill their right to self-realization in accordance with the § 19 (1) of the Constitution and right to family in accordance with the § 27 (1) of the Constitution. The Chancellor of Justice turned with the question to the Minister of Social Affairs and Minister of Justice. The Minister of Social Affairs agreed that the surrogacy could be allowed for medical reasons. The Minister of Justice also expressed an opinion that the prohibition in the Penal Code is not fully justified, and needs further in-depth analysis.[88] The Estonian Council on Bioethics made an expert assessment and concluded that the only possible solution for the applicant to have a child was surrogacy.

The Chancellor of Justice in his opinion states that limitation of getting a child for certain medical problems for a woman might significantly violate the constitutional right of self-realization (§ 19 of the Constitution)[89] and the right to full family life (§ 27 of the Constitution). Additionally, the Chancellor of Justice mentioned that the current law treats unequally women who are unable to become pregnant and women who are unable to carry pregnancy to term[90]. According to the AIEPA, oocyte donation and infertility treatment are permitted, thus, women who are unable to fertilize have the opportunity to get a child through biomedical interventions. The procedure is also covered by the state, pursuant to the § 35^1 of this Act, the Health Insurance Fund[91] compensates medical and other expenses related to artificial insemination. The women who cannot carry pregnancy to term do not have such a possibility in accordance with the current legislation. The conclusion was to continue discussion about surrogacy regulation. There was no legal development of the matter since then. It should be noticed that the Chancellor of Justice when considering the rights of the woman who want to have a child, did not perform an analysis of the rights of the potential surrogate mother.[92] The current regulation also violates the rights of women who want to become surrogate mothers. Surrogacy is only possible, when there are women who want to become surrogate mothers. The obligation of the State is not to evaluate moral and ethical reasons, but create

[88] *Õiguskantsleri 2009. aasta tegevuse ülevaade*, Tallinn 2010, http://www.oiguskantsler.ee/sites/default/files/6iguskantsleri_2009._aasta_tegevuse_ylevaade_0.pdf (last accessed: 5 July 2018).

[89] Constitution of the Republic of Estonia of 28 June 1992 (entered into force on 3 July 1992), RT 1992, 26, 349, https://www.riigiteataja.ee/en/eli/530102013003/consolide (last accessed: 11 June 2018).

[90] L. Oja, *op. cit.*, p. 2.

[91] Estonian Health Insurance Fund Act of 14 June 2000 (entered into force on 1 October 2000), RT I 2000, 57, 374, https://www.riigiteataja.ee/en/eli/502042014001/consolide (last accessed: 14 July 2018).

[92] L. Oja, *op. cit.*, p. 2.

conditions for the women to free-realization, e.g., to make free decisions about their bodies and use of reproductive function.[93] The legislator must ensure that a woman who makes such decision is informed and not forced into surrogacy – indirectly or directly – and her health and fundamental rights are protected.[94] In accordance with the § 10 of the AIEPA the compulsory medical and legal counseling for artificial insemination is provided for a woman. This provision could be a sample for future surrogacy regulation.[95] The problem is still discussed, though there is no change in the legislation.[96] It should be mentioned that there was no such analysis or related discussion in Latvia and Lithuania.

There are different parties involved in discussion about surrogacy in the Baltic States, the most relevant stakeholders are medical specialists, representatives of Churches and politicians. For example, in Estonia these are the Estonian Association of Gynecologists, the Estonian Council of Churches, the Estonian Council on Bioethics, Tartu University Hospital, the Ministry of Social Affairs, practicing gynecologists, Social Ministry and Interior Ministry representatives, Social Affairs Committee of the Parliament, and representatives of various parties in the Parliament.[97]

In the discussions about regulation of the surrogacy in the Baltic States, it is stated that the process comprises of two stages: 1) various elements of surrogacy (*ex-ante*) and 2) parental rights (*ex-post*). Both stages need regulation. There is no place for black-and-white or extreme choices, when regulating the surrogacy.[98] The choice is also not between the complete admission or prohibition of surrogacy. The main issues that the parties to surrogacy discussions define as problematic and that require regulation are the following:

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[93] Idem., p. 2. These arguments were also discussed earlier in the Latvian press: *Суррогатное материнство в Латвии*, "Delfi" 22.12.2003, http://rus.delfi.lv/archive/surrogatnoe-materinstvo-v-latvii.d?id=7079673&all=true (last accessed: 11 July 2018).

[94] K. Lubja, *op. cit.*, p. 26.

[95] L. Oja, *op. cit.*, p. 2.

[96] A. Ammas, *Kas Eestis võiks olla asendusemadus lubatud?*, "Postimees", 14 January 2012, http://www.naine24.ee/702438/kas-eestis-voiks-olla-asendusemadus-lubatud/?redir= (last accessed: 11 July 2018).

[97] Riigikogu pressiteenistus, *Rahvastikukriisi lahendamise probleemkomisjonis on kõne all asendusemadus*, "Pressiteated", 5 June 2017, https://www.riigikogu.ee/pressiteated/probleemkomisjon-rahvastikukriisi-lahendamiseks-2/rahvastikukriisi-lahendamise-probleemkomisjonis-kone-asendusemadus/ (last accessed: 11 July 2018); *Estonia mulls legalising surrogacy on certain conditions*, "The Baltic Course", 19 October 2015, http://www.baltic-course.com/eng/legislation/?doc=111835 (last accessed: 11 July 2018).

[98] L. Oja, *op. cit.*, p. 4.

a) only medical reasons as a ground to allow surrogacy;
b) altruistic or compensated surrogacy;
c) relationship between a surrogate mother and a couple who wants children;
d) relationship between a surrogate mother and a child.

In 2012–2017, the discussion about the surrogacy was reassumed in Estonia and it is worth presenting some of the opinions, as they indicate the main problems that require solution, before any regulation of surrogacy is possible in Estonia, and also as per analogy in Latvia and Lithuania.

Made Laanpere, head of the Estonian Association of Gynecologists (EAG), asserts that surrogacy brings a lot of risks, and therefore should be allowed only for medical reasons, and social indications should not become an acceptable practice. There could be nearly 3–5 percent of women in Estonia who cannot have children because of various pathologies of the uterus[99]. According to the calculations of the AEG upon legalization of surrogacy for medical reasons, with assistance of surrogate motherhood 2.8 children per year could be born. The surrogacy in Estonia would not affect a lot of families[100], but when population of Estonia decreases regularization and allowing surrogacy might be a solution to the problem. Though in practice there will be not more than ten cases of surrogacy a year.[101] Made Laanpere suggests that the surrogacy should be authorized by the independent committee, and not only by a clinic conducting fertility treatment. The same opinion is expressed by the gynecologist Andrei Sõritsa, who believe that a woman should receive a permission from the Estonian Council on Bioethics and then from the Ministry of Social Affairs.[102] The EAG believes that the surrogacy should not become a commercial activity and exclude any coercion and exploitation of persons. Preferably, surrogate mother is a person close to the family who want to have a child.

[99] *Estonia mulls*, *op. cit.*; T. Oja, *Dr Made Laanmere: asendusemaduse täielik keelamine ja täielik lubamine soodustavad mõlemad inimkaubandust*, "Pealinn", 6 June 2017, http://www.pealinn.ee/tagid/koik/dr-made-laanmere-asendusemaduse-taielik-keelamine-ja-taielik-n195129 (last accessed: 14 July 2018).

[100] M. Mäekivi, H. Mihelson, *Riigikogu arutles juba mitmendat korda asendusemaduse üle*, "Postimees", 5 July 2017, https://www.postimees.ee/4135199/riigikogu-arutles-juba-mitmendat-korda-asendusemaduse-ule (last accessed: 14 June 2018).

[101] K.-R. Tigasson, *op. cit*.

[102] A.E. Vaher, M. Skuin, *Andrei Sõritsa*, *op. cit*.

The EAG support surrogacy legalization and indicates that the essential requirements for surrogacy are the following:[103]

1. surrogate motherhood is only allowed for medical reasons;
2. preferred is a total surrogate motherhood (e.g. surrogate mother does not have genetic link with future child);
3. in case of IVF, the probability of multiple pregnancy should be minimized;
4. surrogacy is only allowed upon approval of an application with enclosed medical extracts submitted by intended parents;
5. pre-conception planning is preceded by extensive counseling, the intended parents and a surrogate mother must be counseled separately. The consent of the intended parents and the surrogate mother consent should be in writing. It must be agreed what will be done with the rest of the embryos. Counseling should also be ensured during pregnancy and after giving birth;
6. surrogate mother's autonomy (the right to take independent decisions about her body) is respected in every stage of the process. Her decisions may be in conflict with the ones of the intended parents;
7. surrogacy should not become a commercial activity. The commercial use and coercion of surrogate mother should be avoided;
8. surrogate mother should preferably be a close person, who performs this role based on altruistic motivation. Coverage of direct costs related to pregnancy is allowed;
9. surrogate mother must be healthy, fertile woman (until age of 50) of childbearing age. Previously, it is necessary to assess her state of health and possible pregnancy-related risks.

The Estonian Council of Churches does not support regulation of surrogacy for ethical reasons, because it consciously and deliberately breaks the relationship between a mother and a child.[104] However, a study from 2016, conducted in the countries where surrogacy is allowed for medical reasons, shows that there is no difference in mental and physical development of children born through surrogacy

[103] Eesti Naistearstide Selts, *Asendusemadus* (2012), https://www.ens.ee/ens-seisukohad (last accessed: 2 July 2018); K. Ibrus, *op. cit.*; M. Laanpere, T. Loonet, *Made Laanpere: naistearstid toetavad asendusemaduse seadustamist*, "Postimees", 5 October 2012, https://arvamus.postimees.ee/997164/made-laanpere-naistearstid-toetavad-asendusemaduse-seadustamist (last accessed: 14 July 2018); M. Mäekivi, H. Mihelson, *op. cit*.

[104] See also: M. Laanpere, T. Loonet, *op. cit*.

and other artificial insemination methods.[105] Pastor Meego Remmel states that prohibition of surrogacy allows to prevent "sale of human body." In the opinion of the EAG an absolute prohibition or full legalization of surrogacy, without any restrictions, can give impetus to human trafficking.[106] The same problem with the legalization of surrogacy is foreseen by the Conservative People's Party of Estonia.[107] The Chairman of the Social Affairs Committee Aivar Kokk believes that an absolute prohibition of surrogacy constitutes violation of fundamental rights to have children[108], but this does not preclude the State from finding opportunities to regulate surrogacy by setting up boundaries.[109] The surrogacy should therefore be precisely regulated, indicating the rights and obligations of the surrogate mother, the future mother who cannot carry pregnancy to term and the father, the child and doctors. Almost all the parties agree that the surrogacy could only be allowed for medical reasons, as well as that it could be acceptable if the motivation is altruistic.[110] The compensation for surrogacy should be fair, covering all the medical and related expenses. Even in cases when it is done based on altruistic vocation of a woman, also when it is a close relation of the couple, one should consider fair remuneration due to the loss of salary[111] and possible promotion at work.

5. Conclusions

There is no regulation of surrogacy arrangements in the Baltic States now, and it is unlikely that it will be introduced in the foreseeable future. Prohibition is an easier solution, because there is no need to solve various problems, and it also allows minimizing potential costs related to implementation of the complex regulation. The discussion of the problem is not of the same intense in all the States, though

[105] M. Mäekivi, H. Mihelson, *op. cit.*

[106] T. Oja, *op. cit*.

[107] J. Madison, *op. cit*.

[108] *Estonia mulls*, *op. cit.*

[109] L. Oja, *op.cit.*, p. 4.

[110] K.-R. Tigasson, *op. cit.*; A.E. Vaher, M. Skuin, *Andrei Sõritsa…*; A. Soosaar, A. Raun, *Andres Soosaar: asendusemadusega tekib keerukas sotsiaalne kooslus*, "Postimees", 5 October 2012, https://arvamus.postimees.ee/995828/andres-soosaar-asendusemadusega-tekib-keerukas-sotsiaalne-kooslus (last accessed: 14 July 2018); S. Kotka-Repinski, *Rahvaarvu tõstmiseks on lahendus*, "Postimees", 6 July 2017, http://w3.ee/openarticle.php?id=2719546&lang=est (last accessed: 14 July 2018).

[111] M. Laanpere, T. Loonet, *op. cit*.

ethical and religious grounds are the most decisive. Potentially the surrogacy could be regulated in already existing law, e.g., the the AIEPA in Estonia[112], the SRHL in Latvia, though it is unlikely that such a change will be enforced in Lithuania. Due to a possibility of entering into surrogacy arrangements abroad and bringing a child to the home country of the intended parents in the Baltic States, the probability of surrogacy regulation in the legal acts is relatively low. The demographic situation in the Baltic States and decrease of population could potentially create an impulse for introducing regulation of surrogacy arrangements. The Baltic States – when considering surrogacy arrangements – could potentially introduce only non-commercial and altruistic surrogacy, as in Belgium, Canada, Holland, Israel and South Africa. The surrogacy arrangements of the commercial nature will not be accepted.

[112] M. Laanpere, *Asendusemadus – Eesti Naistearstide Seltsi vaatenurk*, http://www.infertsupport.eu/wp-content/uploads/2015/10/Laanpere.pdf (last accessed: 14 July 2018).

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Surrogacy and egg donation in Israel: legal arrangements, difficulties, and challenges[1]

1. Background

What makes Israel a superpower of assisted reproduction? Procreation has a central place in Israeli society and culture, and that leads to the intensive use of assisted procreation. A few factors influence this phenomenon, starting with religious and cultural ties to the Biblical commandment to "be fruitful and multiply" (Genesis 1:28), which might be seen as pronatalist positions, and ending with a deep consciousness among the Jewish part of Israeli society of the need for the rehabilitation of the Jewish people after the Holocaust.[2] This goes together with a highly modernized medical system, which provides a growing number of couples and singles with the option to use assisted reproductive technologies (*henceforth*: ART).

Opposite factors, however, that restrain the use of ART are also present. The traditionality of large parts of Israeli society (Jewish and non-Jewish alike), together with the significant power of the religious establishment in both in the political and legal spheres, limit the use of ART, especially when these technologies are required for non-traditional families, such as homosexual couples and singles.

This tension is highly important in framing the nature of ART in Israel. Let us explore it a little bit further. On the one hand, Israel is quite open in permitting a wide range of reproductive technologies and procedures, including some which

[1] This paper is based on chapters 1 and 3 of my book Avishalom Westreich, Assisted Reproduction in Israel: Law, Religion, and Culture (Brill Research Perspectives Series, 2018), with significant updates and revisions (mainly, following the 2018 amendment of the Israeli Embryo Carrying Agreements Law).

[2] See references *infra*, note 7.

are prohibited in many other Western countries. For example, the law permits paid surrogacy;[3] the law permits egg donation, including the combination of egg donation and surrogacy;[4] postmortem sperm retrieval is approved by the Supreme Court, when the process is initiated by the deceased's spouse.[5] Some of these procedures are limited, or completely restricted, in other countries.[6] It seems, when focusing on the permitting aspects, that there are very powerful forces that encourage the Israeli legal and health system to widen the use of assisted reproduction. This is especially so as regards more traditional assisted reproduction procedures. The fact that the Israeli national health insurance funds in vitro fertilization (IVF) procedures for women under 45 is a result of those forces, and a catalyst for widening the use of ART. To demonstrate this: the Israeli media reported that the number of IVF procedures in Israel increased in 2016 by 11% compared to 2015, and by more than 40% compared to 2014.[7] Not surprisingly, the use of IVF in Israel is among the highest in the world.[8]

On the other hand, there are legal restrictions on nontraditional families and general restrictions due to religious considerations. For example, surrogacy is permitted in Israel only for heterosexual couples or single women, while male homosexual

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[3] See: Embryo Carrying Agreements Law (Approval of the Agreement and the Status of the Child), 5756–1996 (*henceforth*: Embryo Carrying Agreements Law), Section 6.

[4] Egg Donation Law, 5770–2010 (*henceforth*: Egg Donation Law), section 6(b).

[5] See: Family Appeal Request 7141/15 Plonit v. Plonit et al. (December 22, 2016) (Heb.) (Isr.).

[6] See, e.g., Jon B. Evans, *Post-mortem Semen Retrieval: A Normative Prescription for Legislation in the United States*, 1 Concordia L. Rev. 133, 136–153 (2016). As regards surrogacy, there is a wide range of approaches among different countries (some of which entirely prohibit this procedure), as discussed in detail by scholars in the current composition.

[7] See: Ido Efrati, "Israel Remains an IVF Paradise as Number of Treatments Rises 11% in 2016," Haaretz, May 11, 2017, http://www.haaretz.com/israel-news/.premium-1.788244 (last accessed: July 4, 2017).

[8] See: Carmel Shalev and Sigal Gooldin, *The Uses and Misuses of In Vitro Fertilization in Israel: Some Sociological and Ethical Considerations*, 12 Nashim: A Journal of Jewish Women's Studies and Gender Issues 151 (2006). On the problematic aspects of this situation, see Yehezkel Margalit, *Scarce Medical Resources – Parenthood at Every Age, In Every Case and Subsidized By the State*?, 9 NETANYA ACAD. L. REV. 191 (2014) (Heb.). For a shorter English version, see Yehezkel Margalit, *Scarce Medical Resources? Procreation Rights in a Jewish and Democratic State* (2011), http://ssrn.com/abstract=1807908 (unpublished manuscript); For a forceful normative argument against the (international) rise of the use of assisted reproduction instead of the adoption of already-born children (both national and international adoption) see Elizabeth Bartholet, *Intergenerational Justice for Children: Restructuring Adoption, Reproduction and Child Welfare Policy*, 8 Law & Ethics Hum. Rights 103 (2014), and the literature cited *id*.

couples who wish to procreate need to use international surrogacy.[9] The law also limits egg donation to a third party who belongs to the same religion as that of the intended parents (although in exceptional cases it is possible to bypass this requirement).[10] Matters of personal status are adjudicated in Israel according to the religion of the parties, and religion and religious status in Israel are culturally meaningful and legally important. Although this legal situation is the subject of debate in Israel, and there are voices that call for change,[11] the legislator did not intend to harm this structure when dealing with ART. Therefore, the legislator retains religious sectarianism. In addition, the legislator emphasizes that the laws that deal with ART would not influence the decisions of marriage and divorce matters, which are made according to religious law, and thereby prevents any apparent conflict.[12]

What, then, is the character of the right to procreate in the Israeli legal system? The complicated, somewhat challenging, situation described above leads to a complex right to procreate. As will be explored in this paper, the right exists, with restrictions, and is subject to a continuing process of expansion. We will discuss this argument through an analysis of these two paradigmatic assisted reproductive technologies: surrogacy and egg donation.

1. Conceptual Matters: Motherhood in Surrogacy and Egg Donation

Before turning to the positive discussion, I would like to explore a few conceptual aspects, as regards the definitions of motherhood in surrogacy and egg donation. As we will see below, this conceptual discussion is not merely theoretical, but rather practically influences the legal-positive discussion, especially in matters related to the intersection of religious law and civil law in ART.

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[9] See: the definition of "intended parents" in the Embryo Carrying Agreements Law, Section 1: "a man and a woman who are a couple." The 2018 amendment of the Embryo Carrying Agreements Law permits surrogacy for single women, so that female homosexual couples can procreate using surrogacy: one spouse would be the intended (formally: single) parent, and the other spouse, the social mother, would be declared mother on the basis of a judicial decree.

[10] See: Egg Donation Law, Section 13(e)(3)(1) and 13(e)(4). Before the 2018 amendment of the Embryo Carrying Agreements Law, there was a similar demand for surrogacy, but it was omitted in the amendment. It is reasonable to assume that similar change would be made to the Egg Donation Law in the near future.

[11] See: Avishalom Westreich & Pinhas Shifman, A Civil Legal Framework for Marriage & Divorce in Israel (Ruth Gavison, ed., Kfir Levy, trans., 2013).

[12] See: Embryo Carrying Agreements Law, section 12(b); Egg Donation Law, Section 42(b).

Israeli law adopts a non-formal (or: intentional-functional) approach regarding the concept of motherhood, that is, defining motherhood according to the context of the case, its circumstances, and, mainly, the intentions of the parties which are reflected in the agreement between them. According to this approach, a child born out of the very same medical process – for example, in vitro fertilization involving two women, a genetic mother (the egg owner) and a gestational mother – could be defined differently, according to the intent of the participants and the agreement between them. In the case of egg donation, the mother will be the gestational mother; while in a case of surrogacy, the mother will be the genetic mother.[13] There is, however, some tendency to viewing the carrying mother as the child's mother, which has consequences for defining motherhood in some exceptional cases: in egg donation, the gestational mother is immediately (right after birth) considered as the legal mother of the child. In surrogacy, on the other hand, the egg owner's motherhood depends on a parenthood decree given by the court, and if there is a significant change in the circumstances, the surrogate mother has the option to rescind her agreement and keep the child, even against the surrogacy contract.[14] The partial bias in favor of the carrying mother may be a result of one or more of the following reasons: first, the practical fact that the child is in the "hands" of the carrying mother (who gave birth of him or her), which leads to the need for an active legal and physical act of giving the child to the genetic mother; second, a (natural?) substantive tendency towards defining the carrying mother as the child's mother; third, the influence of Jewish law's dominant view, at least at the time those laws were enacted.[15] In any event, this inclination does not change the picture as a whole: the definition of motherhood is still very flexible, and is dependent on the reality and the legal circumstances, so that in most cases (and this is encouraged by the law), the agreements between the parties and their intentions is the definitive, or at least dominant, element in defining who is the child's mother.[16] Functional motherhood,

[13] See: Egg Donation Law, section 42a; Embryo Carrying Agreements Law, section 11. It should be noted that basing parenthood on the intention of the parties was proposed by Pinhas Shifman a few years before the enactment of these laws. See Pinhas Shifman, Family Law in Israel 2, 131–33 (1989).

[14] See: Egg Donation Law, *ibid*; Embryo Carrying Agreements Law, sections 11–14. For an analysis of this difference, and a proposal for an alternative relational theory for family relations, see Ruth Zafran, *The Family in the Genetic Era – Defining Parenthood in Families Created Through Assisted Reproduction Technologies as a Test Case*, 2 Din Udvarim 223, 265–68 (2005) (Heb.).

[15] But Jewish law's view on motherhood was changed, as will be discussed below.

[16] Interestingly, according to a 2013 family court decision (whose view seems to be accepted by the state, that did not appeal) in an international surrogacy (when the surrogate mother does not

thus, is the best definition of the attitude of Israeli law towards children born by assisted reproductive technologies.

Israeli civil law does not adopt a substantive view of parenthood (and in particular, in surrogacy and egg donation cases, of motherhood), that is, a view which coherently follows either the genetic connections or the physical ones. As we have seen, in a surrogacy agreement the mother will be the genetic mother, while in an egg donation the mother will be the carrying mother. But civil law's functionalist approach does not only depend on the circumstances of the case, but it also takes into account legal-policy considerations, that is, the view of Jewish law in the matter discussed. From this respect, I would define civil law's approach as "considerate functionalism." We will now explore this idea.

Jewish law influences Israeli civil law. This is not an innovative statement; we see this in many aspects related to family law. In important family law aspects, religious law is the binding law in Israel,[17] although not in all aspects – monetary matters for example, are adjudicated according to civil law (that is applicable to all), rather than personal law. Religious law, however, is the positive source of law for core marriage and divorce matters. The religious affiliation of Israeli civilians, thus, is highly important in determining the law in family matters and personal status issues.[18]

In other aspects of Israeli law, the law is basically civil, but from time to time the legislator takes into account, in varying degree, the position of religious law. For example, outside of family law, Israeli law defines death as brain death for the purpose of organ donation.[19] The law was legislated after consultation with and

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have any connection to her child, neither by her intention nor by the local law), the court can declare the (Israeli) egg owner as the child's mother based on a judicial decree, and there is no need for the formal process of a motherhood decree (see Family Court File [Tel Aviv] 21170-07-12 *Ploni and Almonit v. Attorney General*). This is a result of the fact that Israeli law regulates only local surrogacy, and (still) keeps silent regarding international surrogacy; see Yehezkel Margalit, *From Baby M to Baby M(anji): Regulating International Surrogacy Agreements*, 24 J.L. & Pol'y 41, 87–89 (2015). Accordingly, slightly different than the bias in favor of the carrying mother described above, the status of the genetic mother in this case is stronger than that of the surrogate, but this is due to the social and legal context of the case: international, not regulated and unsupervised, surrogacy, which removes the surrogate mother from the picture. It is undoubtedly problematic, and many (including the court in that case) consistently call for legislation on this matter, as well.

[17] See: Rabbinical Courts Jurisdiction Law (Marriage and Divorce), 5713–1953, sections 1–2.

[18] This arrangement is, in fact, an extension of the status quo that existed in British Mandate Palestine, which itself evolved from the Ottoman Empire's Millet legal codes, dating back to the nineteenth century. Despite significant calls for change, and the important process of change brought about by judicial activism, it basically is still binding today. See Westreich and Shifman, *supra*, note 10.

[19] See: section 2 of the Brain-Respiratory Death Law, 5768–2008.

with the agreement of several Jewish law authorities (although others dispute it), so that religious persons would be able to participate in the highly important project of organ donation.[20]

Similarly, in our case, although the biding law is civil law, the civil legislator takes into account the position of Jewish law. Jewish law is often viewed as taking a substantive approach regarding motherhood.[21] Within this approach, however, the decisors debate whether Jewish law follows the genetic connections, in which case the child's mother is the egg owner, or a biological-physical connection, and, consequently, the child's mother will be the carrying mother. We find various approaches on this matter: some decisors argue in favor of the first, some in favor of the second, and others (often due to their doubt regarding the identity of the mother) – argue for both, or for none.[22] But in any event, the arguments are usually substantive, and if one adopts a particular view, it will be applied to all relevant legal areas and all cases. In this respect, although there is no final decision, we can identify the dominant trend among many, if not the majority, of Jewish law decisors. Rabbi Dr. Mordechai Halperin claims that in the past, most decisors have defined the carrying mother as the child's mother, while today, many of them rule in favor of the genetic one.[23] This is reflected, for example, in the unequivocal decision of the former Israeli Chief Rabbi, Shlomo Amar, that the genetic mother is considered the child's mother for all halakhic matters. Rabbi Amar based this ruling, *inter alia*, on a decision by Rabbi Ovadiah Yosef, who was considered the most prominent and leading Jewish law decisor at the turn of the twenty-first century, especially (but not exclusively) for Sephardic Jewry (died 2013).[24] Others, however, are still in doubt,[25] but in any event, *prima facie* all adopt a substantive approach towards parenthood concepts.

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[20] On the definition of the moment of death and the debate concerning brain death, see: Avraham Steinberg & Fred Rosner, Encyclopedia of Jewish Medical Ethics, 695–711 (2003).

[21] For challenging this approach see: Avishalom Westreich, *Changing Motherhood Paradigms: Jewish Law, Civil Law, and Society*, 28 Hastings Women's L.J. 97 (2017).

[22] For a broad discussion and references, see: Mordechai Halperin, Medicine, Nature and Halacha, pp. 278–98 (2011) (Heb.).

[23] *Id.*, pp. 294–95.

[24] See: a response by Rabbi Shlomo Amar to Prof. Richard V. Grazi (the Director of the Division of Reproductive Endocrinology at Maimonides Medical Center, Brooklyn, NY), *Laws of Pedigree When the Mother Is a Non-Jew,* pp. 87–88; Assia, pp. 100, 100–102 (2010) (Heb.).

[25] This was argued even regarding the view of Rabbi Ovadiah Yosef (in contrast with Rabbi Amar's claim that he decided in favor of the genetic mother); see Rabbi Aryeh Katz, *The Parentage of the Embryo from Egg Donation*, pp. 99–100; Assia, pp. 101, 101–6 (2015) (Heb.), according to whom Rabbi Yosef somewhat shifted to preferring the genetic mother, but did not make a final decision. It should be

Israeli civil law takes into consideration the view of Jewish law in defining motherhood. It does so by subordinating its contingent, functional approach to the view of Jewish law in relevant matters. Thus, the law states explicitly that regarding marriage and divorce (issues that in Israel are subject to religious law), its parenthood definitions will not affect the religious laws.[26] Thus, for example, in surrogacy, after a parenthood decree is issued, the genetic mother is defined as the child's mother for all legal and social purposes (including the child being her heir when the time comes), but for marriage and divorce, the surrogate mother may be defined as the child's mother (thus, this child would be prohibited from marrying the surrogate mother's direct relatives), if that would be the decision of the relevant rabbinical court. The opposite case is also possible: in an egg donation case, the child will be legally and socially considered as the couple's child for any parents-child rights and duties. But when the child wishes to get married, the law (which in this case is subject to Jewish law) may view him or her as the egg donor's child, if that would be the dominant view among Jewish law decisors (as some claim that it is today). As is clear from these examples, this is not only a matter of definition; there are several practical consequences of defining the genetic mother as the mother according to Jewish law, mainly, prohibiting the child from marrying his or her mother's direct relatives (although in this case, due to genetic ties, such a marriage would not be recommended anyway, on both societal and medical grounds).

It should be noted that the interaction between civil law and Jewish law regarding artificial procreation is not limited to conceptual definitions and their legal implications. Another aspect of the influence of Jewish law on Israeli civil law is the restrictions due to religious considerations which are imposed on couples and singles who desire assisted procreation. These restrictions limit the available options for assisted procreation, and would be discussed in the next section. In this respect,

noted that Rabbi Prof. David Bleich claims that Halperin's description of the present trend among the majority of halakhic decisors is not accurate. Bleich's own view is that either the carrying mother is the sole mother or both the carrying and the genetic ones are the child's mothers (private conversation at the 8th International Academy for the Study of the Jurisprudence of the Family Symposium on "The Jurisprudence of Family Relations," Ono Academic College, Israel, June 9, 2015).

[26] See: Embryo Carrying Agreements Law, section 12(b); Egg Donation Law, section 42(b). Both laws state that they will not affect the religious laws of marriage and divorce. The Egg Donation Law also adds that it will not affect the authority of the religious courts (in matters of marriage and divorce): "This law shall not harm the instructions of the laws governing marriage and divorce, or the authority of the religious courts."

I would even say that Israeli civil law is not only influenced by but also deferential to Jewish law.

In my opinion, the considerate functionalism of civil law regarding parenthood concepts should be encouraged in order to reconcile these two legal systems. The practical limitations, however, should be discouraged. Those are matters of personal choice (mainly, whether to involve a partner from another religion in the process of procreation), and therefore should be left to the sole discretion of the parties. We will discuss this issue in the next section.

3. Surrogacy and Egg Donation: Restricted Openness

The Israeli legal system was one of the first to regulate egg donation and surrogacy. Progress is made from time to time in modifying those regulations, along with continuing legal and public struggles for their expansion.[27] As mentioned, the current legal arrangements are both open and restricted regarding the use of surrogacy and egg donation due to the very complex, sometimes contradictory, cultural, societal, religious, and legal elements that influence the practice of assisted reproduction.

The Embryo Carrying Agreements Law was, and still is, innovative as regards to providing couples with the very possibility of using surrogacy – even commercial surrogacy – for reproduction. Some Western countries deny this right in its entirety; others limit it to altruistic surrogacy. Similarly, the Egg Donation Law provides couples with the possibility of using ART to procreate by receiving egg donation, including, as mentioned above, the option to combine egg donation and surrogacy. In addition, as part of regulating the procedures of egg donation, the law specifies a fixed compensation that would be paid by the state to the donor.[28]

The Israeli law, in this respect, expands the legitimacy of the use of surrogacy and egg donation. As was mentioned above, several factors underlie this tendency towards expansion. But whatever the explicit or hidden motivations of this phenomenon, the end result is recognition of a relatively wide right to procreate.

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[27] See: Embryo Carrying Agreements Law; Egg Donation Law. The Egg Donation Law was legislated in 2010. The Embryo Carrying Agreements Law was legislated in 1996 and amended in 2010 and in 2018. Both are subject to additional amendment proposals and to court appeals, as will be discussed *infra*.

[28] Egg Donation Law, section 43.

But there are limitations. The law's limitation of the use of assisted reproduction may be divided into three elements: (1) preserving a traditional, heterosexual family structure; (2) ensuring some genetic connection to the intended parents; and (3) protecting religious interests. In connection with these restrictions, the law does not regulate international surrogacy (its regulation is rather based on judicial decisions), so that those who are prevented from surrogacy in Israel, and need international surrogacy, are in a significantly inferior position, comparing to others.

These limitations thus influence the right to procreate in Israeli law, and limit its relatively permissive approach, as will now be discussed.

3.1. Preserving the Traditional, Heterosexual Family Structure

Israeli law is open to assisted reproduction. But, at the same time, it is oriented towards traditional, heterosexual families, while homosexual families cannot use some of the assisted reproduction procedures. The Embryo Carrying Agreements Law unequivocally defines intended parents as: "a man and a woman who are a couple, and who contract with a carrying mother for the purpose of giving birth to a child."[29] Thus, a homosexual couple, as well as single men, cannot contract with a woman in a surrogacy agreement.

It should be noted that other, less complex, assisted reproduction technologies are different in this respect. Single women can conceive using an anonymous sperm donation.[30] Accordingly, a lesbian couple can have children using sperm donations without limitations. Both would be considered mothers: one by giving birth to the child; the other, following a judicial decree that declares her to be a second mother of the child.[31] Indeed, if the couple were to separate, the court would be favorably inclined towards the genetic mother, but even here, there are initial signs of change: positions that recognize the rights of the functional, nonbiological, mother as regards her children in cases of separation (especially when the couple has a few children,

[29] Embryo Carrying Agreements Law, section 1.

[30] See: The Public Commission for the Evaluation of Fertility & Childbirth 33 (2012, Hebrew version available at: http://www.health.gov.il/publicationsfiles/bap2012.pdf) (*henceforth*: Mor-Yosef Commission) (Heb.). The focus of the commission was the possibility of non-anonymous sperm donation (*id.*, at 34–36).

[31] See, e.g., Family Court File 52940-06-16 G.D. and D.P. v. Attorney General (May 22, 2017) (Heb.) (Isr.).

some of whom are the biological children of the first, and others – of the second, and all are siblings of each other).[32]

The 2018 amendment of the Embryo Carrying Agreements Law made another step towards expanding the use of surrogacy: it permitted a single woman to use surrogacy, as long as her ovum is used, so that she is the genetic mother.[33] Single men (and male homosexual couples) are still prevented from surrogacy. This difference led to strong public criticism, due to its apparent discrimination. The Israeli prime minister, Mr. Benjamin Netanyahu, has expressed his wish to change this situation, but (as to September 2018), it has not yet been changed.[34]

The result is that lesbian couples accordingly may establish a nuclear family using ART, and would be recognized as such by the law, as opposed to male homosexual couples. The latter cannot reproduce in Israel using ART, but rather are required to use international surrogacy if they wish to procreate. International surrogacy is a problematic solution by its nature.[35] Moreover, even after international surrogacy was done, and the couple wishes to legalize their status as the child's parents, it cannot be done straightforward. Israeli law does not explicitly recognize the status of the second, non-genetic, spouse, as the father of the child. Truly, in recent year, there is a growing trend among family courts, according to which the second spouse is recognized as the father of the child by a judicial parenthood decree.[36] This practically solves the problem, although it is clearly not a full and equal solution.

Egg donation may also be done by a single woman, as sperm donation. Accordingly, this procedure is relevant for lesbian couples, in which each partner can undergo this process. When the ova are transplanted into the intended mother, the

[32] See: the obiter dictum by Justice Fogelman in Family Appeal Request 4890/14 Plonit v. Plonit (September 2, 2014) (Heb.) (Isr.), section 7: "We cannot say that we cannot recognize joint custody by the members of the same sex of children who were born within the context of this joint relationship."

[33] Embryo Carrying Agreements Law, section 2(2).

[34] See: Jeremy Sharon and Jonathan Weber Rosen, "Gay Couples Denied Right to Surrogacy in New Law," The Jerusalem Post, July 18, 2018, https://www.jpost.com/Israel-News/Surrogacy-bill-passes-Netanyahu-flip-flops-on-homosexual-surrogacy-562810 (last accessed: September 16, 2018).

[35] For the problematic aspects of international surrogacy and proposed solutions, see: Yehezkel Margalit, *From Baby M to Baby M(anji): Regulating International Surrogacy Agreements*, 24 J.L. & Pol'y, pp. 41, 87–89 (2015).

[36] See: Yehezkel Margalit, *Legal Parenthood – Law and Justice*, 47 Hebrew University Law Review 131 (2018) (Heb.). In a recent interesting decision, such a judicial parenthood decree was given 5 years after the birth of the child, when the couple was already separated, what testifies how rooted this practice is. See Family Court File (Tel Aviv) 50078-04-15 G.D. and Y.Y. v. Y.G. (September 5, 2018) (Heb.) (Isr.). Nevertheless, it is still not a full solution, comparing to an explicit state legislation.

Egg Donation Law lists a number of conditions for approving the process, but these conditions are meant to prevent family connections between the genetic father and the genetic mother and to protect religious interests (see below). The law does not demand that the intended mother or father will be part of a formal, traditional family.[37] Therefore, a single woman (or a woman who belongs to a lesbian family unit) may conceive using an egg, which was donated and fertilized by the intended father or by an anonymous sperm donation (that is, in the latter, not necessarily with a genetic connection to either one of the spouses).

The picture is different when the ova are transplanted into a surrogate mother. Here the Egg Donation Law subjects itself to the regulations of the Embryo Carrying Agreements Law, and thereby applies more restrictive rules.[38] The 2018 amendment of the Embryo Carrying Agreements Law permits surrogacy for a single woman only when the fertilized ovum is hers. Accordingly, women who cannot contribute ova (and surely not male homosexual couples) are prevented from using assisted reproduction, when surrogacy is part of the process.

The result is quite odd: the law de facto recognizes the right of single women and lesbian couples to procreate using ART, but does not provide a similar right for male homosexual couples or for women who cannot provide their own ova to procreate using surrogacy. While for single women or lesbian couples procreation is limited only in rare cases, especially after the 2018 amendment, for male homosexual couples this prevents their only way to procreate. This gap has historical roots: the Embryo Carrying Agreements Law was enacted more than 20 years ago, which is a relatively long time, considering the dramatic changes in the family and in family perspectives in recent years, including the status of same-sex couples. But when there was a chance (or necessity) to change it (in the 2018 amendment), it became a result of an intentional policy: limiting the right of male homosexual couples to procreate out of religious considerations or because of conservative approaches. This situation can hardly be justified.

Indeed, the Israeli High Court of Justice (*henceforth*: HCJ) sees this situation as discriminating against homosexual couples. In an obiter dictum, the HCJ explains why it seems to be discriminatory legislation. As Justice Jubran writes:

[37] See: Egg Donation Law, section 13(c)(e)(3).

[38] See: sections 6(b), 11, and 13(a) of the Egg Donation Law.

> I find it difficult to accept the situation in which singles and same-sex couples are prevented from realizing their right to become parents by contracting surrogacy agreements, while this right is afforded to their heterosexual brothers and sisters. A legal arrangement that imparts a right of legal standing to one group, while barring it from another group due to its identity, preferences, tendencies, or lifestyle, is one seen as discriminatory, which can hardly be deemed proper. I myself find no justification for preferring heterosexual parentage to same-sex parentage in general, and especially as regards realizing the right to be a parent, with the range of techniques for its realization.[39]

The HCJ nevertheless did not change this situation, because of a proposed amendment to the Embryo Carrying Agreements Law which was submitted to the Knesset (the Israeli Parliament) and which passed its first vote on July 17, 2017, a couple of weeks before the HCJ issued its decision, on August 3, 2017. The HCJ gave the legislator 6 months to complete the amendment legislation process before subjecting it to judicial review. As Chief Justice Naor writes:

> In the final analysis, although the permission to contract surrogacy agreements is not simple, it would seem that there is no difference between single males or male couples to justify discrimination. To emphasize this once again, this does not establish any rule in these issues. These are merely suppositions. Obviously, the legislator who has these issues before him will have to say his word. To the extent that the legislative processes in the Knesset will not be completed within a reasonable time, the issue will return to this Court, which will discuss it and decide as it sees fit.[40]

On the basis of the proposed legislation, which was in front of the HCJ, the legislator did amend the Embryo Carrying Agreements Law on July 18, 2018 and did expand the right to surrogacy. But that was made only for single women (and, by implication, to lesbian couples when neither of the spouses can become pregnant), which, as mentioned above, can go through a surrogacy agreement. Male

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[39] HCJ 781/15 Itay Arad-Pinkas, Yoav Arad-Pinkas et al. v. The Surrogacy Agreements Approval Committee and the Knesset (August 3, 2017) (Heb.) (Isr.), Justice Jubran's opinion, section 46.

[40] HCJ 781/15 (*supra*, note 38), Chief Justice Naor's opinion, section 6.

homosexual couples, accordingly, were still not provided with the right to use surrogacy. As noted, this amendment was severely criticized in the Israeli media, by LGBTQ groups, and others, and there is a political probability that it would be changed again in the foreseeable future. From a legal perspective, on the basis of the above statements of the High Court of Justice, there is a high probability that if a change would not be made, the HCJ would expand the right to surrogacy to male homosexual couples, either by an activist interpretation of the term "couple" or by striking down the Embryo Carrying Agreement Law as unconstitutional.

As of September 2018, however, the differences between surrogacy and other ARTs still exist: while sperm or egg donation are legally available to a wide spectrum of families, including single parents and homosexuals (when applicable), surrogacy is limited to traditional heterosexual couples, with some expansion to single mothers.

3.2. The Centrality of Genetic Connections

In addition to preserving the classic family structure, the Embryo Carrying Agreements Law requires a genetic tie between the intended parents and the child that will be born. Accordingly, the intended father *must* be the genetic father, while the surrogate mother *need not* be the genetic mother (i.e., full surrogacy, in which the surrogate mother is both the egg owner and gestational mother, is prohibited).[41] The intended mother (in cases of surrogacy for a couple, in which the intended father is the genetic father) *may be* the genetic mother, but this is not necessary, and the fertilized ovum may belong to an egg donor, as long as the intended father is the genetic father.[42] Until the 2018 amendment of the Embryo Carrying Agreements Law, single women could not go through a process of surrogacy. Following the 2018 amendment, that became permissible, as long as the intended mother is the genetic mother (that is, the egg owner).

Single women could receive an egg donation and conceive using sperm donation even before the amendment. In this case, there is no intended father, and the mother – the egg donation receiver – is not the genetic mother, but the fact that she is the carrying mother (or: the physical mother) is sufficient for the purposes

[41] See: Embryo Carrying Agreements Law, section 2(1) – (2).

[42] See: Egg Donation Law, sections 6(b), 11, and 13.

of the law. In surrogacy, as noted, either for couples or for single women, a genetic tie to at least one of the intended parents is required.

The High Court of Justice reviewed the demand for genetic ties in surrogacy, and ruled that it is constitutional.[43] According to the court, there are three relevant ties between the child and the parent in surrogacy: the genetic tie (if the intended mother is the egg owner), the physiological tie (the surrogate mother, whose status will be discussed *infra*), and the spousal connection of the intended mother to the father, who has genetic ties to the child (as in a case of surrogacy which includes egg donation, and requires that the intended father will be the sperm owner).[44] The genetic tie (to the father, to the mother, or to both), therefore, is a crucial element that validates the carrying agreement, which will lead to declaring the child as the intended parents' child.[45] This requirement, according to the HCJ, accords with the object of the Embryo Carrying Agreement Law, which is to provide a limited and supervised option of using surrogacy, together with ensuring the safety of the gestational mother.[46]

This is not to say that Israeli law does not provide singles or couples who can have neither genetic nor physiological ties to the child with the right to become a parent. This right has already been recognized in Israeli law as a human right, which ensues from a wide set of rights: the right to family, the right to autonomy, the right to privacy, and more.[47] Limiting surrogacy, according to the Israeli Supreme Court, does not violate this right, but rather directs the ways of its fulfillment; therefore, those who lack these ties can become parents in alternative ways, such as adoption or parenthood agreements.[48] The demand for genetic ties in surrogacy is thus a relevant demand, and therefore constitutional, as opposed to the distinction between heterosexual and homosexual couples, which was described by the Court

[43] See: HCJ 781/15 (*supra*, note 38), Justice Jubran's opinion, sections 22–44.

[44] Jubran, *id*, based on Justice Hendel's opinion in Family Appeal Request 1118/14 Plonit v. Ministry of Social Affairs and Social Services (April 1, 2015) (Heb.) (Isr.).

[45] *Id*; HCJ 781/15 (*supra*, note 38), Justice Jubran's opinion, section 24.

[46] *Id*, section 39.

[47] See, e.g., CFH 2401/95 Nahmani v. Nahmani et al. (September 12, 1996) (Isr.), http://elyon1.court.gov.il/Files_ENG/95/010/024/z01/95024010.z01.HTM (last accessed: October 16, 2017), section 2 of Chief Justice Barak's dissenting opinion: "From the constitutional viewpoint, of course, we recognize the constitutional liberty to be a parent or not to be a parent. This liberty derives from human dignity and the right to privacy."

[48] HCJ 781/15 (*supra*, note 38), Justice Jubran's opinion, section 43.

as discriminatory (but the Court decided to wait a few months, for the amendment of the law by the legislator, as discussed above).

Genetic parent-child connection, accordingly, has superiority in Israeli law. This, however, does not mean that the law does not recognize alternative parent-child relations. Quite the opposite. Israeli law treats equally various parent-child connections, not only genetic-biological ones. The classic example is, of course, adoption, and other newer ties, such as parenthood by agreement, can be added as well.[49] The outcome, from a conceptual viewpoint, is that the law recognizes alternative parent-child relations, including functional parenthood, psychological parenthood, and other types.[50]

To return to the issue at hand, despite the recognition in Israeli law of alternative parenthood paths, due to the need to limit surrogacy, the Court accepted the argument that surrogacy should be limited to cases in which there is a genetic tie to at least one of the intended parents, while when such ties do not exist, parenthood would be fulfilled using adoption or other parenthood routes recognized by law. In this respect, it is reasonable to assume that the demand for a genetic tie in surrogacy will not be changed in the foreseeable future, as opposed to the limitations that seek to preserve the traditional heterosexual family discussed above.

3.3. Protecting Religious Interests

As already mentioned, Jewish law is a central positive source of family law, and significantly influences Israeli civil law.[51] It is not surprising that the regulation of assisted reproduction takes religious law into consideration due to its centrality in family matters. Both the Embryo Carrying Agreements Law and the Egg Donation Law subject the use of surrogacy and egg donation to various religious considerations. These considerations affect three major areas: parenthood definitions, which will not be discussed here,[52] and two realms of restrictions and limitations: limiting

[49] On different types of parenthood and their financial implications, see, e.g., Ayelet Blecher-Prigat, *From Partnership to Joint-Parenthood: The Financial Implications of the Joint Parenthood Relationship,* 19 Law and Business – IDC L. Rev. 821 (2016) (Heb.).

[50] For further conceptual discussion, see: *infra*, Chapter 4.

[51] See: *supra*, section II.

[52] For the conceptual discussion, see: Avishalom Westreich, *Changing Motherhood Paradigms: Jewish Law, Civil Law, and Society*, 28 Hastings Women's L.J. 97 (2017).

participation in surrogacy and egg donation processes to those of the same religious affiliation, and the imposition of restrictions on the participation of married women as egg donors or surrogate mothers.

Before the 2018 amendment, the Embryo Carrying Agreements Law required that the surrogate mother would belong to the same religion as the intended mother, but in the case of non-Jewish mothers, this clause could be disregarded, with the consent of the religious representative in the surrogacy approval committee.[53] This section was omitted in the amended law, as will be discussed below. It still exists, however, in the Egg Donation Law. The Egg Donation law requires that both donor and recipient will belong to the same religion. The Egg Donation Law does not include the exception of non-Jewish mothers. On the other hand, it does provide "after the fact" legitimacy to bypass it: in the case of a donor whose religious affiliation is different than the intended mother (either Jewish or non-Jewish), if the ova were already taken, the physician in charge should inform the intended parents of the difference in religious affiliation, and receive their written agreement for the process.[54]

Another restriction on surrogacy and egg donation, which is probably motivated by religious considerations, is the demand that the donor or surrogate mother will be unmarried. Here, as well, the 2018 amendment has omitted this demand as regards surrogate mothers, while for egg donors it is still applicable, because of a difference which will be discussed below.

The religious aspect of this demand is the fear of declaring the child as a *mamzer* (frequently translated as bastard). When a married woman commits adultery (as well for some other forbidden unions) the born child might be declared a *mamzer*.[55] Declaring a child a *mamzer* has severe consequences: the *mamzer* is prohibited from marrying a Jewish spouse, although the *mamzer* has other legal, financial, and social rights, such as the right to inherit from his parents. Accordingly, a married woman's involvement in a process of reproducing a child not from her husband might, from a religious perspective, be considered the equivalent of extramarital relations, and the child might be considered a *mamzer*. Although some prominent Jewish law decisors reject this view, since according to many Jewish law decisors one is declared a *mamzer* only when the child was born as a result of a forbidden sexual act, while in surrogacy and egg donation the child was born without the

[53] Embryo Carrying Agreements Law, section 2(5).
[54] Egg Donation Law, section 13(e)(3)(a); 13(e)(4).
[55] See: Maimonides, MISHNEH TORAH, *Issurei Bi'ah* (Forbidden Sexual Relations) 15:1.

commission of adultery (i.e., without a sexual relationship between the surrogate mother and the father),[56] others do indeed take the stringent view.[57] Accordingly, the fear of declaring the child a *mamzer* still exists, and – in order to prevent any possible doubt regarding the proper halakhic status of the child – probably underlies the restrictions on the participation of married women as surrogate mothers (before the 2018 amendment) or egg donors (even today).

The restrictions on the participation of a married surrogate mother or egg donor are, however, not absolute, and the law permits it in certain cases. As mentioned, the amended Embryo Carrying Agreements Law permits it. Even before the amendment, although the law required that the surrogate mother will be unmarried, it permitted the participation of a married surrogate mother if, in the opinion of the approval committee, the intended parents could not, with reasonable effort, find an unmarried surrogate mother.[58] The Egg Donation Law still forbids the participation of a married woman as an egg donor as a general rule, but enables its bypass in a slightly different way (similar to an interfaith egg donation): if the ova were already taken, the responsible physician should inform the intended parents that the donor is married, and receive their written agreement for the process.[59]

As a matter of fact, the enforcement of these restrictions has lessened in recent years, especially as regards surrogacy, even before the amendment. This is so, in my opinion, because of the wide acceptance of the lenient view that does not declare a child to be a *mamzer* even if the child was born by means of ARTs with the participation of a married woman, since, as mentioned above, no actual adultery was committed with her participation.

Another significant permissive step in this direction was taken as a result of a conceptual development, following a dramatic decision by the former Israeli Chief Rabbi, Shlomo Amar. In 2006 Rabbi Amar permitted a couple that was childless after thirteen years of marriage to enter into a surrogacy agreement with a married

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[56] See: Responsa Maharsham, 3:268 (1962); Rabbi Moshe Feinstein, Responsa Iggrot Moshe, *Even Ha-ʾezer* 1:10 (1959).

[57] In the case of sperm donation to a married woman from a man other than her husband, some decisors see it as similar to forbidden relationships, including the possible declaration of the child as a *mamzer*, despite the fact that the wife did not actually commit adultery (as opposed to the lenient approach mentioned above). See, e.g., Rabbi Itshak Y. Weiss, Responsa Minhat Itshak, 4:5 (1993). In our cases as well, this stringent opinion might consider the child a *mamzer* due to the participation of a married woman in the process of giving birth to a child from other than her husband.

[58] Embryo Carrying Agreements Law, section 2(3)(a), before the 2018 amendment.

[59] Egg Donation Law, section 13(e)(4).

surrogate mother.[60] This decision is highly innovative, first, because of the explicit and public permission by a prominent Jewish law decisor to use surrogacy,[61] and second, more importantly, because it overcame the traditional fear of involving a third-party married wife in other family relationships, which, as discussed above, might lead to declaring the child a *mamzer*. Rabbi Amar, after consultation with Rabbi Ovadiah Yosef,[62] ruled that the genetic mother is considered – without doubt – the child's mother. Therefore, a married surrogate mother can participate in the process, and her connections to the child would not be considered motherhood from the Jewish law perspective.

Rabbi Amar emphasized that this is permitted only when other options are not possible, as in this specific case, but the effect of his decision was nevertheless significant and influential. The Knesset Labor, Welfare and Health Committee discussed the case, and, following Rabbi Amar's decision, the committee called upon the Ministry of Health Board for Approval of Surrogacy Agreements to permit (in exceptional cases) surrogacy agreements with a married surrogate mother.[63] The legal and social reality has continued developing in this direction, and in recent years the participation of married surrogate mothers has become more common, probably because of the influence of that decision and the recommendation of the Knesset Committee.[64] The final result is the complete omission of this demand as regards surrogate mother. As to egg donor, since (according to Rabbi Amar's decision), the donor is considered the child's mother from a Jewish law perspective, the participation of a married egg donor is formally forbidden, although it can be bypassed quite easily, as discussed above.

These issues, as can be concluded from our discussion, are very dynamic. These matters, especially the restrictions on assisted reproduction (despite the relative openness of the Israeli system), are continually subject to new challenges and internal change (such as the participation of married women in surrogacy). In addition

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[60] The case and the Chief Rabbi's approval aroused great interest, and were widely reported in the media. See, e.g., Haim Levinson, *Chief Rabbi: Married Woman Can Be Surrogate* (June 11, 2006), http://www.ynetnews.com/articles/0,7340,L-3261249,00.html (last accessed: October 16, 2017).

[61] Many Jewish law decisors object to it; see Avishalom Westreich, Assisted Reproduction in Israel: Law, Religion, and Culture (Brill Research Perspectives Series, 2018), Chapter 3.

[62] See *supra*, note 23.

[63] August 18, 2006, http://www.knesset.gov.il/protocols/data/rtf/avoda/2006-08-15-01.rtf (last accessed: October 16, 2017) (Heb.)

[64] This is attested by one of the approval committee members, Rabbi Yuval Cherlow. See Rabbi Elyashiv Knohl, *Halakhic Positions on Surrogacy* (2016), http://www.tzohar.org.il/?p=7352 (Heb.).

to repeated appeals to the HCJ (some of them were mentioned above), quite a few public commissions have examined the issue. The last one, the Mor-Yosef Commission, seems to be the most comprehensive and with the greatest potential for influencing the law. Its recommendations, as they pertain to the current discussion, will be discussed in the closing section of this paper.

4. Proposals for Changing the Current Legal Situation

The entire issue of assisted reproduction in Israel was examined by a public commission, which submitted its recommendations in May 2012 (the Mor-Yosef Commission). The commission proposed significant changes in the law, including, as regards surrogacy, permitting altruistic surrogacy in Israel for singles or same-sex couples rather than only for heterosexual couples, as was the case until recently, while retaining the option of commercial surrogacy for married heterosexual couples.[65] The HCJ, when it indicated the proper direction and its expectations from the legislator (as discussed above) mentioned *inter alia* the recommendation of this commission.[66] The 2018 amendment of the Embryo Carrying Agreements Law changed the law only partially, as regards single women, but not as regards male homosexual couples. This, as discussed above, led to heavy public, media, and political criticism, and would probably not suffice the demands of the High Court of Justice. It is reasonable to assume, accordingly, that future amendments to the law will follow. I assume that the recommendations of the Mor-Yosef Commissions might be an acceptable compromise: the law will provide same sex-couples with the right to use surrogacy in Israel (and thereby will prevent the law from being struck down as unconstitutional), but will maintain some advantage for heterosexual couples, in that only they will be able to use commercial surrogacy.

Were these recommendations to be accepted, it might be challenged in court, due to its apparent discrimination between homosexual and heterosexual couples in commercial surrogacy. The commission, however, justified this difference with two arguments: first, an ethical consideration. Surrogacy uses another woman's body for the need of a third party. The number of heterosexual couples that need surrogacy is relatively small, as opposed to male homosexual couples, for whom surrogacy is

[65] See Mor-Yosef Commission, at 51–65.

[66] HCJ 781/15 (*supra*, note 38), Justice Jubran's opinion, section 39.

the only way to have their (genetic) child. Opening commercial surrogacy to homosexual couples would significantly raise the number of surrogacies in Israel, and might negatively affect the status of women, including the wide commercial "use" of women and objectification of women's bodies. This effect is less dramatic in the current situation, when paid surrogacy is permitted solely for heterosexual couples and the number of surrogacies is relatively small. The second and related argument is based on the object of the law. The law was intended to assist in cases of medical problems that prevent procreation, rather than being the first and main path for procreation. Opening surrogacy to homosexual couples would change this object, and the so greatly increased demand would lessen the possibilities to use surrogacy for procreation by those who were the object of the law in the first place.[67] Indeed, there are counterarguments against this rationale. Yet, it is reasonable that the HCJ would *not* consider the law based on these recommendations as unconstitutional. This is so because, according to these recommendations, the difference between homosexual couples (altruistic surrogacy) and heterosexual couples (both altruistic and commercial surrogacy) does not violate the very right of homosexual couples to procreate using surrogacy, while the difference that does exist is required to ensure the interest of heterosexual couples that cannot reproduce naturally.

As regards genetic ties, the commission did not change the basic requirement for genetic connection in assisted procreation. As mentioned above, that was recognized and approved by the HCJ, because it does not violate the basic right to become a parent but rather limits one among a number of ways for the fulfillment of this right. The commission recommended expanding the permissibility of egg donation to include already fertilized ova (for example, the remaining fertilized ova of couples who underwent IVF), which, according to the current law, are not explicitly permitted. The commission, however, recommended that since in the case of donated fertilized ova there is no genetic tie to either of the intended parents, it should not be combined with surrogacy. Rather, in such a situation the intended mother must be also the physical mother (who carries and gives birth to the child), so that physical connection to the child would substitute the need for genetic ties.[68]

Another realm that influences the current law's limitations on assisted reproduction, as discussed above, consists of religious considerations as regards the religious affiliation of the participants and as regards restricting the involvement of married

[67] See: Mor-Yosef Commission, at 57.

[68] *Id*, at 40.

women as surrogate mothers and egg donors. This aspect was also examined by the Mor-Yosef Commission. The commission recommended permitting married women to be surrogate mothers.[69] As discussed above, some important Jewish law decisors mitigated the objection to the participation of married women, and notably, former Chief Rabbi Shlomo Amar unhesitatingly approved their inclusion (in certain cases). The recommendations of the commission in this respect continued this trend, and thus not surprisingly were accepted by the legislator in the 2018 amendment. As to the second aspect of the religious limitations discussed above, the commission did not recommend changing the restrictions on interfaith surrogacy or egg donation, probably due to the religious sensitivity of the issue, and since the law itself provides some ways to circumvent this demand. The legislator, however, cancelled the restrictions on interfaith surrogacy, but did not (yet?) change it in egg donation. Here, as well, the changing approaches within religious law as regards surrogacy (the growing dominancy of the permissive approach and the definition of the surrogate as non-mother of the child by Rabbi Amar) had a significant influence on this change.

In conclusion, the Israeli legal system widely recognizes the right to procreate. Yet, despite the relative openness of the Israeli legal system to assisted reproduction, there are significant restrictions due to the traditionality of the society, the desire to guard the interests of couples who cannot procreate due to medical problems, preventing the commodification of women's bodies, and the need to take religious considerations into account. Some of these restrictions are repeatedly challenged in the civil judicial system (such as the distinction between heterosexual and homosexual couples); some are changed as part of internal legal, religious, and social processes; and others are subject to proposals for modifications. Accordingly, we can anticipate much change in the future.

[69] *Id*, at 62–64.

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The ban on surrogate motherhood in Italy and the challenge of unlimited regulatory competition

1. Italian Legislation on Surrogate Motherhood

1.1. Surrogate Motherhood and the Law No. 40 of 2004 (the Medically Assisted Reproduction Act) within the Framework of the Italian Constitution

Surrogate motherhood in the Italian legislation is banned consistently with the *Italian Constitution* according to which the family is an institution recognized in Title II dedicated to *Ethical and Social Relations*. More precisely the family as an institution is characterized in two Articles, namely Art. 29, first paragraph: *The Republic recognizes the rights of the family as a natural association founded on matrimony*; and Art. 30, first and second paragraph: *It is the duty and rights of parents to support, instruct and educate their children, even those born outside of matrimony. In case of incapacity of the parents, the law provides for the fulfilment of their duties*.

The natural character of the family, literally qualified in Aristotelean words as a natural association, finds correspondence in Art. 30, where filiation is ruled on the basis of the principle of the paramountcy of natural filiation. The role of the natural parent is not interchangeable because the original family is presumed to be the best place for the child to grow up and only "in case of incapacity of the parents, the law provides for the fulfilment of their duty."

In the frame of reference of this constitutional table of values, medically assisted procreation was subject to a specific legal discipline provided by the Law No. 40 of 19 February 2004 (the Medically Assisted Reproduction Act).

The law was a reaction to the use of artificial reproductive technology without any control, which was apparent over previous years and had often involved Italian jurisprudence then.

The fundamental paradigm underpinning the law is the legitimacy of artificial fecundation to the extent it can help a couple inflicted with infertility or sterility having a child from their own gametes and avoiding any split of parenthood.

The law begins with the statement that recourse to medically assisted reproduction is allowed only in order to assist in the solution to reproductive problems arising as a result of human sterility or infertility, so as to guarantee the rights of all the involved subjects, including the conceptus (Sec. 1). In particular, recourse to assistance from a third party is expressly forbidden. The law Section (14, para. 2) makes it mandatory to implant all embryos at the same time without preimplantation genetic diagnosis (PGD) (Sec. 13).[1]

Put in a nutshell, the law attempts to balance the wishes of a couple to become parents with the consideration of the respect of the child regarding the best environment in which to grow up, the certainty of the *status filiationis*, the avoiding of split parenthood and of a so-called designed baby.

The aim to protect the child was pursued in two main directions, banning certain types of reproductive technology and consequently preventing birth of children in circumstances that were considered not appropriate; and with respect to children already born by establishing their legal status (Sec. 8), and prohibiting the disownment of paternity and the mother's anonymity (Sec. 9).

Regarding the family environment for the child, Article 5 establishes other subjective requirements of couples who can access medically assisted reproduction: couples must be adults of different genders, married or living together, potentially fertile, and both living.[2] More specifically, the matter of surrogate motherhood, the aim of the law to help couples to procreate, i.e., to have a baby using their own gametes and the body of the woman, implies allowing only homologous fecundation

[1] The provision of the obligation to implant all embryos at the same time was declared unconstitutional by the Italian Constitutional Court in the Judgement No. 151 of 8 May 2009.

[2] The Law refers also to the application of medically assisted reproduction in the field of research and provides certain bans in order to comply with the principle of respect for embryos. Section 13 prohibits any experimentation on human embryos (para. 1), only permitting clinical and experimental research for therapeutic and diagnostic purposes, and only if there are no alternative methods (para. 2). These prohibitions are supported by criminal sanctions (para. 4).

and prohibiting every form of artificial procreation using either sperm or ova from a third party, including surrogate motherhood.

Section 4 of Law No. 40 of 19 February 2004 (the Medically Assisted Reproduction Act) prohibited the use of heterologous assisted reproduction techniques. According to Section 12, paragraph 1, failure to comply with this provision entailed a financial penalty ranging from EUR 300,000 to EUR 600,000.

Section 12, paragraph 6, of Law No. 40/2004 makes it an offence to carry out, organize or advertise the commercialization of gametes, embryos or surrogate motherhood. The penalties incurred are imprisonment, ranging from three months to two years, and a fine, ranging from EUR 600,000 to 1,000,000.

Differently from the prohibition of heterologous insemination, the violation of which it was punished exclusively with a financial penalty, surrogate motherhood is considered as a felony (a serious crime) with criminal sanction (imprisonment) and the authors of the crime are considered not only physicians, but also the parties of the contract of surrogate motherhood (surrogate mother and the intended parents). According to the judgement of Court of Cassation (No. 24001/2014), this criminal sanction can be seen as the application of a principle of public policy emerging from the constitutional protection of human dignity of the woman and the fact that, taking into account the best interests of the child, the Italian legal system recognizes only adoption as a form of parenthood without a genetic link – with the guaranties of due process – and not a mere agreement between the parties.

Ten years after coming into force, unexpectedly from the point of view of the Constitution both per se and as interpreted previously by the Constitutional Court[3], in Judgement No. 162 of 9 April 2014, the Constitutional Court found the provision about heterologous fecundation to be contrary to the Constitution where the prohibition concerned a heterosexual couple suffering from proven and irreversible sterility or infertility.[4] This may not be a point of no return; it represents, nevertheless, a very important change.

However, in the same judgement, the Constitutional Court held that the prohibition on surrogate motherhood imposed by S*ection 12 § 6 of the Act*, was, on the contrary, legitimate.

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[3] The paramountcy of natural filiation and the inalienability of parental rights and duties was underlined by the Constitutional Court in its ruling of 10 February 1981, No. 11, cited by Tribunal of Monza 27/10/1989 in a case about surrogacy.

[4] *Corte cost*, 19 June 2014, No. 162, *Nuova giurisprudenza civile commentata*, 2014, I, p. 802.

In Judgement No. 96 of 5 June 2015, the Constitutional Court again examined the ban on using heterologous reproduction techniques and held that the relevant provisions were unconstitutional with respect to couples that are fertile but are carriers of serious genetically transmitted diseases.

In Judgement No. 272 of 2017, the Constitutional Court stated that "surrogacy motherhood offends in an insufferable way a woman's dignity and profoundly threatens human relationships", but held that every legal proceeding concerning *status* must take into account the best interests of the child even if it is applied to a false recognition of a child after surrogacy in a foreign country.

Since the legal prohibition of surrogate motherhood is formulated in general terms, it refers to every type of surrogacy comprehending *homologous surrogacy* and *heterologous surrogacy*.[5] Homologous surrogacy means that the embryo is created using the intended father's sperm and the intended mother's eggs. The resulting child is genetically related to both intended parents. Heterologous surrogacy involves the use of gametes of a third-party alien to the couple. This may occur when the embryo is created using the intended father's sperm and a donor egg from a woman who is not the surrogate. The resulting child is genetically related to the intended father. Similarly, heterologous surrogacy may occur when the embryo is created using the intended mother's egg and donor sperm. The resulting child is genetically related to the intended mother. A case that should be distinguished from surrogacy as well as from heterologous fecundation is that of adoption of an embryo left over after artificial fecundation undergone by a different couple. This case poses less ethical problems, because there is no intermediation of a third woman: the surrogate, and the embryo is given a chance to live and to develop in a family.[6] Obviously, the implanting of an embryo donor in a surrogate is another example of surrogate motherhood. According to the Court of Cassation (see Cass. No. 12962 of 2016 and

[5] Losappio, *Commento alla legge 19 febbraio 2004, n. 40*, Norme in materia di procreazione assistita, Palazzo – Paliero (ed.) Commentario breve alle leggi penali complementari, Padova 2007, sub Art. 12, 2062.

[6] See: the Opinion of the Study Committee on Frozen Embryos appointed by the Italian Ministry of Health (Commissione di Studio sugli Embrioni Crioconservati nei Centri di P.M.A. nominata con Decreto del Ministro del Lavoro, della Salute e delle Politiche Sociali il 25 giugno 2009), RELAZIONE FINALE 8 gennaio 2010 http://www.salute.gov.it/imgs/C_17_minpag_658_documenti_documento_1_fileAllegatoDoc.pdf.; Opinion of *The Italian Committee for Bioethics,* Adozione per la nascita degli embrioni crioconservati e residuali derivanti da procreazione medicalmente assistita (P.M.A.), 18 November 2005, http://bioetica.governo.it/it/documenti/pareri-e-risposte/adozione-per-la-nascita-degli-embrioni-crioconservati-e-residuali-derivanti-da-procreazione-medicalmente-assistita-pma/.

No. 19599 of 2016) a key element of surrogate motherhood is pregnancy for another couple which a woman promises to do with the duty to refuse her rights to the child while the couple will assume the role of parents of the child.

1.2. The Contract of Surrogate Motherhood, the Law of Contract and the Opinion of the Italian Committee for Bioethics

As for the contract of surrogacy between the intended parents and the surrogate, which may be contracted directly by the parties or more often with the help of a surrogacy agency, it is indeed null and void because it is in violation of the law (Art. 1418 c.c.: *a contract is void if it is incompatible with a mandatory provision (norma imperativa) unless the law provides otherwise*; Art. 1346 c.c.: *the object of a contract must be possible, legal, determined or determinable; Art. 1343 c.c.: the "causa" of a contract is illegal if it violates mandatory rules, public policy (ordre public) or public morality)*. This means not only in violation of Section 12 § 6 of Law No. 40 of 19 February 2004, but also contrary to Art. 5 of Italian Civil Code prohibiting *any actions on one's own body when causing a permanent damage to physical integrity or when violating Law, public order (public policy) or decency*. Moreover, surrogacy offends the principle of human dignity regarding both the surrogate and the child who is the object of an act of disposition. The contract is also contrary to the principle of inalienability of civil status. In fact, legal actions in matter of civil status cannot be renounced, because the rights inherent to *status familiae* are personal rights.[7]

As a result of the violations of public morality, the restitution of the payment of the price cannot be sought (Art. 2035 of the Italian Civil Code).

The illegitimacy of surrogate motherhood, with special regard to commercial motherhood is confirmed also by the *The Italian Committee for Bioethics (NBC)*. The documents by the *The Italian Committee for Bioethics* are not legislation; nevertheless, a certain attention is paid to them by judges. Thus, its Motion (*Paid surrogacy*) of 16 March 2016 is worth mentioning, where it is pointed out that "surrogacy is a contract which damages the dignity of the woman and the child, who, like an object, is subjected to a deed of sale. The NBC believes that this hypothesis of commercialization and exploitation of the female body in its reproductive capacity, under any form of payment, explicit or surreptitious, is clearly contrary to fundamental

[7] Cass. civ. Sez. I, 15 giugno 2017, n. 1487.

bioethical principles also arising from the documents mentioned above"[8]. The NBC expressed a negative opinion on surrogate motherhood also in a previous work, *Medically-assisted reproduction techniques*. Synthesis and conclusions, 17 June 1994.

1.3. Cross-Border Surrogate Motherhood, Public Policy (*ordre public*) and the Adoption Act

Considering the significant phenomenon of cross-border surrogate motherhood a relevant piece of legislation are the rules of international private law. From this perspective, the Law No. 218 of 31 May 1995 (Reform of the Italian System of Private International Law) is to be taken into account. In particular, three sections are important in this matter. Firstly, Section 16 provides for the well-known public policy clause, according which "No foreign law shall be applied whose effects are incompatible with public policy (*ordre public*). 2. In that case, the applicable law shall be determined on the basis of other connecting factors possibly provided for with respect to the same matter. In the absence of other connecting factors, Italian law applies". Secondly, under section 33 the legal parent-child relationship is determined by the national law governing the child at the time of his or her birth. Thirdly, Section 65 (Recognition of foreign rulings) refers to family relations: "1. Any judicial rulings by foreign authorities relating to the capacity of persons as well as to the existence of family relations or personality rights shall take effect in Italy if they were issued by the authorities of the State to whose law reference is made under this law, or if they produce effects under the law of that State, irrespective of their having been issued by the authorities of another State, provided that they do not conflict with the requirements of public policy (*ordre public*) and the fundamental rights of the defence were complied with."

However, the reference to the public policy clause is becoming not absolute, giving the increasing relevance of the best interests of the child in general and "in regards to its own particular merits." From this perspective, as for cross-border surrogate motherhood within the Member State of the European Union, it is of importance the Regulation No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of

[8] The works of The Italian Committee for Bioethics are available at the following link: http://bioetica.goverNo.it/en/works/opinions-responses/.

parental responsibility, repealing Regulation No 1347/2000. Article 23 (Grounds of non-recognition for judgments relating to parental responsibility) confirms the relevance of the best interests of the child: "A judgment relating to parental responsibility shall not be recognized: (a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child."

Italian Court of Cassation explained that the prohibition on surrogate motherhood in Italian law was not only a criminal law one, but also was intended to protect the surrogate mother's human dignity and the practice of adoption. It added that only a legally recognized adoption, organized in accordance with the regulations, would allow non-genetic parenthood to be validated. It stated that the assessment of the child's best interests had been carried out in advance by the legislature, and the court had no discretion in this matter. It concluded that there could be no conflict of interest with the child's interests where the court applied the domestic law and refused to take into account a legal parent-child relationship established abroad following a gestational surrogacy arrangement.

In fact, cross-border surrogacy may be considered, to a certain extent, as a form of circumvention of the provisions concerning the procedure for adoption that are set out in Law No. 184/1983 ("the Adoption Act"), as amended by Law No. 149 of 2001, entitled "The Child's Right to a Family". Law No. 184 of 1983, entitled "The Child's Right to a Family" (hereafter, "the Adoption Act"). Anyhow, surrogate motherhood from certain aspects appears to be antinomic with regard to adoption, especially international adoption.

Whilst through surrogate motherhood the intended parents become parents by means of a contract, adoption provide for rules and procedures in order to assure the best solution for an abandoned child, selecting the adoptive couple and previously the availability of the child for adoption. Section 15 of "the Adoption Act" provides that a declaration that a minor is available for adoption shall be made in a reasoned decision of the juvenile Court (Minors Court) sitting in chambers, after it has heard the Public Prosecutor, the representative of the children's home in which the minor has been placed or any foster parent, the guardian, and the minor if he or she is aged over twelve years or, if aged under twelve, where this is deemed necessary.

Section 44 provides for certain cases of special adoption: adoption is possible for minors who have not yet been declared available for adoption. In particular, section 44 (d) authorizes adoption when it is impossible to place the child in alternative care pending adoption.

The Adoption Act provides for a stability requirement regarding the couple that applies for the adoption. Only couples that have been married for at least 3 years may adopt. Married couples who have been separated at any time during the 3 years before adoption may not adopt. This stability requirement may also be met if the couple establishes that it has lived together for a period of 3 years before marriage. In such cases, however, the juvenile court (Minor's Court – *Tribunale dei minorenni*) must make a finding of the continuity and stability of such a relationship taking all circumstances into account.

In order to be able to adopt a foreign minor, persons wishing to adopt must contact an organization that is authorized to look for a child (section 31) and the Commission for International Adoptions (section 38). The latter is the only body that is competent to authorize the entry and permanent residence of a foreign minor in Italy (section 32). Once the minor has arrived in Italy, the minors court orders that the information on the adoption decision be transcribed into the civil-status register.

Under section 72 of the Act, any person who – in violation of the provisions of sections 31, 32, 38 – brings into the territory of the State a foreign minor, in order to obtain money or other benefits, and in order that the minor be entrusted permanently to Italian citizens, is committing a criminal offence punishable by a prison term of between one and three years. This sanction also applies to those persons who, in exchange for money or other benefits, accept the "placement" of foreign minors on a permanent basis. Conviction for this offence entails disqualification from fostering children (*affido*) and from becoming a guardian.

The Adoption Act contains not only rules in order to protect the privacy of the adoptive family, but also enforces the rights of the adoptive child to know, in such a way as to minimize any psycho-emotional damage, their condition of adoptive child and their origins.

All of the proceedings of juvenile courts (*Tribunale dei minorenni*) are held in camera, i.e., meaning they are not open to the public. Private or public entities involved in any stage of the adoption process are obliged to keep all information secret unless they are ordered to reveal it by a judicial decision, or if the civil status registry asks for such information.

Section 28, as amended in 2001, recognizes a child's interest in knowing his or her condition of adoptive child and in tracing his or her origins. The adoptee may, upon reaching the age of 25, have access to such information. If the adoptee can show serious grounds pertaining to his or her physical or mental health, he or

she may also have access upon reaching the age of 18. To get the information, the adoptee must apply to the juvenile court.

If the adoptee is still a minor, the adoptive parents may apply to the juvenile court for information on the identity of the biological parents, but they are required to demonstrate serious reasons for such a revelation. The juvenile court must also rule on their application. The court may also furnish such information to the head of a hospital if it is urgently needed to prevent great danger to the child's health.

The European Court of Human Rights condemned Italy (case Godelli v. Italy, No. 33783/09 of 25 September 2012) because of the fact that Italian law allowed the biological mother to give birth anonymously without recording her name on the child's birth certificate. This means that where a child of an anonymous birth sought information on their origins, Italian law gave blind preference to the person who wished to remain anonymous. For this reason, the Court decided the law did not genuinely attempt to balance the woman and the child's right to private life in anonymous birth situations and concluded there had been a violation of the European Convention. The Court explained that the right to an identity includes the right to know one's parentage and is an integral part of private life, which is protected by Article 8 of the European Convention. After the ruling of the European Court of Human Rights the Jurisprudence complied with the guidelines of the European Court.

2. Italian jurisprudence on surrogate motherhood

2.1. Opening premise

In order to paint a picture of the most relevant Jurisprudence on this matter a chronological distinction has to be made between cases before the Medically Assisted Reproduction Act of 2004 and Jurisprudence after this Act which, using a common expression at that time, was intended to put an end to the then called "reproductive far west." It had become apparent over previous years that some sort of regulation of artificial reproductive technology was necessary because it was being applied without control. In those years, Italian jurisprudence had often dealt with cases relating to medically assisted reproduction revealing a clear loophole in the Italian law. For instance, jurisprudence was called upon to examine cases of disownment of paternity following assisted reproduction technology; children born by insemination after the death of the father, and last but not least surrogate motherhood.

2.2. Cases before Law No. 40 of 19 February 2004 (the Medically Assisted Reproduction Act)

Before the introduction of the legal ban, the principle judgments regarding cases of surrogacy are those of the Tribunal of Monza and of the Tribunal of Rome, which are reported sometimes as having reached opposite conclusions. This is true only to a certain extent, because in fact they addressed different questions.

In the case of Tribunal of Monza[9] a couple concluded a contract with an Algerian woman, who promised to accept artificial insemination of a gamete from the man and give the child to the couple renouncing every right concerning her motherhood in exchange for a sum of money. During and after the pregnancy the woman demanded more money and other benefits, which she obtained, but seeing that she continued to make demands, at a certain point, the couple sued her. The Tribunal of Monza held that the contract was null and void, but authorized the man, who was the genetic father, to recognize the child (Art. 250 of Italian Civil Code) and to insert the child into the family and his wife to adopt the child according to the rules regarding stepchild adoption (Art. 44 Italian Law of Adoption).

The Tribunal of Monza qualified the voiding of the contract on a series of grounds: Firstly, they showed the inconsistency with the principles on filiation provided by the Italian constitution. Secondly, the contract was held null and void according to Art. 5 of Italian Civil Code. In fact, the act of disposition of the body violates public policy or decency. In addition, a contract like this violated the principle of inalienability of civil *status* and the rules governing adoption (Law No. 184/1983).

Differently from the case judged by Tribunal of Monza, on 14 February 2000 Tribunal of Rome dealt with a case of a contract of surrogate motherhood without compensation – the so-called non-commercial, or altruistic surrogacy – and the intended parents claimed that a doctor would perform the contract with them by implanting embryos of the couple into a woman who had previously given her consent for the surrogacy. The doctor refused because of the ban in the meantime

[9] Tribunal of Monza 27/10/1989, Giurisprudenza Italiana, 1990, I, sez. 2, 295 (with a comment of G. Palmeri, *Maternità "surrogata": la prima pronuncia italiana*). Another commentator – M. Dogliotti, *Inseminazione artificiale e rapporto di filiazione*, in Giur. it., 1992, I, 2, 73 – underlines that in a society where everything has a price it is not surprising that also the very delicate and intimate sphere of the person may be subjected to commodification and that surrogate motherhood is an example of the sad and obscene trade in children, which takes a variety of forms, all which are extremely insidious.

issued by the Italian ethical Code of physicians (Codice Deontologico dei medici) of 25 June 1995, Section 41, which prohibited explicitly surrogate motherhood.

The couple used the contract of surrogate motherhood as the only solution to have children genetically bound to the couple, because the wife was afflicted by a malformation of the uterus – the Rokitansky Kuster syndrome (congenital aplasia of the uterus and the upper part of the vagina) – that prevented her from carrying a pregnancy, but not from producing oocytes.

Regarding the contract, the Tribunal of Rome argued that since Art. 1322 of the Italian Civil Code required that an atypical contract pursues an interest which may be qualified as worth of protection and this interest was the desire of becoming a parent, the contract was valid. Moreover, the contract could be considered a means to giving life to the embryos already produced. The right to life of embryos – underlines the Tribunal – was expressly recognized by the Italian Constitutional Court, that declared that human life ought to be protected from its beginning.

Considering the complexity of the case and split-parenthood, the Tribunal of Rome decided that the surrogate mother could not renounce her rights regarding the child. Therefore, she was allowed to continue to see the child, to participate in the main decisions of the parents and to have him home regularly. This was a result of the reference to the principle of responsible motherhood, which, according to this judgment, was the updated way of thinking in this field.

According to the Tribunal of Rome, since pregnancy prompts no impairment nor loss of organs or parts of the body, gratuitous surrogate motherhood cannot be seen as contrary to Art. 5 of the Italian Civil Code. This judgement, completely one-off, has been criticized by Italian scholars who stressed the contrast with general principles of Italian Law especially emerging from the rules on adoption and the rules on inalienability of *civil status*.[10]

[10] F.D. Busnelli, *Verso una madre intercambiabile? Riflessioni a margine di tribunale di Roma, 17 febbraio*, Bioetica, 2000, 674 ff.; M. Dogliotti, *Maternità surrogata: contratto, negozio giuridico, accordo di solidarietà?*, Famiglia e diritto, 2000, 159 ff.; M. Sesta, *Norme imperative, ordine pubblico, e buon costume: sono leciti gli accordi surrogazione?*, Nuova giurisprudenza civile commentata, 2000, II, 204 ff.

2.3. Jurisprudence after the Law No. 40/2004. The ban of surrogate motherhood in a changed context. The judicial dismantlement of the Law No. 40 of 2004

It goes without saying that the due to qualification of contract of surrogate motherhood as an illicit contract, strengthened as a result of Law No. 40/2004, one can justifiably expect that legal issues in this field have reached a satisfactory level of certainty.

However, despite the very clear wording of the law, the so-called procreative tourism challenged the Law. Couples went abroad to countries where surrogate motherhood is licit, returning to Italy and applying to the Italian civil status register office to have the data of the birth certificates obtained abroad recorded in the Italian civil status register.

It is worth pointing out that in the meantime the Constitutional Court declared the provision of Art. 4 of the Law No. 40/2004, which prohibited heterologous insemination, unconstitutional. The Italian Constitutional Court overruled its previous jurisprudence, which inspired also the Tribunal of Monza in its judgement, to put aside the paramountcy of natural filiation established in Art. 30 of the Constitution, and held that self-determination of adults is of paramount importance and that couples who cannot use their gametes had the right to use them of donors otherwise they were effectively being discriminated against. In addition, it was contrary to the same principle of non-discrimination that some couples could not afford the costs of going abroad to have heterologous insemination.[11]

This judgement, although the Court reiterates its opposition to the surrogate motherhood, meant a significant change of mind and a different interpretation of Constitutional values about filiation. The formal respect to the idea of illegitimacy of surrogate motherhood can be found also in a successive ruling of the Constitutional Court (No. 272 of 2017), but after having stated that Art. 263 of Italian Civil Code is to be interpreted in the way that child's best interest becomes a requirement for the de-recognition of the false recognition, also when it relates to practices that are

[11] Comment on this Judgement: C. Castronovo, *Fecondazione eterologa: il passo (falso) della Corte costituzionale*, Europa e diritto privato, 2014, 1105 ff.; V. Carbone, *Sterilità della coppia. Fecondazione eterologa anche in Italia*, Famiglia e diritto, 2014, 753 ff.; L. D'Avack, *Cade il divieto all'eterologa, ma la tecnica procreativa resta un percorso tutto da regolamentare*, Diritto famiglia e persone, 2014, 1005 ff.; G. Ferrando, *La riproduzione assistita nuovamente al vaglio della Corte costituzionale: l'illegittimità del divieto di fecondazione eterologa*, Corriere giuridico, 2014, 1068 ff.

prohibited by law, such as surrogacy, which causes intolerable offence to the dignity of the woman and profoundly undermines human relations.[12]

This may be seen as, to a certain extent, in line with the orientation of some judicial courts (literally ordinary judiciary) regarding cases involving surrogate motherhood, where the transcription of data registered in a foreign country into the Italian register is an issue.[13]

The judgements of these courts are inspired by a few recent judgements of the Italian Court of Cassation that, as a matter of fact, dealt with different hypothesis. The case ruled by the Court of Cassation, Section I, judgment No. n. 19599 of 30 September 2016, concerned a couple of homosexual women, the first of whom donated her gametes in order to produce an embryo that was implanted into the body of the latter.[14] The woman who carried the pregnancy to term and gave birth to the child was not treated as a surrogate mother, but correctly as one who had a heterologous fecundation. Since the couple were registered as parents of the child in the foreign country where artificial procreation was pursued and they applied for the entering of this data in the Italian civil *status* register, the Court of Cassation held that this data could be entered in the Italian *status* register, being not inconsistent with the requirement of not-contrariety with public policy for recognition or enforcement of a foreign judgement, although contrary to the principles of family law. In a previous judgement, the Court of Cassation (Section I, judgment No. 12962/14 of 22 June 2016) ruled in a case in which the claimant had asked to be able to adopt her companion's child.[15] The two women had travelled to Spain to use assisted reproduction techniques that were forbidden in Italy. One of them was the "mother" under Italian law, and the seminal fluid had been provided by an unknown donor. The claimant had been successful at first and second instance. On an appeal by the public prosecutor, the Court of Cassation dismissed the latter's submissions, and thus accepted that a child born through assisted reproduction

[12] Corte costituzionale 18-12-2017, n. 272, Foro italiano, 2018, I, 5 (with a comment by Casaburi); Familia, 2018, 59 (with a comment by Sandulli).

[13] Previously the Court of Appeals of Bari, on 25 February 2009, 8 In leggiditalia.it. declared that the transcription of the parentage of two children born based on a surrogacy is considered admissible in Italy, because the two children were citizens of the United Kingdom, and therefore, were EU citizens, and also in furtherance of the best interests of the children.

[14] Corte di cassazione 30-09-2016, n. 19599, Riv. dir. internaz. privato e proc., 2016, p. 813; Foro italiano, 2016, parte I, c. 3329; Nuova giur. civ., 2017, 3, p. 72 (with a comment by Palmeri).

[15] Cass., sez. I, 22.06.2016, n. 12962, Nuova giurisprudenza civile commentata, 2016, 1135 ff.; Famiglia e diritto, 2016, 881 ff. (with a comment of Sesta).

techniques within a same-sex female couple could be adopted by the woman who had not given birth to that child. In reaching that conclusion the Court of Cassation took into account the stable emotional bond between the claimant and the child, and the best interests of the minor child. The Court of Cassation referred to section 44 of the Adoption Act, which provides for special circumstances. A similar conclusion was drawn at the juvenile court (Tribunale dei minorenni) of Rome (23 December 2015/21 March 2016).[16] This trend was confirmed in the judgement of the Court of Cassation No. 14878 of 15 June 2017.[17]

The Judgement of the Court of Cassation (No. 19599/2016) is cited for the overruling of the concept of public policy that in the view of these decisions is dramatically diminished till almost undermined. In other words, the threshold of the conformity with public policy was made almost irrelevant.

2.4. Reproductive tourism and some judicial courts

In line with the decisions of the Court of Cassation, the Court of Appeals of Trento drew its conclusion about a homosexual couple of men who stipulated a contract of surrogate motherhood in a foreign country, where it was legal. Embryos were made in vitro with oocytes of a donor and gametes of one of the couple. The children were registered in the foreign country as children of the couple, who after a few years of living together with the children in Italy, applied for recognition of the birth certificate. They sustained that their marriage contracted in the foreign country should equate to a civil union under section 28, b) of Italian Law No. 76 /2016 and, since the six-year old children had been living in their nuclear family, they requested the application of the principles expressed by the Court of Cassation in its judgement No. 19599 of 2016 that excludes contrariety with international public policy.

The Court of Appeals of Trento granted the application and ordered the transcription of the birth certificate into the Italian register of births.[18] The reasoning of the Court of Appeals of Trento was based on two main points. The former was a less strict idea of public policy than that applied in the past and applied also by the Court of Cassation in a case addressing precisely surrogacy (Court of Cassation

[16] M. Winkler, *Figlio di due padri: un caso di stepchild adoption e gestazione dinnanzi al Tribunale di Roma*, Il quotidiano giuridico, 4 April 2016.

[17] Cass., n. 14878, 15.06.2017 in leggiditalia.it.

[18] Corte Appello Trento 23-02-2017, Foro italiano, 2017, part I, 1034.

No. 24001/2014), according to which only some supreme fundamental rights established by the Constitution, EU Treaty, Charter of the fundamental rights of the European Union and The European Convention of the fundamental rights are a principle of public policy. The latter point was based on the criterion of the best interests of the child, which, according to the Court of Appeals, was to be seen in the continuity of the *status* of the child that was thought to correspond to the principle of conservation of status established by the International Private Law Act (Art. 13 e 33).

A similar conclusion was expressed also by the Court of Appeals of Milan (decrees Nos. 345 and 346 of 28.10.2016) which referred to the judgement of the Court of Cassation No. 19599 of 2016 and cases Mennesson e Labasseé decided by the European Court of human rights with reference to the importance of biological parentage as a component of identity.[19]

The Tribunal of Florence (decree No. 8/3/2017) granted the application of a homosexual couple who claimed the recognition of adoption allowed by a British Court without any specification on how the child was born, if by surrogate motherhood or otherwise. The Tribunal held that its decision conformed to the Italian Law of Adoption, excluding that it was an international adoption, while also conforming to the principle of the Haag Convention. In addition, the Tribunal excluded contrariety with public policy, citing the judgement of the Court of Cassation No. 19599 of 2016.

As a matter of fact, the issue of recognition of foreign civil status registration, contrary to domestic principles of family law, is controversial in Italian Jurisprudence. The Judgement of the Court of Cassation No. 24001/2014, on the premise that the ban of surrogate motherhood corresponds to a principle of public policy relevant also in the field of international law, denied the recognition of a birth certificate made in the Ukraine regarding a child born after surrogate motherhood, pursued by a Ukrainian woman on the basis of a contract with an Italian heterosexual couple. The Court underlined that the ban on surrogate motherhood (section 12 paragraph 6, Law No. 40 of 2004) and the rule that a mother is defined as the person who gives birth (Art. 269 cod. civ.) are applications of inviolable principle of public policy because they protect "fundamental juridical values (goods)". These are human dignity of the woman, that is protected by the Constitution, and the institution of adoption with which surrogate motherhood conflicts, because while adoption is ruled by a series

[19] Corte Appello Milano, decr. 28.10.2016, Foro italiano 2017, I, 722. See also the commentary by Cardaci, *La trascrizione dell'atto di nascita straniero formato a seguito di gestazione per altri*, Nuova giurisprudenza civile commentata, 2017, I, 1034.

of norms in order to protect the interests of everyone involved, particularly the children, surrogate motherhood consists in a mere private contract among adults.[20]

As a result of the fact that the issue of interpreting the concept of public policy gave rise to different decisions in different divisions of the same Court of Cassation, namely the judgement of the Court of Cassation No. 24001/2014 on the one hand and the judgements of Court of Cassation Nos. 19599/2016 and 14878/2017 on the other, apart from a case in the matter of punitive damages[21], the Court was asked to adjudicate in *sezioni unite* (joint session), which is presided over by the first president and made up of an invariable number of nine members[22]. At that moment, in expectation of the ruling of *sezioni unite*, only the *ordinanza,* which referred the matter to the joint session (*sezioni unite*) is available.[23]

2.5. The case of Paradiso and Campanelli v. Italy and some conclusions

The issue of surrogacy has been treated in the case of *Paradiso and Campanelli v. Italy*, ruled by the European Court of Human Rights.[24] The case deals with a legal battle of an elderly married couple who decided to hire a company that took them to a Moscow-based clinic for reproductive tourism, where an embryo originating from anonymous sperm and oocyte donation was carried through pregnancy and delivered by a paid surrogate woman. Even though the outcome was such, the couple claimed that their intention had been that the spouse would be genetically related to the child but due to "unknown reasons", the child's genetic origins were "unknown". Due to the absence of a genetic link between the spouse and the child, the Italian authorities instigated a formal investigation for "altering civil status", forgery and

[20] The full text of the judgement is available on *Foro italiano* 2014, 12, 3408 (with a comment of Casaburi); *Nuova giur. Civ. comm.*, 2015, I, 235, (with a comment of Benanti); *Corriere giur*., 2015, 471 (with a comment of Renda).

[21] Court of Cassation, Joint session (Sezioni unite), judgement 05/07/2017 No. 16601.

[22] The Court of Cassation is a collegiate body, consisting of divisions, each of which is made up of a first president, division presidents and judges. It generally adjudicates as a simple division with five members present. Where questions or conflicts of jurisdiction are raised, and also in the case of controversies between branches of governments and cases concerning questions, which are particularly relevant or which give rise to different decisions in different divisions, the Court adjudicates in *sezioni* unite, which are presided over by the first president and made up of an invariable number of nine members.

[23] Court of Cassation (ord.) 22.02.2018, No. 4382.

[24] ECHR, 27.01.2015, Paradiso and Campanelli v. Italy, hudoc.echr.coe.int.

offence set out in section 72 of the Adoption Act, since they had brought the child to Italy in breach of the procedure provided for by the provisions on international adoption. The State Counsel's Office asked for proceedings to declare the child as abandoned and free for adoption. The Juvenile court (Tribunale dei minorenni) decided to remove the child from the couple and initially placed him in a children's home and subsequently in a foster family, which had the intention to adopt him.

On 24 January 2017, after a first judgement of its section delivered on 27 January 2015 favorable to the couple, the Grand Chamber of the European Court of Human Rights accepted "that the Italian courts, having assessed that the child would not suffer grave or irreparable harm from the separation, struck a fair balance between the different interests at stake, while remaining within the wide margin of appreciation available to them in the present case. It follows that there has been no violation of Article 8 of the Convention."

The main points in the reasoning of the Court can by summarized as follows. Unlike the Mennesson and Labassee cases, in this case the Article 8 complaint did not concern the registration of a foreign birth certificate and recognition of the legal parent-child relationship in respect of a child born from a gestational surrogacy arrangement. What was at issue in the case were the measures taken by the Italian authorities which resulted in the separation, on a permanent basis, of the child and the applicants. Indeed, the domestic courts stated that the case did not involve a "traditional" surrogacy arrangement, given that the applicants' biological material had not been used. They emphasized the failure to comply with the procedure laid down by the legislation on international adoption and the breach of the prohibition on using donated gametes within the meaning of section 4 of the Medically Assisted Reproduction Act. Therefore the legal question at the heart of the case was: whether, given the circumstances outlined above, Article 8 was applicable; in the affirmative, whether the urgent measures ordered by the Minors Court, which resulted in the child's removal, amounted to an interference in the applicants' right to respect for their family life and/or their private life within the meaning of Article 8 § 1 of the Convention and, if so, whether the impugned measures were taken in accordance with Article 8 § 2 of the Convention. Lastly, the Court pointed out that the child was not an applicant in the proceedings before the Court, the Chamber having dismissed the complaints raised by the applicants on his behalf. The Court was called upon to examine solely the complaints raised by the applicants on their own behalf. In this respect, the Court held that although the termination of their relationship with the child is not directly imputable to the applicants in the present case, it was nonetheless

the consequence of the legal uncertainty that they themselves created in respect of the ties in question, by engaging in conduct that was contrary to Italian law and by coming to settle in Italy with the child. The Italian authorities reacted rapidly to this situation by requesting the suspension of parental authority and opening proceedings to make the child available for adoption. The Court outlined also that the case differed from the cases of Kopf, Moretti and Benedetti, and Wagner, where the child's placement with the applicants was respectively recognized or tolerated by the authorities.

In contrast with the ruling in the Menneson and Labasse cases, the Court held that the minor's right to an identity was not at stake because of the lack of biological tie with the couple and for the same reason the couple had no power to complaint in behalf of him.

Criminal law is outside the scope of this paper, but in order to better understand the development of the Italian legal frame of reference on surrogacy, it must be noted that the Court of Cassation (Section V, judgment No. 13525 of 5 April 2016) ruled in criminal proceedings against two Italian nationals who had travelled to Ukraine in order to conceive a child and had used an ova donor and a surrogate mother. Ukrainian law required that one of the two parents be the biological parent. The acquittal judgment delivered at first instance had been challenged by the public prosecutor before the Court of Cassation. That court dismissed the public prosecutor's appeal on points of law, thus confirming the acquittal, which had been based on the finding that the defendants had not been in breach of section 12 § 6 of Law No. 40 of 19 February 2004 (the Medically Assisted Reproduction Act), given that they had had recourse to an assisted reproduction technique which was legal in the country in which it was practiced. In addition, the Court of Cassation considered that the fact that the defendants had submitted a foreign birth certificate to the Italian authorities did not constitute the offence of "making a false statement as to identity" (Article 495 of the Criminal Code) or "falsifying civil status" (Article 567 of the Criminal Code), since the certificate in question was legal under the law of the issuing country.

This judgement was confirmed by the Court of Cassation No. 48696, 2016.[25] In conclusion, in the matter of medically assisted reproduction the quite apparent judicial activism reveals a minimal consent of the Jurisprudence to the solutions adopted in the Law No. 40 of 2004.

[25] In Foro Italiano, 2016, 5, 2, 286; in Diritto Penale e Processo, 2016, 8, p. 1085.

Although during the subsequent years the Law No. 40 has not been modified by the Italian Parliament, its application has changed dramatically due to non-legislative interventions. As matter of fact, more than 30 judgements during the fourteen years after the law came into force have significantly modified the Italian legislation on medically assisted reproduction. This is the context in which the ban on surrogate motherhood must be analyzed.

Despite the commonly held idea that Italian Jurisprudence has been influenced by the European Court of Human Rights, an analysis of the judgements reveals that the distance between legislation and jurisprudence in application of the Law No. 40 of 2004 has been a consequence of the autonomous orientation of the Italian judges rather than of the rulings of the European Court of Human Rights. Emblematic is the case of heterologous fecundation. Although the European Court of Human Rights refused to condemn Austria because of the ban on heterologous fecundation laid down in The Artificial Procreation Act (*Fortpflanzungsmedizingesetz*, Federal Law Gazette 275/1992)[26], the Italian Constitutional Court held that the ban was unconstitutional without any reference to Art. 30 of the Italian Constitution. A similar conclusion can be drawn with respect to Italian Jurisprudence on the issue of recognition of foreign civil status registration, contrary to domestic principles of family law. While the European Court of Human Rights apparently tries to balance the rule of law of the countries where a specific technique is banned with the best interests of the child giving particular importance to the genetic bonds between the child and the person or the couple in question, a significant number of judgements of the Italian Jurisprudence veer towards the recognition of foreign civil *status* registration, even when there are no genetic bonds. In some cases, Italian Jurisprudence has extended as far as recognizing the status of parents even for a homosexual couple, contrary to the Italian Law, which admits only heterosexual parenthood.

[26] ECHR, 3 November 2011 – Case S.H. and Others v. Austria, hudoc.echr.coe.int. As one can read in the judgement, "under section 3(1), only ova and sperm from spouses or from persons living in a relationship similar to marriage (*Lebensgefährten*) may be used for the purpose of medically assisted procreation. In exceptional circumstances, i.e. if the spouse or male partner is infertile, sperm from a third person may be used for artificial insemination when introducing sperm into the reproductive organs of a woman (section 3(2)). This is called *in vivo* fertilisation. In all other circumstances, and in particular for the purpose of in vitro fertilisation, the use of sperm by donors is prohibited. Under section 3(3), ova or viable cells may only be used for the woman from whom they originate. Thus, ovum donation is always prohibited."

3. The point of view of the Italian doctrine. Between facts and norms

3.1. The legal ban on surrogate motherhood and the argument based on solidarity in favor of gratuitous surrogacy

The doctrinal debate regarding surrogate motherhood in Italy reflects the state of art of the legislation and jurisprudence.

Regarding the legislation, the question is not particularly complex. Considering the clarity of the wording of Law, i.e., the expressed ban on surrogacy as per Section 12 of the Law No. 40 of 2004, *Medically Assisted Reproduction Act* and the principle of paramountcy of natural filiation as per Art. 30 of the Italian Constitution, it is difficult to state that the issue of interpretation of the law in this field exists. In particular, commercial surrogate motherhood is clearly inconsistent with some fundamental values that can be seen as rooted in human dignity, which specifically prevent the commodification of the child and of the body of the woman.[27] In fact, if one analyses the debate, rather than an inclination for surrogate motherhood in general, positions in favour of gratuitous surrogate motherhood are likelier to be found. Using a German formula, in the case of gratuitous surrogacy it could be argued that the ban is "teleologically reduced", in the sense of the method of interpretation used by the courts when they interpret legislative provisions in the light of the purpose, values, legal, social and economic goals these provisions aim to achieve.[28] From this perspective, gratuitous surrogate motherhood is presented as a form of solidarity between the gestational mother and the infertile couple that excludes the infringement of the dignity principle of the woman and gives the chance to the couple to have a genetically bound child.[29] Nevertheless, if the difference between onerous and gratuitous surrogate motherhood is easy to understand in principle, the boundaries

[27] "In the realm of ends everything has either a price or an intrinsic value. Anything with a price can be replaced by something else as its equivalent, whereas anything that is above all price and therefore admits of no equivalent has intrinsic value" I. Kant (orig. 1785, 1999). Groundwork of the Metaphysics of Morals. Cambridge, England: Cambridge University Press, p. 33.

[28] See K. Larenz, *Methodenlehre der Rechtswissenschaft*, Berlin-Heidelberg-New York, 1975, p. 377; F. Bydlinsky, *Juristische Methodenlehre und Rechtsbegriff*, Wien – New York, 1982, 480; N. Mac Cormick, *Legal Reasoning and Legal Theory*, Oxford 1978, p. 106; L. Mengoni, *Ermaneutica e dogmatica giuridica*, Milano 1996, p. 91.

[29] P. Zatti, *Tradizione e innovazione nel diritto di famiglia*, Tratt. Dir. Fam. P. Zatti (ed.), I, 1, Milano 2011, 69 ff.; P. Zatti, Maschere del diritto. Volti della vita, Milano 2009, p. 222; S. Rodotà, Solidarietà. *Un'utopia necessaria*, Roma- Bari, 2014, p. 52; V. Scalisi, Maternità surrogata: come "far cose con regole". Riv. dir. civ., 2017, p. 1100.

are blurrier than one might expect.[30] The so-called reimbursement of expenses can be often a hidden price to pay.[31] After all, it is very unlikely that a woman who is a stranger to the couple embarks gratuitously on a pregnancy, tolerating egregious interference on decisions regarding her body[32] and then refuses any rights to the child just because of her sense of solidarity to the infertile couple. In the field of heterologous fecundation, it has been proved that the question of reimbursement remains unsolved with significant differences between countries, situations and particularly the economic conditions of donors.[33] This may be valid *a fortiori* for the surrogacy. Moreover, even in gratuitous surrogacy, the disposition of the body implied in a similar contract and the cutting of every possible relation with the child are very controversial. In any case, they are irreconcilable with the principles of Italian Law, and the general ban laid down in Section 12 of the *Medically Assisted Reproduction Act* leaves no room for discussion.

3.2. The tension between the constitutional concept of filiation based on the biological aspect and the contractual concept of filiation based on self-determination and the right to become a parent: arguments

However, a tension between the ban on surrogate motherhood and a trend to revise the conception of parenthood has emerged over time. This trend is fed by a shift in the jurisprudence from the constitutional conception of filiation and of the family in general towards a concept of filiation developed in the field of the principle of self-determination.

Indeed, as was underlined above, Art. 30 of the Italian Constitution recognizes that filiation derives from natural procreation, a fact which joins the parents in

[30] According to the definition in the *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, H.M.S.O. 1984, the surrogate mother is "a woman who carries a child to term for another person or couple, whether she contributes to the genetics of the child or not, and who usually receives some payment."

[31] A. Renda, *La surrogazione di maternità e il diritto di famiglia al bivio*, Europa e diritto privato, 2015, p. 424.

[32] Examples are provided by C.M. de Aguirre, *International Surrogacy Arrangements: a Global Handmaid's Tale?*

[33] A. Ruiz, S G. Pennings – F. Shenfield – A.P. Ferraretti – T. Mardesic – V. Goosens – A. Ruiz, S*ocio-demographic and fertility-related characteristics and motivations of oocyte donors in eleven European countries*, Human Reproduction, Volume 29, Issue 5, 1 May 2014, pp. 1076–1089.

a juridical relation with the child, thus implying parental duties. In other words, the relationship is conceived in the interests of the child because of his or her need for parental care. Only in the case natural parents are not capable of pursuing the parental task, Art. 30 provides that the public authorities ought to take over the parental role. Adoption is the preferable solution in these cases, and according to Section 1 of the Italian Law of Adoption the right of the child to be raised and educated in his or her natural family is replaced by the right to grow up and be educated in a family. Therefore, according to the Italian Constitution, natural filiation and adoption are not interchangeable: the latter is a form of solidarity that succors the child without parents and cannot be seen as a form of agreement between natural parents and the adoptive couple, because this would mean conceiving of the child as an object of a contract. Instead, the contractual concept of filiation tends to depict filiation as an object of the right of an adult to his or her self-actualization and the child as a means of this self-actualization of the adult. This implies a shift regarding values of reference in the matter of filiation.

The primacy of the subjective right replaces the primacy of the duty to care for children; the right to become a parent based on the self-determination principle replaces the generation as criterion of parenthood; the will (intention) replaces the parental responsibility as a result of the generation of a child. More precisely, parental responsibility, which should be an ethical and juridical concept meaning an inalienable duty to care for children, turns into a question of choice, a decision of taking responsibility.[34] "Children of choice", "intended parents" and "procreative liberty" in a positive sense that includes the right to choose the form and technique to become legally a parent are common formulations of this idea of basing filiation on the mere choice (intention) to become a parent.[35] This reorientation is usually accompanied by the argument of the need of protecting the health of the person who is infertile.[36] Moreover, some scholars point out that the strong desire to have a child is a presumption of the readiness of the couple to love and take care of the child, which should be considered at least not less than that of a couple of natural

[34] In the Italian doctrine, the originator of this way of thinking was S. Rodotà, *Intervento*, La riforma del diritto di famiglia, Atti del Convegno Venezia 30 aprile – 1° maggio 1967, Padova 1967.

[35] With respect to use of this concept regarding surrogate motherhood see R. Picaro, *Le fragili fondamenta del divieto di surrogazione di maternità nel contesto globale non armonizzato*, Riv. dir. civ., 2017, p. 1278.

[36] See: Scalisi, *Maternità surrogata: come "far cose con regol"*, ibidem, who underlines self-determination, health, non-discrimination, reasonableness and balance.

parents. The supporters of this view reiterate that in a modern society the concept of natural filiation should be replaced by the concept of social filiation, meaning that filiation is to be conceived as the result of the will of the intended parents (parenting plan), help of third parties like physicians and donors and recognition by the society and by the law.[37]

However, regarding the argument based on health, it is difficult to accept because thereby the concept of health becomes a subjective one and fails on a common understanding. Moreover, a child cannot be a therapy for someone. A similar objection can be raised relating to the argument of the freedom of will (self-determination, intention) as a criterion for filiation. The concept of filiation thus loses its objective grounds and becomes difficult to distinguish from other forms of relation. Filiation based on genetic bonds has proven to be since the dawn of times, according to the criterion of *id quod plerumque accidit*, the best solution for children, although as usual in the imperfect real world exceptions are common. It is noteworthy that also supporters of the concept of social filiation argue in favor of aptitude tests and educational and counselling preparation of the intended parents.[38] Furthermore, it is at least unlikely that reshaping the concept of filiation on the basis of the right of the adult and his or her will implies more love for the child who becomes an object and a means for the self-actualization of the adult. A relationship based on the will of one party is subject to the same party changing their mind. Furthermore, grounding the concept of filiation in an individual will lead to a loss of criteria to ascertain which reproductive technologies are acceptable and which not, opening the door to the designed baby and the artificial uterus. Art. 147 and 315 *bis* of the Italian Civil Code provide that the parents must respect the child as it is.

This movement toward a revision of filiation has found significant momentum from the judgement No. 162 of 2014 by the Constitutional Court that declared constitutionally illegitimate the ban on heterologous insemination laid down in Section 4 of the *Medically Assisted Reproduction Act*. In particular, the Constitutional Court, instead of considering the constitutional principles in the matter of filiation (Art. 30–31 of the Italian Constitution), accepted a subjective idea of parenthood and of health. From this perspective, it stated that it was irrational to forbid heterologous fecundation in all cases, because this would lead to a complete negation of

[37] C. Flamigni – M. Mori, *La fecondazione assistita dopo dieci anni di legge 40*, Meglio ricominciare da capo!, Torino 2014, p. 152.

[38] C. Flamigni – Mori, *La fecondazione assistita dopo dieci anni di legge 40*, Ibidem.

the fundamental right to become parents, especially for persons affected by serious diseases, by preventing them from having a child. Evidently, the idea of becoming a parent was interpreted by the Court as independent from the genetic bond and determined by the will of the person who wishes to become a parent. The formulation "reproductive self-determination of the couple", used by the Court, makes clear the change in the concept of filiation, which is transformed from one, based on an objective requirement into a purely subjective one. The primacy of parental duties in favor of the child, highlighted by Art. 30 of the Italian Constitution, never mentioned by the Court in fact, is substituted by the primacy of self-actualization of the couple, which absolutizes the right of the adult to become a legal parent and reduces the child to a means of the self-actualization of the adult.[39] Only on the basis of this conceptual premise can the Court also argue that as the right to be a parent is constitutionally granted, any limitation of such a right should be reasonable and duly justified, based on the impossibility of simultaneously protecting other relevant interests. Similarly, regarding the concept of health, the Court pointed out that the access to reproductive techniques is necessary to enhance the right to the protection of health (see Article 32 of Italian Constitution) on the ground that such techniques constitute a remedy for reproductive dysfunction.[40] In that respect, the legislator is not allowed to substitute itself for physicians in the identification of better instruments to satisfy the right to the health, as previously stated by the Constitutional Court in its aforementioned judgement No. 151/2009. As a matter of fact, it is disputable that heterologous fecundation, which implies the use of gametes from third parties, can be presented as a therapy for reproductive dysfunction. Again, a subjective idea of health replaces an objective concept of health and of therapy.[41]

This change of perspective is of great importance also in the field of surrogacy because it undermines the conceptual foundations of the ban on surrogate motherhood. Moreover, the complexity of surrogacy challenges the rule of juxtaposition of genetic and gestational motherhood. The meaning of Art. 269 paragraph 3, of

[39] A. Nicolussi, *La filiazione e le sue forme: la prospettiva giuridica*, Allargare lo spazio familiare: adozione e affido (eds. E. Scabini – G. Rossi, Milano 2014, 6ª and *La natura dell'umana generazione: una prospettiva giuridica*, La natura dell'umana generazione (E. Scabini – G. Rossi eds.), Milano, 2017, p. 140.

[40] A. Vallini, *Sistema e metodo di un biodiritto costituzionale: l'illegittimità del divieto di fecondazione 'eterologa'*, Diritto Penale e Processo, 2014, p. 7, p. 825.

[41] The trend to subjectivism in the matter of constitutional values involves also the concept of dignity. In Germany, for instance, BGH XII ZB 224/17 in its Judgement on 5th September 2018 sustains that the dignity of the women is not compromised when her participation to surrogacy is voluntary.

the Italian Civil Code (motherhood is demonstrated by the proof of the identity of the person who claims to be the child and the person who was given birth by the woman who is claimed to be the mother) is controversial, because according to some scholars this rule regards only the proof of motherhood. Furthermore, some scholars point out that in the matter of surrogacy the mother should be the woman who contributes to the genetics of the child instead of the woman who carries the child to term.[42] The same conclusion is reached by those who stress the idea of the primacy of the best interests of the child and, in this way, argue that the ultimate criterion should be the actual care and the relationship between the child and the intended parents.[43] Other scholars support the idea that the assignment of motherhood to the woman who gives birth to the child should be adopted in order to prevent surrogate motherhood.[44]

Last but not least, an argument in favor of surrogate motherhood is sustained by some scholars who stress the idea that surrogacy is the only means of having a child with a genetic link for a same sex male couple.[45] This argument shows the ambiguity of the thesis, according to which parenthood is based on the intention (the will to become a parent), given that it is commonly sustained, arguing against the relevance of biological bonds. Anyhow, this argument lacks any legal foundation in the Italian legislation, which does not provide for homosexual parenthood. However, considering that in spite of the legal framework, the Jurisprudence has recognized in particular cases of homosexual parenthood, one should not underestimate the *de facto* power of the argument.

The tension between the rule of law and the judicial activism, supported by some scholars who point out that the facts should prevail over the law and that the legal categories conceived by the doctrine of civil law ought to be put aside[46], poses doubts and even concerns. The state of the juridical culture, as it emerges also from these elements, led an authoritative Italian scholar to denounce eclipses of civil

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[42] F. Prosperi, *La gestazione nell'interesse altrui tra diritto di procreare e indisponibilità dello* status filiationis, C.A. Graziani – I. Corti (eds.), *Verso nuove forme di maternità*, Milano 2002, p. 123.

[43] Scalisi, *Maternità surrogata: come "far cose con regole"*, cited, p. 1103.

[44] C.M. Bianca, *Diritto civile*, II, Milano 2014, p. 408.

[45] See: R. Picaro, *Le fragili fondamenta del divieto di surrogazione di maternità nel contesto globale non armonizzato*, Riv. dir. civ., 2017, p. 1278.

[46] See: V. Scalisi, *Il superiore interesse del minore ovvero il fatto come diritto*, Riv. dir. civ., 2018, p. 405; C. Camardi, *La ridefinizione dello status della persona*, F. Mezzanotte (ed.), Le libertà fondamentali dell'unione europea e il diritto privato, Roma 2016, pp. 116–177.

law.[47] In fact, the phenomenon of the serious lack of rigor and of a certain degree of objectivity in the jurisprudence and in the theoretical juridical discourse raises an important methodological question, which involves the very notion of law as a rational and scientific activity.

3.3. The ban on surrogate motherhood and reproductive tourism as a vehicle for regulatory competition in the matter of filiation

A very controversial subject of debate emerged at a different level as a result of reproductive tourism, which causes various problems.[48] Couples who go abroad in order to access procreative techniques or procedures that are not allowed in Italy, such as surrogate motherhood, present Italian authorities with the *fait accompli* of the child and often of a significant period of the child living together with the couple.[49] In addition to the reference of the principle of self-determination, a question arises with regard to the need to protect the status of the emotional bonds that in the meantime have developed and to recognize foreign civil status registration, contrary to the domestic principles of family law. This also leads to a question of the best interest of the child to be evaluated with respect to the real-life situation in which he or she lives (the so-called concrete best interests). This means that the concrete interests of the child challenge the interests of the child considered *a priori* by the legislators as the rationale for the ban on certain forms of procreation. Apart

[47] C. Castronovo, *Eclissi del diritto civile*, Milano, 2015, *passim*.

[48] A.LL. Cherry, *The Rise of Reproductive Brothel in the Global Economy: Some Thoughts on Reproductive Tourism, Autonomy, and Justice*, University of Pennsylvania Journal of Law and Social Change, 2014, p. 17, p. 257; I.G. Cohen, Circumvention Tourism, Cornell Law review, 2012, p. 97, p. 1309; J. Mouly, *La «délocalisation procreative»: fraude à la loi ou habileté permise?*, Recuell Dalloz, 2014, p. 2419; A. Piga, *Leggi e norme sulla PMA: il panorama legislativo europeo*, in L. Lombardi – S. De Zordo (ed.), *La procreazione medicalmente assistita e le sue sfide. Generi, tecnologie ed uguaglianze*, Milano 2013, p. 112; C. Flamigli – A. Borini, *Fecondazione E(s)terologa*, Roma 2012, p. 33.

[49] Paradiso and Campanelli v. Italy: In contrast, the Court does not consider in the present case that the domestic courts were obliged to give priority to the preservation of the relationship between the applicants and the child. Rather, they had to make a difficult choice between allowing the applicants to continue their relationship with the child, thereby legalising the unlawful situation created by them as a *fait accompli*, or taking measures with a view to providing the child with a family in accordance with the legislation on adoption.

from the clear violation of the ban on surrogacy, cross-border surrogacy violates, according to some scholars, the rules on international adoption.[50]

As a matter of fact, the issue of recognition of foreign civil *status* registration, contrary to the domestic principles of family law is controversial in Italian Jurisprudence. On the one hand, the judgement of the Court of Cassation No. 24001 of 2014, on the premise that the ban of surrogate motherhood corresponds to a principle of public policy relevant also in the field of international law, denied the recognition of a birth certificate made in the Ukraine regarding a child born after surrogate motherhood pursued by a Ukrainian woman on the basis of a contract with an Italian heterosexual couple. On the other hand, the Court of Cassation (in the ruling No. 19599/2016) held – in a case regarding a lesbian couple who, in a foreign country, registered both partners' names on a birth certificate of a child born after heterologous assisted reproduction undergone by one of them with oocytes of the other – that data could be entered in the Italian status register, being not inconsistent with the requirement of not-contrariety with public policy for recognition or enforcement of a foreign judgement, although contrary with the principles of family law. This judgement is cited for the overruling of the concept of public policy that in the view of these decisions is dramatically diminished till almost undermined. In other words, the threshold of the conformity with public policy was made almost irrelevant. Afterwards, in line with this overruling, some courts granted the application of couples that claimed the transcription of the foreign birth certificate into the Italian civil status register regarding minors born after surrogate motherhood. The difference between the case ruled by the Court of Cassation and surrogate motherhood, where also the dignity of the woman and of the child is at stake, was not taken into consideration.[51] Irrelevant was even the homosexuality of the couple, although Section 5 of the *Medically Assisted Reproduction Act* expressly provides that access to assisted reproduction is permitted only to couples who are composed of a man and a woman and the Law No. 76 of 20 May 2016 (rules governing civil unions between people of the same sex) contains no rule about filiation.

In any case, the strongest point in favor of recognition of foreign civil status registration is the best interests of the child principle "in regards to its own particular

[50] B. Barel, *La filiazione nel diritto internazionale privato dopo la riforma del 2012–2013*, in La nuova disciplina della filiazione, Santarcangelo di Romagna, 2014, p. 285; A. Renda, *La surrogazione di maternità e il diritto di famiglia al bivio*, Europa e diritto privato, 2015, p. 419.

[51] M. Fabre-Magnan, *La gestation pour autrui. Fictions et realité*, Parsi 2013, 22 stresses an "instrumentalisation des femmes sans précédent."

merits." The principle of children's best interest has to be taken into consideration also according Article 23 (*Grounds of non-recognition for judgments relating to parental responsibility*) of the Regulation No. 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. Within the frame of reference of the child's best interests, the right to continuity of the *status* has been affirmed also on the basis of a controversial interpretation of Art. 8 of the New York Convention on the rights of the child (realized on 20 November 1989).[52]

However, uncertainty over this interpretation aside, reference to this provision would also imply the protection of the genetic identity of the child and prevent the splitting of the bonds with the anonymous genetic parent.

As cited above, also the Constitutional Court (No. 272 of 2017) stressed the relevance of the best interest of the child in regards to its own particular merits, holding that Art. 263 of the Italian Civil Code is to be interpreted in the way that the child's best interest becomes a requirement for the de-recognition of the false recognition also when it relates to practices that are prohibited by law, such as surrogacy. As one scholar points out, the logic of the parentage actions (azioni di stato), which is the certainty of the status, is contaminated thereby with an unusual criterion.[53]

The problem of procreative tourism, anyway, cannot be solved without an international discipline[54], which is not easy to achieve and – in the best-case scenario – might be limited to Europe and consist of a ban on commercialization and exploitation of the female body in its reproductive capacity, under any form of payment, explicit or surreptitious. In expectation of an international solution, the difficult question in Italy remains on how the protection of children born after these practices can be balanced with the rule of law, substantially challenged by the practice of procreative tourism and itself rooted in the general protection of the child's best interests.

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[52] 1) States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference. 2) Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

[53] M. Sesta, *La filiazione*, Trattato di diritto privato (edit. Bessone), IV, 3, Torino 1999, p. 37.

[54] See, among others, K. Trimmings – P. Beaumont, *International Surrogacy Arrangements: An Urgent Need for Legal Regulation at The Internazional Level*, *Journal of Private International Law*, 7, 3, 2001, pp. 627–647; L. Poli, *Maternità surrogata e diritti umani: una pratica controversa che necessita di una regolamentazione internazionale*, *Biolaw Journal-Rivista di BioDiritto*, 2015, p. 7.

The case of *Paradiso and Campanelli vs. Italy*, decided by the European Court of Human Rights in 2017, suggests that the rule of law when the ban of surrogate motherhood is at issue is not of secondary importance. In this case, particularly in the light of the lack of any biological link between the child and the intended parents, the short duration of the relationship with the child and the uncertainty of the ties from a legal perspective, despite the existence of a parental project and the quality of the emotional bonds, the conditions enabling the Court to find that there is a *de facto* family life were not met and the authorities' removal of the child, turned out to be compatible with Art. 8 of The European Convention of Human Rights. Instead, when the duration of a relationship is sufficient and health experts claim that taking the child into care would be contrary to his or her interests it is necessary to find a solution which respects the interests of the child but also does not undermine intolerably the rule of law.[55] In order to find a provisional balance, a possible solution may be to apply a principle derived from the rules on relationship between parents and children in the field of putative marriage (Art. 128 of the Italian Civil Code).[56] Thereby, the minor would be attributed the *status* of a child but only in their favor, while no rights would be recognized in favor of the couple or while at least not in favor of the non-biological parent. Thus, the welfare of the child is safeguarded, but, in parallel, the reason of rule of law is not entirely ignored given the infringement of the ban on surrogate motherhood.

Whatever solution of the question, no doubt that reproductive tourism is a big challenge for legal systems that provide bans in this field.[57] The issue arisen at the beginning of the century about competition between legal systems, which was debated with regard to economic rights above all, has eventually been extended to

[55] Although it is difficult to predict trends in this field, it is noteworthy that the latest official stance of the European Institutions demonstrates that in Europe there is no common consensus in favor of surrogacy. Referenced is the European Parliament Resolution of 5 April 2011 on priorities and outline of a new EU policy framework to fight violence against women (2010/2209(INI). At points 20 and 21 it is stated that "Member States [are asked] to acknowledge the serious problem of surrogacy which constitutes an exploitation of the female body and her reproductive organs." Furthermore, said poins "[e]mphasiz[e] that women and children are subject to the same forms of exploitation and both can be regarded as commodities on the international reproductive market, and that these new reproductive arrangements, such as surrogacy, augment the trafficking of women and children and illegal adoption across national borders."

[56] Art. 128, paragraph 3, provides that if only one of the spouses was in good faith at the time of marriage the benefits of the putative marriage are valid only for him/her and for the children.

[57] See: S. Luna, *Turismo procreativo: "Mater semper certa est?" (Uno sguardo alla maternità surrogata)*, Rassegna dell'avvocatura dello stato, 2017, p. 124.

the field of the family. Then the concern about regulatory competition was the possible consequence of a race to the bottom.[58] Re-introducing the market by the back door of competition between legal orders would make the failures that caused the State to intervene in the first place resurface at the higher level of intergovernmental competition.[59] In fact, the protection of the weaker parties is put at risk if the legal system cannot count on some mandatory rules. Now, the downward spiral turns out to be extended even to the delicate sphere of procreation. Undermining the principle of public policy is a back door opened to cross-border surrogacy and the concerns arising by this practice are not of minor importance given that children are involved.

[58] See: A. Nicolussi, *Europa e cosiddetta competizione tra ordinamenti giuridici*, Europa e diritto privato, 2006, p. 83 and A. Nicolussi, *Famiglia e biodiritto civile, Le parole del diritto*, Scritti in onore di Carlo Castronovo, II, Napoli 2018, 744 ff.

[59] H. W. Sinn, *The New Systems Competition*, Oxford, 2003, p. 6.

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Surrogate motherhood in Russia and the Commonwealth of Independent States: legislation, jurisprudence, and political discussion

Introduction

According to the Constitution of the Russian Federation, the Russian Federation (CRF) is a social State "…*whose policy is aimed at creating conditions for a worthy life and the unhindered development of Man*".[1] To ensure a worthy life and a free development of Man State support shall be provided for the family, maternity, fatherhood and childhood.[2] Article 38 CRF, Part 1, also stipulates that "*maternity, childhood and family shall be protected by the State.*" Paragraph "g", part 1 to the Article 72 determines public entities providing this protection – the Russian Federation and the constituent entities of the Russian Federation. Russia is a federative state where the subjects and functions between the Russian Federation and its entities are stipulated in accordance with the Constitution. Protection of the family, maternity, fatherhood and childhood are within the joint jurisdiction of the Russian Federation and its constituent entities.

Nevertheless, the issues directly related to surrogacy are regulated by the Family Code of the Russian Federation (FCRF), which does not empower the constituent entities of the Russian Federation to govern the relations concerning reproductive

[1] Para. 1 Art. 7 CRF.
[2] Para. 2 Art. 7 CRF.

technologies including surrogacy.[3] Therefore, only the Federal Law regulates the issues connected with surrogate motherhood.[4]

Main rules related to surrogate motherhood are provided in Article 55 of the Federal Law of November 21, 2011 № 323-FZ "On the basics of the protection of the health of the citizens in the Russian Federation" (FZ №323-FZ) and in Article 51 and Article 52 of the FCRF. The procedure of the registration by the parents of the child born by the surrogate mother is stipulated in paragraph 5 Article 16 of the Federal Law of 15.11.1997 №143-FZ "On Civil Status Records" (FZ №143-FZ).[5] Guidelines for using legal regulations concerning surrogate motherhood are specified in the Resolution of the Plenum of the Supreme Court of the Russian Federation of 16.05.2017 № 16 "On application by the Courts of Legislation When Considering Cases on Establishing the Parentage of Children" (Resolution №16), which has legal interpretation, i.e. is obligatory for courts.[6]

Surrogate motherhood in Russia means child bearing and delivering (including preterm delivery) under the contract made by a surrogate mother (a woman who bears a fetus after donor embryo transferring) and intended parents whose sex cells were used for fertilization or a single woman who can't bear and deliver a baby due to medical grounds.

Russian legislation stipulates quite liberal rules concerning surrogate motherhood. The main constraints relate to the legislator's interpretation of the "*medicalized*" model of Assisted Reproductive Technologies, which are regarded as methods of overcoming infertility or the risk of hereditary disorder transmission to a child.

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[3] Para. 2 Art. 3 FCRF.

[4] В.В. Масляков, Н.Н. Потапенко, *Законодательное регулирование суррогатного материнства, Медицинское право,* 2016, №5, pp. 43–48.

[5] An in-depth article by Yana Berger including the translation of main legal rules on surrogate motherhood in Russia into Polish has been recently published. The history of surrogate motherhood development in Russia is also available: Iana Berger, *Macierzyństwo zastępcze w świetle przepisów prawa Federacji Rosyjskiej, Instytut Wymiaru Prawa Sprawiedliwości*, Warszawa 2017, pp. 1–47, https://www.iws.org.pl/analizy-i-raporty/raporty#PP2018.

[6] И.Г. Гаранина, Т.И. Лысенко, *Основные вопросы реализации права на суррогатное материнство в международном праве и судебной практике Российской Федерации, Российский судья,* 2017, №7, pp. 20–27.

1. Legal regulation of surrogate motherhood in Russia

1.1. "Medicalized" model?

In practice, this "medicalized" model is called into question due to the right of both a single woman and a single unmarried man to opt for surrogate motherhood. At the same time in practice, medical organizations delivering services of in-vitro fertilization and donor embryo transfer to the surrogate mother do not follow the requirement on the use of assistive reproductive technologies only in case of inability of carrying and delivering of a child on medical grounds among women seeking for medical help. Moreover, this issue is not raised in regard with single men. We have not dealt with the cases when medical organizations refused to use the method of surrogate motherhood among men and women turning to them for assistance in the event of the lack of medical grounds.

Article 35 of "The fundamentals of the legislation of the Russian Federation regarding the preservation of the health of citizens" of July 22, 1993 № 5487–1, which was in force prior to adopting of the FZ № 323-FZ, stipulated that every adult woman of childbearing age has a right to artificial insemination and embryo implantation.[7] Jurisprudence deals with such matters with regard to a single man in a positive way, recognizing the right of a single man to exercising his right to fatherhood by means of surrogate motherhood.[8]

Among the most important precedents there are the judgements of Babushkinsky district court in Moscow of August 4, 2010[9] and Smolninsky district court in St. Petersburg of March 12, 2011.[10] In the latter case a single father had even two children.[11]

In the first case the judge of Moscow court compelled the Agency of Civil Acts Registration Bureau to register the child born upon the program of gestational surrogacy with donor oocytes for a single man. According to the Court, Russian law "has no prohibitions or restrictions regarding an opportunity for unmarried

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[7] *Медицинское право. Учебное пособие, науч. ред. Ю. А. Дмитриев*, Москва 2006, p. 227.

[8] О.Ю. Ильина, *Постановления судов по семейно-правовым спорам в практике органов записи актов гражданского состояния, Семейное и жилищное право*, 2015, №2, pp. 6–12.

[9] Бабушкинский районный суд г. Москвы, решение от 4 августа 2010 г. по гражданскому делу N 2–2745/10, СПС КонсультантПлюс.

[10] Смольнинский районный суд г. Санкт-Петербурга, решение от 4 марта 2011 г. по гражданскому делу N 2–1601/11, СПС КонсультантПлюс.

[11] А.Т. Боннер, *Законодательство об искусственном оплодотворении и практика его применения судами нуждаются в усовершенствовании. Закон.* 2015, №7, pp. 142–145.

men or women to fulfill themselves as a mother or father by means of the methods of artificial reproduction."[12]

In the second case the judge of St. Petersburg court explicitly referred to Article 19, part 3, of the CRF holding that "the national legislation stipulates equal rights of men and women. The right of single men to have children and to found a family consisting only of children and their father" and that "the national legislation has no prohibition on registration of a child born as a result of embryo implantation to a woman in order to bear it by a single woman or father of this child."[13] The Court stated that the refusal to register a child in the Agency of Civil Acts Registration Bureau violates the rights and lawful interests of both father and children born by means of surrogate motherhood.[14] Currently, this right is explicitly granted only to a single woman:

> Men and women both married and unmarried have the right to use assisted reproductive technologies provided there is a mutual informed and free consent to a medical intervention. A single woman also has the right to use assisted reproductive technologies provided there is her informed and free consent to a medical intervention.[15]

This rule is also granted to other states – members of the Commonwealth of Independent States in paragraphs 2–3 to Article 12 of the "Model Law on the protection of reproductive rights and reproductive health of citizens" (Adopted in St. Petersburg on November 28, 2014 by the Ruling 41–21 at the 41st plenary session of Inter-parliamentary Assembly of Member Nations of the Commonwealth of Independent States):

> Men and women both married and unmarried have the right to use assisted reproductive technologies provided there are medical indications and no counter indications to the use of these technologies subject to their mutual written informed and free consent to a medical intervention with the aid

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[12] Бабушкинский районный суд г. Москвы, ibidem.

[13] Смольнинский районный суд г. Санкт-Петербурга, ibidem.

[14] Л.К. Айвар, *Правовая защита суррогатного материнства, Адвокат,* 2006, №3, p. 18; Е.Ю. Горская, *Тенденции изменения внесения сведений о родителях в запись акта о рождении, Семейное и жилищное право*, 2018, №3, pp. 4–6.

[15] Para. 3 Art. 55 FZ N 323-FZ.

> of such technologies… A single woman has the right to use assisted reproductive technologies provided there is her informed and free consent to a medical intervention and compliance with the demands set out in Paragraph 2 of this Article.[16]

Currently, a single man having neither wife nor unmarried cohabitant is restricted in the right to fatherhood. Legislative position is based upon the interests of a child – arrival in a two-parent family or composed of only a mother as a last resort that violates the principle of family support in Russia as little as possible.[17] In practice, quite often a single mother can be unable or unwilling to identify paternity of her child. However, in Russia there are no instances involving fathers having children from unknown mothers. The principle *mater semper certa est*, that is every child should always have mother, is in force in Russia. Man's intention to have a child involving no mother raises concerns regarding his future. What are the grounds of the man's unwillingness to have a mother for his child? Such a person is likely to have some deviations in sexual orientation (homosexual) or (and) psychiatric deviations which, will be detrimental for the child's life in the future.

At a first glance, there cannot be any problems related to the use of surrogate motherhood with respect to a single woman, as the law explicitly provides such an opportunity. However, quite often Civil Registry Offices refuse to register a child born by a surrogate mother. Civil Registry Offices refer to paragraph 5 article 16 FZ №143-FZ[18] and paragraph 4 article 51 FCRF[19], stipulating that married people who gave a written consent to the embryo transfer for the purpose of carrying

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[16] Модельный закон "Об охране репродуктивных прав и репродуктивного здоровья граждан", утв. Постановлением МПА СНГ от 28.11.201 4 г. № 41–21, http://iacis.ru/activities/documents.

[17] Д.Б. Савельев, *Соглашения в семейной сфере: учебное пособие, Москва 2017*, p. 98.

[18] Art. 16 FZ № 143-FZ stipulates: "When registering the birth of the child upon the application of the spouses who gave their consent to the embryo transfer to the other woman for the purpose of carrying a child, along with the document confirming the birth of the child the document issued by the medical organization and confirming the receiving of the consent from the woman who gave birth to the child (surrogate mother) to the register the spouses as parents of the child is required."

[19] According to p. 4 art. 51 FCRF "Married persons who gave their written consent to the use of the method of IVF or embryo transfer in case of a childbirth resulting from the use of these methods are registered as his parents at the Civil Registry Offices. Married persons who gave their written consent to the embryo transfer to the other woman for the purpose of carrying a child can be registered as parents of the child only with the consent of the woman who gave birth to the child (the surrogate mother)."

a child can be registered as parents only with the consent of the surrogate mother, in addition to the above, the baby born from the surrogate mother must have both parents who must be legally married.

The refusals on the part of Civil Registry Offices are caused by the collision between the legal regulations of paragraph 5 article 16 FZ №143-FZ and paragraph 4 article 51 FCRF according to which only married people who gave their written consent to the embryo transfer to the surrogate mother for the purpose of carrying a child can be registered as his parents only with the consent of the surrogate mother, and the born baby must have legally married parents and paragraph 3 article 55 FZ № 323-FZ stipulating that man and woman both married or unmarried have the right to the use of assistive reproductive technologies, provided there is a mutual informed voluntary consent to medical intervention.[20]

On the basis of the regulations of the law FZ №143-FZ and the FCRF, unmarried people, single mothers, single fathers forced to resort to the help of surrogate mothers, cannot officially receive their parental rights, even provided there is a consent from women carrying children. In such cases when considering disputes on administrative legal claims of biological parents about challenging the acts of a civil Registry office, the court shall make the decision on meeting the claims of biological parents and enforcing the Civil Registry Offices to register them as parents of the child.[21] In this event, the Court refers to the following norms: in the UNO Convention "On the Rights of the Child" (1989), the Constitution of the Russian Federation, the Federal Law of 24.07.1998 N 124-FZ "On Basic Guarantees of the Rights of the Child"[22], the Federal Law "On Civil Status Records", the Family Code of the Russian Federation Russian legislation stipulates that provided there is a written consent of the surrogate mother, the persons who entered into the contract of carrying and delivering a child with her, shall be recognized as legal parents (parent). It means that unmarried persons, if they have the consent of the surrogate mother, shall be registered as mother/father in the child's birth certificate. The court also refers to

[20] Art. 55 FZ № 323-FZ: "Surrogate motherhood is carrying and delivering a baby (including premature birth) under the contract concluded between the surrogate mother (the woman who carries a baby after embryo transfer) and intended parents, whose sex cells were used for fertilization, or a single woman for whom carrying and delivering a baby is impossible on medical grounds."

[21] И.И. Черных, *Особенности рассмотрения в суде дел об оспаривании отцовства (материнства) в правоотношениях суррогатного материнства, Законы России: опыт, анализ, практика*, 2017, №9, pp. 67–75.

[22] Федеральный закон от 24.07.1998 N 124-ФЗ (ред. от 04.06.2018) "Об основных гарантиях прав ребенка в Российской Федерации", http://www.pravo.gov.ru.

paragraph 3 article 55 FZ № 323-FZ specifying that a man and a woman both married and unmarried have the right to the use of assistive reproductive technologies, provided there is a mutual informed voluntary consent to the medical intervention. Thus, the legislation allows persons both married and unmarried to use any assistive reproductive technologies.

It is noteworthy that the courts do not take into account whether the use of surrogate motherhood was required on medical grounds or not. From the court's perspective, the main issue here is the protection of child's rights. If the child is already born and has at least one biological parent, then in the interests of the child he/she should have the family even with one biological parent. The alternative measure is to register the child as if he/she was born by a single woman who did not want to keep him/her for herself. However, according to the courts, this approach is not in compliance with the circumstances of the case, as surrogate mother's consent to register other person as a parent is not her refusal of the child, but a part of the process of establishing a legal link between a biological parent and his child.

Alternatively, against the parent's will, the refused child is placed to the orphanage and the parent can establish the legal link with his child only through adoption. In the Russian Federation, the adoption of the own child is possible as according to the general rule, the adopters can be persons of full age of both genders. The list of restrictions for several groups of citizens is closed and does not include parents of the child. [23] However, analyzing the norms of the Family law, it can be concluded that in order to establish the legal link with his own child, father has to apply for being the father of the child.[24]

The establishment of the paternity will take place in judicial proceedings. Mother of the child will also have to establish her maternity through the courts on the basis of evidence placed before the court – documents and proof of witness confirming her biological relationship with the child.[25] There will be no grounds for the court not to recognize biological parents as legal parents of the child, as parents will confirm their biological relationship with the results of genetic tests. And the court will have to find in favor of parents. The principle of legal economy is one more argument to enforce Civil Registry Offices to register biological parents of the child as his parents, as if biological parents are denied being registered as legal parents

[23] Para. 1 Art. 127 FCRF.
[24] Art. 49 FCRF.
[25] Para. 1 Art. 48 FCRF.

of the child born by the surrogate mother, their next step will be filing a lawsuit on establishment maternity and paternity with obvious results of the legal proceedings.

The position of the courts is based on the overall policy thrust of the Russian state and legal regulation aimed at the protection of childhood and maternity. Political documents of the Russian Federation set out that State family policy is a system of principles, tasks and priority measures oriented at the support, strengthening and protection of the family as a core basis of the Russian society, preservation of traditional family values, promoting the role of the family and the prestige of parenthood in social life (The Order of the Government of the RF of 25.08.2014 №1618-p "On ratifying the Outline of the State family policy in the Russian Federation for the period till 2015").[26] The legislation has the same approach. Among the basics of the family law the priority is given to the principle stipulating that: "Family Legislation reflects the need of strengthening the family."[27] Interim working group on the development of family legislation in the Coordinating council to the President of the RF on implementing national strategy of actions in the interests of children for 2012–2017 proposed for the purpose of protecting family rights and interests of the citizens to add to the Family Code of Russian Federation an article related to regulation of relations in the sphere of surrogate motherhood and the use of other assistive reproductive technologies.

The judge of the Supreme Court of the RF, A.A. Klikushin, highlighted the insufficient regulation of surrogate motherhood. The Family Code of Russian Federation contains only two paragraphs of Articles 51 and 52 and Article 55 in the chapter "On Fundamentals of the Public Health Care." Due to such a concise legal regulation, there is a number of problems, to the judge's mind, one of which is protection of surrogate mother's rights when parents refuse to keep the child. Basically, surrogate motherhood instead of helping people who are not able to have children on medical grounds is turned into a kind of paid services featuring foreigners among other things by perfectly healthy citizens. A.A. Klikushin admitted that with the current legislation the courts have no grounds to refuse single men, who get donor eggs and become fathers, in satisfying their claims to the Civil Registry Offices on registration of the childbirth only in case of the record about father. However, during the debates on this matter it is decided not to apply to the Duma with the proposal on

[26] Распоряжение Правительства РФ от 25.08.2014 №1618-р об утверждении Концепции государственной семейной политики в Российской Федерации на период до 2015 года, http://www.garant.ru/products/ipo/prime/doc/70627660.

[27] Para. 1 FCRF.

implementing amendments until the matter whether to allow or prohibit surrogate motherhood is settled by the society.[28]

The author of the current article as a legal practitioner in the field of the family law faced this problem in St. Petersburg. A married couple resorted to the method of surrogate motherhood using donor oocytes, as the wife could not fall pregnant. An egg was fertilized with the husband's sperm and transferred into the surrogate mother's uterus. Two months later the husband unexpectedly died. Several problems emerged in this regard: as the wife had no genetic relationship with the child, she refused to keep the relations under the surrogate motherhood contract and pay remuneration to the surrogate mother; the parents of the dead husband wanted to have a grandchild, that is why they made the next payment; but soon the surrogate mother fell ill and started taking medication negatively influencing the fetus.

Today the parents of the dead husband do not want to keep the relations with the surrogate mother as well – to bear all material costs, pay remuneration for the services and take the sick child after his birth. In this respect, several questions have to be answered:

- If the parents of the dead man confirmed their intention to keep the relations with the surrogate mother and paid for her maintenance, did they put obligations on themselves with regard to the surrogate mother? Are they as universal successors who inherited after the death of their son obliged to perform the duties with regard to surrogate mother?
- Is succession of other persons possible on the part of the dead husband?
- Is the situation possible when the parents of the dead want to continue the programme of surrogate motherhood, agree to bear all the costs instead of the wife who refused to participate in the programme, and to register the child born by the surrogate mother, as if they themselves were the intended parents?

All these questions shall be answered negatively, as the rights and obligations under the contract between the intended parents and the surrogate mother are closely related to the individual and cannot be transferred to other persons and to the heirs of the dead among other things.

[28] Стенограмма парламентских слушаний на тему: "Совершенствование семейного законодательства: возможности и перспективы сохранения традиций российской семейной культуры" от 17.03.2016 г. (The transcript of Parliamentary hearings on "The Development of Family Legislation: Opportunities and the Prospects for Maintaining of the Traditions of Russian Family Culture" of 17.03.2016), unpublished.

As the party to the contract, the wife is liable for breaching the contact and performing her duties on paying for the surrogate mother's maintenance and remuneration, but it is impossible to make her keep the child for herself. There has not been a trial, which is why it is difficult to say what judgement the court will deliver.

However, the courts have already dealt similar cases when not biological parents but other persons wanted to keep the child born by the surrogate mother for themselves. Regarding to the possibility to register grandmother or grandfather as a parent of the child, Court practice provides cases with favorable outcomes.[29]

The following case is quite illustrative:[30]

M.I. Tsygankova had a son, who due to the severe disease underwent the procedure of cryopreservation of biological material (ejaculate). Some time later he died. After his death M.I. Tsygankova and the surrogate mother entered into the surrogate motherhood contract according to which after the transfer of the embryo produced by means of in-vitro fertilization of the sex cells of anonymous donor oocytes and her son's ejaculate, the surrogate mother in case of pregnancy is obliged to carry, deliver and place the born child to Tsygankova. The surrogate mother gave birth to a girl. However, in the Civil Registry Offices of Prikuban district of the city of Krasnodar M.I. Tsygankova was denied the right to register her as mother of the girl, as married persons who gave their consent to the embryo transfer to the surrogate mother for the purpose of carrying a child can be registered as parents only with the consent of the woman who gave birth to the child (surrogate mother), i.e. only married persons can be registered as parents in this case. But M.I. Tsygankova was a single woman. At the same time, the surrogate mother gave her consent to register Tsygankova as the mother of the girl.

The court satisfied the claim of M.I. Tsygankova and obligated the registry office of Prikuban district of the city of Krasnodar to make a record on the birth of a live-born baby, register M.I. Tsygankova as mother of the child, and to make a record on the father of the child upon Tsygankova's application.

The position of the Court is based on the UNO Convention "On the Rights of the Child" (1989), the Constitution of the Russian Federation, the Federal Law of 24.07.1998 N 124-FZ "On Basic Guarantees of the Rights of the Child", the Federal Law "On Civil Status Records" (FZ №143 FZ), the Family Code of the Russian

[29] Л.К. Айвар, *op. cit*, pp. 13, 17–18.

[30] Решение Прикубанского районного суда г. Краснодара № 2-13109/2016 2–13109/2016~М-15023/2016 М-15023/2016 от 1 ноября 2016 г. по делу № 2-13109/2016, http://sudact.ru/regular/doc/nWkdonQD14J5.

Federation and specifies that according to Russian legislation, in case of surrogate mother's written consent, the persons who entered with her into the contract on carrying and delivering a baby shall be recognized as parents.

The most noteworthy thing here is the fact that neither Civil Registry Offices nor the Court took into account that the mother of the dead man was not entitled to conclude such contract. Infertility treatment in this case was out of the question as the intended parent was already dead at the time the contract was concluded. The purpose was different – the birth of the grandson. According to the Court's decision, there was no violation of the law, and the child shall have mother being in biological terms his grandmother.

Russian courts give priority to two facts: childbirth and biological relationship with intended parents. All other violations of the law, even if they are gross, are not taken into account by the court, provided there is no a criminal offense. The position of the court is based on the following principles:

- nobody shall be punished for childbirth;
- a child shall have parents or parent;
- a child shall leave in a family.

The courts refer not to the law which stipulates the otherwise, but to the principle of justice – there is a biological parent or relative who wants to keep a child for himself, and to the cultural concept of a family as a link between relatives and different generations among other things.

1.2. Surrogate motherhood contract

The features of the legal regulation of surrogate motherhood in Russia are as follows. The relations of surrogate motherhood are based on the agreement made by a surrogate mother and intended parents, which sets forth extra corporal fertilization and transfer of an embryo into the surrogate mother's uterine cavity.[31]

[31] С.В. Лозовская, М.Э. Шодова, *Субъектный состав договора суррогатного материнства, Семейное и жилищное право*, 2016, №3, pp. 8–9.

Russian legislation specifies only the contract between the surrogate mother and the intended parents.[32] Other people cannot be the parties of these relations.[33] Nevertheless, quite often the contract of surrogate motherhood can be concluded between the intended parents and an intermediary organization, which is not in conformity with the law, but does not receive a proper assessment from courts.

The parties to the surrogate motherhood contract shall meet the following requirements:

The persons who are unable to carry and deliver a baby on medical grounds can become intended parents.[34] It may be a man or a woman, both married and unmarried, and a single woman.[35] However, as it has been already mentioned, in practice this requirement is seldom complied with. The relations of surrogate motherhood are based on the agreement made by a surrogate mother and intended parents, which sets forth extra corporal fertilization and transfer of an embryo into surrogate mother's uterine cavity. The child has to be genetically related to at least one of the intended parents. At the same time, a surrogate mother can't be a donor of oocytes of a carried child, i.e., only gestational surrogate motherhood is allowed in Russia. Genetic relationship between a surrogate mother and intended parents of their child is quite conceivable. On the first stages of the development of surrogate motherhood among surrogate mothers there were mainly relatives of a woman incapable of carrying a pregnancy on her own – her sisters, cousins, even her mother. Other requirements to a surrogate mother relate to forthcoming childbearing. A surrogate mother must undergo a special medical examination and have at least one child delivered naturally. If a child was delivered by Caesarean section, such a woman can become a surrogate mother three years after delivering a baby. She has to be no less than 20 and no more than 35 years of age.[36] Nevertheless, in practice age limits are not always enforced. Medical organizations applying reproductive methods provide for these purposes 36–38 year-old women who have already experienced to be sur-

[32] И.В. Афанасьев, *Правовая природа и содержание договора суррогатного материнства, Медицинское право*, 2015, №4, pp. 39–42.

[33] Another opinion: С.В. Алборов, *К некоторым вопросам суррогатного материнства. Судья.* 2017, №6, pp. 43–45.

[34] Para. 9 Art. 55 FZ № 323-FZ; А.Н. Левушкин, И.С. Савельев, *Требования, предъявляемые законодателем к будущим родителям ребенка, рожденного с применением технологии суррогатного материнства, Современное право*, 2015, №9, pp. 92–96; А.А. Флягин, *Правовой статус родителей при суррогатном материнстве, Гражданское право*, 2015, №3, pp. 39–43.

[35] Para. 3 Art. 55 FZ № 323-FZ.

[36] *Медицинское право. Учебное пособие, науч. ред. Ю.А. Дмитриев*, Москва 2006, p. 290.

rogate mothers. The law does not specifically impose sanctions for violation of these requirements. We haven't come across the cases of holding medical organizations liable for violation the rule of surrogate mother's age limit.

If the surrogate mother is married, her spouse's written consent to the use of surrogate motherhood program is required.[37] This rule is resulted from surrogate mother's right not to give her consent to the intended parents to register themselves as parents, and to register herself as mother. In this case surrogate mother's husband becomes father of the born child owing to the guidelines of the law.[38]

The subject matter of the contract is carrying a baby by the surrogate mother.[39] The surrogate mother is obliged to undergo the procedure of embryo transfer, carry the child, provide all necessary conditions for favorable pregnancy and in case of the childbirth place the child to the intended parents, who are usually called "the customers."[40]

The contract can be either gratuitous or non-gratuitous.[41] Even if a relative wants to help parents have a baby without any compensation, their relationship must be based on the contract. It is not specified by the law whether the contract of surrogacy should be oral or written. When a baby is carried by a relative gratuitously, the contract is not concluded in writing but a written consent to free of charge delivery of surrogacy services is provided.[42] Currently, in the great majority of cases surrogacy services are provided on a cost-recovery basis. The parties can conclude a contract in a notarial form. This type of a surrogate motherhood contract has become very common lately as it publicly makes the contract credible and in

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[37] Para. 3 Art. 52 FCRF.

[38] Para. 1 Art. 51 FCRF: "Married mother and father are registered as parents at the Civil Registry Office upon the application of one of them."

[39] К.А. Кириченко, *Определение предмета договора суррогатного материнства, Семейное и жилищное право*, 2016, №1, pp. 9–12; К.Ф. Фаракшина, *Предмет договора суррогатного материнства: теория и практика, Актуальные проблемы российского права*, 2013, № 6, pp. 738–742; Т.К. Крайнова, *Договор суррогатного материнства, Нотариальный вестник*, №11, 2010, pp. 19–20; Г.Б. Романовский, *Правовое регулирование вспомогательных репродуктивных технологий (на примере суррогатного материнства)*, Москва 2011, pp. 94–96.

[40] И.В. Афанасьева, *ibidem*, pp. 39–42; А.А. Вихарев, *Договор как инструмент регулирования семейных отношений, Российский юридический журнал*, 2017, №3, pp. 144–152; А.М. Мубарашкина, *Правовая природа договора суррогатного материнства, Семейное и жилищное право*, 2014, №4, pp. 24–27.

[41] Т.Е. Борисова, *Суррогатное материнство в Российской Федерации: проблемы теории и практики*, Москва 2016, p. 64.

[42] А.А. Серебрякова, *Проблемы правового регулирования суррогатного материнства, Российская юстиция*, 2016, №12, pp. 52–55.

case of any disputes between the parties lets facilitate the proof of circumstances specified in the contract.[43] Before the contract is concluded, the parties have no rights and obligations. A common mistake of intended parents is the payment of certain sums of money to the alleged surrogate mother before signing the contract of surrogate motherhood.[44]

The cost of the services delivered by the surrogate mother is specified in the contract, which also stipulates the procedure and the terms of remuneration payment. In case of violation the terms of remuneration payment the contract provides delay penalties.[45] In the event of favorable course of pregnancy not resulting extra expenses the customers can be obliged to pay an additional sum of money to the surrogate mother. Such clause of the contract should encourage the surrogate mother to take care of her health better. The contract almost always sets out that in case of a multiple pregnancy the customers must pay additional remuneration to the surrogate mother above the sum of money specified by the parties. The additional compensation is usually from 25% to 50% of the base compensation specified by the parties in case of one child delivery. The contract sets out the costs and the payment procedure for obtaining qualified medical assistance needed by the surrogate mother due to her performance of the contract. The contract stipulates the expenses for recovering the surrogate mother's health after pregnancy and delivery. Payment to the third parties is made by the customers or by the surrogate mother that is also specified by the provisions of the contract. For instance, there can be expenses related to the provision of additional medical services for the surrogate mother. The customers can be obliged to pay for the pregnancy termination in case of immediate need on medical grounds.

The surrogate mother is obliged to abstain from alcohol and smoking, follow all medical prescriptions and undergo all necessary examinations and procedures.[46] Permanent monitoring of surrogate mother and child's health is of great importance for the customers. That is why the contract specifies the terms and procedure of pro-

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[43] А.В. Кристалова, *Суррогатное материнство в Российской Федерации: основные понятия, проблемы правового регулирования, роль нотариуса, Семейное и жилищное право*, 2014, №3, pp. 25–27.

[44] З.Н. Горбунов, *Договор о суррогатном материнстве и его значение в системе защиты прав участников репродуктивных технологий, Юстиция*, 2017, №2, pp. 53–57; А. А. Петрикова, *Проблемы договора о суррогатном материнстве, Гражданское право*, №2, 2006, p. 16.

[45] Т.Е. Борисова, *ibidem*, p. 99.

[46] Ю.С. Норбекова, *Экономическая сторона договорных семейных обязательств, Юрист*, 2017, №6, pp. 26–29.

viding the report by the surrogate mother. Medical organizations, which supervise the course of pregnancy, also inform intended parents about surrogate mother's state of health. For the breach of the contract by the surrogate mother, punitive sanctions can be imposed as well as reduction or deprivation of the payment.[47]

A child is carried by a surrogate mother for the purpose of its eventual placing in the custody of intended parents. However, the law stipulates the right of a surrogate mother to keep the child,[48] as in Russia the relationship between a surrogate mother and a child is of greater importance than between a child and his genetic parents.[49] That is why the remuneration is paid to the surrogate mother only after she has given her consent to register the customers as the child's parents. Nevertheless, punitive sanctions cannot be imposed against the surrogate mother for the refusal to give such consent, as her conduct is lawful.[50] Depending on her emotional closeness with the carried baby, the surrogate mother decides whether to give the child to his/her biological parents or to keep him/her for herself.[51]

Recently this rule ceased to be unconditional. The Supreme Court of the Russian Federation set forth that if a surrogate mother refuses to provide her consent to register intended parents by parents, it can't form incontestable grounds for the rejection of a parentage suit.[52] Cases are known in which the surrogate mother

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[47] С.Ф. Афанасьев, *Гражданская процессуальная сторона дел об исполнении договора о предоставлении услуг суррогатного материнства, Арбитражный и гражданский процесс*, 2014, №7, pp. 27–31; Л.К. Трунова, *Юридические и практические аспекты проблемы суррогатного материнства, Юридический консультант*, №10, 2004, p. 9.

[48] Para. 4 Art. 51 FCRF, p. 5 art. 16 FZ №143 FZ.

[49] А.Я. Ахметова, *Поименованные и непоименованные договоры, направленные на укрепление семьи, Семейное и жилищное право*, 2016, №6, pp. 4–7; И.А. Михайлова, *Законодательство, регламентирующее установление происхождения детей, нуждается в корректировке*, *Вопросы ювениальной юстиции*, 2009, №2, pp. 15–16; М.В. Ульянова, *Установление происхождения детей: правовые аспекты, Актуальные проблемы российского права*, 2017, №5, pp. 110–117; А.А. Флягин, *Правовой статус родителей при суррогатном материнстве, Гражданское право,* 2015, №3, pp. 39–43.

[50] Ю.А. Дронова, *Что нужно знать о суррогатном материнстве*, Москва 2006, p. 62; the opinion about possibility of applying fines is mistaken: Л.К. Айвар, *Правовая защита суррогатного материнства, Адвокат,* 2006, №3, p. 17.

[51] А.П. Кокорин, *К вопросу о получении согласия суррогатной матери на запись родителями ребенка супругов, предоставивших свой генетический материал, Семейное и жилищное право,* 2010, № 1 pp. 29–30; И. В. Авхадеев, *Некоторые вопросы правового регулирования института суррогатного материнства, Право и образование*, 2007, №9, pp. 155–156.

[52] P. 31 Resolution №16; О.Г. Зубарева, *К вопросу о совершенствовании семейного законодательства в части регулирования родительско-детских отношений, Нотариус*, 2018, №2,

blackmailed intended parents, refusing to place the child to them and demanding a considerably larger payment than it was stipulated in the contract.

Special rules for establishing a child's parentage are being imposed. Genetic parents can be registered only with the consent of the surrogate mother. If the procedure of surrogacy was followed in the country where the consent of the surrogate mother is not required, for the parents to be registered in the Agency of Civil Acts Registration Bureau the apostilled consent of the surrogate mother is still needed, since the procedure for establishing the child's parentage on the territory of the Russian Federation is regulated by Russian legislation.[53] For the state registration in a Russian consular office a written consent of the surrogate mother is required.[54] The legislation doesn't specify which of the participants of surrogacy program will care for the child if neither surrogate mother nor intended parents want to keep him/her, should he have any defects or disorders.

The unfairness of the surrogate mother:

- assuring some different couples of intended parents at the same time in her readiness to become a surrogate mother and arranging the time for embryo transfer. In case of obtaining better terms from one of the couples, the surrogate mother does not meet the other couple at the scheduled time for embryo transfer;
- when the surrogate mother became pregnant after embryo transfer but deliberately terminated the pregnancy to conclude the contract with the other couple on better terms;
- when the procedure of embryo transfer failed to take place at the appointed time due to surrogate mother's unjustified refusal.

In the beginning, the surrogate mother can agree to all the terms of the intended parents but asks to increase the sum of her remuneration sometimes several times on the day the program of surrogate motherhood is to start. Recovering damages from

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pp. 18–20; О.О. Косова, *О концептуальной основе развития российского семейного законодательства, Актуальные проблемы российского права*, 2017, №5, pp. 35–40.

[53] Para. 2 Art. 162 FCRF.

[54] Sub-paragraph 3 paragraph 27 of the Order by MFA of the Russian Federation of March 13, 2018 N 3507 "On the Approval of the Administrative Provision of MFA of the Russian Federation on providing state services of state registration of acts of civil status of Russian citizens living outside the territory of the Russian Federation"), (пп. 3 п. 27 Приказа МИД России от 13.03.2018 г. №3507 "Об утверждении Административного регламента МИД РФ по предоставлению государственной услуги по государственной регистрации актов гражданского состояния граждан РФ, проживающих за пределами РФ"), СПС КонсультантПлюс.

the unscrupulous surrogate mother can be quite difficult due to the imperfection of the legislation and possible defects of the contract.[55]

The sale of the already born children under the guise of surrogate motherhood is also possible. Fraudsters operate according to the following scheme: they find young women who want to have an abortion, offer them to continue their pregnancy and promise to find parents for the born child. The woman is offered remuneration which is much less than the money the surrogate mother receives. Then the fraudsters draw up the documents ostensibly to take part in the program of surrogate motherhood, get money from intended parents and place them the child born by that woman. Such fraudsters are usually prosecuted under Article 327, part 3 of the Criminal Code of the Russian Federation ("Forgery of documents") and Article 330, part 1 of the Criminal Code of the Russian Federation ("Usurpation of power"), and fined 350,000 Rub or sentenced to a short term of imprisonment (up to two years).

There is one more option that is possible. A "black market" mediatrix simulates pregnancy in one of her proposed surrogate mothers and receives money for food, medical care and delivery from intended parents for 10 month. Instead of their native child, the parents get the other baby whose mother refused to keep him/her on the forged documents.

Searching for a surrogate mother, people tend to contact medical or intermediary organizations. Independent search of a surrogate mother most often happens via the Internet and is linked to various types of risks. Thus, a potential surrogate mother from another region of Russia can ask to send her and two more her children money for travel and to rent a flat in Moscow for all of them. Surrogate mothers also can ask to give money on medical analyses and necessary pharmaceuticals. Due to their emotional state, the spouses are easily exposed to manipulations of fraudsters or unscrupulous surrogate mothers and can give money without concluding the contract or take the counterpart at face value.

Another problem is related to the activities of organizations rendering intermediary services in this field. Commercial organizations engaged in mediation efforts, try to get the maximum profit, so they can delay payments for food to the surrogate mother, do not conduct a timely medical examination or conduct it to a lesser extent than required or delay payments for the services of the surrogate mother under various pretexts. At the same time, the parents pay the mediator all the necessary

[55] Определение Свердловского областного суда по делу № Дело N 33-5744/2007 от 28 августа 2007 года, http://www.ekboblsud.ru/show_doc.php?id=17476.

expenses and remuneration for the surrogate mother and do not know about the violations made by the intermediary organization.

Apparently, the activities of intermediary organizations should be legislated more strictly,[56] for instance, they must have a registered capital of no less than 1,000,000 Rub, compulsory insurance in this field, or this type of activity should be allowed only to medical organizations providing services of assistive reproductive technologies as is usual in Belarus, for example.

Homosexual couples can't use the method of surrogacy just like any alternative method of assistive reproductive technologies. Such alliances even recognized and registered abroad are not recognized in Russia, as being in conflict with the public policy of the State and decent moral values. Since 2015 this prohibition has been enshrined at the legislative level with regard to the possibility of adopting children by same-sex couples. According to subparagraph 13, paragraph 1 of Article 127 FCRF, the prohibition applies to persons who are in union made by the people of same sex recognized as marriage and registered in accordance with the legislation of the state where such type of marriage is allowed, as well as to persons who are the citizens of the mentioned state and not married. By analogy of statute, this prohibition should be applied to the possibility of obtaining parental rights as a result of surrogate motherhood for those persons. The staff member of the Civil Registry Office was dismissed for the issue of the marriage certificate to two male citizens of Russia who contracted the same-sex marriage outside the Russian Federation. The officer issued Russian marriage certificate in accordance with the apostilled certificate given to those persons abroad. In virtue of his professional skills, the officer should have followed not a formal requirement of legalization of apostilled foreign documents, but the requirements of Russian legislation and comprehended the unacceptability of the same-sex unions for Russian law and order.

In Russian legislation, there is no specific offense related to illegal surrogate motherhood or causing harm to surrogate mother's health. We have not dealt with the cases of illegal surrogate motherhood in Russia, since it is not required as Russian legislation on surrogacy is quite liberal; therefore, there are no socio-economic preconditions for it to pull back. Adequate provision of surrogacy services, as well as any alternative medical services, are generally controlled in an administrative

[56] Ю.А. Чернышева, *Суррогатное материнство в Российской Федерации: уголовно-правовое, криминологическое и социально-правовое исследование*, Москва 2013, p. 140.

way. The abovementioned cases of criminal prosecution are linked to other offences related to surrogate motherhood.

1.3. Disputes about the acceptability of surrogate motherhood

Authorization of surrogate motherhood provoked a lot of disputes in the society and among politicians about the acceptability of this practice in Russia. First of all, disputes have been caused by the rapid development of entrepreneurial activities related to surrogate motherhood. There were a significant number of commercial organizations that began to provide surrogate motherhood services. The absence of special state control over their activities, resonant disputes between surrogate mothers and the genetic parents of the child, the novelty and unusualness of surrogacy led to the appearance of numerous opponents of surrogate motherhood.[57]

The loan-translation of the institution's name "surrogate motherhood" from the English language, has a negative meaning in Russian. A "surrogate" in Russian means something counterfeit, not real in the negative sense of the word, and what is more, the semantics of the word "surrogate" in combination with the notion of motherhood causes a negative attitude. It would be better to call this institution "replenishing" or "supplementary" motherhood, and to use the term a "mother-assistant" instead of a "surrogate mother." The introduction of the term "surrogate motherhood" by legislators is an example of how the whole legal institution can be negatively affected by its name given without taking into account the linguistic features and social environment where it will have to function.

Legislators did not take into consideration that for the overwhelming majority of the people of Russia motherhood bears a sacred meaning – "Motherland", "Russia is the Mother, the Cradle of Its People," such concepts and ideas have been cultivated throughout Russia for many centuries and generations. Russia largely remains a traditional country that does not perceive many Western values. Negative experience of integration in Western countries in the 1990s led to the fact that at present society is very wary of any attempts to introduce Western institutions, especially if it concerns the family and childhood. Attempts to introduce juvenile justice in Russia have been thwarted by mass public protest. Western family values in the Russian media are represented by homosexuals, transgenders, officials from

[57] А. Симонов, *Мнение специалистов, Юридический мир*, №8–9, 2004, pp. 43–46.

juvenile justice, taking arbitrarily children from traditional families and relocating them to same-sex couples. At present, the easiest way for a politician in Russia to become popular among people is to oppose Western family values. This is in part true in regard of critics of surrogate motherhood. In addition, traditional Russian religious denominations – Orthodoxy, Islam, Judaism and Buddhism, with varying degrees of categoricalness oppose surrogate motherhood.

Supporters of the prohibition of the surrogate motherhood give the following arguments:[58]

1. At the moment, Russia is among the countries with the most liberal and least developed legislation that regulates the issues of the surrogate motherhood.
2. In many foreign countries, including Austria, Germany, Norway, Sweden, certain states of the USA (Arizona, Michigan, New Jersey), France, surrogate motherhood is completely prohibited, and in others very strict restrictions are imposed, including prohibiting provision of surrogate motherhood services on a commercial basis (Great Britain, Israel, Switzerland).[59]
3. In Russia, the implementation of surrogate motherhood services has become a very rapidly developing and almost unregulated business.
4. Moreover, foreign but not Russian couples resort to services of Russian women in this area increasingly frequently. The relative cheapness and lack of legislative restrictions have already made Russia one of the centers of the so-called "reproductive tourism." According to the Association of Medical Tourism, Russia is one of the most attractive countries for "genetic tourists". In 2015–2016, the growth of the flow of medical tourists to Russia was provided, for the most part, by only three directions: IVF (in vitro fertilization), donor fertilization and the surrogate motherhood.
5. Surrogate motherhood services in Russia are performed on the basis of an ordinary civil law contract that allows the consolidation of any duties and rights of the parties, but does not guarantee at the same time their strict implementation:

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[58] Пояснительная записка к проекту Федерального закона № 133590-7 "О внесении изменений в отдельные законодательные акты Российской Федерации в части запрета суррогатного материнства", http://sozd.parlament.gov.ru/bill/133590-7.

[59] Е.В. Вершинина, Е.В. Кабатова, М.О. Яшметова, *Суррогатное материнство в России и зарубежных странах: сравнительно-правовой анализ, Семейное и жилищное право*, 2011, №1, pp. 3–6.

- as a rule, it remains unclear whether the birth of a child with pathology or the case of intrauterine death is the result of improper performance of services and serves as the basis for termination of the contract. In judicial practice, there is a case when a surrogate mother had a child with a heart disease and biological parents refused to pay her compensation and take the baby. The plaintiff lost the case on the grounds that in 1989 the Council of Europe on bioethics recommended the implementation of surrogate motherhood programs free of charge;
- to "transfer" a child from the surrogate mother to the "parents-customers", even the adoption procedure is not required, which further takes the contract for rendering the appropriate services outside the legal field and, above all, may lead to violation of the rights of children born in this way;
- biological parents can take a new-born from the hospital only after the surrogate mother agrees (Para. 4 Art. 51 FCRF), which often leads to blackmail by surrogate mothers against biological parents. For example, in 2016 in St Petersburg, a criminal case was initiated against a woman who provided services for a surrogate motherhood program and refused to return her children to biological parents without additional payment, and then on the ground that the contract provided the birth of only one child not the twins as was in the case;
- in case when foreign citizens are the biological parents, and this happens more often, the rights and obligations of the parties are subject to legal regulation to an even lesser extent, since this issue has not been settled in the Russian legislation. Most European countries consider surrogate motherhood as an ethically unacceptable procedure that violates the rights not only of the parents of the child, but primarily of the child himself/herself, who is given the property of a product endowed with certain consumer properties. The child is thus equated with an inanimate object.

6. Surrogate motherhood is a gross violation of the rights of the child, first of all – for personal and family identity and associated with that a specific communication with the mother, because, as it is proved by the existing numerous scientific researches, a child in infancy has a stable psychophysiological connection with mother who bore him and gave birth, and such a connection is formed already at the prenatal stage of its development (when it is in the womb of the mother). Interruption of this relationship entails significant stress for the child and other negative consequences for him.

7. Representatives of the main religious confessions have repeatedly stated violations of the child's rights and the inadmissibility of conducting surrogate motherhood programs from an ethical point of view.[60] In particular, in the Fundamentals of the social concept of the Russian Orthodox Church, the position is expressed that "surrogate motherhood", that is, the bearing of a fertilized egg by a woman who, after giving birth, returns the child to "customers" is unnatural and morally unacceptable, even when it is carried out on a non-commercial basis. This technique involves the destruction of deep emotional and spiritual intimacy, established between the mother and the baby already during pregnancy. Surrogate motherhood traumatizes both the nurturing woman, whose motherly feelings are trampled on, and the child, who later may experience a crisis of self-awareness.
8. It should be noted that the boost of surrogacy programs in Russia is related more to commercial interest rather than to an altruistic idea of helping couples afflicted with infertility. Commercial reproduction is quite a booming enterprise both for those seeking for safe investment and for specialists in medico-biological field due to high salaries. Such profitable trends of this field as reproductive tourism have already come on market. At the same time, the effectiveness of surrogacy as a method for infertility treatment has not been confirmed yet.
9. Medical reasons for infertility requiring surrogacy account for about 0.01% of all causes of infertility as well as about 1.5% of the cases involving the use of assisted reproductive technologies. In this regard, the number of cases involving the use of surrogacy is the second derivative of the total number of married couples seeking infertility treatment, and the first derivative of those who opt for IVF. At the same time, infertile couples and couples seeking medical assistance for infertility treatment are not clearly interdependent, as they can be influenced by such subjective factors as the level of medicine in the area, economic situation in the country, region and family, religion, traditions and so on. Economic reasons are worth emphasizing: the cost of surrogacy services is far from affordable for those Russians from 0.01% cases, where this technology is required provided there is patient's consent. The cost of surrogate mother's services varies from 700,000 Rub to 1,000,000 Rub depending on the region, the full package of service costs 2,500,000

[60] Ю. А. Дронова, *ibidem*, pp. 16–22.

Rub, given that the average salary in Russia is 35,000 Rub. However, the effectiveness of Russian surrogacy as a method of infertility treatment leaves much to be desired, "the influx of genetic tourists" shows that this trend of reproductive medicine is badly needed on the world market and getting more and more commercialized.[61]

Ultimately, critics of surrogacy insist on its prohibition on the territory of the Russian Federation until a new comprehensive approach to the institution of surrogacy equally protecting the rights of children, surrogate mothers and intended parents is adopted in Russia. For this purpose, the bill on the absolute prohibition of surrogacy in Russia was introduced by the State Duma in March 2017.[62]

The law faced intense criticism from special-purpose committees of the State Duma (Committee for Public Health, Committee for Family, Women's and Children's Affairs), the government of the Russian Federation, politicians and general public.[63] Public opinion also advocates for surrogacy.[64] Russian news agency "RIA Novosti" carried out a social survey on Russians' attitude to surrogacy prohibition in Russia. The response to the question "Do you support the idea of surrogacy prohibition in Russia?" was for the most part (about 77%) negative.

The position of the opponents on this issue is as follows:

1. Insufficient legal regulation in the field of criminal, family, civil or inheritance law can take place within the limits of sector specific legislation.
2. The bill does not provide for a transitional period to give effect to surrogacy prohibition. Should the bill be adopted, the rights of the children whose parents consented to embryo transfer to the surrogate mother, to registration

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[61] О.В. Романовская, *Право и репродуктивный туризм, Туризм: право и экономика*, 2014, №4, pp. 243–28; О.В. Саввина, *Влияние «репродуктивного туризма» на законодательство, регулирующее суррогатное материнство, Lex russica*, 2018, №2, pp. 140–147.

[62] Проект Федерального закона № 133590–7 «О внесении изменений в отдельные законодательные акты Российской Федерации в части запрета суррогатного материнства», Система обеспечения законодательной деятельности, http://sozd.parlament.gov.ru/bill/133590-7. Draft Federal Law No. 133590-7.

[63] Заключение Комитета Государственной Думы по вопросам семьи, женщин и детей по проекту федерального закона № 133590-7 "О внесении изменений в отдельные законодательные акты Российской Федерации в части запрета суррогатного материнства", внесенный членом Совета Федерации А.В. Беляковым; Решение Комитета Государственной Думы по охране здоровья о проекте федерального закона № 133590-7 "О внесении изменений в отдельные законодательные акты Российской Федерации в части запрета суррогатного материнства", внесен членом Совета Федерации А.В. Беляковым, http://sozd.parlament.gov.ru/bill/133590-7.

[64] Ю.А. Чернышева, *op. cit.*, pp. 47–50.

of birth as well as property rights of all the parties of the surrogate contract and the child can be violated.

3. According to the decision of the Constitutional Court of the Russian Federation of May 15, 2012 N 880-O, assisted reproductive technologies along with surrogacy are an important means of protecting the interests of family, motherhood, fatherhood, childhood as well as every person's constitutional right to health protection and medical assistance.[65] In accordance with the legislation of the Russian Federation, surrogate motherhood can be used only on medical grounds if carrying a pregnancy for a woman is impossible. Prohibition of surrogate motherhood violates the right of citizens with infertility problems to the use of this kind of assisted reproductive technologies.
4. At present, there is a steady increase in illnesses related to female and male forms of infertility, primiparous natality is shifted to a higher age that affects the demographical situation in Russia and requires the use of assisted reproductive technologies including surrogate motherhood.[66]
5. Prohibition of surrogate motherhood in Russia can lead to its use in the shadow economy resulting in the risk of citizens' rights violation.
6. Russian citizens' legal inability to use surrogate motherhood will inevitably lead to their "outbound reproductive tourism" to the countries providing such an option. As a result, Russian "customers" and children born for them abroad can face the problems related to cross-border surrogate motherhood (establishing children's parentage born abroad by surrogate mothers, their citizenship and entrance to the Russian Federation).
7. Challenges relate not to the institution of surrogate motherhood itself, but to the practical enforcement of existing statutory and regulatory enactments governing this area of civil-law relations and inadequate control of their use. In this respect, legislative regulation of the use of assisted reproductive technologies including surrogate motherhood requires further improvement.

The bill was not supported by deputies and therefore was withdrawn as not very detailed. It was to have been considered last on September 13, 2018 but the

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[65] Определению Конституционного Суда Российской Федерации от 15 мая 2012 г. № 880-О об отказе в принятии к рассмотрению жалобы граждан Ч. П. и Ч. Ю. на нарушение их конституционных прав положениями пункта 4 статьи 51 Семейного кодекса Российской Федерации и пункта 5 статьи 16 Федерального закона "Об актах гражданского состояния", СПС КонсультантПлюс.

[66] Г. Б. Романовский, *Правовое регулирование вспомогательных репродуктивных технологий (на примере суррогатного материнства)*, Москва 2011, pp. 219–230.

consideration was postponed once again for an indefinite period (the consideration has been put off 17 times this year alone).[67] Legislators are clearly unwilling to adopt amendments proposed in the bill. Total prohibition of surrogate motherhood in Russia is not likely to be expected.

2. Surrogate motherhood in CIS countries

Regulatory acts on the reproductive rights of citizens were also adopted in the CIS countries.[68] However, the issues of surrogate motherhood were the most challenging for legislators. Surrogate motherhood is allowed in Armenia, Belarus, Kazakhstan, Kirghizia, Russia and Ukraine. In Azerbaijan, Uzbekistan and Tajikistan there is no any direct prohibition of surrogate motherhood, as well as no special laws regulating these relations. In Moldova surrogate motherhood is strictly prohibited up to criminal prosecution of the persons who violated the prohibition. In many respects the legal regulation of surrogate motherhood in the CIS countries is similar to Russian. Here we are going to mention only the most noticeable differences from surrogate motherhood in Russia.

Surrogate motherhood legislation is the most detailed in Kazakhstan and Belarus.

2.1. Kazakhstan

"The Law on Marriage and Family" adopted in Kazakhstan in 1998 allowed the use of surrogate motherhood as a method of assistive reproductive technologies. In 1999, the Centre of Reproduction carried out the first program of surrogate motherhood. In 2004, the Law "On Reproductive Rights of Citizens and Guarantees of Their Implementation" was adopted and in 2009 the Code "On National Health and Health System" was implemented. The Code of the Republic of Kazakhstan "On Marriage (matrimony) and Family" (CRK) was enacted on January 7, 2012.[69] The former Code of the Republic of Kazakhstan "On Marriage and Family" of 1998 is no longer

[67] http://sozd.parlament.gov.ru/bill/133590–7.

[68] A Historical overview of the CIS Countries. See: G.B. Romanovsky. The Legislation on Reproductive Rights in the CIS countries. // *Medical law* 2010, No. 5.

[69] Кодекс Республики Казахстан "О браке (супружестве) и семье", https://online.zakon.kz/Document/?doc_id=31102748#pos=6;-294.

in force. The new law includes a separate chapter 9 about surrogate motherhood "Surrogate motherhood and the use of assistive reproductive technologies." [70]

Surrogate motherhood in Kazakhstan is based on the contract. The contract of surrogate motherhood must be notarized and concluded in writing. Along with the contract of surrogate motherhood, the intended parents (the customers) conclude the contract with a medical organization using assistive reproductive methods and technologies and providing the relevant services. The contract of surrogate motherhood is considered by the legislator as the kind of the contract of services.[71]

The conclusion of the contract of surrogate motherhood specifies parental obligations and rights to the child born due to the use of assistive reproductive methods and technologies, that is the surrogate mother cannot refuse to place the child to the parents and to keep him for herself or to place the child to other persons.[72]

The essential terms of the contract are as follows:[73]

- personal information of the spouses (customers) and the surrogate mother;
- the procedure and terms for the payment of material costs to the surrogate mother;
- rights, obligations and liabilities of the parties in case of breaching the contract;
- the amount and the procedure of compensations;
- other terms including force-majeure;
- the period within which after the conclusion of the surrogate motherhood contract assistive reproductive methods and technologies are to be used. In case of non-use of assistive reproductive methods and technologies within the period stipulated in the contract, the contract shall be regarded invalid.

It is significant that in the legislation the payment to the surrogate mother "remuneration" or "fee" is never called, but "compensation" due to the peculiarities of Kazakh society's perception of surrogate motherhood.

The surrogate mother shall meet the following requirements:[74]

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[70] Г.Б. Романовский, *Понятие и содержание репродуктивных прав в России и странах СНГ, Реформы и право*, 2010, №4, p. 10.

[71] Para. 1, 3 Art. 54 CRK.

[72] Para. 2 Art. 54, п. 3 ст.57 CRK.

[73] Art. 55, para. 7 Art. 59 CRK.

[74] Para. 1–2 Art. 56 CRK.

- she should be 20 to 35 years of age, have a good physical, emotional and reproductive health certified by the medical organization and have her own healthy child;
- if the surrogate mother is married when concluding the contract of surrogate motherhood, the written and notarized consent of surrogate mother's husband is required;

The law imperatively specifies the rights and obligations of the intended parents and the surrogate mother.

According to the law when concluding the contract of surrogate motherhood, the parents are obliged to:[75]

- bear all the costs related to medical examination of the surrogate mother and to the use of assistive reproductive methods and technologies;
- pay the expenses on medical care for the surrogate mother during the course of pregnancy, childbirth and 56 days after delivery. In case of complications due to the pregnancy and delivery, the expenses must be paid within 70 days after delivery.

The intended parents are also required to submit the medical certificate of their physical and mental health as well as the results of medical-genetic examination to the medical organizations using assistive reproductive methods and technologies.

The surrogate mother is required to:[76]

- submit a medical certificate of her physical, mental and reproductive health to the customers;
- undergo a medical examination in a timely manner and strictly follow all medical prescriptions;
- inform the other party to the contract about the course of pregnancy within the periods of time specified in the contract of surrogate motherhood;
- place the born baby to the other party to the surrogate motherhood contract.

The law specially stipulates that if the surrogate mother has a constant job, the matter of her employment is dealt with by agreement of the parties to the contract.[77]

This agreement can provide additional payments to the surrogate mother in order to compensate lost income. The surrogate mother is responsible for the pregnancy provided by the contract of surrogate motherhood after the use of assistive

[75] Para. 1 Art. 57 CRK.
[76] Para. 2 Art. 57 CRK.
[77] Para. 4 Art. 57 CRK.

reproductive methods and technologies and must exclude the possibility of natural pregnancy, which is an unwritten ban on sex life of the surrogate mother. However, in the event of a natural pregnancy after the conclusion of the surrogate motherhood contract, the contract is terminated and the surrogate mother is to pay all expenses made by the customers under the contract of surrogate motherhood.[78] The terms of multiple pregnancy should be stipulated by the agreement of the parties to the surrogate motherhood contract. However, in the case of multiple births of children, even if any consequences are not provided by the contract, the existing norms and regulations are applied to the other children as well, that is the surrogate mother cannot keep one of the children for herself. The customers are recognized as parents of all the children.[79] As to the legal consequences of the surrogate motherhood contract, the spouses (the customers) are recognized as the parents of the child born due to the use of assistive reproductive methods and technologies whereas the wife (the customer) who concluded the surrogate motherhood contract is recognized as his mother in the medical birth certificate.[80]

The law allows the parents to refuse the child that is registered in the manner prescribed by law in the registering body after the child's birth.[81] In this case the spouses who gave their consent to the use of assistive reproductive methods and technologies or entered into the contract with the surrogate mother are not entitled to claim monetary compensation from the surrogate mother. In turn, in case of parents' surrender of the child the surrogate mother has a right to keep the child for herself. In this event, the customers are obliged to pay to the surrogate mother the compensation in the amount and manner stipulated in the contract. If the surrogate mother does not want to keep the child, he/she shall be placed in the care of the State. In case of marriage dissolution of the spouses-customers their rights and obligations related to the child born under the surrogate motherhood contract remain unchanged.[82]

Noteworthy are special rules applicable in case of the death of one or both spouses that occurred before the birth of the child. In case of the death of one of the spouses, the surviving spouse is entrusted with all the rights and obligations related to the child born under the surrogate motherhood contract. In the event of

[78] Para. 5 Art. 57, para. 8 Art. 59 CRK.
[79] Para. 6 Art. 57, para. 1 Art. 59 CRK.
[80] Para. 1–2 Art. 59 CRK.
[81] Para. 3 Art. 59 CRK.
[82] Para. 4 Art. 59 CRK.

the death of both spouses, their close relatives, for instance parents can adopt the born child. The legislation does not provide the model of the transfer of rights and obligations under the surrogate motherhood contract to the close relatives of the dead spouses, but only the procedure of adoption, which indicates the impossibility of the transfer of rights and obligations under the surrogate motherhood contract to the legal successors of the dead intended parents. In case of close relatives' refusal to adopt the child, he/she can be placed to the surrogate mother upon her request or in the care of the State in the event of surrogate mother's refusal. However, the legal relationship between the child and the parents who died before his/her birth is not terminated. The placement of the child to the surrogate mother or in the care of tutorship and guardianship authorities does not terminate his/her rights as the heir of the parents-customers under the surrogate motherhood contract.[83] Such legal regulation is not found in any of the CIS countries where surrogate motherhood is allowed and can be an example for others.

Currently, in Kazakhstan it is proposed to increase the age of a surrogate mother to 40 years on the grounds that after 35 years the woman can carry and deliver a healthy child, but today the age limit is still 35 years.

2.2. Belarus

In Belarus, surrogate motherhood was legislated much later than in Russia. The Code on Marriage and Family of the Republic of Belarus (CRB) was amended in 2006.[84] The law On Assistive Reproductive Technologies of the Republic of Belarus № 341-Z of January 7, 2012 regulating the main provisions concerning surrogate motherhood was adopted in 2012.[85]

The program of surrogate motherhood starts with a medical examination of intended parents and a surrogate mother. After medical examination, it is certified that genetic parents are not able to have a naturally born baby, and the surrogate

[83] Para. 5–6 Art. 59 CRK.

[84] Кодекс Республики Беларусь о Браке и семье, http://kodeksy-by.com/kodeks_rb_o_brake_i_semje.htm; art. 53 CRB; Е.Г. Малиновская, *Правовое регулирование суррогатного материнства в Российской Федерации и республике Беларусь, Семейное и жилищное право*, №2, 2007, pp. 28–29.

[85] Закон Республики Беларусь "О вспомогательных репродуктивных технологиях" от 07.12.2012 №341-З, http://kodeksy-by.com/zakon_rb_o_vspomogatel_nyh_reproduktivnyh_tehnologiyah.htm.

mother has no contraindications to pregnancy. Unlike Russian, Belarusian legislation strictly adheres to the "medicalized" model of the use of assistive reproductive technologies. It is impossible to conclude the surrogate motherhood contract without medical certificate.[86]

Only after receiving the medical certificate the surrogate mother and the biological mother or the woman who used the donor egg can enter into the surrogate motherhood contract. In Belarus, the contract of surrogate motherhood is concluded between the biological mother or the woman who used the donor egg, but not with both intended parents.

The surrogate motherhood contract shall be written and notarized. If the biological mother and the surrogate mother entered into the contract, which is not certified by a notary, then the surrogate mother will be regarded as the child's mother even against her will. The customer can be an unmarried single woman. The main requirement is medical indications to the use of surrogate motherhood method. Married women enter into the contract of surrogate motherhood only with the written consent of their spouses.

The law provides a very detailed regulation of the essential terms of the surrogate motherhood contract.[87] The most noteworthy are as follows:

- the number of embryos to be transferred to the uterus of the surrogate mother;
- the name of the health institution (institutions) which supervises the association of the sperm (sperms) and egg (eggs) removed from the organism of the biological mother or the donor egg; the transfer of the embryo (embryos) into the uterus of the surrogate mother; monitoring the course of her pregnancy and delivery;
- the place of surrogate mother's residence during the period of carrying the child (children)
- the surrogate mother's duty to place the child (children) after his/her (their) birth to the biological mother or to the woman who used the donor egg, as well as the term within which the placement of the child (children) is to be made;

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[86] Р.Б. Брюхов, *Договор о суррогатном материнстве по законодательству России, Казахстана и Белоруссии, Частное право. Преодолевая испытания. К 60-летию Б.М. Гонгало*, Москва 2016, pp. 180–185.

[87] Т.А. Боннер, *Искусственное оплодотворение: достижения и просчеты современной медицины и человеческие драмы, Закон*, 2015, №9, pp. 183–185.

- the duty of the biological mother or the woman who used the donor egg to take the child (children) after his/her (their) birth from the surrogate mother, as well as the term within which the child (children) shall be taken.

According to the general rule, the contract of surrogate motherhood is gratuitous. Non-gratuitous surrogate motherhood is allowed in case the surrogate mother is a relative of the intended parents – mother or her spouse. Relatives can be regarded as persons who have common ancestors up to great grandfather and great grandmother inclusive.

In Belarus, as the country with more traditional views of the family than in Russia, it is of great importance for the surrogate mother to keep the secret of carrying a child. In this regard, the contact can also provide the terms including the obligations of the customers to pay travel and accommodation costs in other city during the period when pregnancy becomes visible for other people and until the baby is born.

Among all the CIS countries, Belarusian legislation has the most detailed requirements the surrogate mother shall meet.[88] The surrogate mother can become a woman who is 20–35 years of age, has no contraindications to surrogate motherhood, has at least one own child. The surrogate mother cannot become a woman who gave birth to a child through cesarean section. The surrogate mother cannot be at the same time an egg (eggs) donor in the regard of the woman who concluded the surrogate motherhood contract with her. The surrogate mother cannot be single whereas the biological mother can be unmarried. The surrogate mother must be legally married that is why her spouse must either provide his notarized consent or be personally present in the transaction.

Belarusian legislation has the requirements which are absent in other legislations of the CIS countries, for instance, the surrogate mother should not be deprived of her parental rights or limited to them by the court; be relieved of her duties as a tutor or guardian for improper performance of the obligations imposed on her; be the former adoptive parent if the previous adoption has been revoked by the court owing to the fault she has committed; be convicted of committing serious and extremely serious crimes; be a suspect or an accused in a crime. The implementation of these requirements is based on the interpretation of a special role of the surrogate mother carrying a baby. However, as the surrogate mother has no right to keep the child for herself, these requirements should be considered excessive. Thus, for instance,

[88] Art. 22 CRB.

the prohibition to be a surrogate mother to the woman who relieved of her duties as a tutor or guardian for improper performance of the obligations imposed on her in no way can influence her qualities as a surrogate motherhood, as the relations concerning tutorship and guardianship of already born child are outside the scope of the relations of surrogate motherhood. After his/her birth, the child is immediately placed to the intended parents even against the will of the surrogate mother. That is why she will not be able to perform her obligations as a tutor or guardian with regard to the born child.

The rights and obligations of the parties to the surrogate motherhood contract are also regulated in detail by Belarusian legislation. The surrogate mother is entitled to: have the accommodation, special conditions required for carrying a baby (children), provision of services under the non-gratuitous surrogate motherhood contract. In turn, the customer is obliged: to pay all the expenses on medical care, food, and accommodation during the pregnancy, delivery and post-natal period, unless otherwise provided by the surrogate motherhood contract. The surrogate mother is subject to the rules of receiving state allowances for pregnant women paid in accordance with the law. At the same time the surrogate mother is obliged to: inform the woman who entered into the contract with her and her spouse about the results of the medical examination as well as the state of health of her own child; undergo medical examination within the terms specified by her doctor; follow all medical prescriptions; provide all necessary information about the state of her health and the health of the carried child (children) to the other party to the contract; place the child (children) after his/her birth to the other party to the contract within the term stipulated by the contract; keep confidential the information related to the conclusion of the surrogate motherhood contract and the parties to the contract; perform other obligations specified in the contract.

Civil Registry Offices register the birth of the child and make the record on the parents on the grounds of the surrogate motherhood contract. The consent of the surrogate mother is not required. As it has been mentioned, in Belarus the surrogate mother is not entitled to keep the child for herself. This fact makes Belarus more attractive for Russian citizens as the place for childbirth by the surrogate mother. Foreign biological parents register their children in the embassy of their country, or in Belarusian Civil Registry Offices if there are no embassies of the countries of which they are citizens.

2.3. Ukraine

Surrogate motherhood in Ukraine is mainly governed by the following laws and regulations: the Family Code of Ukraine (FCU), the State Civil Registration Act № 2398/VI of July 1, 2010, the Rules for State Civil Registration №52/5 of October 18, 2000, the Order of the Ministry of Health of Ukraine № 771 of December 23, 2008 "On the Procedure for the Use of Assistive Reproductive Technologies" (Order №771).[89]

Article 123 of the Family Code of Ukraine enacted on January 1, 2004 clearly stipulates the relations of surrogate motherhood.

The main features of surrogate motherhood in Ukraine:

- men and women of full age have a right to undergo fertility treatment of assistive reproductive technologies on medical grounds including the method of surrogate motherhood[90];
- requirements to surrogate mothers: the woman is obliged to be physically and mentally healthy, have her own healthy child, be no less than 18 and no more than 35 years of age, provide her written voluntary consent and have no medical contraindications[91];
- legal relations of surrogate motherhood arise on the grounds of a civil law contract, which can be both gratuitous and non-gratuitous;
- surrogate mother's consent to register the biological parents as the child's parents is not required;
- surrogate mother acquires no parental rights to the child born as a result of surrogate motherhood program. The parents of the child born by the surrogate mother shall be regarded his biological parents.

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[89] О.В. Розгон, *Договор о суррогатном материнстве: проблемы теории и практики, Нотариальный вестник*, №1, 2013, pp. 45–46: Семейный кодекс Украины, http://kodeksy.com.ua/ka/simejnij_kodeks_ukrainy.htm; Закон Украины "О государственной регистрации актов гражданского состояния" №2398/VI от 01.07.2010 г http://zakon.rada.gov.ua/laws/show/2398-17; Правила государственной регистрации актов гражданского состояния №52/5 от 18.10.2000 г., http://zakon.rada.gov.ua/laws/show/z0719-00; Приказ Министерства Здравоохранения Украины № 771 от 23 декабря 2008 года "Об утверждении инструкции о порядке применения вспомогательных репродуктивных технологий", http://zakon.rada.gov.ua/laws/show/z0263-09.

[90] Art. 123, para. 7 Art. 281 FCU; Art. 48 of "The principles of Ukrainian Health Protection Legislation Act".

[91] Para. 7 Order № 771.

- the programes of assistive reproductive technologies are implemented only in licensed health institutions, and the patient has the right to a free choice of such medical organization.

In general, Ukrainian legislation governing the relations of surrogate motherhood can be assessed as even more liberal than Russian. It is seen in a lower age for surrogate mothers (18 years) and in the lack of any surrogate mother's rights to the child.

2.4. Armenia

Assistive reproductive technologies along with the program of surrogate motherhood have been used in Armenia since 2003. The law of the Republic of Armenia On Reproductive Health and Reproductive Rights (LRA) stipulates legal relations arising when using the program of surrogate motherhood.[92]

Legal relations of surrogate motherhood arise on the grounds of a notarized civil law contract.[93] According to the legislation of Armenia, surrogate mother is a woman who carried a donor fetus in her uterus and whose born baby does not have her genotype. There used to be the rule, which stipulated that surrogate mother could be an egg donor as well.[94]

In 2012, the law was amended to abolish this provision. Nowadays surrogate mother cannot be an oocyte donor. A woman between the ages of 18 to 35 who has no contraindications to surrogate motherhood upon medical-genetic examination and who delivered at least one child can become a surrogate mother. A woman can be a surrogate mother no more than twice. A married woman can become a surrogate mother only with the consent of her husband. Surrogate mother is obliged to register with health-care authorities early in pregnancy (before 12-week pregnancy), be continuously under medical supervision, follow medical prescriptions and care of her health.

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[92] Закон Республики Армения о репродуктивном здоровье и репродуктивных правах человека. Принят 11 декабря 2002 г., http://www.parliament.am/legislation.php?sel=show&ID=1339&lang=rus; art. 13, 15, 19 LRA.

[93] Г.Б. Романовский, *Понятие и содержание репродуктивных прав в России и странах СНГ, Реформы и право*, 2010, №4, pp. 9–10.

[94] Para. 5 Art. 15 LRA.

Surrogate mother is not entitled to refuse to place a born child to intended parents, who concluded the contract of surrogate motherhood in a due form. Thus, surrogate mother has no rights to a born baby and no obligations after placing the baby to the other party of the contract.[95]

Surrogate mother can receive remuneration for pregnancy and delivery in accordance with the contract concluded by the surrogate mother with relevant health institutions and intended parents. Apart from remuneration to the surrogate mother, an individual or a married couple using the program of surrogate motherhood bear all the costs related to pregnancy, delivery and management of obstetric complications.

The services connected with the use of assistive reproductive technologies are provided by those health institutions which have a license to engage in this type of medical activity and service in accordance with Armenian law. As we can see, not only intended parents but also licensed medical organizations can be the parties of the surrogate motherhood contact.

In general, legal regulation of surrogate motherhood in Armenia lets this type of assistive reproductive technologies develop successfully. Nevertheless, it hasn't been widely spread in Armenia. There are few medical clinics providing the program of surrogate motherhood in the country. The society tends to blame this institution that is why most married couples resort to the services of surrogate mothers in other countries.[96] Negative evaluation of surrogate motherhood is caused by the position of the Armenian Apostolic Church, which completely argues against this institution, as the surrogate mother carries a baby and becomes his mother.

It can be explained by the fact that according to the Bible, the aim of the marriage is not childbearing but the cohabitation of the spouses.[97] It is the society's repudiation of the surrogate motherhood idea in Armenia why intended parents take on additional liabilities (accommodation for the period of surrogate mother's pregnancy, if she does not stay with donors, board and so on).

As it has been mentioned, this institution does not achieve wide distribution in Armenia due to the national attitudes of the society towards the home and family,

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[95] М.А. Манукян, *Правовое регулирование применения вспомогательных репродуктивных технологий с участием иностранных лиц в Республике Армения, Международное публичное и частное право*, 2012, №3, pp. 33–36.

[96] https://openarmenia.am.

[97] http://xn----7sbbjlcv3aghvajcuff5m.xn--p1ai/surrogatnoye-materinstvo/24-strani/strani/843-surrogatnoe-materinstvo-v-armenii.html.

nevertheless, Armenia is quite an attractive country for foreign citizens, as it provides affordable prices for the services of surrogate mothers compared to western countries. In Armenia, the average price for such services is $ 20,000 – 30,000.[98]

2.5. Kyrgyzstan

In Kyrgyzstan, married citizens can use the method of surrogate motherhood only on medical grounds. The relations between the citizens and the surrogate mother are based on the notarized contract. If the surrogate mother is married, her spouse's consent to the conclusion of the surrogate motherhood contract is required. The contract can be concluded not only personally by the spouses themselves, but by other persons representing their interests. The surrogate mother must be 20 to 40 years of age, have at least one child, be mentally and physically healthy and undergo medical-genetic testing. She must register with the medical authorities early in pregnancy (before 12-week pregnancy), undergo medical examination in a timely fashion, follow the medical prescriptions, care of her health, abstain from smoking, drugs, psychotropics and alcohol; inform the customers about the course of pregnancy in case of separate residence. However, the contract can specify that the surrogate mother must live together with the intended parents. The intended parents who gave their consent to the embryo transfer to the surrogate mother bear all the costs related to the maintenance of her health during the pregnancy, delivery and post-natal period in accordance with the contract. Married persons who concluded the contract in order to get a child by means of the method of embryo transfer to the surrogate mother are registered as the child's parents in case of his birth in the Civil Registry Offices. The intended parents who entered into the contract of surrogate motherhood are not entitled to refuse the child until they register him in their name in the Civil Registry Offices. The persons who used the program of surrogate motherhood try to keep this fact confidential. The surrogate mother also tries to hide her participation in this program. The society's ambiguous attitude towards this type of infertility treatment is caused by the national mentality and Muslim

[98] http://newsarmenia.am/news/society/society-20130911-42935622.

religion. Due to this reason, the citizens of Kyrgyzstan tend to use this method on the territory of neighboring Kazakhstan, trying to avoid possible publicity.[99]

In Uzbekistan, the matter of surrogate motherhood has not been legislated yet. Everything concerning this assistive reproductive technology in Uzbek legislation is contained in one paragraph of the Family Code. This rule says that married persons who gave their written consent to the use of IVF method or to the embryo transfer are registered as parents in the Civil Registry Offices in case of the birth of the child resulting from the use of these methods. Married persons who gave their written consent to the embryo transfer to the surrogate mother can be registered as parents only with the consent of the woman who gave birth to the child (the surrogate mother). However, no mechanisms of execution the procedure of surrogate motherhood are not specified.[100]

2.6. Uzbekistan

In this regard, the Government of Uzbekistan proposed the draft law on reproductive health regulating the procedure of surrogate motherhood. At the end of July 2018, the law of the Republic of Uzbekistan "On Reproductive Health" was brought up for public discussion. According to article 22 of the draft law, surrogate mothers can become women who are 22 years or older, mentally and physically healthy, and have one healthy child. Noteworthy is the lack of the upper age limit and the highest (22 years) bound for the lower age of surrogate mothers in the CIS countries. If the woman is married, she can become a surrogate mother only with the written consent of her spouse. The surrogate mother cannot be an egg donor at the same time. Legal regulation of the relations concerning the use of surrogate motherhood program is based on the informed and voluntary consent of the surrogate mother and the contract with the intended parents.[101]

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[99] Семейный кодекс Кыргызской Республики, 30 August 2003 №201, https://online.zakon.kz/Document/?doc_id=30286698.

[100] А.Н. Левушкин, *Юридические факты в семейном праве России и других государств – участников СНГ, Российская юстиция*, 2013, №10, p. 12.

[101] https://kun.uz/ru/news/2018/07/23/v-uzbekistane-ureguliruut-pravila-surrogatnogo-materinstva.

Uzbek legislator proposes to emphasize the position and rights of biological parents. That is why the draft law contains the rule stating that the surrogate mother cannot refuse to place the child to the other party to the contract.

However, the idea of surrogate motherhood causes a rejection on the part of religious minded people. The Spiritual governance for Muslims issued a fatwa "On artificial insemination", having prohibited the true believers to use this method if they are not in Sharia marriage. Those who entered into marriage with a *nikokh* religious ceremony are prescribed to use reproductive technologies only in cases of immediate need, consult only qualified doctors and make sure that nothing went wrong and "there was no mix of other people's sperm."

The Uzbek obstetrician-gynecologists (fertility specialist) Igor Avramenko commenting the fatwa on artificial insemination marked that Uzbekistan is a secular democratic state; the opinion of the Spiritual governance for Muslims is only for optional application and has no legal force:

> The fatwa says that artificial insemination is allowed only for couples who entered into marriage according to Muslim traditions. It should be mentioned here, whether, according to the Spiritual governance, this group includes people who did not register their marriage in Civil Registry Offices, but entered into marriage with a nikokh religious ceremony, that is practically cohabit without being formally married. The fact that religious workers often perform a nikokh religious ceremony for married men and single women as second or even third wives – is a widespread and well-known phenomenon, and we believe that following the fatwa is a purely personal matter. IVF lets infertile couples or single people who cannot enter into marriage due to different circumstances know the joy of being parents. We think that such a thing cannot be regarded as a sin but just a medical procedure. The Hadith says: "Take your medicine as Allah Almighty did not create a disease without creating a cure for it, apart from one disease – the old age". In our opinion, these words mean that doctors and scientists should search for medications and other ways of treatment, and the sick should follow medical prescriptions as infertility is a disease as well", commented the doctor.[102]

[102] https://ru-ru.facebook.com/fergananews/posts.

Such a state of things leads to the fact that citizens evade the law or even directly violate it. In some families, women who already have children give their newly born babies to their infertile relatives. Cases of trafficking in children are quite common.[103] In 2012 the director of a private gynecological clinic in Karshi Zilola Ernazarova was sentenced to 9 years of imprisonment for having sold 15 babies to childless families. For each child, she received two thousand dollars. Some members of medical staff were accused of the same crime in the Khorezm district. In 2014 in Kattakurgan (the Samarkand district) the obstetrician-gynecologist of a maternity hospital sold a baby left by an unknown woman to the teacher. The teacher who wanted to have a child for a long time received the documents of the girl's birth for a bribe.

In the early 2000s, in the Ferghana Valley there was a talk about the so-called "bola bozori" – a children's bazaar in Margilan where one could buy a child of any age and gender. The buy and sell was under the guise of a quite legal process – biological parents provided an official refusal to their parental rights whereas "buyers" applied for adoption. Today 10–15 cases of trafficking in children are annually registered in the Republic. They all are classified under article 135 of the Criminal Code of the Republic of Uzbekistan "Human trafficking." (Part 3, paragraph "a" "The acts committed against persons known to the perpetrator to be under 18 years of age"). According to the senior investigator of the investigation department of Tashkent city Directorate of Internal Affairs lieutenant-colonel N. Kholbaev, most often criminals look for childless families that are desperate to have a baby. "There is more confidence that the child will be loved here", he marked. It ends tragically: if the sale of the child is proved, the parties to the transaction are brought to justice whereas the child is placed to the orphanage.[104]

[103] С.И. Винокуров, *К вопросу о путях реформирования международного законодательства в сфере борьбы с торговлей людьми (основные тезисы), Российский следователь*, 2014, №4, pp. 51–52.

[104] https://ru-ru.facebook.com/fergananews/posts.

2.7. Azerbaijan

The draft law "On Reproductive Health" regulating among other things artificial insemination and surrogate motherhood has been discussed for a few years in Milli Majlis (Parliament) in Azerbaijan.[105]

The disputes between the supporters and the opponents of surrogate motherhood are mainly limited to the matters of its admissibility in the context of religion. The Caucasus Muslim Board has made numerous negative statements concerning surrogate motherhood. As a main argument, the opponents of this law claim that artificial insemination and surrogate motherhood are "at variance with our mentality." The head of Azerbaijan field office of the UNESCO bioethics department, member of International Association on Medical Law, professor Vugar Mamedov, stated:

> People need this law to be adopted but, unfortunately, in practice the society is not ready for that. Surrogate motherhood is a very sensitive and contentious issue affecting ethical, medical and legal aspects. There are a lot of pitfalls in this matter, but the main obstacle here is the position of our society which mainly speaks out against such state of things.[106]

The supporters of surrogate motherhood legislation adduce the following arguments: "Religion does not forbid surrogate motherhood. There are no prohibitions on this matter in the Koran. In fact, surrogate motherhood is practically the same as child adoption", says the deputy head of the State Committee on cooperation with religious organizations Rafik Aliev. According to him, a lot of religious figures think that if a family is infertile that means God decided not to give them a child: "God didn't want Prophet Muhammed to have a son, only daughters. In spite of this, he had sons, but they died. If the matter were so fundamental, the Koran would clearly stipulate this", he explained. R. Aliev thinks that religious figures who argue against surrogate motherhood do not seem to have fully comprehended Koran *ayats* and do not entirely understand what a birth of a child is. "It is not prohibitions religion consists of, but permissions. Religion prohibits only things that are not good for

[105] http://www.1news.az/mobile/news/parlament-mozhet-rassmotret-zakonoproekt-o-pohoronah-i-kladbischah---hady-radzhabli.

[106] http://baku-99412.my1.ru/publ/chto_gde_kogda/vse_o_suragatnykh_materjakh_v_baku/6–1-0–845.

people and the issue of surrogate motherhood is outside the scope." Aliev believes that infertile families also should have a chance to bring up a child.[107]

In turn, the Azerbaijanian lawyer Elchin Gambarov thinks there is no immediate need to legislate surrogate motherhood in the country, as this aspect can cause negative reaction on the part of definite groups of the society. "Nowadays religious figures are speaking out against surrogate motherhood, and given the mentality of our people such matters can be dealt with only after thorough public opinion research", he said.[108]

Infertile families who can have a child only by means of surrogate motherhood cannot use this medical procedure in Azerbaijan and select surrogate mothers from neighboring countries, mainly from Russia and Ukraine. Azerbaijani law does not prohibit its citizens to use surrogate motherhood in other countries so any infertile family can easily use the services of a surrogate mother and take a child back to the home country. The parliamentary deputy Musa Guliev marked the inefficiency of prohibitive measures and called for the adoption of an appropriate law.[109] Azerbaijani doctors believe that the government should think seriously about adoption the law on surrogate motherhood and avoid creating additional complications for the families for whom surrogate motherhood is the only opportunity to have a long-awaited baby.[110]

2.8. Tajikistan

In Tajikistan, there is no direct prohibition to the use of surrogate motherhood or other assistive reproductive technologies as well as no special laws regulating them. However, in practice it is not recognized by the religious minded society. In the interview for Radio Ozodi, the head of the directorate of fatwas of the Council of Ulemas in Tajikistan, Djaloliddin Khomushov said that the legal child is only that one who was born in his own family: "According to Islam, the matters of family, relations between men and women are sacred. There are four types of relations with regard to a child. "Nasabi" – when the child is born by his parents, "shirkhoragi" (foster son, daughter), "sababi" (pisarhonda, duhtarhonda) – when the spouse's parents

[107] http://ru.echo.az/?p=58090.
[108] Ibidem.
[109] https://yenicag.ru/surrogatnoe-materinstvo-u-nas-bylo-vs.
[110] http://ru.echo.az/?p=58090.

recognize son-in-law/daughter-in-law as son and daughter. In Shariah according to "masnui", as it is mentioned in the fatwa, if the spouses entered into marriage with a nikokh religious ceremony, then the husband can inseminate his wife and make her fall pregnant. All other cases are illegal in terms of religion and the child born by means of other way cannot be legitimate." It is quite unacceptable for Islam that a man cannot be an item of goods, sold and purchased." It is the way surrogate motherhood for a fee is interpreted by Islamic religious figures in Tajikistan. Professor, PhD (in medicine) Shamsiddin Kurbonov, the founder of the first and the only in the country medical center "Nasl" delivering the services of IVF does not consider it immoral, provided there are solid medical grounds. He also speaks out against turning children into goods, but free-of-charge help for childless couples is possible. Shabsiddin Kurbonov notes that this procedure is in great demand in Tajikistan. Annually about 80–100 married couples seek for IVF in their center, and no less than 10–15 of them need surrogate motherhood. He supposes that nearly as many Tadjik couples go abroad for these purposes. Today the doctors from "Nasl" recommend them to go to Kazakhstan, where surrogate motherhood is legislated and the contract between genetic parents and "temporary" mother can be officially concluded. Any changes concerning surrogate motherhood are not likely to happen in the foreseeable future in Tajikistan.[111]

2.9. Moldova

Numerous attempts have been made to legislate surrogate motherhood in Moldova. In 2012 the draft law on reproductive health providing that women of 20 to 40 years can become surrogate mothers for their first and second-degree relatives (parents, sisters) was brought up for discussion in the Parliament. But in the Parliament the preference was given to the view according to which surrogate motherhood is morally contrary to the principles supported by most of the churches, and not enough studies have been carried out so far to know about the emotional influence on surrogate mothers.[112] This view was expressed by the deputy of Liberal Democratic Party of Moldova Valery Giletsky. The members of Liberal Party of Moldova

[111] https://rus.ozodi.org/a/28933928.html.

[112] Г.Б. Романовский, О.В. Романовская, *Право на материнство в конституционном измерении, Российская юстиция*, 2015, №5, p. 62.

spoke up for surrogate motherhood justifying their opinion that the deletion of this article is the violation of citizens' right to become parents.[113]

Nevertheless, surrogate motherhood in Moldova is prohibited today. Article 165 "Human trafficking" of the Criminal Code of the Republic of Moldova was amended in December 2013. Now it has the paragraph specifying that the use of a woman as a surrogate mother "…committed by means of: b) deception; c) abuse of a position of vulnerability or abuse of authority, giving or receiving of payments or benefits or the use of such means against someone having power over another person" is a crime and shall be punishable by imprisonment for a period of 6 to 12 years.[114] The evasion of this ban is still possible. In Moldova there is a law on reproductive health according to which paragraph 9h of article 9 allows the use of such assistive reproductive technologies as "sperm, eggs and embryos donorship." In this case, the married couple finds a single woman for carrying a child. The woman carries and delivers the child, after that the surrogate mother registers the biological father as "Father" in the Civil Registry Offices. He applies for acknowledgment of paternity and receives all parental rights. Then the surrogate mother applies for the deprivation of parental rights by a court order and asks to place the child to his father.[115] The spouse of the father, that is the child's biological mother, adopts the child. However, in most cases intended parents tend to use the program of surrogate motherhood in Ukraine, Belarus or Russia that is much more reliable and safer as a matter of law.[116]

Conclusion

It is hardly possible to speak about any overall trend with regard to surrogate motherhood among the CIS countries. For instance, in Armenia there is a decline in the number of opportunities to use the program of surrogate motherhood, while Uzbekistan provides just the opposite state of things. The countries of Islamic culture demonstrate a more cautious attitude towards assistive reproductive technologies as such, on the other hand, in Kazakhstan surrogate motherhood has become

[113] https://3rm.info/main/24866-v-moldove-surrogatnoe-materinstvo-ostavili-pod-zapretom.html

[114] Ю.А. Чернышева, op. cit. p. 113, http://vse.md/novosti/item/4508-za-surrogatnoe-materinstvo--v-moldove-budut-sazhat-v-tyurmu

[115] https://mamaplus.md/ru/posts/1777.

[116] О.В. Саввина, *Влияние «репродуктивного туризма» на законодательство, регулирующее суррогатное материнство, Lex russica*, 2018, №2, pp. 141–142.

extensively developed. Noteworthy that surrogate motherhood is directly prohibited in the Christian country – the Republic of Moldova. All this shows that the religious factor plays a very significant but not the primary role with regard to surrogate motherhood, at least for the CIS countries.

Principal objections on surrogate motherhood are centered on the antagonism against its commercialization – the child as well as his carrying and delivering cannot be sold and purchased. In the global world, there are a lot of countries where surrogate motherhood is allowed on the basis of non-gratuitous contract, moreover, it is related not only to poor countries but also to economically relatively prosperous states (Kazakhstan, Russia). Economic conditions of a woman and her family in the former Soviet Union make her search for any sources of income. Noteworthy that women coming deliberately to Russia from Belarus, Kazakhstan, Ukraine as well as from Tajikistan and Uzbekistan become surrogate mothers mainly for the purpose of improving their financial situation. They confess that this is the only way for them to buy a flat or support their own children.

The economic set-up of modern Russia and the CIS countries is moving towards objectification of family relations, turning woman's ability to carry and deliver a child into an item of goods, the thing that used to be interpreted as a sacred function is becoming a "compensated provision of services." The general trend of alienation and atomization of the society leads to the estrangement of the child from the woman who carried and delivered him/her, to changing the child into a subject of sale.

The most illustrative case is biological parents' refusal of a sick child born under the program of surrogate motherhood. The quality of goods does not conform to the terms of the contract, that is why if the blame is laid on the contractor (the surrogate mother), she will bear material liability, and the customer can reject the goods. Nobody cares of the future life of this child left by the woman who gave birth to him/her and his/her biological parents. Having come into the world he/she becomes unwanted at once. In our opinion, the problem of human's alienation in the modern society is nowhere more evident than in the sphere of surrogate motherhood. The society unconsciously realizes it and tries to voice its protest by means of religious taboos, references to the traditional values of this society up to the absolute prohibition of surrogate motherhood.

Is it possible to solve the problem by means of prohibition? Prohibition of surrogate motherhood in one of the CIS countries (Moldova) or disapproval in others (Azerbaijan, Uzbekistan, Turkmenistan), as the current research has shown, does not prevent the citizens of these countries from using this assistive reproductive

technology, just creates additional complications and makes the achievement of the main result – the birth of the child – much more expensive.

The author of the present article believes that the prohibition of surrogate motherhood in a particular CIS country is impractical. We are convinced that the allowance of surrogate motherhood seems to be more appropriate:

- only on medical grounds
- free of charge
- under the firm control of the State
- upon condition of liability to prosecution for violation of the rules of surrogate motherhood.

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Surrogate motherhood in Spanish and Latin American law: the law and the loophole

1. Spanish legal rules on filiation: a quick overview[1]

1.1. Basic Spanish rules relating to filiation

According to article 108 of the Spanish Civil Code (hereinafter, SCC), "filiation may be by birth and by adoption. Filiation by birth may be matrimonial and non-matrimonial. It is matrimonial if the mother and father are married to each other. Matrimonial and non-matrimonial filiation, and adoptive filiation, shall have the same effects, pursuant to the provisions of the present Code."[2] This article envisages the two traditional sources of filiation: biology (natural filiation) and will, or judicial decision (artificial filiation: adoption); filiation coming from reproductive technologies, in turn, can be biological (if the gametes come from the legal parents, or at least from one of them) or artificial (if gametes come from donor or donors). Biological filiation is (or, at least, should be) the model of every legal filiation link, and provides the "template" for artificial filiation.[3] For Spanish law, filiation is, first of

[1] To better understand the Spanish legal system concerning filiation, see: C. Martínez de Aguirre *La filiación*, [in:] C. Martínez de Aguirre (ed.), P. de Pablo Contreras, M. Pérez Álvarez, *Curso de Derecho Civil IV. Derecho de Familia,* 5th edition, Madrid, 2016, §§ 139–148, pp. 321–353.

[2] There is an official translation of the Spanish Civil Code into English: Clinter Traducciones e Interpretaciones (translator), *Spanish Civil Code,* Madrid, 2016. Available (upon purchase) at http://www.mjusticia.gob.es/cs/Satellite/Portal/es/servicios-ciudadano/documentacion-publicaciones/publicaciones/traducciones-derecho-espanol (last accessed: 3 August 2018).

[3] For more information, see: C. Martínez de Aguirre, *The Principle of Verisimilitude of Artificial Filiation Links: Biology as a Model for the Law of Parent and Child,* "International Journal of the Jurisprudence of the Family", vol. 2 (2011), pp. 315 and ff.

all, the biological link between one person and his or her offspring. So, the primary basis of the parent-child relationship is biology.[4]

The main way to legally determine maternity is the delivery, together with the registration of the birth in the Civil Registry (Articles 108, 115 and 120 SCC, and Article 10.2 of the Human Assisted Reproductive Technologies Act – *Ley 14/2006, de 26 de mayo, sobre Técnicas de Reproducción Humana Asistida*, hereinafter LTRHA), regardless of whether the mother is married (Article 115 SCC) or not (Article 120 SCC). As for the father, if he is married to the mother the legal presumption of paternity applies: "children born after the wedlock is solemnised and before three hundred days after the dissolution thereof, or after the de iure or de facto separation of the spouses, shall be presumed to be children of the husband" (Article 116 SCC). In addition, legal filiation can be determined by final judgement (Articles 115 and 120 SCC), or, only if father and mother are not married to each other, by declaration, recognition or administrative resolution (Article 120 SCC).

Non-matrimonial filiation can be legally determined by recognition before the officer in charge of the Civil Registry, in a will or in another public document (Article 120 SCC). Recognition requires the consent of the child if he is of legal age (Article 122 SCC), or of the representative of the child who is minor or incapable (Article 123 SCC). In any case, recognition is deemed to be a declaration of knowledge (the person who recognizes states that he knows that the child is of his or her biological offspring) more than a declaration of will (although the will to declare that knowledge is usually involved).[5]

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[4] The Spanish Constitution stipulates that the law shall provide for investigation into paternity. This is what is usually known as *libre investigación de la paternidad*—free investigation into paternity or maternity. This provision provides the constitutional foundation for the principle that the legal father of a child is the man who is his or her biological father, and the legal mother of a child is his or her biological mother. The investigation envisaged by the Constitution is not an inquiry into legal parentage (for whose knowing there is no need to investigate anything: consulting the Civil Registry would be enough) but into biological facts. This conclusion is supported by the widespread use of biological tests for this purpose, as contemplated by the Civil Procedure Act (Article 767.2: "the examination of paternity and maternity through all kinds of tests, including biological tests, shall be admissible in kinship trials").

There is an official translation of the Spanish Civil Procedure Act into English in Linguaserve (*Civil Procedure Act*, Madrid 2015), available (upon purchase) at: http://www.mjusticia.gob.es/cs/Satellite/Portal/es/servicios-ciudadano/documentacion-publicaciones/publicaciones/traducciones-derecho-espanol (last accessed: 8 August 2018).

[5] For more information, see: C. Martínez de Aguirre, *op. cit.*, pp. 322 *et seq.*

Anonymous birth has been erased from Spanish Law on the grounds of unconstitutionality since the judgment of the Spanish Supreme Court of 21 September 1999.

1.2. Adoptive filiation[6]

In Spanish Law, filiation can also come from adoption (Article 108 SCC: "filiation may be… by adoption"), and adoptive filiation produces the same legal effects than natural filiation. Spanish Law gives to the adopted child the so-called *status familiae*, thus affecting the whole family of the adopters (and not just the *status filii*, regarding only the adopters, but not their families): so, the adopter's parents will legally become the adoptee's grandparents; the adopter's brothers or sisters will become the adoptee's uncles and aunts, and so on… On the other hand, adoption causes the extinction of any legal relations between the adoptee and his former biological family, without prejudice to the provisions relating to matrimonial impediments: so, the impediment of kinship remains between the adoptee and his or her biological parents (Article 178 SCC). Finally, Article 175.3 SCC prohibits the adoption of descendants (so, a grandfather is not entitled to adopt his grandchildren), and relatives in the second degree in the collateral line by consanguinity or affinity.

The best interest of the child is the paramount interest in adoption. According to Article 176.1 SCC, "the adoption shall be constituted by judicial resolution, which shall consider always the interests of the prospective adoptee and the suitability of the adopter or adopters for the exercise of parental authority." This brief wording summarizes the internal legal balance of interests in the adoption, inasmuch as it identifies the respective positions of the adopter and the adoptee: regarding the adoptee, Spanish Law takes into account his or her interest; regarding the adopter, Spanish Law takes into account his or her suitability to be a good father or mother. This balance of interest reveals the institutional aim of the adoption, and the adopters' role in this institution: summing up, adoption tries to give a family to children that need it, rather than giving a child to the adults that want to have children. The relevance of the principle of the best interest of the adoptee must be underlined: this is the keystone of the Spanish legal adoption system. Adoption only can be

[6] To better understand the Spanish legal system concerning adoption, see: M. Pérez Álvarez, *La adopción*, in C. Martínez de Aguirre (ed.), P. de Pablo and M. Pérez Álvarez, *Curso de Derecho Civil IV. Derecho de Familia*, §§ 196–202, pp. 455–469.

constituted if it fulfils the best interest of the adoptee: the wishes of the adopters, even the most legitimate ones (i.e., having a child and taking care of her or him), must yield in front of this paramount interest.[7]

Adoption is not a contract in Spanish Law, but needs a judicial decision. To adopt a child, the consent of the prospective adoptive parents is needed (Article 177.1 SCC), but is not enough: i) they have to be declared suitable to exercise parental authority by the public entity entrusted with the protection of minors (Article 176.2 SCC); ii) this public entity must make a proposal in favor of the prospective adopters; iii) a judicial resolution is required: in fact, adoption is constituted by this judicial resolution, not just by the will of the adopters. On the other hand, there is no contract between adopters and biological parents (if known), whose consent it not always necessary (Articles 177.2 & 3 SCC).

Since 2007 Spanish Law recognizes the right of adopted children to know their (biological) origins: in its current wording, Article 180.6 SCC declares that "adopted persons, after reaching legal age or whilst being underage, represented by their parents, shall be entitled to know any data relating to their biological origin."

Finally, according to Article 177.2.IV SCC, the mother cannot give her consent to her child's adoption "until six weeks have elapsed from the birth". This provision is inspired in the *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* (Article 4.c.4), and the *European Convention on the Adoption of Children* (Article 5.5). This legal requirement can be especially useful regarding surrogate motherhood, in which usually the pregnant mother gives her consent to the surrogacy arrangement (that includes the transfer of the child) before the birth (and even before the child's conception).

[7] See: C. Martínez de Aguirre, *Adoption, between the best interest of the child and the wishes of the adopters*, paper presented at the "Symposium on the Jurisprudence of Family Relations: Child and Family in Challenging Situations: Legal Issues", Ono Academic College Faculty of Law, Kiryat Ono (Israel), June 9–10, 2015. Available at: https://www.researchgate.net/publication/281523532_Adoption_between_the_best_interest_of_the_child_and_the_wishes_of_the_adopters (last accessed: 3 August 2018).

1.3. Reproductive technologies

Filiation resulting from the use of assisted reproductive technologies is governed by arts. 7 to 10 LTRHA.[8] Article 7.1 establishes that the filiation of the children born as a result of the use of these techniques will be regulated by the general civil law (mainly, the SCC) unless the LTRHA stipulates otherwise.

In the Spanish regulation of medically assisted procreation, a decisive role is given to free will, to the point that in three situations legal filiation links that lack biological basis are established:[9]

1. When a woman married to a man uses donor semen, with the consent of her husband: according to Article 8 LTRHA, the newborn is considered legally the husband's child. This occurs through the combination of the legal presumption of paternity (Article 116 SCC) and the prohibition on challenging paternity (Article 8.1 LTRHA). In this case, legal paternity is not based on biology but exclusively on the consent given by the husband.
2. When a woman married to another woman uses donor semen. In accordance with Article 7.3 LTRHA, both married women could legally be "mothers" of the child born as a result of these techniques: one because she gave birth, the other if she has made a statement, before the birth (not after), declaring her will to assume maternity. In such a case, this "second" maternity (the first one arises from the birth) derives only from will.
3. When an unmarried woman uses donor semen, with the consent of a man who is going to assume paternity. According to Article 8.2 LTHRA, the newborn may be recorded in the Civil Registry as a (non-marital) son or daughter of that man, even though there may be no emotional or cohabiting relationship between him and the woman who gave birth. In this case, the will of the consenting man is the only basis for the legal determination of his paternity: neither the nonexistent biological relationship nor the equally nonexistent presumption of paternity can be used to justify it. On the other hand, it cannot be said that he has acknowledged paternity in the true sense, since he has not acknowledged any biological affinity (that does not exist) but merely consented to fertilization by another man's sperm.

[8] A translation of the LTRHA into English is not available, so the translations have been made by the author of the present essay.

[9] For more information on the topic, see: C. Martínez de Aguirre, *The Principle…*, pp. 328 and ff.

Two more provisions of the LTRHA must be stressed, because they can be relevant from the point of view of the legal answer to surrogacy: i) according to Article 5.5 LTRHA, the donation of gametes is anonymous, but the children born as a result of these techniques has the right to obtain general information about the donors, except for their identity; only exceptionally, when the child's life or health is at risk, donor's identity can be disclosed: this provisions could have been deemed contraries to Article 39.2 of the Spanish Constitution ("the law shall provide for the possibility of the investigation of paternity"), but the Spanish Constitutional Court ruled in favor of their constitutionality (judgment 116/1999); ii) the disclosure of the identity of the donor according to Article 5.5 LTRHA never will imply legal determination of parentage (Article 8.3 LTRHA).

2. Surrogate motherhood in Spanish Law: legal approach

2.1. Legal rules on Surrogate motherhood

Surrogate motherhood is strictly prohibited by Article 10 LTRHA[10], which states that this contract is null and void: the legal mother will be the woman who gives birth to the child; in spite of this, the action to claim paternity regarding the biological father according the general rules shall remain unaffected. According to these rules, the legal mother would be the pregnant mother, and the legal father would be the husband of the pregnant mother if she is married (because of the presumption of paternity of the husband), or the man who provided the sperm but is not a donor, after the recognition of paternity (Article 120 SCC), or after a legal action claiming his paternity; if the male gametes came from a donor, there would be not any legal father (Article 8.3 LTRHA), so the intended father could recognize the child, this way becoming the legal father.[11]

[10] Article 10 LTRHA: "1. Any agreement whereby gestation is entrusted, with or without monetary consideration, to a woman who waives maternal parentage in favour of the other contracting party or a third party shall be null and void. 2. The parentage of children born by gestational surrogacy shall be determined by birth." In this case, the translation into English comes from the *Spanish Bioethics Committee Report on the Ethical and Legal Aspects of Surrogacy*; available at: http://assets.comitedebioetica.es/files/documentacion/en/spanish_bioethics_committee_report_on_the_ethical_and_legal_aspects_of_surrogacy.pdf (last accessed: 3 August 2018), p. 3.

[11] Regarding legal filiation issues coming from surrogate motherhood in Spain, see: M. Pérez Monge, *La filiación derivada de técnicas de reproducción asistida,* Madrid 2002, pp. 353 and ff., and

From Article 10 LTRHA one can easily conclude that surrogate motherhood is prohibited in Spain, as said above. However, some authors consider that such a prohibition does not exist: the Law would just declare that these contracts are void, but would not prohibit them.[12] Nevertheless, it seems more accurate to think that they are prohibited, taking into account the criminal rules on pretended birth of a child and on alteration of the paternity or maternity, status or condition of the child (Articles 220 and 221 Spanish Criminal Code, hereinafter SCrimC[13])[14], and the rules of the same LTRHA related to administrative penalties on those who carry out techniques not allowed by the Law (and, in accordance with Article 10 LTRHA, surrogacy is not allowed) – Art. 26.2.c.2 LTRHA.

2.2. Cross-border surrogacy in Spanish Law: facts and (administrative and judicial) decisions

The starting point must be Article 10 LTRHA, as mentioned above: "1. Any agreement whereby gestation is entrusted, with or without monetary consideration, to

Cuestiones actuales de la maternidad subrogada en España: regulación "versus" realidad, "Revista de Derecho Privado" julio-agosto 2010, pp. 50 and ff.

[12] See: M. Atienza, *Gestación por sustitución y prejuicios ideológicos,* 63 "La Notaría", available at: http://www.elnotario.es/opinion/opinion/5373-gestacion-por-sustitucion-y-prejuicios-ideologicos (last accessed: 3 August 2018); E. Farnós Amorós, *La filiación derivada de reproducción asistida: voluntad y biología*, "Anuario de Derecho Civil", 2015-I; available at: http://cort.as/-9_HE (last accessed: 8 August 2018), p. 36.

[13] Article 220 SCrimC: "1. A pretended birth shall be punished with imprisonment of six months to two years. 2. That same punishment shall be imposed on whoever conceals or delivers a child to third parties to alter or change the parentage thereof"; Article 221 SCrimC: "1. Those who, for a financial consideration, deliver a child, descendent or any minor to another person, even though there is no bond of affiliation or consanguinity, eluding the legal procedures for safekeeping, fostership or adoption, in order to establish a similar relation to that of filiation, shall be punished with imprisonment from one to five years and to special barring from exercise of parental rights, guardianship, care or safekeeping for a term from four to ten years.

2. The same punishment shall apply to punish the person receiving that child and the intermediary, even though the delivery may have taken place in a foreign country."

There is a translation of the Spanish Criminal Code into English in Clinter & Linguaserve (translators), *Spanish Criminal Code* Madrid 2013; available at: http://www.legislationline.org/documents/id/18769 (last accessed: 3 August 2018).

[14] See R. Barber Cárcamo, *La legalización administrativa de la gestación por sustitución en España (Crónica de una ilegalidad y remedios para combatirla),* "Revista Crítica de Derecho Inmobiliario" 739 (2013), p. 2919.

a woman who waives maternal parentage in favor of the other contracting party or a third party shall be null and void. 2. The parentage of children born by gestational surrogacy shall be determined by birth." This clear legal statement must be nuanced and complemented by the *Resolución de la Dirección General de los Registros y del Notariado* [*Resolution of the General Directorate of Registries and Notaries*] of 18 February 2009. The facts were as follows: two Spanish men got married in October 2005. After concluding a surrogacy arrangement in California, they requested the registration of the two children born in California as a consequence of said contract in the Civil Register of the Spanish Consulate of Los Angeles, as their children. The Consul rejected the request, based on the afore-mentioned Article 10 LTRHA. This decision was contested before the *Dirección General de los Registros y del Notariado*, that in the above-mentioned Resolution of 18 February 2009, upheld the appeal and agreed on the registration of the two children as the legal children of the requesting parties.[15] The public prosecutor appealed this decision, and both the Judgment of 15 September 2010 passed by *Juez de Primera Instancia* [*First Instance Judge*] and the Judgment of 23 November 2011 passed by *Audiencia Provincial* [*Provincial Court*] upheld the appeal, and rejected the registry of the children. Finally, the Spanish Supreme Court ruled against the plaintiffs in its very important Judgment of 6 February 2014, in a five to four vote (hereinafter, *STS. 6 February 2014*), the four dissenting Judges issuing a dissenting opinion (hereinafter, *STS. 6 February 2014/Dissenting Opinion*); on 2 February 2015, the Spanish Supreme Court issued a decision confirming its Judgment of 6 February 2014, in the light of the decision of the European Court of Human Right in the case of *Mennesson* (ECHR Judgment of 26 June 2014).

Prior to the judgment of the Supreme Court, but short after the first judicial decision rejecting the children's registry, the *Instrucción* [*Directive*] *de la Dirección General de los Registros y del Notariado* of 5 October 2010, established the cases and conditions to allow the registration of the children born abroad as a consequence of surrogacy arrangements. That *Instrucción* gives legal validity to what actually is an evasion of the law that prohibits surrogate motherhood in Spain, and is currently being applied by the registrars despite the clear judgment of the Spanish Supreme Court: this is the current situation, that has been denounced as a break of the rule of Law, inasmuch as an administrative body keeps acting against the decision of

[15] A short and sharp critic to this resolution, in R. Bercovitz, *Hijos "made in California"*, "Aranzadi Civil", 2009-I, p. 2117 and ff.

the Supreme Court. From then onward, a significant number of cases of births derived from international surrogacy arrangements, that took place abroad, and meet the requirements established by this *Instrucción,* have been registered in the Spanish Civil Registry, while a few have been rejected because they did not meet those requirements.[16]

For the moment, I would like to emphasize the sharp divide among the Supreme Court and the *Dirección General de los Registros y del Notariado,* and also within the Supreme Court itself (the five to four vote): this is a good illustration of the existing division between the Spanish society with regard to surrogate motherhood.

2.3. Current legislative proposal

On 27 April 2017, the political party *Ciudadanos* (*Citizens*)[17] submitted a legislative proposal relating surrogate motherhood[18]. This proposal is aimed at authorizing surrogate motherhood in Spain. The bill is based on the freedom of individuals in the field of reproductive technologies, and on the prevalence of the human will over the biological bonds. The main characteristics of this proposal are:

i) The proposal authorizes only non-commercial (altruistic) surrogacy, but allows the so-called "compensación resarcitoria" (economic reparatory compensation: Article 5 of the Bill), which is considered by the critics of the bill as a real price[19], this way allowing a sort of "hidden commercial surrogacy."

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[16] See: R. Barber Cárcamo, *La legalización administrativa de la gestación por sustitución…*, p. 2907.

[17] *Ciudadanos* is a relatively new Spanish political party, situated in the centre of the current political spectrum, whose ideology is "liberal-progressive." Currently, is the fourth parlamentary group in the Spanish Parliament (*Congreso de los Diputados*), with 32 parliamentary deputies out of 350.

[18] *Boletín Oficial de las Cortes Generales. Congreso de los Diputados. 8 September 2017*; available at: http://www.congreso.es/public_oficiales/L12/CONG/BOCG/B/BOCG-12-B-145–1.PDF (last accessed: 3 August 2018).

[19] M. Pasquau Liaño, *Gestación subrogada: no es solidaridad, es mercado,* "Revista Contexto" 123 (2017), p. 2; available at: http://ctxt.es/es/20170628/Firmas/13629/ctxt-gestacion-subrogada-vientres-alquiler-ciudadanos.htm (last accessed 3 August 2018); J. Nanclares Valle, *Maternidad subrogada en España: entre la Ley y la trampa* (lecture delivered at the University of Saragosse, 16 March 2018; I thank Dr. Nanclares for allowing me to use his text). In general, on the problems linked to altruistic surrogacy, and this sort of "compensation", see: V. Bellver Capella, *Tomarse en serio la maternidad subrogada altruista*, "Cuadernos de Bioética" XXVIII 2017/2ª; available at: http://aebioetica.org/revistas/2017/28/93/229.pdf (last accessed: 3 August 2018), pp. 237 and 242; Spanish Bioethics Committee, *Report on the ethical and legal aspects of surrogacy*; available in English at: http://assets.

ii) The pregnant woman cannot be relative by blood of the intended parents (Article 4.3 of the Bill): this rule, combined with the altruistic character of the surrogacy agreement, would make more difficult for the intended parents to find women willing to carry the baby for them, without been relatives or receiving an economic compensation.
iii) At least one of the intended parents must provide the gametes, and the pregnant woman is not supposed to provide the egg (Articles 3 b & c of the Bill).
iv) The consent of both the pregnant woman and the intended parents is irrevocable (Article 9 of the Bill).
v) There is no legal filiation bond between the pregnant woman and the child born as a consequence of the surrogacy agreement (Article 11 of the Bill).

This proposal has been strongly criticized because of its bad legal technique, and because of substantive grounds, linked to the policy options underlying the Bill.[20] On the other hand, it has few chances to be adopted by the *Cortes Generales*, because of the political divide of the Spanish Parliament regarding surrogate motherhood. Only *Ciudadanos* is supporting the Bill, while other political parties are clearly against it (*PSOE* and *Podemos,* both in the left of the political spectrum), and the *Partido Popular* (centre-right) has not a clear position, as we are going to see immediately.

3. The debate about surrogate motherhood in Spain: the positions

3.1. Social and political debate

As mentioned above, there is a sharp division and a strong debate in Spain concerning surrogate motherhood. The peculiarity of this debate is its transversality: different, even opposite political parties or social organizations have converged in their opposition to surrogacy.[21]

comitedebioetica.es/files/documentacion/en/spanish_bioethics_committee_report_on_the_ethical_and_legal_aspects_of_surrogacy.pdf (last accessed: 3 August 2018), p. 33.

[20] M. Pasquau Liaño, *Gestación subrogada: no es solidaridad, es mercado*; J. Nanclares Valle, *Maternidad subrogada en España: entre la Ley y la trampa*; V. Bellver Capella, *Proposición de Ley sobre Maternidad Subrogada,* "Red de Investigaciones Filosóficas Scio"; available at: https://proyectoscio.ucv.es/actualidad/sobre-maternidad-subrogada/ (last accessed: 3 August 2018).

[21] F. Vidal, J. Hamburger, R. Mota, *La modernidad de una sociedad familiar. Informe familia 2017*, Madrid 2017; available at: https://bit.ly/2KtV55A (last accessed: 3 August 2018), p. 149. This report

From the political point of view, leftist parties reject surrogate motherhood, the more to the left, the stronger the opposition. So, *Podemos* [*We can*], which is a new populist left-wing party, after a few hesitations, clearly rejected this sort of agreements[22], and more specifically the Bill submitted by *Ciudadanos,* arguing that surrogacy entails reproductive exploitation of women. The Socialist Party (*PSOE*), after a few hesitations too, in its *39º Congress* (2017) rejected surrogate motherhood for being contrary to the rights of women and children.[23] On the right wing, the *Partido Popular* (PP) has not a clear opinion yet: while some relevant politicians of the PP, holding important positions in the party or in regional governments, strongly supported a regulation allowing surrogate motherhood in Spain, other local leaders of the PP opposed this idea; the 18º Congress of the PP was unable to reach an agreement, and finally the assembly adopted a resolution calling for an in-depth discussion involving experts, aimed to build a common position:[24] so, the question remains open.

Probably, one of the major causes of all these internal divisions within the political parties is the confrontation between two social forces usually united in their goals and proposals, both situated in the left wing of the socio-political spectrum: the male gay organizations (for which surrogacy is almost the only way to have children of their own) supporting surrogacy, and the feminists organizations (for which surrogacy entails the commodification of women, and the exploitation of poor women) rejecting this; so, is has been written that surrogacy pits feminists against LGTBI groups.[25] That is why surrogacy, that once seemed to be a new liberal/progressive flag, has become a sort of civil war in the progressive field, leading to confusion to all who wanted to be considered as "progressive." In this line, it is worth underlining that not all LGTBI groups are in favor of surrogacy: some of them, mainly lesbian groups, are strongly against it, and take an active part in the opposition to its legalization.[26]

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analyzes the situation of the family in Spain, and the family trends in year 2017. One of these trends is surrogacy, see: pp. 149–183.

[22] F. Vidal, J. Hamburger, R. Mota, *La modernidad…*, p. 173. See also: https://podemos.info/posicion-politica-sobre-explotacion-reproductiva-mujeres/ (last accessed: 3 August 2018).

[23] F. Vidal, J. Hamburger, R. Mota, *La modernidad…*, p. 172.

[24] F. Vidal, J. Hamburger, R. Mota, *La modernidad…*, pp. 164 and ff.

[25] See: https://politica.elpais.com/politica/2017/02/17/actualidad/1487334746_534707.html (last accessed: 3 August 2018).

[26] F. Vidal, J. Hamburger, R. Mota, *La modernidad…*, p. 167.

As mentioned above, the social opposition to surrogate motherhood runs from the feminist organizations, gathered in the *Red Estatal contra el Alquiler de Vientres* [*State-network against Womb Renting*][27], to the Catholic Church[28], and pro-life and pro-family organizations.[29]

On the other side, in favor of surrogate motherhood, in addition to *Ciudadanos*, one can first mention the very influential gay (male gay) community: many Spanish gay celebrities have shown their support to surrogacy, some of them even have had children through international surrogacy agreements[30]; it goes without saying that this support has had a huge impact in the Spanish public perception of surrogate motherhood. Male gay organizations, intended parents' associations, i.e., *Son Nuestros Hijos* [*They are our Children*], and Law firms have gathered in the *Asociación por la Gestación Subrogada en España* [*Association for Surrogate Motherhood in Spain*].[31]

Finally, a large debate has taken place in the mass media, and in social networks.[32]

3.2. The Spanish Bioethics Committee Report on the Ethical and Legal Aspects of Surrogacy

Special consideration deserves the *Spanish Bioethics Committee Report on the Ethical and Legal Aspects of Surrogacy*, issued on 19 May 2017.[33] This is a long, very well founded and balanced report, that deals with the ethical (Part II), political and legal aspects of surrogacy (Part III), after having focused on the types of gestational surrogacy, the rules of the bioethical debate on surrogacy and the biological and

[27] F. Vidal, J. Hamburger, R. Mota, *La modernidad…*, pp. 167 and ff.; https://www.noalquilesvientres.com (last accessed: 3 August 2018).

[28] F. Vidal, J. Hamburger, R. Mota, *La modernidad…*, p. 166.

[29] Cf. https://www.forofamilia.org/articulos-para-pensar/la-maternidad-subrogada/, and http://www.revistapalabra.es/feministas-provida-critican-la-gestacion-subrogada/ (last accessed: 6 Aug 2018).

[30] F. Vidal, J. Hamburger, R. Mota, *La modernidad…*, p. 156.

[31] Cf. http://www.gestacionsubrogadaenespaña.es (last accessed: 6 August 2018).

[32] F. Vidal, J. Hamburger, R. Mota, *La modernidad…*, pp. 156–159.

[33] According to its webpage, the Spanish Bioethics Committee is an official body that "was created through Law 14/2007 of July 3rd on Biomedical Research (BOE July 4th) as a 'collegiate, independent and consultative professional body, which will develop its responsibilities, with full transparency, on materials related to the social and ethical implications of Biomedicine and Health Sciences.' The Committee was established on October 22nd 2008 and forms part of the Ministry of Health, Social Services and Equality"; see: http://www.comitedebioetica.es (last accessed: 8 August 2018).

psycho-social aspects of the mother-child relationship during gestation (Part I). Some of the ideas and arguments included in the *Spanish Bioethics Committee Report,* will be (and have been) used in this report. Its main conclusions are as follows:[34]

i) There are solid reasons for rejecting surrogacy: the desire of a person to have a child, no matter how noble that may be, cannot be realized at the cost of the rights of others. Every gestational surrogacy agreement entails exploitation of the woman and harm to the best interests of the child and, as such, cannot be accepted in principle.

ii) The regulatory proposals mooted – altruistic and commercial surrogacy in its various formats – are clearly wanting in terms of safeguarding the dignity and rights of the surrogate mother and child.

iii) Spain has rejected surrogacy, since its first Act on assisted human reproduction in 1988. However, taking advantage of the permissive laws of some countries, Spanish citizens enter into these types of agreements abroad and then succeed in registering the parentage of children so obtained at the Civil Registry in Spain. These types of agreements and registrations fly in the face of the considered opinion of the Supreme Court, which ruled on the matter in 2014 and 2015, declaring them and any effects flowing therefrom to be null and void.

iv) A legal reform regarding surrogacy should be guided by three fundamental criteria:

   a. Minimum intervention principle: the reform of the law should be geared to ensuring that the nullity of surrogacy agreements is also applicable to those concluded abroad.

   b. Towards a universal ban on international surrogacy: the unfortunate experiences of countries in which this practice has crudely highlighted the exploitation to which surrogate mothers are subjected, is a strong reason for Spain to go before the international community and advocate the adoption of measures targeted at banning the conclusion of gestational surrogacy arrangements at an international level.

   c. Safe transition for the Spanish citizens involved in international surrogacy processes.

[34] *Spanish Bioethics Committee Report…*, pp. 87–88.

4. The debate about surrogate motherhood in Spain: the arguments

This section of the report is going to be organized in two parts: the substantive arguments regarding surrogate motherhood (4.1.), and the arguments regarding cross-border surrogacy in Spanish Law (4.2.).[35]

4.1. Arguments regarding surrogate motherhood

4.1.1. Arguments supporting surrogate motherhood

The arguments in favor of surrogate motherhood can be organized taking into account the point of view of the intended parents (A), the point of view of children (B), and the point of view of the pregnant mother (C); in addition, we are also going to consider a substantive argument, related to the relation between biology and human will (D).

A) From the point of view of the commissioning parents, the main argument has to do with the "right to procreate"[36]: surrogate motherhood would enable to individuals who are not able to carry out a pregnancy for any reason, to be parents.[37] Hence, the abovementioned "right to procreate" is closely linked to the desire to be father or mother: surrogate motherhood would offer an alternative so that any man or woman can satisfy his/her desire to be a father or mother.[38] In this line, the Preamble of the legislative proposal submitted by *Ciudadanos* emphasizes the "right to surrogate motherhood", as a consequence of the reproductive rights and the freedom of individuals.[39]

This argument is also tied to some consequences of the use of assisted reproduction techniques, inasmuch as prohibiting surrogate motherhood could produce

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[35] A first glimpse about the pros and cons of surrogate motherhood, [in]: M. Pérez Monge, *La filiación derivada de técnicas de reproducción asistida*, pp. 334 and ff.

[36] *STS. 6 February 2014/Dissenting Opinion*, no. 3.

[37] V. Bellver Capella, *Tomarse en serio la maternidad subrogada altruista*, p. 132. Asociación por la Maternidad Subrogada en España, *Manifiesto a favor de la legalización y regulación de la gestación subrogada en España* (Association for Surrogate Motherhood in Spain, *Manifesto for the legalization and regulation of surrogate motherhood in Spain*); http://gestacionsubrogadaenespaña.es/images/PDF/Manifiesto.pdf (last accessed: 6 August 2018).

[38] *Spanish Bioethics Committee Report…*, p. 19.

[39] *Preamble*, sections II and III.

unfair discrimination.[40] Indeed, "why was it that a woman could be the mother if she gestated the embryo, even though she had not provided the egg in the AHRT, and yet in contrast, could not be the mother if she had not gestated the egg? Why could a single woman – but not a man (with or without homosexual partner) – be a mother by means of AHRT?" (this is the rhetorical question asked in the *Spanish Bioethics Committee Report*).[41]

This approach presupposes the right to have a child, which is a very problematic right:[42] first of all, because a child (in fact, any human being, irrespective of his or her age) can never be the object of a right. On the other hand, the connection between the desire to be a parent and the right to procreate opens the door to situations in which individuals (women) that could carry on a pregnancy decide to use surrogate motherhood for reasons linked to work, to physical appearance, or even to the desire of not experiencing the physical problems related to pregnancy. This approach also opens the door to cases in which a man wants to have biological children but without the pregnant mother being (legally and factually) involved with them (father and child) from the birth onward.

B) From the point of view of the child, it has been said that so strong a desire to have a child is the best guarantee that he/she will be loved and cared for: the commissioning parents have made a big effort from both personal and economic point of view, to have a child; this effort would be, as said above, the best guarantee for the child to find in them a loving, caring family.[43]

But, as the *Spanish Bioethics Committee* points out,

> … this is not exactly so. The desire may change, and spoil what promised to be an idyllic relationship. It is one thing to want something and quite another to assume responsibility of a child over time and under any type of circumstance. Our society has tended to encourage individuals to put more store in satisfying their own desires than assuming the responsibilities that such desires can entail. We are accustomed to looking for new desires once

[40] *Manifesto for the legalization and regulation of surrogate motherhood in Spain*.

[41] *Spanish Bioethics Committee Report*…, p. 21.

[42] On the "right to a child", see: D. Jarufe Contreras, *Tratamiento legal de las filiaciones no biológicas en el ordenamiento jurídico español: adopción "versus" técnicas de reproducción humana asistida*, Madrid 2013, pp. 115 and ff.; *Spanish Bioethics Committee Report*…, p. 22.

[43] Resolution of the Spanish General Directorate of Registries and Notaries of 18 February 2009, section V.

> we have achieved what we want, rather than committing ourselves to the consequences of these desires over time. In an age that proclaims the freedom of the individual to change his/her identity whenever he/she desires, it cannot be said at one and the same time that this desire is any guarantee of compliance with the commitments undertaken. Furthermore, even though the desire may exist and remain steadfast over time, this in itself is no assurance that the child is going to receive the best care and education. For this to happen, such a desire must be neither pathological, immature nor selfish.[44]

On the other hand, it is easy to see (and to prove) that in surrogate motherhood contracts (and practice) children can easily become some sort of consumer item: rather than guaranteeing the child's best interests, surrogacy ensures quite the opposite: "environment of choice and selection surrounding the unborn baby is – as agencies are wont to do – beset by proposals to obtain the best product, the best child, it takes little imagination to foresee that, when the child fails to meet the expectations for which it was acquired, this will not be easily accepted by those who sought to buy perfection." [45]

The argument based on the best interest of the child has also been used in the discussion about cross-border surrogate motherhood in Spanish Law, so we will come back later to it.

C) From the point of view of the pregnant mother, surrogate motherhood is supposed to be based on her freedom. The surrogate mother is supposed to be a woman who freely and knowingly consents to performing this "service": in this vein, the legislative proposal from *Ciudadanos* go as far as to talk about the "right" of the pregnant mother to facilitate the pregnancy in favor of the commissioning parents (Article 2).[46] The women's capacity to freely consent, and to arrive to free and voluntary agreements have been also emphasized.[47] Related and in addition to this idea, the solidarity of the pregnant mother, that enables the intended parents to become real parents, has also been underlined.[48]

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[44] *Spanish Bioethics Committee Report*…, p. 23.

[45] *Spanish Bioethics Committee Report*…, p. 36.

[46] This "right" has been strongly criticized: V. Bellver Capella, *Proposición de Ley sobre Maternidad Subrogada,* pp. 4 and ff.; J. Nanclares Valle, *Maternidad subrogada en España*…

[47] *STS, 6 February 2014/Dissenting Opinion*, No. 3.

[48] *Ciudadanos* legislative proposal, *Preamble*, section III. See also: https://www.infolibre.es/noticias/politica/2015/09/29/quot_mas_acto_solidaridad_con_las_parejas_que_pueden_gestar_que_lucro_

Both arguments have been challenged, as we are going to see when dealing with the reasons against surrogate motherhood.

D) One of the most relevant arguments in favor of surrogate motherhood has to do with the relation between biology and human will: assisted reproductive technologies in general, and particularly surrogacy, are considered as means for human will to prevail over biology. According to this, the most important factor to be (legally) a parent would be not biology, but consent.[49]

But, as the *Spanish Bioethics Committee Report* states, the basic issue consists of deciding whether it is gestation or the reproductive desire that makes for the most appropriate conditions for being parents and assuming responsibility for children.[50] In response to the abovementioned approach, the importance of the gestational link between the pregnant mother and the child she is carrying has been stressed[51], even when the pregnant mother is not the genetic mother.[52] That is why the *Spanish Bioethics Committee* is of the view that the importance of gestation in the procreative process and in the life of each human being should not be relativized and that, consequently, the bond between each human being and his/her biological mother should be protected.[53]

4.1.2. Arguments against surrogate motherhood

The arguments used against surrogate motherhood in the Spanish debate can be grouped in arguments related to surrogate mother (A) and arguments related to children (B).

A) Regarding surrogate mothers, it has been argued that surrogate motherhood entails a very high risk of commodification, because they become an object of business. In surrogacy arrangements not only the womb is rented, but the complete woman, given the total character of gestation[54], that affects the whole life of the

quot_38493_1012.html (last accessed: 6 August 2018); https://subrogalia.com/codigo-deontologico/ (last accessed: 6 August 2018).

[49] Resolution of the Spanish General Directorate of Registries and Notaries of 18 February 2009, section V. *Ciudadanos* legislative proposal, *Preamble*, section VI.

[50] *Spanish Bioethics Committee Report…*, p. 30.

[51] *Spanish Bioethics Committee Report…*, pp. 23 and 30. N. López Moratalla, *Comunicación materno-filial en el embarazo* [*Communication between mother and embryo or foetus*], "Cuadernos de Bioética" XX, 2009/3, pp. 303 and ff; available at: http://www.redalyc.org/pdf/875/87512342001.pdf (last accessed: 6 August 2018).

[52] J. Nanclares Valle, *Maternidad subrogada en España…*

[53] *Spanish Bioethics Committee Report…*, p. 30.

[54] V. Bellver Capella, *Tomarse en serio la maternidad subrogada altruista*, pp. 232 and 235.

pregnant woman during pregnancy: in fact, a great number of decisions affecting the surrogate mother during pregnancy are left to the intended parents[55], who can decide about relevant health issues (medical treatments for the surrogate mother, or for the child), method of delivery (natural, cesarean section) [56], or abortion, this way having a real control over the surrogate mother's life.[57]

There has also been underlined the risk of exploitation of vulnerable women[58], especially in the case of for-profit surrogacy arrangements: it has been said, vividly, that surrogate motherhood is not solidarity, but market.[59] The *Spanish Bioethics Committee* stated that "ethics and the law have traditionally considered that decisions which entail an important sacrifice for the individual or, in essence, compromise his/her physical integrity and are remunerated, are not taken freely but rather in a context of vulnerability, so that, by eliminating this specific context, the individual would not take the same decision. Hence, such decisions which affect spheres very directly linked to human dignity are subject to the requirement of charge-free provision, as a guarantee of freedom."[60] This seems to open the door to altruistic surrogacy, as proposed by *Ciudadanos* in its legislative proposal. However, altruistic surrogacy has also been objected for a number of reasons: i) because Law would be unable to prevent for-profit surrogacy, once altruistic gestation has been accepted[61]; ii) because the surrogate mother voluntarily submits to the will of the intending parents during the period of the pregnancy[62]; iii) because there is no way to ensure that the surrogate mother received no (hidden) remuneration whatsoever.[63]

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[55] V. Bellver Capella, *Tomarse en serio la maternidad subrogada altruista*, p. 237; *Spanish Bioethics Committee Report…*, p. 36.

[56] V. Bellver Capella, *¿Nuevas tecnologías? Viejas explotaciones. El caso de la maternidad subrogada internacional,* "SCIO. Revista de Filosofía", 11, November 2015; available at: https://proyectoscio.ucv.es/wp-content/uploads/2015/10/1-bellver.pdf (last accessed: 6 August 2018), p. 45. As is well known, cesarean section is safer for the child, but not for the mother.

[57] V. Bellver Capella, *¿Nuevas tecnologías? Viejas explotaciones…*, p. 45.

[58] *STS. 6 February 2014*, Fundamento de Derecho (Ground of Law: hereinafter FD) Tercero (Third), No. 3, and FD Quinto (Fifth), No. 7; V. Bellver Capella, *¿Nuevas tecnologías? Viejas explotaciones… cit.*, p. 44; *Spanish Bioethics Committee Report…*, pp. 24 and 26. Spanish Judgments are organized in *Hechos* (Facts) and *Fundamentos de Derecho* (Grounds of Law).

[59] M. Pasquau Liaño, *Gestación subrogada: no es solidaridad, es mercado*.

[60] *Spanish Bioethics Committee Report…*, pp. 24 and 25.

[61] *Spanish Bioethics Committee Report…*, p. 25.

[62] *Spanish Bioethics Committee Report…*, p. 32.

[63] *Spanish Bioethics Committee Report…*, p. 32. For other problems linked to the regulation of altruistic surrogacy, see: p. 76.

B) Regarding children, there has been alleged that surrogate motherhood entails a high risk of commodification and objectification of children[64]: they could be seen as "products", that have to meet the standards imposed by the desire of the intended parents. So, the commissioning parents would be able to choose the characteristics of one or both gametes, they can request a pre-implantation genetic diagnosis which would identify certain diseases, or certain qualities that they wish the future child to have (and more specifically, they can choose the sex); they can choose the surrogate mother, and even they will be informed of the medical progress of the pregnancy and may even attend the medical monitoring of the pregnant woman… On the other hand, problems could arise if the new born child does not meet the standards imposed by the intended parents: "when the child fails to meet the expectations for which it was acquired, this will not be easily accepted by those who sought to buy perfection."[65]

In conclusion, the *Spanish Bioethics Committee* stated that "the transformation of the child that one wants to have into some sort of consumer item, rather than guaranteeing the child's best interests, ensures quite the opposite."[66] That is why the Spanish Supreme Court considered international surrogacy arrangements being against the dignity of children.[67]

On the other hand, the child's right to know his or her biological origins would be affected: in this case, a conflict of interest between the child and his or her legal parents (the commissioning parents) could easily arise, being precisely the legal parents the ones who are trying to hide the child's biological origin.[68]

4.2. Cross-border surrogacy in Spanish Law (and in Spanish legal practice)

As explained above, the current legal situation in Spain regarding surrogacy arrangements concluded abroad, and the recognition of the children born as result of these

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[64] STS, 6 February 2014, FD Quinto (Fifth), nr. 8; *Spanish Bioethics Committee Report…*, p. 32.

[65] *Spanish Bioethics Committee Report…*, p. 36. That is why the intended parents could be entitled by contract to impose abortion on the surrogate mother, or simply reject the child: this is the case of Baby Gammy. For more information, see: https://www.aceprensa.com/articles/la-agencia-de-subrogacion-solo-contaba-las-historias-felices/ (last accessed: 6 August 2018).

[66] *Spanish Bioethics Committee Report…*, p. 35.

[67] *STS, 6 February 2014*, FD Quinto (Fifth), No. 8.

[68] V. Bellver Capella, *¿Nuevas tecnologías? Viejas explotaciones…*, p. 44.

arrangements as children of the intended parents, is unusual: there is a Judgment of the Supreme Court rejecting this recognition, but there is also an administrative directive and an administrative practice allowing the recognition when some legal requirements are fulfilled. Now we are going to deal with the arguments exchanged in favor or against that recognition.

4.2.1. The recognition of foreign decisions legal technique

There is agreement about the legal technique to be used in those cases: not the conflict-of-laws technique, but the technique for the recognition of foreign decisions.[69]

4.2.2. The Spanish legislation regarding Civil Registry

In order to accept the registration of the children born abroad as a result of an international surrogacy arrangement, the DGRN applied Articles 81 and 85 of the *Reglamento del Registro Civil* [*Regulation of the Civil Registry*], hereinafter RRC.[70] According to Article 81 RRC, "authentic documents, no matter if they are originals or copies or of judicial, administrative or notarial nature, are sufficient proof to register the fact to which they bear witness. The same applies to foreign authentic documents valid in Spain according to international law or conventions"; and according to Article 85.1 RRC, "to register a fact without proceedings and by virtue of a certificate issued by a foreign register office, the corresponding register office must be regular and real in order to be able to ensure that the entry being certified offers similar guarantees as the ones required for registration according to Spanish law with regard to the facts being attested". In the light of these articles, and of the concordant articles of the RRC, the *Dirección General de los Registros y el Notariado* allowed the registration of the new-born as children of the intended parents, arguing that the decision of the foreign authorities were subjected to a mere control of formal

[69] STS, 6 February 2014, FD Tercero (Third), nr. 2; Resolution of the Spanish General Directorate of Registries and Notaries of 18 February 2009, section II; R. Barber Cárcamo, *La legalización administrativa…*, p. 2919.

[70] Resolution of the Spanish General Directorate of Registries and Notaries of 18 February 2009, section II. There is a translation of the RRC into English: Startul S.L. (translator), *Decree of 14th November 1958 Approving the Regulations of the Civil Registration Act*, Madrid, 2017. Available (upon purchase) at: http://www.mjusticia.gob.es/cs/Satellite/Portal/es/servicios-ciudadano/documentacion-publicaciones/publicaciones/traducciones-derecho-espanol (last accessed: 6 August 2018).

legality[71], but not to a review involving a control of the substantive legality of the decision according to the Spanish Law (and mainly, according to Article 10 LTRHA).

The Spanish Judges that decided on this case do not share this view, because it forgets the content of article 23 of the Spanish *Ley del Registro Civil* [*Civil Registry Act*], hereinafter LRC, which is superior to the RRC in the Spanish hierarchy of norms.[72] According to Article 23 LRC, "Entries may be made by virtue of an authentic document or, in the cases determined by the Act, by declaration as provided for therein. Entries may also be made – without a previous file being required – upon certification of entries made at foreign register offices, provided that the registered fact is absolutely certain and legal pursuant to Spanish law."[73] Hence, in order to admit the registration of the children born abroad as a consequence of international surrogacy arrangements, the registrar needs to verify two different things: i) the certainty (the reality) of the fact to be registered; ii) the substantive legality of the fact according to Spanish Law. But in the situations we are dealing with: i) it is clear that the intended parents (in the case, two married men) are not the biological parents of the child, because this is not biologically possible, so the filiation they are trying to register is not real, as a fact [74]; ii) it is also clear that surrogacy arrangements are null and void according to Article 10 LTRHA.[75] This latter argument needs a closer approach.

4.2.3. "Legal pursuant to Spanish law": cross-border surrogacy and Spanish international public policy

In this section, we are going to consider whether these international surrogacy arrangements entail a fraud of Spanish Law (A), and are contrary to Spanish international public policy (B); finally, we will deal with the solution offered by the Spanish Supreme Court (C).

A) According to Article 6.4 Spanish Civil Code, "acts carried out pursuant to the text of a legal provision, which pursue a result forbidden by the legal system or contrary thereto shall be deemed to be in fraud of the law and shall not prevent

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[71] Resolution of the Spanish General Directorate of Registries and Notaries of 18 February 2009, sections III and IV. Similarly, *STS February 2014/Dissenting Opinion*, No. 3.

[72] In fact, RRC is designed to develop LRC, so RRC cannot amend, modify or contradict LRC.

[73] There is a translation of the LRC into English: Startul S.L. (translator), *Act of June 8th, 1957 on civil registry*, Madrid, 2017. Available (upon purchase) at: http://www.mjusticia.gob.es/cs/Satellite/Portal/es/servicios-ciudadano/documentacion-publicaciones/publicaciones/traducciones-derecho-espanol (last accessed: 6 August 2018).

[74] J. Nanclares Valle, *Maternidad subrogada en España…*

[75] *STS, 6 February 2014*, FD Tercero (Third), No. 7.

due application of the provision which they purported to elude". In the light of this article, could we consider that international surrogacy arrangements concluded abroad are in fraud of Spanish Law, and more specifically, of Article 10 LTRHA?

A first response says no, arguing that the intended parents have not used a conflict-of-laws rule to defraud Spanish Law, neither have changed their nationality, or the children's nationality, nor have incurred in "forum shopping." [76]

A second, and different, response, understands that these arrangements are in fraud of Spanish Law[77], because the intended parents go out of Spain specifically to conclude a contract which is null and void under Spanish Law, to come back to Spain and manage to register the children, getting this way the results specifically excluded by Article 10 LTRHA. In the same vein, the Supreme Court (that has not taken into consideration the fraud-of-Law argument) asserted that the intended parents did not have any real connection with California (which is the place in which the surrogacy arrangement was concluded), so it is clear for the Supreme Court that the intended parents "fled" the Spanish Law in order to avoid the application of Article 10 LTRHA[78]: and this clearly fits into the legal notion of fraud of Law, as set in Article 6.4 SCC.

A further argument could be based on the idea that surrogacy arrangements neither are prohibited under Spanish Law, nor are contrary to it:[79] according to this approach, Article 10 LTRHA would confine itself to declaring this sort of arrangements null and void, but no more; so, these arrangements would be "allegal" (meaning not regulated by Law) but not "illegal" (meaning contrary to Law) in Spanish Law. Before going ahead, it must be added: i) that the DGRN *Resolution* of 2009 does assert that surrogacy arrangements are prohibited by Article 10 LTRHA[80], so that is not the reason why the DGRN considers that there has not had fraud of law; ii) that there are strong reasons to hold the opinion that surrogacy arrangements are prohibited by Spanish Law, because they (or their necessary consequences)

[76] Resolution of the Spanish General Directorate of Registries and Notaries of 18 February 2009, section V.

[77] Judgment of the First Instance Judge on the case eventually decided by *STS, 6 February 2014*.

[78] *STS, 6 February 2014*, FD Tercero (Third), no. 7.

[79] M. Atienza, *Gestación por sustitución y prejuicios ideológicos…*, p. 2; E. Farnós Amorós, *La filiación derivada de reproducción asistida…*, p. 36.

[80] Resolution of the Spanish General Directorate of Registries and Notaries of 18 February 2009, section V; R. Barber Cárcamo, *La legalización administrativa de la gestación por sustitución…*, p. 2919.

are sanctioned by Article 26.2.c.2 LTRHA, and arts. 220 and 221[81] of the Spanish Criminal Code.[82]

B) Now we are going to focus on a controversial question: even admitting that surrogacy arrangements are prohibited by Spanish Law, would that mean that they are contrary to the Spanish international public policy? Because if they are not, we could easily conclude that their consequences (the registration of children as sons or daughters of the intended parents) could be allowed in Spanish Law.

a) The first response to this question is that these arrangements are not contrary to the Spanish International Public Policy:

1. Because the best interest of the children involved leads to the registration of these children: this interest would demand the legal filiation of the children to be one and the same in all countries, and the only way to achieve this goal is that the children have in Spain the same filiation that in their native country.[83] On the other hand, the dissenting opinion to the Supreme Court Judgment of 2014, argues that if the children's registration in Spain is rejected, the children would be left in a sort of legal limbo, that in the short or mid-term could lead to a situation of legal abandonment.[84]
2. Because the international surrogacy arrangements are not deemed to be contrary to human dignity, notion that is in the base of a right notion of Public Policy.[85]

b) A second answer (given by the Spanish Supreme Court in its Judgment of 6 February 2014) considers that these arrangements violate the Spanish International Public Policy:

1. Because the regulation contained in Article 10 LTRHA is part of that Spanish International Public Policy, inasmuch as this article regulates core aspects of legal family relations (more specifically, filiation) that are based on the principles of human dignity and children protection[86]: in particular, Article 10 LTRHA not only declares null and void surrogacy agreements, but also states that the legal mother of the child is the pregnant mother (woman

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[81] See: above, note 13.

[82] R. Barber Cárcamo, *La legalización administrativa de la gestación por sustitución…*, p. 2919.

[83] Resolution of the Spanish General Directorate of Registries and Notaries of 18 February 2009, sections V. *STS*, *February 2014/Dissenting Opinion*, p. 3.

[84] *STS*, *February 2014/Dissenting Opinion*, p. 5.

[85] M. Atienza, *Gestación por sustitución y prejuicios ideológicos*, p. 2.

[86] *STS*, *6 February 2014*, FD Tercero (Third), No. 10.

who gives birth). On the other hand, the Spanish Supreme Court states that surrogacy arrangements commercialize pregnancy, and reify women and children, allowing the exploitation of young vulnerable women: those are the reasons behind Article 10 LTRHA, and that is why this article is deemed to be a part of the Spanish International Public Policy.[87]

2. But, what about the best interest of the child? According to the Spanish Supreme Court, this is an undefined legal concept that needs to be defined by Courts, but when defining this concept in a particular case, the Courts cannot change or violate the Law.[88] On the other hand, surrogacy agreements are contrary to the human dignity of children to the extent that they commercialize filiation and turn the child into an object of business.[89]
3. Finally, as for the lack of legal protection for the children if they are not registered as children of the intended parents, the Supreme Court says that the rejection of the registration of the children born as a consequence of an international surrogacy arrangement does not mean that the children must be removed from the intended parent's care: on the contrary, there are several legal ways for the intended parents to become the legal parents (and the legal caregivers, in the meantime), but with full respect to the Spanish legal system: recognition or judicial claim of paternity for the biological father (the man who gave the sperm), adoption, foster care, and so on…[90]

C) The solution offered by the Supreme Court (rejecting the registration but allowing to establish legal filiation bonds through other legal ways) has been criticized from both sides of the debate:

a) As mentioned above, supporters of the registration of children said that the Supreme Court failed in taking into account the best interest of the child, and in justifying the assertion that international surrogacy arrangements are contrary to the Spanish International Public Policy: but both arguments are baseless, as proven by reading the Judgment, as we have seen.
b) Opponents to the registration argue that allowing the intended parents to establish filiation using other legal ways, means the final consolidation of the legal fraud, because the intended parents eventually

[87] *STS, 6 February 2014*, FD Tercero (Third), No. 6 and 7.
[88] *STS, 6 February 2014*, FD Quinto (Fifth), No. 6.
[89] *STS, 6 February 2014*, FD Tercero (Third), No. 7.
[90] *STS, 6 February 2014*, FD Quinto (Fifth), No. 11.

succeeded in (legally) having their own children using international surrogacy arrangements.[91] The conclusion is to some extent correct, but should be complemented by other ideas: i) According to Article 6.4 SCC, the legal consequence of the fraud of law is the due application of the rule which they purported to elude: in this case, the rules relating filiation or adoption; if so, the proper legal consequence is to apply these rules, whose right application can lead to establishing filiation bonds between the intended parents and the child, using the regulation of recognition of paternity, judicial claim of paternity, or adoption. ii) It is true that the solution proposed by the Supreme Court, on the one hand can encourage the conclusion of international surrogacy agreements, in the hope that the intended parents can become legal parents using these alternative ways; but, on the other hand, this solution can also discourage the conclusion of such arrangements, because the proposed way to legal parenthood is far much difficult and uncertain[92] (starting by the ban of consent of the mother to the adoption until six weeks after the birth: Article 177 Spanish Civil Code).

5. Brief reference to surrogate motherhood in Argentina, Chile, Mexico and Brazil

5.1. Argentina

The situation of surrogate motherhood in Argentina, from the legal point of view, can be summarized as follows:

a) The Law. Surrogate motherhood is not regulated in Argentine Law. Neither the *Ley 26.862 de Acceso Integral a los Procedimientos y Técnicas médico-asistenciales de Reproducción Médicamente Asistida* [*Comprehensive Access to the Assisted Reproductive Technologies Act*], nor the new *Código civil y Comercial* [*Civil and Commercial Code*][93] have included any explicit legal provision about surrogacy. During the preparatory works of the *Civil and Commercial*

[91] J. Nanclares Valle, *Maternidad subrogada en España*.

[92] R. Barber Cárcamo, *La legalización administrativa de la gestación por sustitución…*, pp. 2946 and f.

[93] The new *Civil and Commercial Code* was approved by Act 26.994 (7 October 2014), entered into force on 1 August 2015 (Act 27.077, 18 December 2014).

Code, this issue was taken into account, but finally was removed from the Argentine *Civil and Commercial Code*.[94]

This lack of specific regulation has been interpreted in two contradictory ways: as prohibiting surrogate motherhood[95], or as allowing it (based in the idea that whatever is not prohibited is allowed).[96] The first opinion has in its favor some articles of the new *Civil and Commercial Code*: i) Article 17, that prohibits altruistic or for-profit contracts on human body; ii) Article 522, according to which the legal mother is the woman who gives birth to the child, even when reproductive technologies have been used; iii) Article 611, according to which parents and relatives are prohibited from the direct transfer of children and adolescents in guardianship or foster care.

b) Judicial activism. Since 2013[97], a certain number of Judgments have allowed surrogacy agreements, or supported their legal consequences, throughout Argentina, opening the doors to this practice (even suggesting in some cases the permissibility of commercial surrogacy)[98] from the judicial point of view.[99] This judicial activism has been strongly criticized, stressing that these judgments introduce a "reifying view" of persons, prioritize the desire

[94] U. Basset, M. Ales, *Legislar sobre la maternidad subrogada*, "Revista Jurídica Argentina La Ley", May 2018.

[95] U. Basset, M. Ales, *Legislar sobre la maternidad subrogada*, *cit.*; M. M. Sanders Bruletti, *La maternidad subrogada en la legislación argentina. Una mirada bioética*; available at: https://aldiaargentina.microjuris.com/2018/06/01/la-maternidad-subrogada-en-la-legislacion-argentina-una-mirada-bioetica/ (last accessed: 6 August 2018).

[96] See: https://www.lanacion.com.ar/2041258-un-fallo-judicial-autoriza-el-primer-caso-de-alquiler-de-vientre-en-la-argentina (last accessed: 7 August 2018); one of the groungs of the Judgment that first allowed surrogacy in Argentina, according to the news, is the abovementioned idea (this is not prohibited, *ergo* is allowed).

[97] F. M. Quani, *Leading case sobre maternidad subrogada: primer fallo en la Argentina*; available at: http://www.colectivoderechofamilia.com/wp-content/uploads/2017/10/QUAINI.-Leading-case-sobre-maternidad-subrogada-primer-fallo-en-la-Argentina.pdf (last accessed: 7 August 2018).

[98] N. Lafferriere, *Activismo judicial impulsa el alquiler de vientres en Argentina*, available at : http://centrodebioetica.org/2015/08/activismo-judicial-impulsa-el-alquiler-de-vientres-en-argentina/ (last accessed: 7 August 2018).

[99] See, for instance: https://www.lanacion.com.ar/2041258-un-fallo-judicial-autoriza-el-primer-caso-de-alquiler-de-vientre-en-la-argentina; https://www.clarin.com/sociedad/maternidad-subrogada-fallo-justicia-favor-pareja-gay_0_SyKs9mbHZ.html; https://aldiaargentina.microjuris.com/2018/05/16/homologacion-del-acuerdo-entre-los-conyuges-por-un-lado-y-cunada-de-la-actora-por-otro-autorizandose-la-gestacion-por-sustitucion/ (last accessed: 7 August 2018).

of adults over the interest of children and favor the exploitation of vulnerable women.[100]

c) Legislative proposals. Currently there are three legislative proposals regarding surrogate motherhood in Argentina:[101] the three of them legalize surrogacy in Argentina. These proposals have been criticized for prioritizing the interest of adults over the best interest of the child[102], for putting vulnerable women in risk of exploitation, and for being incompatible with the legal rules on nullity of contracts on account of the unlawfulness of their object.[103]

d) The debate. There is also a social and legal debate about surrogacy in Argentina. One of the peculiarities of the discussion in this country is that feminist organizations seem no to be as strongly opposed to surrogacy as in Spain, or in general in many Western countries[104]; on the other hand, LGTB organizations are in favor of the regulation of surrogacy as a right.[105] From the legal and scientific point of view, the *Centro de Bioética, Persona y Familia* [*Center for Bioethics, Person and Family*][106] has played (and keeps playing) an active role in the debate against the legalization of surrogate motherhood. A certain number of legal scholars, some of them very influential in Argentina, have also spoken out in favor of the regulation (legalization) of surrogacy.[107]

5.2. Chile

The legal situation in Chile is far simpler than in Argentina. Surrogate motherhood is not regulated, so the general rules about filiation apply to the cases of surrogacy. One of these rules is article 183 of Chilean Civil Code, according to which legal

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[100] N. Lafferriere, *Activismo judicial…*

[101] N. Lafferriere, *Activismo judicial…*

[102] N. Lafferriere, *Activismo judicial…*

[103] N. Lafferriere, *Activismo judicial…*; U. Basset, M. Ales, *Legislar sobre la maternidad subrogada…*

[104] See, for example: https://www.pagina12.com.ar/51350-descartables; http://borderperiodismo.com/2016/11/07/maternidad-subrogada-la-discusion-que-avanza-en-argentina-parte-1/ (last accessed: 7 August 2018).

[105] See: http://www.falgbt.org/?s=maternidad+subrogada&x=0&y=0 (last accessed: 7 August 2018).

[106] See: http://centrodebioetica.org.; for more information on reproductive technologies, see: http://centrodebioetica.org/category/nt/pa/.

[107] Cfr. E. Lamm, *Gestación por sustitución,* "Indret. Revista para el análisis del Derecho", 3/2012, p. 7; available at: http://www.indret.com/pdf/909_es.pdf (last accessed: 7 August 2018).

maternity is determined by the delivery of the child, so the woman who gives birth is the legal mother of the child: so, in cases of surrogacy, the legal mother would be the pregnant mother.

As for judicial decisions, for the moment there has been only one[108], in a case in which the pregnant mother was also the biological mother of the intended – and genetic: the egg came from her – mother (so, the pregnant mother is the genetic grand-mother of the children). The grand-mother/pregnant mother delivered twin girls, the intended parents judicially contested the maternity of the pregnant mother, and claimed their legal paternity and maternity, the grand-mother/pregnant mother agreed, and the Judge eventually decided in favor of the plaintiffs. Regarding this case, and this judgment, two general remarks must be made: i) on the one hand, the final decision of the Judge seems to legalize surrogate motherhood in Chile, at least in some particular cases, as the one decided by the Judge; ii) on the other hand, the legal way for the intended parents to become legal parents in Chile is long and complicated, since a judicial action contesting the maternity of the pregnant mother and claiming the paternity and maternity of the intended parents is needed: this way is discouraging for those wanting to use surrogate motherhood in Chile.

Finally, a legislative proposal aimed to legalize and regulate altruistic surrogacy (for-profit surrogacy being prohibited) has been submitted to the *Cámara de los Diputados* [*Chamber of Deputies*] on 10 January 2018.[109] For the moment, this proposal is under consideration in the *Health Commission* of the *Cámara de los Diputados:* taking into account that the legislative term ends this year, the proposal is not likely to succeed.

[108] See: https://www.cooperativa.cl/noticias/pais/judicial/jueza-reconocio-maternidad-biologica-en-utero-subrogado/2018-04-12/162653.html (last accessed: 7 August 2018). For more information on this case, but prior to the judgment in question, see: H. Corral Talciani, *Madre de sus propios nietos*, available at: https://corraltalciani.wordpress.com/2017/05/14/madre-de-sus-propios-nietos/ (last accessed: 7 August 2018).

[109] See: http://rbb.cl/inp4 (last accessed: 7 August 2018); the text of this proposal is available (in Spanish) at:
https://www.camara.cl/pdf.aspx?prmTIPO=DOCUMENTOCOMUNICACIONCUENTA&prmID=65427 (last accessed: 7 August 2018).

5.3. Mexico[110]

In Mexico, there is not legislation at the national level, but four Mexican States have their own regulation about surrogacy. Two of them have banned surrogate motherhood: Coahuila (Article 491 of the Civil Code of Coahuila) and Queretaro (Article 400 of the Civil Code of Queretaro[111]). On the other hand, the States of Tabasco (Arts. 380 bis and ff. of the Civil Code of Tabasco) and Sinaloa (Articles 283 and ff. of the Family Code of Sinaloa) allow surrogacy, but subject to strict conditions. Two of these conditions can be emphasized: i) only Mexican citizens can be parties, as commissioning parents or as pregnant mother, to the surrogacy arrangements (Article 290 of the Family Code of Sinaloa, Article 380 bis 5 of the Civil Code of Tabasco): this excludes Tabasco and Sinaloa from the reproductive tourism; ii) surrogacy is only allowed when the intended mother (and this means that must be a intended mother as a party of the contract) suffers from physical impossibility or medical contraindication to carry out the pregnancy in her uterus (Article 283 and 290 III Family Code of Sinaloa, Article 380 bis 1 and 380 bis 5 III of the Civil Code of Tabasco).

Mexico has been a recipient country of reproductive tourism, but the lack of a general legislation at the national level, and some malpractices have generated problems with both pregnant mothers and intended parents.[112] That is why one of the most relevant e-magazines in Spanish on surrogacy issues advice against going to Mexico for international surrogacy.[113]

There are a few legislative proposals at national level:[114] the Mexican Senate passed a Report, which is being considered by the Mexican Congress for its approval; in the meanwhile, the Congress itself has passed its own (different) Report, that must be considered and approved by the Senate in order to become Law. Both Reports have many common points, among which I would underline: i) the requirement that all parties in surrogacy agreements are Mexican citizens; ii) the ban of commercial surrogacy; iii) the establishment of penalties of between six and seventeen years of

[110] The most complete report about surrogate motherhood in Mexico is Grupo de Información en Reproducción Elegida (hereinafter, GIRE), *Gestación subrogada en México. Resultados de una mala regulación,* available at: http://gestacion-subrogada.gire.org.mx/-/ (last accessed: 7 August 2018).

[111] The regulation in Queretaro is striking, because the ban of surrogacy is framed under the regulation on adoption of human embryos (Articles 399 and ff. of the Civil Code of Queretaro).

[112] GIRE, *Gestación subrogada en México*, 3.2 and 5.

[113] See https://www.babygest.es/mexico/#lectura-recomendada (last accessed: 7 August 2018).

[114] GIRE, *Gestación subrogada en México*, 4.2.

imprisonment in case of for-profit surrogacy, abandonment of the pregnant woman, or misuse of the vulnerability of the pregnant woman.

5.4. Brazil

The situation in Brazil regarding surrogate motherhood is worth considering due to its peculiarities. There is not specific regulation about surrogacy, though the Brazilian Civil Code establishes a few rules about legal aspects of reproductive technologies (Article 1597, dealing with the presumption of husband's paternity). However, there is a sort of regulation, not exactly legal, but that has functioned as if it were: I am referring to successive resolutions of the *Conselho Federal de Medicina* [*Federal Council of Medicine: CFM*], related to the ethical rules regarding the use of reproductive technologies. These resolutions are worded as if they were real laws, and set the principles, conditions, requirements and limits of the use of reproductive technologies in general, and surrogacy, in particular. These are the resolutions 1358/1992, 1957/2010, 2013/2013, 2121/2015 and, finally, 2168/2017, which revokes and substitutes the resolution 2121/2015, and is currently in force.[115]

Section IV of the resolution 2168/2017 focuses on "a gestação de sustitução" (gestational surrogacy), also called "cessão temporaria do utero" (temporary ceding of uterus). Among the "rules" set up by the CFM, I would like to underline the following:

1. Surrogacy is allowed when the genetic mother has a medical condition that prevents her from pregnancy or is contraindicated with this, or in case of homosexual couples or single persons;
2. The pregnant mother has to be a relative until the fourth degree of consanguinity of one of the intended parents; otherwise, surrogacy needs to be authorized by the Regional Council of Medicine;
3. For-profit surrogacy is prohibited[116];
4. An agreement between the intended parents and the pregnant mother on the filiation of the child is needed. This requirement has to do with the

[115] The full text of the Resolution is available (in Portuguese) at: https://sistemas.cfm.org.br/normas/visualizar/resolucoes/BR/2017/2168 (last accessed: 7 August 2018).

[116] D. Gozzo, *A mercantilização da pessoa humana na maternidade de substituição,* in A.C.S. Scalquette, C. E. Nicoletti Camillo, " Direito e Medicina: novas fronteiras da ciência jurídica", São Paulo 2015, pp. 49 and ff.

problems linked to the registration of the child:[117] after this CFM resolution, *Corregedoria Nacional de Justiça*[118] issued its decision (Provimento Nº 63 de 14/11/2017): Article 17 § 1 establishes that in case of surrogacy the name of the pregnant mother will not appear in the birth Register, and the agreement signed by the pregnant mother relating the filiation of the child has to be presented to the registrar.[119]

Nevertheless, this peculiar regulation of surrogacy does not solve all legal problems, even creates new ones, taking into account that *Conselho Federal de Medicina* has no competence to issue legal rules, legally binding neither for Judges nor for citizens. This situation, which is not clear from the legal point of view, explains why one of the most relevant e-magazines in Spanish on surrogacy issues advises against going to Brazil for international surrogacy.[120]

[117] D. Gozzo, W. R. Ligiera, *Maternidade de substituição e a lacuna legal: questionamentos* [*Surrogate Motherhood and the Legal Gap: Range of Problems*]; available at: http://civilistica.com/wp-content/uploads/2016/07/Gozzo-e-Ligiera-civilistica.com-a.5.n.1.2016.pdf (last accessed: 7 August 2018), pp. 10 and ff.

[118] According to its website, *Corregedoria Nacional de Justiça* is "an organ of the *Conselho nacional de Justiça* [National Council of Justice], acts in the orientation, coordination and execution of public policies focused on the correctional activity and the good performance of the judicial activity of the courts and judges of the Country. The main objective of the *Corregedoria* is to achieve greater effectiveness in the jurisdictional rendering, acting based on the following principles: legality, impersonality, morality, publicity and efficiency"; source: http://www.cnj.jus.br/corregedoriacnj (last accessed: 7 August 2018).

[119] For more information on the legal situation prior to this decision, see: D. Gozzo, W. R. Ligiera, *Maternidade de substituição…*, pp. 11 ff.

[120] See: https://www.babygest.es/brasil/.

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Surrogate motherhood under different laws and federal issues – the case of the USA

1. Introduction

A short look at the state of laws and jurisprudence in the USA proves that we are in the state of mixed solutions being at the same time a source of confusion. It seems that the legislation (if any) differs from state to state, especially when it comes to the (no) enforcement of surrogate contracts. Since the matter of surrogacy is not left to the federal law (although it controls certain indirect consequences of surrogacy, such as the nationality of the child[1]), the number of practical solutions is applied. In the effect, often it is the court that decides whether a certain contract on surrogate motherhood is valid and enforceable (in general or under some circumstances). On the other hand, it can be said that probably the US is the most favorable to the concept of surrogacy in general. In spite of the fact that not all the 50 states allow the gestational surrogacy (see below), the law allows many forms of surrogacy agreements.

The main areas of discussion are: the validity of surrogacy agreements, parental rights, terms of contract (if allowed at all) and the compensation to the surrogate. Since it seems that in most jurisdictions this contract is left outside legislation (or case law), it is possible that the parties may want to include several clauses concerning both the assisted conception method, bearing the child, relinquishing parental rights by the surrogate as well as terms of her behaviour during pregnancy

[1] See: D. Gruenbaum, *Foreign Surrogate Motherhodd: Mater Semper Certa Erat*, 60 Am. J. Comp. L. 475 (2012), p. 486.

(for example prohibition of smoking, drinking alcohol, undergoing scheduled medical tests, etc.).[2] Since the institution of "womb-leasing", as harsh as it may sound, provokes many controversies (as to compensation, exploitation of woman's body, parental rights, etc.) in all the jurisdictions, not only the availability must be discussed but also the legal framework of this practice. As long as it remains controversial, many theories will be presented supporting or being against the surrogacy (or some of its forms).

On the one hand, we can argue that such agreements are against public policy as creating a risk of children trafficking and being against adoption laws, but if a surrogate wishes to bear a child altruistically (i.e. for a family member), this argument is no longer convincing.

All these issues were discussed in the *Baby M* case.[3] In February 1985, W. Stern and M.B. Whitehead concluded a contract stating that Elisabeth (wife of Mr. Stern) is infertile and therefore Mrs. Whitehead agrees to bear a child. The parties used eggs of the surrogate and sperm of Mr. Stern. The contract was concluded only between Mr. Stern and Mrs. Whitehead. The latter agreed not only to bear a child but also to pass the child to Mr. Stern and take all the necessary legal steps to relinquish parental rights (so that Mrs. Stern could adopt the child in the future). Mr. Stern promised to pay 10,000 $ after the birth of the child. After giving birth, the surrogate gave away to child to the Sterns but the day after asked them to take the child for a week; the Sterns agreed; after that time Mrs. Whitehead did not return the child and flew to Florida. The Sterns managed to obtain a custody order over the child and took the child away from the surrogate. The Supreme Court of New Jersey ruled that surrogate contracts containing the element of payment are void and cannot be enforced, also being against public policy and adoption law (it prohibited adoption by remuneration), especially when it comes to the relinquishing parental rights before the child's birth. Court also stressed that although the child's best interest should speak in favor of placing the child with the intended parents, it did not find any constitutional grounds to rule in favor of Mr. Stern. In other words, the court used the Latin rule of *mater semper certa est* (parental rights belonged to the biological mother being at the same time the surrogate). However, in the end Mr. Stern was

[2] See M. Wałachowska, *Macierzyństwo zastępcze w systemie common law, Państwo i Prawo* 2003 No. 8, p. 98.

[3] *In the matter of Baby M* (1988) 537 A 2d 1227.

granted parental rights as a biological father, and Mrs. Whitehead, although she was a natural mother, was only granted a right to visit the child.

In another case *Jaycee B. v. the Superior Court of Orange County, John B. et al.*[4] the married couple B. concluded a contract with the couple X, stating that a woman X would bear a child for Bs, by implantation of an embryo created by gametes of anonymous donors. The child-to-be was neither biologically tied to the intended parents or the surrogate (or her husband). A month before the delivery, Bs split: husband filed for divorce and the wife filed for an order obliging B to provide maintenance for the child after the birth. The Court of Appeal ruled that such order is well-grounded, as the husband agreed to procreate a child through surrogacy. In other words, the court focused on the intention of the parties, taking also into account that Xs did not call for any rights to the child. This case was continued in *In re Marriage of John and Luanne H. Buzzanca*[5] where the circumstances were similar (a surrogate agreed to bear a child to the intended parents, who were not genetically tied to the fetus). The court stressed that the intention of the parties is predominant therefore the parenthood can be determined not only by biology or genetics but also by a freely negotiated agreement.

In another famous case *Johnson v. Calvert*[6] the intended parents were also genetic parents of a child. The courts ruled that surrogacy agreement is valid and enforceable (even if it contains payment) and parental rights should be granted to the intended parents. The Supreme Court of California added that in such cases one could not rely only on genetics or giving birth but on the intent of the parties (if it wasn't for the parties' intent, the child would have never been born).

The question of payment did not arise in the *Belsito v. Clark* case[7] in which the surrogate was a sister of the intended mother (the contract was concluded between the married couple Belsito and Mrs. Clark who proposed being a surrogate; she had already had three children of her own and she knew how important having a child was for her sister; she herself offered to be a surrogate mother, without any payment). Both intended parents were also genetic parents; the medical records stressed exactly that they were "parents" and Mrs. Clark was a "surrogate." The court stressed that adoption laws did not apply here, as Belsitos were genetic parents. Moreover, although the law stated that a woman who gave birth was the mother, such a rule

[4] Cal. App. 4th 718.
[5] 61 Cal. App. 4th 1410 (1998).
[6] 5 Cal. 4th 84 (1993).
[7] Ohio Misc 2d 54, 644, N.E. 2d 760 (1994).

should be interpreted in a broader way, taking into account the state of medicine and the possibilities of medically assisted procreation. It would be unacceptable to rule that a child has two mothers therefore the interest of a child speaks for granting parental rights to the intended (biological) parents.

Before I present the main solutions in the USA, it is necessary to explain the types of surrogacy, as also visible in the cited cases. Both seem to be possible after the *in-vitro fertilization* (IVF) became available in the end of seventies in the XX century (1978)[8]. Both types can be either altruistic or commercial. **Partial surrogacy**, used first, involves the implantation of the surrogate mother with the sperm of the biological father, using the surrogate mother's eggs for pregnancy. In this case, the biological/genetic bond with the surrogate is created, causing legal difficulties for the contracting parties (it is easy to determine that the surrogate is the legal mother, along with the Latin rule of *mater semper certa est*).

The second main type of surrogacy can be called a **"full"** (gestational) surrogacy. In this case, the surrogate mother is implanted with an embryo created out of the contracting parents' cells (sperm of the father and eggs of the mother); it is also possible that none of the intended parents are genetic parents[9]. As a result, any biological/genetic relationship between the surrogate and the child to be born is eliminated. Therefore, the contracting parties (the sociological/legal parents-to-be) abstain from the *mater semper certa est* rule (deciding that the mother giving birth cannot be a parent in the legal sense). ***It may seem that this type of surrogacy causes less doubts both from the point of view of law and ethics.*** On the other hand, the question of child's rights/welfare is at stake as a value being perhaps contrary to surrogacy in a more general sense.

Along with the evolution of medicine and society one should also bear in mind – when discussing future legal solutions – that a child born after a surrogacy agreement may have – in a genetic sense – up to six adults claiming parental rights over that child: the egg donor, the surrogate, the intended/commissioning mother, the sperm donor, husband of the surrogate mother (by the presumption of paternity) and the

[8] See: C. Spivak, *Surrogate motherhood in the USA,* [in:] *Gestation pour autrui: surrogate motherhood,* ed. F. Monéger, Paris 2011, p. 258.

[9] See: also M. Mikluszka, *Zagraniczne procedury tzw. macierzyństwa zastępczego (surrogacy motherhood) w świetle zasady handlu ludźmi – zagadnienia węzłowe,* Instytut Wymiaru Sprawiedliwości, Warszawa 2017, p. 4. Recent study says that in the USA around 95% surrogates carry embryos created by genetic materials other than their own – see: B. Stark, *Transnational Surrogacy and International Human Rights Law,* 18 ILSA J. Int'l & Comp. L. 369 (2012), p. 369.

commissioning/intended father. Such scenarios may cause not only litigation over the parental rights but also endanger the child's right to know his/her origin and identity, guaranteed in Art. 7 of the Convention on the Rights of a Child.[10]

2. Legal theories and surrogacy contracts

After the Baby M case, both in the legal doctrine and jurisprudence some theories were presented both for supporting the surrogacy contracts or banning them (or even criminalizing), as well as allowing their enforcement under certain conditions. The discussion inevitably led to a proposal called *Uniform Status of Children of Assisted Conception Act (9C U.L.A. 383 (2001)*, drafted by the National Conference of Commissioners on Uniform State Laws in 1988.[11] The first concept was to ban surrogacy and the other to regulate it. Unfortunately, as these concepts are naturally contradictory, no common solutions have been found to date. In 2000, it was replaced with the Uniform Parentage Act, which adopted the first option (validity and enforceability of surrogate contracts only if approved by the court). What is also interesting, the Act allowed payment to surrogate mothers.

The proposal was drafted primarily for the security and welfare of children born through assisted conception (so not mainly focusing on the surrogacy contracts). Under its provisions – except for surrogacy cases – the woman who bears a child is the child's mother and the husband of this woman is the (legal) father. Donors of sperm or eggs are not the child's parents. The proposed Act gave the states two options to regulate surrogate contracts. In other words, the states were to decide as to allow these contracts or not. Sections 5 to 9 allowed the surrogacy contracts between the surrogate (and her husband, if she was married) and the intended parents. The proposal was that these contracts should be approved by the court, and determining the intended parents as the legal parents of the child. On the other hand, if a state decided not to allow these agreements, the proposal in the Act was to regulate surrogacy contracts as void and determining the surrogate mother (and her husband) the legal parents of the child.

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[10] See also: *Surrogate Motherhood: a violation of human rights. Report Presented at the Council of Europe, Strasbourg on 26 April 2012*, p. 3, available at https://www.ieb-eib.org/en/pdf/surrogacy-motherhood-icjl.pdf (last seen on 13 Aug 2018).

[11] See: https://definitions.uslegal.com/u/uniform-status-of-children-of-assisted-conception-act/ (last accessed: 11 August 2018).

Paragraph 5 of the proposed act defined a surrogacy agreement as an agreement between the surrogate (and the husband if she is married) and the intended parents. The contract must have been written and contain a provision that the surrogate would relinquish her parental rights to the intended parents (therefore the intended parents were to become the legal parents of a child conceived by assisted conception; see also § 8). If the contract was not approved by the court, it was void and the surrogate was the legal parent of the child. If the surrogate was not married, the act governed the child's paternity. Moreover, at least one of the indented parents had to be a resident of a state allowing surrogacy. The court, deciding on the petition, must appoint an *ad litem* guardian (Latin *curator ventris*) to represent the child's interest and – at the state's option – a counsel to represent the surrogate (§ 6). If the agreement was approved, the court must authorize assisted conception for 12 months and declare the intended parents to be the (legal) parents of a child conceived by assisted conception (they must meet i.e. the state's standards for adoptive parents). The contract could be terminated by the parties and the court, but only before conception (§ 7). However, if the surrogate provided and egg for the assisted conception, she could terminate the contract (filing a written notice with the court) within 180 days of the last insemination. In this case, the court must rule the contract void. In such a case, the surrogate would not be liable to the intended parents for terminating an agreement (if terminated voluntarily, understanding the effects of termination).

According to § 9 of the proposal, the surrogacy agreement may provide for a payment to the surrogate mother. It may not limit her right to make decisions about the health of the fetus and herself.

After the Proposal was presented, two states adopted this model act (North Dakota and Virginia).

Another interesting proposal was prepared by the American Bar Association (ABA) in 2008: *Model Assisted Reproductive Technologies Act (MARTA)*.[12] Both models adopted put forward the validity of surrogacy contracts (article 7). The first one demanded the approval by the court (also the compensation to the surrogate was proposed, if reasonable) and effected in parenthood of the intended parents upon the birth of the child. The second one proposed the validity of a contract if it met certain conditions, including donation of gamete by at least one of the intended parents and that the surrogate has not provided hers. The gestational carrier was

[12] Available at: https://www.americanbar.org/content/dam/aba/administrative/family_law/committees/artmodelact.authcheckdam.pdf (last accessed: 11 August 2018).

defined as "adult woman, not an intended parent, who enters into a gestational agreement to bear a child, whether or not she has any genetic relationship to the resulting child. Both a traditional surrogate (a woman who undergoes insemination and fertilization of her own eggs *in vivo*) and a gestational surrogate (a woman into whom an embryo formed using eggs other than her own is transferred) are gestational carriers." As to the intended parent, MARTA proposed it to be an individual, married or unmarried, who manifests the intent as provided in this Act to be legally bound as the parent of a child resulting from assisted or collaborative reproduction.

Moreover, MARTA defined compensation as "payment for any valuable consideration for time, effort, pain and/or risk to health in excess of reasonable medical and ancillary costs."

To date no state has followed this ABA proposal.

3. State's laws – uniformity or confusion?

As the discussed matter is not covered by the federal laws, the states' laws vary inevitably. Some states ban the surrogacy agreements entirely, other allow it, and some provide for the recognition of the intended parents. An interesting categorization is provided by R. Rao[13], who rightly recognizes four types of approaches:

a. **Prohibition** (a direct ban in the law or even imposing civil and criminal penalties on parties entering or facilitating the surrogacy contracts). In this group, we might place Arizona (Arizona Rec. Stat. Ann. § 25–218(D) (2009) follows the *mater semper certa est* and declares the custody of the child to the surrogate mother), District Columbia, Indiana, Michigan and North Dakota[14];
b. **Inaction** (no direct regulation along with disapproving the enforcement of surrogacy agreements). In this model, the contracts are in general allowed however the court may declare them void as against public policy.[15] In such cases the element of remuneration can be of importance. As C. Spivack aligns

[13] R. Rao, *Surrogacy Law in the United Stated: The Outcome of Ambivalence,* [in:] *Surrogate Motherhood: International Perspectives,* ed. by R. Cook, S. Day Sclater, F. Kaganas, Oxford – Portland – Oregon 2003, p. 23.

[14] See: C. Spivack, *Surrogate motherhood in the USA,* [in:] *Gestation pour autrui: surrogate motherhood,* ed. F. Monéger, Paris 2011, p. 261; see also Z.M. Beiner, *Signed, Sealed, Delivered – Not Yours: Why the Fair Labor Standards Act Offers a Framework for Regulating Gestational Surrogacy,* 71 Vand. L. Rev. 285 (2018), p. 294.

[15] See: C. Spivack (2011), p. 261.

that some states allow enforcement of these contracts through general contract rules, however some do not allow the surrogate to be compensated for her services[16] (but it is allowed to remunerate the surrogate for legal, medical and counselling costs born by the surrogate mother). The Author stresses that only Illinois expressly allows a fee. Only five states make only uncompensated surrogacy legal[17] and six states ban payment for intermediaries.[18] It is obvious that even if a statutory regime is of some form, there are states that leave the enforceability of contracts with compensation unclear[19] or the enforcement of any surrogacy agreements[20]. Some states have no detailed regulations in this matter,[21] which leaves the parties entering the surrogacy agreement unsure as to whether the contract will be considered void as for example contrary to public policy, welfare of the child, constitution, etc. This is the case in Oregon and Iowa, but in general it is even stressed in the doctrine that **it is unclear in over half of the states whether the surrogacy contracts will be (fully) enforceable**.[22] For example, it was only in 2013 when the Supreme Court in Wisconsin first addressed the enforceability of surrogacy contracts.[23] The court ruled that a surrogacy contract is valid and enforceable as long as it did not conflict with the best interests of the child. However, the contract could not require a termination of parental rights (this part of contract was severed and the court urged the legislator to take action), therefore it was analysed by the court in the light of general contract law. It added that the contract was enforceable and it was not against any public policy statements in Wisconsin law. In addition, **the court stated that**

[16] Kentucky, Louisiana, Nebraska, New York, North Carolina, Washington.

[17] Florida, Nevada, New Hampshire, New Mexico, Virginia – C. Spivack (2011), p. 262.

[18] Arizona, District of Columbia, Kentucky, New Hampshire, New York, Virginia.

[19] Texas and Arkansas.

[20] Tennessee.

[21] E.g. Alaska, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Kansas, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Montana, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, Wisconsin, Wyoming.

[22] See P.G. Arshagouni, *Be Fruitful and Multiply, by Other Means, if Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreements,* 61 DePaul L. Rev. 799 (2012), p. 808 – cited by Z.M. Beiner, *Signed, Sealed, Delivered – Not Yours: Why the Fair Labor Standards Act Offers a Framework for Regulating Gestational Surrogacy,* 71 Vand. L. Rev. 285 (2018), p. 297.

[23] *Rosecky v. Schissel*, 2013 WI 66, 349, Wis. 2d 84, 833, N.W. 2d 634; see also J.J. Bryant, *A Baby Step: The Status of Surrogacy Law in Wisconsin following Rosecky v. Schissel,* 98 Marq. L. Rev. 1729 (2015), p. 1740 et seq.

enforcement of such agreements promotes stability and permanence in family relationships because it allows the intended parents to plan for the arrival of the child, reinforces the expectations to all parties to the agreement, and reduces contentious litigation that could drag on for the first several years of the child's life;

c. **Status regulation** (allowing surrogacy contracts only when approved by the state, containing mandatory provisions creating a relationship between parties). Currently 14 states authorize some forms of gestational surrogacy, however there is no common attitude as to details. For example, some states regulate who can be a surrogate (in Utah, Virginia, Washington)[24];

d. **Contractual ordering** (allowing parties to decide the terms of a surrogacy agreement, provided that complete information and consent are met). **The example is California, seeming to be the most surrogate-friendly state for many reasons** – the law not only allows to enter a surrogate agreement but also permits the intended parents to file for a parentage orders before the child is born (as in *Johnson v. Calvert*, which stressed the recognition of rights of the intended parents in all surrogate agreements). In some states on the other hand, the contracts are valid, however the petition for a birth certificate can be filed only after the child's birth (e.g. Florida, Texas).

It seems necessary to present some of statutory regimes in more detail. Recent studies show that around half of the states have some regulation relating to surrogacy.[25] Some states have only case law, and some no regulation or case law at all. However, it is stressed that there is little activity to seeking to prohibit surrogacy.[26]

States where surrogacy is expressly prohibited are: New Jersey, New York, Indiana and Michigan. The last three also provide that such contracts are void and unenforceable. However, in New York it is proposed to repeal the ban[27] (in 2015 Child-Parent Security Act was presented; the Act was voted in 2017).

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[24] See: Z.M. Beiner, *Signed, Sealed, Delivered – Not Yours: Why the Fair Labor Standards Act Offers a Framework for Regulating Gestational Surrogacy,* 71 Vand. L. Rev. 285 (2018), p. 296.

[25] A. Frankenstein, S. Mac Dougall, A. Kintominas, A. Olsen, *Surrogacy Law and Policy in the U.S.: A National Conversation Informed by Global Lawmaking. Report for the Columbia Law School Sexuality & Gender Law Clinic,* May 2016, p. 7, available at: https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia_sexuality_and_gender_law_clinic_-_surrogacy_law_and_policy_report_-_june_2016.pdf (last accessed: 11August 2018).

[26] A. Frankenstein, S. Mac Dougall, A. Kintominas, A. Olsen, p. 7.

[27] A. Frankenstein, S. Mac Dougall, A. Kintominas, A. Olsen, p. 9.

Recent study shows that Washington, District of Columbia, Arizona, Michigan, North Dakota and Indiana ban surrogacy as against public policy and even impose criminal or civil penalties on parties of such agreements.[28] Moreover, Kentucky prohibits compensating the surrogate mother or an agency for relinquishing parental rights (Ky. Rev. Stat. Ann. § §99.590(4)). In Louisiana, Nebraska and New York these contracts are not enforced[29] (La. Stat. Ann. § 9–2713; Neb. Rev. Stat. Ann. § 9–2713; N.Y. Dom. Rel. Law § 1220).

In some states the surrogacy agreements are expressly allowed: these are 14 states: Alabama, California (from 2013), Colorado, Delaware, Florida, Illinois, Me. (2016) Nevada, New Hampshire, Texas, Utah, Va, Washington. However, there is no consistency in the legislation as long as the compensation is concerned or who can be a parent[30] or a surrogate, along with the forms of surrogacy. For example, **California**[31] allows full surrogacy contracts only and compensation to the surrogate mother (however there is no limit to be paid reasonably). Moreover, there are no specific regulations as to who can be the intended parent or a surrogate. It is also possible to obtain a court order determining the parenthood even before the child is born (however the order is effective only from the birth of a child).

In **Florida**[32], both full and partial surrogacy contracts are allowed, each having a different regime. What is important is that in both regimes reasonable compensation for expenses for the surrogate is allowed. The effect is that the intended parents obtain full parental rights and responsibilities towards the child upon his/her birth. The first model (full surrogacy) is allowed if the future parents are over 18 yrs old and married, the woman is certified by a doctor that she is unable to get pregnant (or that is would impair her of the child's health). Partial surrogacy is possible without these restrictions. Pre-birth parentage orders are not allowed. If the surrogate mother is biologically tied to the child, she can withdraw from the contract within

[28] See: V.R. Guzman, *A comparison of surrogacy laws of the U.S. to other countries: should there be a uniform federal law permitting commercia surrogacy?,* 38 Hous. J Int'L L. 619 (2016), p. 626. See also Wash. Rev. Code §§ 26.26.230–240 (2012); D.C. Code § 16–402 (2012); Ariz. Rev. Stat. Ann. § 25–218(A) (2006) [although found unconstitutional, it remains in force – see *Soos v. County of Maricopa,* 897 P.2d 1356, 1361 (Ariz. Ct.App 1994); Mich.Comp. Laws. § 722.855 (2014); N.D. Cent.Code Ann. § 14-18-05 (2012); Ind.Code § 31–20–1-2 (2015).

[29] See also: A.B. Carroll, *Discrimination in Baby Making: The Unconstitutional Treatment of Prospective Parents through Surrogacy*, 88 Ind. L.J. 1187 (2013), p. 1194.

[30] A. Frankenstein, S. Mac Dougall, A. Kintominas, A. Olsen, p. 9.

[31] California Family Code – Art. 7960–7962.

[32] Florida Statutes – § 63.213.

48 hrs after the child's birth. Only after that time the intended parents can file to the court to issue a birth certificate.

Virginia[33] adopted in part the model Uniform Status of Children of Assisted Conception Act. The law does not distinguish full and partial surrogacy, moreover compensation for the surrogate in not allowed. The intended mother must be infertile, unable to bear a child or do so without a reasonable risk to her or fetus' health. Only after 7 days from the child's birth the intended parent can file to the court for the birth certificate.

When it comes to a commercial (for-profit) surrogacy, it is allowed in several US states, which include Alabama, Arkansas, California, Connecticut, Illinois, Iowa, Maryland, Massachusetts, Minnesota, Nevada, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, West Virginia, Wisconsin.[34]

In comparison, **there are several states where surrogacy is not clearly addressed, either by the legislation or case law**. This being the case can lead to different results in practice, which is again – in my opinion – a strong argument for introducing a piece of legislation (be it a ban or allowance). As A. Frankenstein, S. Mac Dougall, A. Kintominas, A. Olsen stress (p. 11), in Oregon courts grant pre-birth orders, which proves that the state is quite friendly to surrogacy itself. At the same time in Tennessee such orders or pre-birth agreements are not allowed. In Massachusetts, although the rule that a surrogate is the mother, the state allows granting pre-birth orders in case of full surrogacy. Case law seems to prove that the biological parents are named in the birth certificate. However, when it comes to partial surrogacy, the laws of adoption apply (the surrogate can withdraw from the contract within 4 days after the child's birth).

4. Theories pro and against surrogacy

It seems that in the states with no regulation two main questions arise: is the contract enforceable (including the relinquishing parental rights by the surrogate mother) and will the surrogate be able to receive some form of compensation for her services. In both areas, several theories are used in the legal doctrine and by

[33] Va. Code Ann §§ 20–156 to 20–165.

[34] See: *Children's rights related to surrogacy. Report. Parlamentary Assembly, Council of Europe*, 21 Sep 2016, p. 4, available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=23015&lang=en (last accessed 13 August 2018).

the courts. Undoubtedly, no or little regulation leads to confusion and unnecessary litigation, leaving surrogates unprotected from abuse and medical standards, as well as impairing or threatening the interests of the intended parents.[35] Moreover, lack of cohesion among states' laws encourages forum shopping and forces individuals to cross state-boundaries looking for a more-friendly jurisdiction. The same may provoke the intended parents to engage in international surrogacy agreements that may lead to confusion concerning nationality of the child (or its recognition), or to recognition of parental rights, etc.[36]

4.1. Parental rights – what prevails: genetics/biology or intent?

Historically, the woman who bears the child is its biological and legal mother. However, after discovering the methods of assisted conception that might not always be a case. In *Johnson v. Calvert* case of 1993 (5 Cal. 4th 84) the court established a theory of parenthood by intent. In this case, the court faced a contract including a complete surrogacy: the surrogate (A. Johnson) was implanted with an embryo created out of the cells of the contracting parents-to-be (M. and C. Calvert). The intended mother was not able to bear a child but was still producing eggs. The payment included 10,000 $ plus a 200,000 $ life insurance policy (the full payment was supposed to be done after the child was born). The surrogate relinquished all parental rights to the child. After the conception, the relations between the surrogate and the intended parents deteriorated, the surrogate demanded full payment before the end of pregnancy threatening the Calverts that she would not relinquish her parental rights. The intended parents sought a court declaration that they were the legal parents, the same petition was filled by A. Johnson. The court of first instance declared the Calverts the genetic, biological and legal parents; after A. Johnson's appeal the Supreme Court of California focused on **the intent of the parties** of the contract and ruled that the mother who intended to raise the child as her own (also providing the genetic material) was the natural mother according to the law. In other words, the main issue was the intent of the parents to procreate a child and raise it by themselves. According to the court, this solution is also in the best interest of

[35] See: V. R. Guzman, p. 628.

[36] See for more: S.L. Gössl, *The Recognition of a Judgement of Paternity in a Case of Cross-Border Surrogacy under German Law,* 7 Cuadernos Derecho Transnational 448 (2015), p. 448 et seq.

that child. Overall, the court did not find such contracts being against public policy. It also stressed that the payment was only for the services of the surrogate and not for relinquishing the parental rights; moreover, since A. Johnson was not the genetic mother of a child, the intent of the Calverts should prevail.

This reasoning was also applied in *In re Marriage of Buzzanca* case of 1998.[37] In this case, the intended parents (the father was not a donor of a sperm) divorced after the birth of a child. The mother agreed to bear costs of bringing a child, however filed for the declaration of a court that the father (intended by the surrogacy agreement, although not a genetic father) was also obliged to pay for the maintenance of the child. The Court of Appeal of California ruled that when the husband of a woman agrees to IVF procedure, he is deemed to be a legal father and is obliged to provide maintenance to a child.

The doctrine of intention is also applied in Nevada (Nev. Rev. Stat. 126.45 (2001) where the law states that a person identified as an intended parent in a surrogacy contract must be treated in law as a natural parent under all circumstances. Similarly, the law in Arkansas (Ark. Code Ann. § 9–10–201 (2002) provides that a child born to surrogate mother is presumed to be the child of the biological father and the intended mother as long as the father is married.

The intent theory can be a subject of some criticism, as it does not take into account the role of biology/genetics in parenthood as well as the right of a child to know his/her genetic identity (this concept is also discussed in the EU).

4.2. Parenthood by contract?

In some states – where there is no direct regulation of surrogacy – the courts seem to apply general contract rules as to the validity and enforcement of surrogate agreements. For example, in Minnesota the Court of Appeals ruled that the contract was valid.[38] It stressed that all the parties entered the agreement voluntarily, were fully informed and aware of its consequences and since such contracts were not banned, the parties were fully bound by it.

[37] 1 Cal. App. 4th 1410, 72 Cal. Rptr. 2d 280.

[38] *P.G.M. v. J.M.A.,* 2997 WL 4304448 Minn. App. – C. Spivack (2011), p. 265.

4.3. Parenthood by genes?

Another concept used to enforce a surrogate agreement is the genetic tie between the contracting parents-to-be and a child.[39] Using that factor along with the intent of the parents-to-be seems to be a good ground to allow the surrogacy agreements. However, one can argue that relying solely on the genetic ties is not enough (the same goes to the sperm donors – the sole fact of being a donor does not constitute parental rights).

4.4. Gestation and parenthood

In states that consider surrogate contracts void, such as Arizona, the theory of motherhood by gestation is actually applied. This follows a rule of *mater semper certa est* meaning that only the mother who carried the pregnancy can obtain parental rights (during the pregnancy a strong emotional bond grows between the mother and the fetus). On the other hand, one can argue that such a theory contradicts the right to privacy including a right to decide on parenthood (perhaps that also embodied a right to decide how to bring a child/conceive a child). Taking this into account, the Superior Court of Pennsylvania ruled that a surrogate mother who removed triplets from the hospital without the knowledge and consent of the intended parents was a third party in relation to the children and their biological parents and therefore had no parental rights or any other rights whatsoever.[40]

4.5. Best interests of a child – how does it matter in surrogacy contracts?

Taking into account the welfare of a child, one should take into account how the best interests of a child might influence not only the validity of a surrogate agreement but also its enforceability (especially when parties breach the terms of surrogacy contract). It is stressed in literature that only few times the courts took this factor into account[41], focusing rather on the abovementioned theories. The first exception

[39] See: *J.F. v. D.B.* (Ohio), Spivack, p. 265. *Belsito v. Clark,* 644 N.E.2d 760, 762 (Ohio 1994), ibidem.
[40] *J.F. v. D.B.,* 897 A2d 1261, 1273 (2006) – C. Spivack (2011), p. 267.
[41] See: C. Spivack (2011), p. 267.

was a ruling in California in *In re Adoption of Matthew B.M,* 284 Ca Prtr. 18 (Cal. Ct. App. 1991). The court stated that the interest of a child prevail over the other (illegal) conduct, especially in cases where there is no regulation. Therefore, the general ideas of family law should be applied to decide on specific circumstances. Even though this idea may be in conflict with the privacy and the intent of the biological parents, in some cases the welfare of a child should take precedent. That might be the case when for example custody dispute arise between two contracting parents (i.e. because of divorce).[42]

The issue arising from the point of view of children born out of surrogacy agreements is **the commercialization of service and waiving the parental rights that come with the birth**. One can argue that a child born because of surrogacy agreement is an object of a contract which itself can be seen as against the welfare of a child (since the right of intended parents are prevailing). The risk of such an understanding is that a child learning that he/she was an object of a contract, paid for, can be harmed both psychologically and sociologically. On the other hand, if the surrogate mother is paid for a gestational service, why shouldn't the market values apply here? If an adult voluntarily agrees to bear a child for another couple and the contract is concluded before the conception, can we really discuss the welfare of a child[43] (especially when the parties agree that conception can take place only within, e.g., one year)?

Apart from that the welfare of a child can play a significant role in **transnational** surrogacy contracts. One can argue that this is some form of a human trafficking, therefore violation of international law prohibiting the sale of children. For example, the UN Convention on the Rights of a Child (CRC) prohibits certain transfers of children abroad (see Art. 11 and Art. 35). Moreover, the Hague Adoption Convention aims at preventing, i.e., sale or trafficking of children (Art. 1). Since it is prohibited to obtain children for adoption or any other purpose illegally, one can argue that transnational surrogacy can be interpreted as a violation of the right of children.[44] For example, we could imagine a situation that the surrogacy contract did not provide a solution in a situation where the child is born impaired. If the intended parents and the surrogate do not wish to take responsibility of a child, he/she can face many other legal problems such as no parental rights, no identity, nationality, etc.

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[42] See: also C. Dashiell, *From Louise Brown to Baby M and Beyond: A Proposed Framework for Understanding Surrogacy*, 65 Rutgers L. Rev. 851 (2013), p. 871.

[43] See: A. Frankenstein, S. Mac Dougall, A. Kintominas, A. Olsen, p. 19.

[44] A. Frankenstein, S. Mac Dougall, A. Kintominas, A. Olsen, pp. 19–20.

Another factor to be taken into account then addressing legislative proposal is the right to know one's biological heredity and parentage. For example, if a child is diagnosed with a genetically transmitted disease – should he/she have a right to know the biological parents? On the one hand, we can consider it as a human right, on the other allowing such knowledge should only be accepted in cases of a risk of a disease, etc. (not to harm the third parties' privacy). It seems that to date the US courts took the biology test only when deciding as to whether the intended parents or the surrogate should have the parental rights. Biology played a main role in the *Baby M.* case and Ohio cases where the natural parents are those who provided for the genetic material for the assisted conception procedure.[45] In general, however, only very few courts use the best interest of a child test in cases of surrogacy.[46]

Some authors stress however that longitudinal studies do not illustrate any recurring pattern of psychological disorders among surrogate children – generally they are well adjusted.[47]

4.6. Declaration of parenthood – should this be enough?

As is stressed in the literature, in some cases parents file to the court to obtain a declaration of parenthood before the child is born.[48] The reason seems quite obvious – since in many states the surrogacy agreements are not regulated, parties of such contracts cannot be sure whether it will be considered valid and enforceable. In general courts are in favour of such petitions, basing the ruling especially on genetics.

4.7. Specific issues – homosexual partners/spouses

These couples might more often wish to use the surrogacy to procreate a child with a genetic tie to at least one partner. One should however bear in mind that in most

[45] Ibidem, pp. 20–21.

[46] C. Spivack, *The law of Surrogate Motherhood in the United States,* 58 Am. J. Comp. L 97, 97, 106 (2010).

[47] See S. Golombock et. al., *Children Born Trough Reproductive Donation: A Longitudinal Study of Psychological Adjustment*, J. Child Psychol. & Psychiatry 653, 657 (2013) – cited by Z.M. Beiner, *Signed, Sealed, Delivered – Not Yours: Why the Fair Labor Standards Act Offers a Framework for Regulating Gestational Surrogacy,* 71 Vand. L. Rev. 285 (2018), pp. 303–304.

[48] See C. Spivack (2011), p. 268.

countries the homosexual couples cannot marry or enter into another form of a formal relationship. The issues to be taken into account might be caused not only by the fact that there can be no presumption of parenthood (like in cases where the mother is married), but often no formal legal bond between partners. Obviously, one can stress that the intent of partners to procreate can be a basis to establish parental rights, but the lack of regulation in this area is even more problematic than in cases of different sex couples contracting with a surrogate mother.

It seems that on one hand each case should be treated individually, but on the other – it is also a child's welfare to be taken into account. Let us imagine a same-sex couple contracting with a surrogate mother (one partner is an egg donor). When the couple splits, one of the former parents might file for a declaration of no obligation to support the child anymore, etc., based on no genetic ties to the child. Such a declaration would inevitably infer with the child's best interest depriving the child of one parent. This leads to a conclusion that perhaps tying the concept of intent and the child's welfare seems the best grounds for allowing the surrogacy agreements.

We should also bear in mind that as a consequence of granting – in US states[49] or non-US countries – same-sex couples the same rights as to the opposite-sex couples (marriage), they should also have the right to enter a surrogacy agreement in general. The question remains of course open as to the model to be adopted.[50] Therefore, if a prerequisite to be married should be met, it should not matter – as a rule – if a couple is of opposite-sex or same-sex partners. In the effect, in California not only opposite-sex couples may enter a surrogacy agreement, but also Lesbians, Gays, Bisexual and Transgender individuals. In Florida, however, surrogacy is not allowed for the same-sex couples.

4.8. Rights and interests of the surrogate. Is surrogacy exploitation?

When the surrogacy is discussed, very little attention seems to be put onto the rights of the surrogate mother. However, undoubtedly in practice the main factor

[49] See: *Obergefell v. Hodges*, 135 Supreme Court, 2584 (2015). Although the court established the ability to marry by same-sex partners, it did not establish parental rights. Undoubtedly it opened new discussion as to the parental relationships – see also J. Carbone, N. Cahn, *Parents, Babies and More Parents,* 92 Chi.-Kent L. Rev. 9 (2017), p. 9.

[50] See also: A. Frankenstein, S. Mac Dougall, A. Kintominas, A. Olsen, p. 40.

influencing the validity of a surrogate contract must be the informed consent.[51] Some authors even argue that the issue is not even sole compensation but the right to decide about one's body and ability to choose being a surrogate.[52] This idea is followed by a theory that being a surrogate is a kind of work/service, which for some women can serve as a rewarding and satisfying experience, so the society should allow women to make this choice.[53]

On the other hand, however, this choice can be sometimes made under pressure caused by financial situation.[54] Recent studies do not suggest a growing pool of desperate, reproductive prostitutes: on the contrary, it seems that most of surrogates in the US are Caucasian, Christian women in their late twenties or early thirties, many with high education, stable, self-aware.[55]

When it comes to the informed consent, it is stressed that unique nature of pregnancy and the bond between the woman and the fetus make it too difficult for a woman to consent prospectively to act as a surrogate.[56] This danger exists especially when the surrogate-to-be has never been pregnant so she cannot predict her emotional status and the bond with a child. Moreover – as the IVF procedure comes into play – the surrogate must undergo a hormonal treatment, which may cause some side effects.

The informed consent can be doubted also in cases where the surrogate mother is not as wealthy as the intended parents or less educated.[57] On the other hand, however, any form of compensation to a surrogate makes the consent to be given more likely. If again the decision is made because of financial difficulties or a need to support the family members of a surrogate, there is a strong argument for banning surrogacy (or at least the element of remuneration). However, if the surrogate is not paid for the service, one can argue that her efforts have not been satisfied. At any

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[51] A. Frankenstein, S. Mac Dougall, A. Kintominas, A. Olsen, p. 24.

[52] J. Shapiro, *For a Feminist Considering Surrogacy, Is Compensation Really the Key Question?* 89 Wash. L Rev. 1345, 1352 – 1353 (2014).

[53] Ibidem, p. 1372.

[54] A. Frankenstein, S. Mac Dougall, A. Kintominas, A. Olsen, p. 25.

[55] L. Peng, *Surrogate Mothers: An Exploration of the Empirical and the Normative,* 21 Am.U. J. Gender Soc. Pol'y & L. 555, 560 (2013) – cited by Z.M. Beiner, *Signed, Sealed, Delivered – Not Yours: Why the Fair Labor Standards Act Offers a Framework for Regulating Gestational Surrogacy,* 71 Vand. L. Rev. 285 (2018), p. 300.

[56] M.M. Tieu, *Altruistic Surrogacy: The Necessary Objectification of Surrogate Mothers,* J. Med. Ethics 171, 172 (2009) – p. 25.

[57] J. Shapiro, p. 1349; X. Tang, *Setting Norms: Protection for Surrogates in International Commercial Surrogacy,* Minn. J of Int'l Law [vol. 25: 1] 2016, pp. 193–194; V.R. Guzman, p. 635.

rate, I share a view that a potential exploitation is a reality, but it can be reduced by adequate counselling and screening the conditions of parties' households, abilities, etc.[58] Moreover recent studies prove that the risk of exploitation is not that high as expected, the surrogates in the US are not necessarily poor or pressured into surrogacy or unable to separate from the babies that they have carried.[59] They might do it for altruistic reasons or ever enjoy being pregnant.

Obviously, we can argue that this decision is a part of the right to privacy, protected also by international law, but there is a strong risk of exploitation of disadvantaged women. This might be a case in transnational surrogacy agreements by which a surrogate comes from a developing country, is poorer or uneducated (i.e. does not speak the language of the contract itself).[60] The same goes in developed countries – one can easily imagine a wealthy couple (intended parents) contracting with a young poorer woman who has never even been pregnant and her motivation is strongly connected with a need to pay tuition for her college studies. Of course, the surrogate might want to do it by altruism but we must not forget about the risks of a compensation-based surrogacy agreements. All in all, the compensated surrogacy cannot be treated as a baby-selling, as the intention of the parties is to bring a child, not to treat is a property; on the contrary, studies show that these children are especially cherished and safeguarded, quite often also the surrogate is concerned about the child's well-being after the childbirth.[61] Some data also proves that many gestational surrogates in the United States volunteer to serve as a surrogate.[62]

As **far as commercial surrogacy is concerned there is no uniform approach** – some states allow compensation and some only the altruistic "service." The notion "altruistic" may be however misleading: it does not only refer to contracts where no payment is made for the "womb-leasing", but also to these where reimbursement is possible for legal, medical and other pregnancy-related expenses (as in for example Florida or Washington).[63] Commercial surrogacy involves the payment of a surrogate beyond reimbursement for such expenses (including agency's fees, if allowed). For

[58] See V.R. Guzman, p. 638.

[59] See B. Stark, *Transnational Surrogacy…*, p. 376.

[60] A. Frankenstein, S. Mac Dougall, A. Kintominas, A. Olsen, pp. 32–33.

[61] See: C. Dashiell, p. 888.

[62] See: Z.M. Beiner, *Signed, Sealed, Delivered – Not Yours: Why the Fair Labor Standards Act Offers a Framework for Regulating Gestational Surrogacy,* 71 Vand. L. Rev. 285 (2018), p. 302 and the literature there given.

[63] See also: Z.M. Beiner, *Signed, Sealed, Delivered – Not Yours: Why the Fair Labor Standards Act Offers a Framework for Regulating Gestational Surrogacy,* 71 Vand. L. Rev. 285 (2018), p. 293.

example, in Maine a surrogate is now (from 2016) allowed to receive compensation that is "reasonable" and "negotiated in good faith"; similar legislation exists also in Utah and Nevada.[64]

5. Constitutional values

It can be pointed out that the decision to enter a surrogacy agreement is a part of the right of privacy protected by the Fifth Amendment[65] along with the Fourteenth Amendment and therefore the surrogacy itself should be allowed. Some authors believe that the right of privacy encompasses not only marital decision and procreative choices, but also deciding to hire a surrogate mother.[66] This argument can be also supported by the freedom of a woman to decide on her body.[67] However, there is also a strong conflict between the privacy of the intended parents and the surrogate mother. Inevitably, if the latter decides not to relinquish her parental rights, the privacy of the contracting parents will be violated. That calls even for more arguments to establish a legislation taking into account both of the conflicting interests. Obviously, one can argue that the genetic tie with the intended parents should prevail over the surrogate's rights, but it leaves a question open in – probably rare but possible – cases where none of the parties (surrogate mother, intended parents) are the genetic parents of the conceived child. It is stressed in the literature that by and large, the parties having a genetic tie to the child will receive the greatest legal protection, if a gestational surrogacy is at stake, however, it is usually the intended parents whose interests prevail.[68]

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[64] See Z.M. Beiner, *Signed, Sealed, Delivered – Not Yours: Why the Fair Labor Standards Act Offers a Framework for Regulating Gestational Surrogacy,* 71 Vand. L. Rev. 285 (2018), p. 297.

[65] C. Spivack (2011), p. 270.

[66] L. Gostin, *Surrogacy from the Perspectives of Economic and Civil Liberties,* 17 J. Contemp. Health Law and Poly 429, 434 (2001) – Spivack, p. 270; A. B. Carroll, *Discrimination in Baby Making: The Unconstitutional Treatment of Prospective Parents Through Surrogacy*, 88 Ind. L. J. 1187, 1195 – 1196 (2013); see also: G. Dashiell, *From Louise Brown to Baby M and Beyond: A Proposed Framework for Understanding Surrogacy*, 65 Rutgers L. Rev. 851 (2013), pp. 861–863 (the Author even relates to the doctrine of family privacy – p. 864 et seq.).

[67] See: G. Dashiell, pp. 866–867.

[68] See: G. Dashiell, p. 856.

6. International Human Rights Law

I believe we can agree that – from the human rights law perspective – there is no general right to a child.[69] However, if we look at some principles, there are strong arguments to protect the rights of the intended parents.[70] As an example, we can recall Art. 17 of the International Covenant on Civil and Political Rights (right to respect for privacy and family cannot be subject to arbitrary or unlawful interference). This right can serve at least as an indirect argument to allow surrogacy as a way to bring a child. However, neither the Covenant of the Convention of the Rights of the Child addresses surrogacy as such, touching however upon health, right to support, the right to know one's origins and the right to family (art. 7, 10, 12). Therefore, with connection with no right to a child, those who want to procreate have no basis for a claim stemming from human rights legislation. This causes problems concerning transnational surrogacy (i.e. when citizenship is declined by a country which bans surrogacy in general, as it would contradict its public policy). Therefore, unregulated cross-border surrogacy arrangements may result in stateless and parentless children.[71] To date, Art. 7 of the UN Convention of the Rights of the Child does not seem to contain enough protection in this matter. Perhaps implementing the rule *ius sanguinis* would be a good solution, determining that the child receives the nationality of the intended parents. On the other hand, however, even if such a rule would be adopted, still a question of transcription of foreign birth certificates remains open (as it may be considered against public policy of the country which bans surrogacy and whose citizens went abroad and concluded a surrogacy agreement). Having discussed the abovementioned issues concerning surrogacy, I do not believe that in the near future we are able to find a common solution at the international level. The sensitive area of family law, parenthood, assisted conception, and autonomy of women seem to pose questions which cannot be answered once and for all at the global level. Perhaps however referring to domestic solutions can serve as a starting point and help the courts to interpret for example the public policy factor in a different manner, along with the concept of the best interest of the child.

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[69] B. Stark, *Transnational Surrogacy and International Human Rights Law,* ILSA J. Intl & Comp. L 1, 10 (2012), p. 372.

[70] A. Frankenstein, S. Mac Dougall, A. Kintominas, A. Olsen, p. 39; see also B. Stark, p. 374.

[71] See: Y. Margalit, *From Baby M to Baby M(anji): Regulating International Surrogacy Agreements*, 24 J.L. & Pol'y 41 (2015), p. 54.

Conclusions

As some authors stress, in many US states surrogacy becomes in fact a form of adoption[72] and among those state legislations there is no clear policy on surrogacy in general. It can be also seen as a commissioned pregnancy in some states.[73]

I share a view that under certain conditions not only surrogacy as a rule should be allowed, but also a commercial form of it. As deciding of own body can be seen as a part of privacy, there are even constitutional grounds for allowing the discussed contracts.[74] Another argument is a right to procreate. It would be a proper option to regulate this form of surrogacy, reducing the risk of surrogacy tourism or uncertainty for all the parties of the contract as to the parental rights, unethical practices abroad, etc. The question is however how the level of payment should be regulated (sole compensation for service or also for mental suffering, physical difficulties, etc.). What is also at stake is the freedom of contract rule, which by some authors may be a basis for allowing surrogate agreements in general.[75] It is stated that if a contract is freely negotiated, it should be void and enforceable.[76]. If therefore the commissioning parents clearly and freely show the intent to bring a child and then raise it, this should have a dominant role as a rule. If the circumstances change (i.e. by divorce), the law should provide for some appropriate solutions.[77] Of course, as surrogacy creates many ethical and legal challenges, there should be a mechanism for accomplishing recognition of the legality of surrogacy contracts, such as pre-contractual counselling, psychological support, examining the financial gap between parties, etc., as well as introducing prerequisites as to who can become a surrogate mother.[78]

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[72] See: A. Frankenstein, S. Mac Dougall, A. Kintominas, A. Olsen, p. 40; L. v Zyl, R. Walker, *Surrogacy, Compensation and Legal Parentage: Against the Adoption Model,* 12 J. *Bioethical Inquiry*, p. 383.

[73] L. v Zyl. R. Walker (above), p. 385.

[74] See V.R. Guzman, p. 642.

[75] See: Y. Margalit, *In Defence of Surrogacy Agreements: A Modern Contract Law Perspective,* 20 WM. & Mary J. Women & L. 423 (2014), p. 440.

[76] Ibidem, pp. 448–450.

[77] Ibidem, pp. 457–458.

[78] Ibidem, pp. 463–464.

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Surrogate motherhood in Ukraine: method of infertility treatment, judges' activism and doctrine

1. Introduction

Medicine forges ahead, and is constantly evolving. Every year new research is carried out and medical technologies are improved. A person wants to get as much knowledge as possible in this sphere, in order to be able to continue their life and leave the descendants behind. That is why there is such a rapid development of medicine, in particular, of reproductive technologies.

One of the important indicators of the population's reproductive health state is infertility. Nowadays, 10–15 percent of Ukrainian families suffer from infertility, which leads to direct reproductive losses. One of the ways to overcome infertility is to use assisted reproductive technologies, in particular, surrogacy maternity.

The contemporary legislation of the various states is increasingly inclined to providing infertile couples with the right to use the surrogacy maternity institute and to settling the order of exercising this right and the guarantees of the protection of the surrogate mother's rights in the national legislation. Several decades ago, only a few examples of legislative regulation of surrogacy maternity in the world could be mentioned, for example in India and California, but their number is constantly increasing with geometric progression. At present, there is an almost inexhaustible list of countries that allow surrogacy maternity, including the majority of the states comprising the United States of America, Canada, Brazil and Argentina, Hong Kong, Australia, South Africa, Israel, Greece, Romania, Great Britain, Ukraine. The prohibition of surrogacy maternity is enshrined in legislation in France, Sweden, Hungary,

Germany, Iceland, Italy, Japan, Switzerland, Pakistan, Saudi Arabia, and Serbia. However, this does not mean that this problem has been solved in these countries.

The institution of surrogacy maternity is inextricably connected with human rights, and, accordingly, a reference to international instruments on the protection of human rights can be duly made.

The UNO Convention on the Rights of the Child establishes: the right not to be the target for discrimination on grounds of birth or parents' status (Article 2), the child's right to take priority of their interests in all actions against them (Article 3), the child's right to obtain a name and acquire nationality (Article 7).[1]

The International Pact on Economic, Social and Cultural Rights includes the right to health (Article 12) and the Convention on the Elimination of All Forms of Discrimination against Women also relate to important rights in this context, in particular the right to care (Article 10)[2].

The Hague Conference on Private International Law refers to the Convention on Protection of Children and Cooperation in respect of Intercountry Adoption (The 1993 Convention on International Adoption), which may be used by the states at solving issues relating to agreements for international surrogacy maternity (which means "any agreement on surrogacy maternity, involving more than one country, takes place due to the difference in the place of residence, as well as, as usual, of nationality, between future parents and a surrogate mother, or for other reasons").

The legal and regulatory framework of surrogacy maternity in Ukraine is also imperfect. Only certain provisions as for it are established under the Family Code of Ukraine[3], the Civil Code of Ukraine[4], the law of Ukraine "Fundamentals of the Legislation of Ukraine on Health Care"[5], the Rules of State Civil Registration of

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[1] *Convention on the Rights of the Child* of 20 November 1989; official translation (Ratified by the Resolution of VR No. 789-XII of 27 February 1991) is available at: http://zakon.rada.gov.ua.

[2] *International Pact on Economic, Social and Cultural Rights* of 16 December 1966; the International Pact was ratified by the order of the Presidium of the Supreme Soviet of the Ukrainian SSR No. 2148-VIII (2148–08) of 19 October 1973; its official translation is available at: http://zakon.rada.gov.ua.

[3] *Family Code of Ukraine* of 10 January 2002 No. 2947–III [Text] // Vidomosti Verkhovnoii Rady Ukraiiny (VVR). – 2002. – No 21. – p. 135.

[4] *Civil Code of Ukraine* of 16 January 2003 No 435–IV [Text] // Vidomosti Verkhovnoii Rady Ukraiiny (VVR). – 2003. – No. 40–44. – p. 356.

[5] *Fundamentals of the Legislation of Ukraine on Health Care* [Text]: the law of Ukraine of 19 November 1992 No. 2801-XII // Vidomosti Verkhovnoii Rady Ukraiiny (VVR). – 1993. – No 4. – p. 19.

Ukraine, approved by the Order of the Ministry of Justice of Ukraine of 18 October 2000[6], "The Procedure of Application of the Assisted Reproductive Technologies in Ukraine", approved by the Ministry of Health of Ukraine of 09 September 2013, No 787[7] (hereinafter the Order of the Ministry of Health of Ukraine No 787), the Clarification of the Ministry of Justice of Ukraine of 11 May 2012, "The Determination of the Origin of the Child from Parents at the State Birth Registration"[8], etc.

The aim of this research is to identify the main legal issues that arise when using such method of the assisted reproductive technologies as surrogacy maternity and formulating suggestions for their solution.

2. The results of the research

The main issue of surrogacy maternity in Ukraine is the lack of a clear mechanism of action when citizens of the countries, where such procedure is prohibited, plan to participate in the program. That is what causes various suspicions towards Ukrainian doctors, mediators, surrogate mothers and employees of the departments of Bureau of Vital Statistics of Ukraine.

On the one hand, the justified goal is to help a fertility – challenged couple of foreigners and give it the opportunity to be parents. On the other hand – the risk that a newborn child can stay for a long time on the border of two countries and as a result will be brought up by random adopters.

In such situations, all the responsibility for the fate of the infant relies on the future parents who are recommended to come to Ukraine long before the birth of their child (especially the future mother), so that in the embassies of their countries, the story of the child's birth looks like convincing. But any guarantees, if there are any suspicions at issuing passports for the child, cannot be given by the Ukrainian part. Because in the case of a judicial dispute, it is Ukrainian doctors and a surrogate

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[6] *Rules of State Civil Registration of Ukraine*, approved by the Order of the Ministry of Justice of Ukraine of 18.10.2000 No. 52/5, as revised by the order of 24.12.2010 No. 3307/5 of 18.10.2000 No. 52/5[Text]//OVU. – 2010. – No. 2101. – p. 3649.

[7] Order of Ministry of Health of Ukraine, "On the Approval of the Procedure of Application of the Assisted Reproductive Technologies in Ukraine", 9 September 2013, No. 787 // Ofitsiinyi Visnyk Ukraiiny of 1 November 2013, No. 82, p. 446, Article 3064.

[8] *Clarification of the Ministry of Justice of Ukraine,* "The Determination of the Origin of the Child from Parents at the State Birth Registration" of 11 May 2012; official translation is available at: http://zakon3.rada.gov.ua/laws/show/n0016323–12.

mother who will confirm the provision of services and genetic affinity between parents and the child. And this practice is quite widespread. For example, Canada, and in some judicial disputes Great Britain require affirmation of kinship exactly by the decision of the Ukrainian court, and not by a certificate.

In the countries, where surrogacy maternity is prohibited, prosecution and paternity establishment legal lawsuits begin after determination of acts of infringing. And if the issue of responsibility is solved quickly, then the court sessions as for paternity can take years. All this time, the child is separated with their genetic parents and it becomes a significant obstacle at the further transfer of the child to them for upbringing due to the loss of psycho-emotional contact between them, regardless of kinship.

Experience has proven that, the European Court in these matters always remains on the side of the child and their interests in order to ensure the right to be brought up by their parents of origin, but it respects the peculiar features of the national legislations of those countries where surrogacy maternity is prohibited.

An example in the judicial practice of Ukraine of a sentence related to surrogacy maternity may be: in 2011 in Ukraine, a surrogate mother gave birth to two girls for the couple from France. The embassy of their country refused to issue documents for the newborns because of the prohibition of surrogacy maternity in France. Wishing the fastest reunification of the girls with their mother, the father and grandfather tried to take them out of Ukraine without documents, whereof violated the law on crossing the border of Ukraine, for that they were prosecuted under the legislation of Ukraine.

The issue of responsibility remains open in the relationship between the surrogate mother, genetic parents, doctors and mediators. And not only under the law, but above all before the child who came to the earth at someone's express desire, due to medical manipulations of some doctors, born by one woman and left on the border of two foreign countries, which do not even try to fight for it.[9]

Ukraine belongs to a number of states, where the assisted reproductive technologies are permitted legislatively.

The surrogacy maternity in Ukraine goes back for more than 25 years. For the first time the surrogacy maternity in Ukraine was used as a method of treatment in 1993, when a grandmother carried her grandchild because her daughter had the uterus

[9] *Surrogacy Maternity, or Left on the Border of Two Countries*; the text is available at: https://dt.ua/family/surogatne-materinstvo-abo-zalisheniy-na-kordoni-dvoh-krayin-270280_.html.

congenital pathology. Day by day this issue is becoming more and more a topic for discussion in scientific community and society. The surrogacy maternity procedure is successfully carried out both on a commercial (paid) and on a non-commercial (free) basis. But despite a rather successful practice, there are many controversial issues that require research and finding solutions.

At present such issues are:

1. the legal regulation of surrogacy maternity;
2. the medical and ethical aspects of this procedure.

The problem is related to the insufficient level of the legislation development in this sphere and the presence of gaps in it, which gives rise to a number of legal issues that require research. In addition, the low level of knowledge of the population about the surrogacy maternity procedure creates debates and the emergence of disinformation that harms its purpose, namely, the struggle against infertility.[10]

Medical science and practice have gained considerable success in the last decades. One of the most spectacular examples is the reproductive technologies that have been especially developing in recent years. The main stimulus to such a rapid development and spread of such type of technology is the desire of people, who, for one reason or another, have been deprived of the opportunity to have children. For such categories of individuals, reproductive technologies can be a lifeline that permits to feel the joy of motherhood (parenthood).

Reproductive technologies are infertility therapy methods, at which separate or all stages of conception and the early embryos development are carried out in vitro. The Order of the Ministry of Health of Ukraine No 787 defines the concept of the assisted reproductive technologies: as a technique of infertility treatment, at which the manipulations with the reproductive cells, the separate or all stages of the reproductive cells preparation, the processes of fertilization and development of the embryos before they are transferred to the patient's uterus are carried out *in vitro.*

R. A. Maidanyk aptly notes that reproductive technologies are modern high-technology methods of infertility treatment, at which separate or all stages of conception and early embryos development are carried out in vitro, in particular, the ovum fertilization in vitro, embryos implantation and carrying of a pregnancy in case of impossibility of these processes naturally.[11]

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[10] Yu.Yu. Talanov, *Surrogacy Maternity: Moral and Legal Aspects*, Kharkiv 2012, pp. 23–25.

[11] R.A. Maidanyk, *Reproductive rights. Surrogacy Maternity*, Kiev 2013, pp. 5–6.

Article 290 of the Civil Code of Ukraine guarantees the human right for reproductive cells donorship and, in particular, the provision of part 7 of Article 281 of the Civil Code of Ukraine attaches the right to carry out the assisted reproductive technologies and stipulates: "A full-aged woman or a man has the right due to medical reasons to be carried out treatment programs of assisted reproductive technologies in accordance with the procedures and conditions established by the law."

Article 48 of the Fundamentals of the Legislation of Ukraine on Health Care determines that at request of an able woman the methods of artificial implantation and embryo implantation can be used. The conditions for the implementation of these methods of medical intervention according to the laws are:

1. subject of the right exercise – an adult woman;
2. written consent of spouses;
3. donor confidentiality provision;
4. medical secrecy protection.

Currently in the world there are a large number of types of the assisted reproductive technologies used in the infertility treatment. Analyzing the content of the Order of the Ministry of Health of Ukraine No. 787, it can be concluded that the following varieties of the assisted reproductive technologies are used in Ukraine:

1. *in vitro* fertilization – a method of infertility treatment, at which the ovum fertilization is carried out outside the woman's body. It is also called extracorporal fertilization, or artificial fertilization;
2. intrauterine insemination – one of the forms of infertility treatment, which can be carried out by intake of the prepared sperm cells into the uterus cavity during the period of ovulation;
3. generative cells or embryos donation is a procedure, whereby donors by the written and free-will consent, donate their sex cells – generative cells (spermatic fluid, oocytes) or the embryos for use by others in the infertility treatment;
4. surrogacy maternity – one of the types of the infertility treatment;
5. generative cells, zygotae or embryos transfer to the Fallopian tube (GIFT – Gamete Intrafallopian Transfer), ZIFT – Zigotae Intrafallopian Transfer) and EIFT – Embryo Intrafallopian Transfer) and others.[12]

[12] A.P. Holovashchuk, *Assisted Reproductive Technologies as a Means of Exercise of Maternity Right*, Kyiv 2012, p. 32.

Two distinct types of reproductive technologies – extracorporal fertilization and surrogacy maternity have a special significance for medical law.

In my opinion, such a version of reproductive technologies as extracorporal fertilization needs a detailed analysis, it involves the artificial introduction of donor material (spermatic fluid or ovum) into the female genital tract.

Currently not all researchers support and believe to be the best possible a statement on the right of every able woman to use artificial fertilization and embryo implantation provided in the Fundamentals of the Legislation of Ukraine on Health Care. It is important to stipulate legal guarantees for the possibility to implement one or another reproductive technologies for people who really need such intervention due to medical reasons. Prof. M. Maleina, on the subject of the artificial birth of children, notes that "this operation is not carried out for a woman (or spouses) who are able to give birth to a child in a natural way. This is not equal to refusing to provide medical care, and as a woman is able to have children, healthy and she does not need such help. An unreasonable increase in number of such operations will complicate the provision of medical care in other, truly necessary cases, and will lead to unnecessary waste of energy and healthcare facilities. Unrestricted implementation of the artificial fertilization can, to a certain extent, depreciate social meaning of a family, maternity, paternity."[13] For real, in this regard there are good reasons to focus on the general medical criteria, whereby there should be definitive indications for any medical intervention.

One of the most important aspects of the legal regulation of the researched issue is the determination of the age limit for persons, as for whom the assisted reproductive technologies may be used. For today, the use of the assisted reproductive technologies in Ukraine has been authorized in the case of persons, who have reached the age of 18, but no upper age limit has been established, after reaching of which no assisted reproductive technologies will be applied. Such a necessity has been determined to a large extent by the protection of the future child's interests, since it will be difficult for perspective parents of a very mature age to care about it in a proper manner. It is also necessary to take into account the factor of reducing their community commitment. For example, in the Republic of Belarus, extracorporal fertilization and artificial insemination are not applied to a female patient who has reached 50 years of age.

[13] M.N. Malieina, *A Person and Medicine in Modern Law*, Moscow 1995, p. 103.

I believe that it is necessary to establish an ultimate age limit for women aged 49. Since according to medical data, the childbearing (fertile) age of a woman may last until this age.

The issue of the need for perspective parents being married during the assisted reproductive technologies program flow is an integral part of assisted reproductive technologies legal regulation. In Ukraine, there is no actual prohibition for a single woman to use the assisted reproductive technologies, in particular, artificial fertilization. As for surrogacy maternity, the situation here is more difficult, because in most cases clinics refuse to carry out surrogacy maternity programs and women are recommended to enter into marriage. In my opinion, such a refusal is a violation of the women's maternity rights and the patients' rights. If a woman has medical indications to carry out a surrogacy maternity program, she can take advantage of it regardless of her marital status. The medical indications for the use of the assisted reproductive technologies are specified in the Order of the Ministry of Health of Ukraine of 23 December, 2008, No. 771.[14]

For today in Ukraine there is no single form of an agreement for artificial fertilization and embryo implantation. I believe that an agreement on the provision of services of extracorporal fertilization is an agreement, under which one party, a doctor (a medical institution) is obliged to provide the corresponding medical service, at the request of the other party (a patient) with the use of the assisted reproductive technologies, during which the ovums are fertilized with spermatic fluid in vitro, and the patient is obliged to pay for it a monetary amount agreed upon by the parties.

Currently unsolved problems of legal regulation of artificial fertilization are:

- obtaining information about the donor who provided material for artificial fertilization;
- rights, obligations and responsibility of donors and recipients;
- rights of children born as a result of artificial fertilization, to the information relating to the "biological" father;
- age criteria for all participants of the artificial fertilization procedure.

Taking into account the above-mentioned data, we can make a conclusion that in Ukraine there is a need for proper legal regulation of the assisted reproductive technologies. The current legislation does not regulate a number of important aspects, and therefore there is a need in adoption of a law, which will be aimed at

[14] A.P. Holovashchuk, op. cid., p. 32.

specifying the legal and organizational foundations of application of the assisted reproductive technologies and ensuring the rights of citizens at their application.

In Ukraine, it is legally permitted to use such a form of reproductive medicine as surrogacy maternity, but it is limited to only one method. Modern medical science distinguishes two types of surrogacy maternity:[15]

- complete or gestational surrogacy – transfer into the body of a surrogate mother a human embryo, conceived by spouses, a wife and donor, donors. In this case, the surrogate mother does not have a genetic connection with the child;
- partial or gender-based surrogacy involves a genetic link with the child, since the surrogate mother's ovum is used.

According to the Order of the Ministry of Health of Ukraine No. 787, surrogacy maternity is artificial ovum fertilization with the following embryo transfer into the uterine cavity of another woman (a surrogate mother).

According to the viewpoint of the representatives of the Ukrainian Association of Reproductive Medicine, surrogacy maternity is a method of infertility treatment, at which the embryo, obtained from the genetic parents, is transferred to the uterine cavity of another woman.

In the dictionary of "Terms of Assisted Reproductive Technologies" of the World Health Organization and the International Committee for Monitoring of Assisted Reproductive Technologies (*ICMART*) surrogacy maternity is defined as a method of assisted reproductive technologies.[16]

In the legislation of Great Britain, the concepts "the agreement for surrogacy maternity", "a surrogate mother" are used.[17] The German legislation uses the term "a surrogate mother."[18]

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[15] F.V. Dakhno, *Surrogacy Maternity* // Zhinochyi Likar, 2007. – No. 3, pp. 27–31.

[16] *Dictionary of Terms of Assisted Reproductive Technologies. Revised by ICMART and WHO Dictionary of Terms of Assisted Reproductive Technologies*, 2009 (ICMART – International Committee Monitoring Assisted Reproductive Technologies); "Fertility and Sterility" 2009, Issue 92. No. 5., http://www.who.int/reproductivehealth/publications/infertility/art_terminology2/ru/index.html.

[17] *Agreement for Surrogacy Maternity: Law of Great Britain* of 16 July 1985 [Surrogacy Arrangements Act 1985], http://www.legislation.gov.uk/ukpga/1985/49.

[18] *On Mediation at Adoption: Law of Germany* of 2 July 1976. Gesetz über die Vermittlung der Annahme als Kind und über das Verbot der Vermittlung von Ersatzmüttern (Adoptionsvermittlungsgesetz – AdVermiG). Bundesgesetzblatt No. 78, 7 July 1976, http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl176s1762.pdf#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl176s1762.pdf%27%5D__1446215628622.

From the legal point of view, surrogacy maternity means "fertilization of a woman by embryo implantation with the use of genetic material of spouses aiming at carrying and giving birth to a child who subsequently will be recognized as having come from the spouses usually on a commercial basis on the grounds of the appropriate agreement between the spouses and a surrogate mother". Thus, the essence of surrogacy maternity is that the fertilized ovum is transplanted to the organism of a genetically strange woman who carries and gives birth to a child not for herself, but for the spouses who, for various reasons, cannot have children.

Since the content of the subjective right of a man and woman to maternity (paternity) constitutes one of the legal power to carry a child for spouses by another woman, this right requires not only regulating, protective norms. According to V. Yu. Moskaliuk "by itself, the wife and husband's consent to the embryo implantation with the use of their genetic material into another woman's organism should be considered as an action directed towards the fulfillment of their reproductive function, that is, the exercise of one of the legal powers constituting the substance of the subjective right to maternity (paternity)."[19]

I believe that "a surrogate mother" is a woman who, with the help of artificial fertilization carries and gives birth to a child for another person or family who, for medical reasons, do not have the ability to conceive and give birth to a child.[20]

The necessary conditions for conducting surrogacy (replaceable) maternity are:

1. presence of medical indications for surrogacy maternity;
2. documents necessary for conducting surrogacy maternity;
3. spouses (or one of the future parents), in whose interests the surrogacy maternity conducts, must have a genetic connection with the child.

It is allowed to carry a pregnancy by close relatives of the future parents (a mother, sister, cousin, etc.).

A surrogate mother can be a full-aged able woman, provided she has her own healthy child, a free-will written statement of the surrogate mother, and also at the absence of medical contraindications.

It should be noted that part 2 of Article 123 of the Family Code of Ukraine in 2011 underwent certain changes, namely: after the words "conceived by spouses" it was supplemented with the words "a man and woman." Such changes excluded

[19] V.Yu. Moskaliuk, *Right to Maternity (Paternity) under the Family Code of Ukraine*, Kharkiv 2007, p. 128.

[20] A.A. Herts, *Agreement Commitments in the Field of Povision of Medical Services,* Khmelnytskyi 2015, p. 250.

the possibility of participation in surrogacy maternity programs of foreign citizens who are registered in same-sex marriages.

The current legislation of Ukraine does not stipulate specific requirements for an agreement for surrogacy maternity; consequently, it needs supplementary legislative regulation.

An agreement for surrogacy maternity has a risky nature oriented not to the guaranteed, but only possible achievement of the result of medical intervention that is determined by both objective phenomena, and probable character of biological parameters of functioning of the surrogate mother's organism, the embryo and the child.

An agreement for surrogacy maternity has a personal trust-based nature, which involves the possibility of its fulfillment only in accordance with the stipulated terms of the agreement between the surrogate mother and the genetic parents. In this connection, it is not permitted the assignment of claim and the transfer of debt related to the novation – of a surrogate mother and/or genetic parents.

It is sensible the viewpoint of Diakovych M.M., who indicates that the best tool for carrying out the security and protection of the rights and interests of persons who became parents due to the application of the surrogacy maternity procedure, would be an agreement concluded between the parents of the future child and a surrogate mother in a written form and certified (notarized) by a notary public.[21]

Consequently, the conclusion of an agreement for surrogacy maternity, in our opinion, in fact, is possible at presence of such conditions: 1) a surrogate mother should be full-aged and able, have her own healthy child, give free-will, informed consent to participate in a surrogacy maternity program, she cannot at the same time be a ovum donor and should not have medical counter-indications; 2) the genetic parents, who conclude such an agreement, cannot carry and give birth to a child by themselves.

The parties of an agreement for surrogacy maternity are: 1) spouses who wish to have a child; 2) a surrogate mother who carries the child.

It is characteristic of surrogacy maternity, unlike artificial fertilization and an "ordinary" embryo implantation that, apart from spouses, another subject, who has her own rights, appears – a surrogate mother.

[21] M.M. Diakovych, *Security and Protection of the Family Rights and Interests by a Notary*, Kyiv 2014, p. 336.

I consider it expedient to stipulate the requirements for spouses, who will be a party of an agreement for surrogacy maternity, that are similar to those established for persons who can be adopters (Articles 211, 212 of the Family Code of Ukraine). In particular, a wife and a husband must be able, not be younger than twenty-one years old. An agreement for surrogacy maternity cannot be concluded by a wife and a husband who:

- were deprived of parental rights, if these rights have not been regained;
- were a party of an agreement for surrogacy maternity, but the agreement was terminated due to their fault;
- were adopters (guardians, caregivers, foster parents, parents-educators) of another child, but the adoption was cancelled or invalidated (the custody, care or activity of the foster family or family-type orphanage was terminated) due to their fault;
- are registered or treated in a psycho-neurological or detoxification clinic;
- abuse alcohol or narcotic drugs;
- do not have a permanent place of residence and steady earnings (income);
- suffer from certain diseases, the list of which is approved by the Ministry of Health of Ukraine;
- were convicted of crimes against life, liberty and dignity of a person, sexual offences, against public security, public order and good morals, in the sphere of distribution of narcotic drugs, psychotropic substances, their analogues or precursors; and of crimes, stipulated by Articles 148, 150, 150–1, 164, 166, 167, 169, 181, 187, 324, 442 of the Criminal Code of Ukraine[22], or have an outstanding or an un-expunged conviction for committing other crimes;
- need constant nursing care for health reasons;
- are stateless persons.

The subject-matter of an agreement for surrogacy maternity is a relationship of carrying and giving birth of a child by a surrogate mother, with the subsequent transfer of the child to genetic (biological) parents under the terms of this agreement.

In an agreement for surrogacy maternity it is appropriate to stipulate:

1. the procedure for compensating of the expenses incurred in carrying and giving birth to the child, except in case when the surrogate mother wishes to pay such expenses by herself;

[22] *Criminal Code of Ukraine* of 5 April 2001 No. 2341-III [Text] // Vidomosti Verkhovnoii Rady Ukraiiny (VVR). – 2001. – No. 25–26, p. 131.

2. the place of accommodation and the food cost of a surrogate mother;
3. a specific medical institution, in which the fertilization, ongoing examination and child birth support will be carried out;
4. the name, position of the responsible medical officer.

In the Ukrainian legislation, there are no requirements for the essential terms of agreements for child carrying, and therefore such terms are determined in each individual case by the parties of the agreement. As a matter of actual practice, such autonomy often ends with the fact that the terms of the agreement regulate and protect the rights and obligations of the parties improperly that, in its turn, leads to conflicts and violations of the rights of perspective parents and a surrogate mother.

Therefore, there is an urgent need to stipulate, at the legislative level, the essential terms and conditions of such agreements, in particular: a surrogate mother's obligation to comply with all doctor's orders and to provide information on the state of her health and the health of the child she is carrying; determination of the surrogate mother's place of residence during the period of carrying the child; the period, during which the surrogate mother must transfer the newborn child to genetic parents, and the parents are obliged to take the child; the amount of compensation for the surrogate mother for carrying and giving birth to the child; the procedure for reimbursement of expenses for medical services, food, accommodation for the surrogate mother during the period of the child carrying, childbirth and the postpartum period, etc.

According to part 1 of Article 632 of the Civil Code of Ukraine, the price in the agreement is established by mutual consent of the parties. I believe that the price in an agreement for surrogacy maternity should consist of two parts. Firstly, spouses must compensate to a surrogate mother all costs associated with the performance of the agreement for surrogacy maternity, namely: medical examination, purchase of medicines, the cost of special clothing, etc.; secondly, the remuneration for carrying the child and the birth.

As for the conditions and procedure of settlements between the parties of the agreement, then under the current legislation of Ukraine the settlements can be made both in cash and in non-cash form. I think that the non-cash form of settlements that are carried out through banks is the most acceptable at concluding agreements for surrogacy maternity. Since each party of the agreement can prove the fact of funds transfer or receipt. Perspective parents can transfer funds to a surrogate mother's account or bank card.

In order to protect the interests of the parties of agreements for commercial surrogacy maternity, the monetary compensation paid to a surrogate mother after the child birth must be transferred to the notary's deposit until the child is transferred to perspective parents. In this case, the interests of the parties of the agreement for surrogacy maternity will be protected. According to p. 18 of part 1 of Article 34 of the Law of Ukraine "On Notary", a notary can legally commit the act of taking on cash deposits[23]. So, after the child is transferred to perspective parents, the notary on the day of addressing or, not later than the next working day, transfers the money non-cash to the surrogate mother, in whose name it was deposited, under her statement, in which the requisites for the transfer must be indicated. In case of the child non-transfer to perspective parents, the notary gives back the money from the perspective parents' deposit that was submitted under their statement. Under this approach, a surrogate mother will know that her money compensation is deposited with the notary and after the child is transferred to the perspective parents the agreed sum will be paid to her, and the perspective parents will be sure that the surrogate mother will not be able to take money and disappear with the child.

Both parents and a surrogate mother should also be responsible for the life of the carrying child. In this regard, an agreement for surrogacy maternity should necessarily include a section on the responsibility of the parties for non-fulfilment or improper fulfilment of their obligations, where it is possible to establish the size of penal sanctions for violation the terms of the agreement for surrogacy maternity by a surrogate mother or failure to comply with the proper regime that will have negative effect on fetal development.

We believe that surrogacy maternity services are a regulated by the legislation process of conception, carrying, and birth of a child with the subsequent registration of its origin by genetic (biological) parents. After the birth of a child by a surrogate mother for registration of a newborn the spouses submit to the authorities of the Civil Registration of Ukraine a set of documents, which must include a notarized consent of the surrogate mother to register a child by its parents and a certificate from the reproductive clinic on the implementation of the surrogacy maternity program.

Thus, the legislation of Ukraine defines the origin of the child in the case of the surrogacy maternity use, approves the list of medical indications for the application of this method as a kind of the assisted reproductive technologies and the procedure

[23] "On Notary": Law of Ukraine of 2 September1993, No. 3425-XII (with amendments and additions). Vidomosti Verkhovnoii Rady Ukraiiny 1993, No. 39, p. 383.

of registration of such children in the registration authorities, but a few important issues have been disregarded.

So, the issue of the form of an agreement for carrying a child by a surrogate mother remains out of the legal regulation. Since for today the current legislation of Ukraine does not contain requirements for mandatory notarization of such agreements, then, at first glance, one can make a conclusion that it will be sufficient to conclude such an agreement in a simple written form. However, according to the Procedure, among the documents necessary for the surrogacy maternity implementation, there must be a notarized copy of a written joint agreement between the surrogate mother and spouses, which implies that the agreement itself must also be certified by a notary.

One of the most acute legal problems of surrogacy maternity is that the interests of future children, conceived as a result of the application of the surrogacy maternity method, remain unprotected. Thus, the legislation does not provide for the registration of such a child in the authorities of the Bureau of Vital Statistics of Ukraine in case of divorce of genetic parents, death of the genetic mother or both genetic parents until the child birth by a surrogate mother, and consequently the further fate of these children remains uncertain.

For today the topical problem remains the participation in the surrogacy maternity program of citizens of those foreign countries, which prohibit the use of this method. After undergoing a completely legal procedure of treating by the surrogacy maternity method at the territory of Ukraine and registering newborns, such parents have problems with the registration of documents for taking the children to their country of permanent residence, thus there is a high risk of leaving such children in Ukraine.

As a matter of actual practice, the problems related to the registration of the child, born by a surrogate mother often arise. It is evidenced by the case that was considered by Balakliia District Court of Kharkiv region No. 610/3305/14-ц of 21 August 2014 on the recognition of paternity and maternity. In the cause of action, the plaintiff noted that the agreement for child carrying had been concluded. On the grounds of this agreement, the assisted reproductive technologies had been used; in particular, the embryos were transferred into the surrogate mother's uterus. However,

after the child birth, the surrogate mother had been registered as its mother. The court sustained the case in full.[24]

However, in the court practice, there are cases of refusal to satisfy claims on maternity disputes and the data exclusion from the entry relating to the surrogacy maternity. Thus, Frunzenskyi District Court of Kharkiv city of 27 January 2015, in case No. 645/9412/14-ц, substantiating its resolution, stated that the plaintiff did not prove the absence of real kinship between a child and a person who was recorded as her mother (who, as the plaintiff claimed, was a surrogate mother), it was not proven that the defendant was not a biological mother to the child, that the human embryo, conceived by the spouses, was transferred into the defendant's organism, in addition, there was no data on the plaintiff being married, as well as no evidence on conclusion of the agreement for child carrying between the plaintiff and the defendant.[25]

In order to protect the property and non-property rights and legitimate interests of persons participating in surrogacy maternity programs, in my opinion, the following legal means can be applied:

1. preparation of the agreement for child carrying between a surrogate mother and biological parents;
2. execution of the written consent of biological parents to carrying by a surrogate mother the embryo, received as a result of the extra-corporal fertilization;
3. execution of the written consent of a surrogate mother for carrying biological parents' embryo;
4. preparation of a surrogate mother's statement about the absence of claims to biological parents after the surrogacy maternity program completion;
5. execution of a surrogate mother's consent for recording biological parents as the child's parents in the civil registration authorities.

As for the maternity presumption in European countries, for example, in France, Germany, Austria, a child's mother is considered to be the woman who has given birth to it. In particular, in the German civil code this provision is contained in §1591 BGB (Burgerliches Gestzbuch).[26] In France and Germany, a woman who gave birth

[24] Case No. 610/3305/14-ц, Information Server of the Unified State Register of Judicial Decisions of Ukraine; http://www.reyestr.court.gov.ua.

[25] Case No 645/9412/14-ц, Information Server of the Unified State Register of Judicial Decisions of Ukraine; http://www.reyestr.court.gov.ua.

[26] Bürgerliches Gesetzbuch.; http://www.gesetze-im-internet.de/bundesrecht/bgb/gesamt.pdf

to a child is legally the mother of the child even when the child comes from the parents-customers, despite the fact that, from a biological point of view, it is wrong.

In return, the Austrian viewpoint is closer to reality. In particular, the Constitutional Court of Austria twice, in 2011 and 2012, in similar cases, made resolutions, by which it recognized the parentage of the Austrian parents-customers and, on this basis, also recognised the Austrian citizenship of the child.[27] Similar resolutions were also made regarding children born at the territory of Ukraine by Ukrainian surrogate mothers. In particular, this is the resolution of the Constitutional Court of Austria of 11 October 2012 in case No. B 100/12–2 and the resolution of the Court of Appeal of Belgium of 31 July 2013 in case No. 2013 KK/80, which recognized the birth certificates of these children issued by the Ukrainian civil registration authorities and the parentage of the parents-customers.[28]

Some German resolutions are more rigorous: "Since a legal mother is a foreign surrogate mother, her child can claim German citizenship only if the legal father is a German citizen."[29] But a legal father, according to §1592 of the German Civil Code, is a man who, at the time of the child birth, is married to the mother or a man who has recognized his fatherhood. Therefore, the legal fatherhood of the biological father cannot be recognized, firstly, if the surrogate mother is married, because the afore-mentioned norms of the NCA (National Centre for Accreditation), as well as the Family Code of Ukraine, presume the fatherhood of the man, married to the child's mother. Secondly, a biological father cannot recognise his fatherhood until the fatherhood of another man is valid (§1594 of NCA).[30] Thus, under the German legislation, a biological father can only recognize his fatherhood if a surrogate mother is unmarried and gives her consent.

In return, the Federal Court of Justice of the Federal Republic of Germany (*Bundesgerichtshof*) made a resolution that recognizing the resolutions of foreign courts, under which in case of surrogacy maternity the fatherhood of the fathers-customers is recognized, is not contrary to the German public order if there is a genetic relationship with one or both parents-customers.[31]

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[27] *VfGH* 11.10.2012 – B 99/12; VfGH 14.12.2011 – B 13/11–10, IPRax 2013, pp. 271, 275.

[28] O.V. Danchenko, *Surrogacy Maternity Method: Legal Regulation in Ukraine and International Aspects*, www.uaa.org.ua/events/01/Danchenko.pdf.

[29] *VGBerlin* 5.9.2012 – I-3 Wx211/12 Rs.23 L 283.12, IPRax 2014, p. 81.

[30] Claudia Mayer, *Sachwidrige Differenzierungen in internationalen Leihmutterschaftsfallen*, IPRax 2014, p. 18.

[31] *BGH*, 10 December 2014 – XIIZB 463/13, FamRZ 2015, 240 mAnmTobiasHelms.

In the light of the above, attention ought to be drawn to the fact that the agreement for surrogacy maternity is the reason for the conclusion of the agreement for the use of the assisted reproductive technologies.

The agreement for the use of the assisted reproductive technologies is an agreement, under which one party (a doctor, a medical institution) is obliged to provide an appropriate medical service with the use of the assisted reproductive technologies, and the other party (the customer) is obliged to pay for it a monetary amount agreed upon by the parties.

The parties of the agreement for the use of the assisted reproductive technologies are: 1) a medical institution or an individual who carries out private medical practice that are obliged to provide medical services with the use of the assisted reproductive technologies of a certain amount and quality; 2) spouses who wish to have a child (a husband or wife); 3) a surrogate mother who carries a child.

The form of the agreement for the use of the assisted reproductive technologies should conform to the general provisions of the Civil Code of Ukraine (Articles 208, 639). The agreement is concluded in writing. The agreement termination is possible in case of violation by a surrogate mother of medical requirements concerning the pregnancy course or by mutual consent of the parties.

After the conclusion, the agreement must be affixed by the signatures and seal of the medical institution. In the text, it should be noted that the agreement is made up in three copies (one is for the medical institution, the other – for the patient: spouses or one of them and the surrogate mother).

These agreements are on a paid basis, unless otherwise provided by them, by law or follow from the nature of these agreements.

These agreements can be concluded for a period that, as a rule, objectively depends on the capabilities of a particular type of a medical service and the desired result to be achieved.

According to part 2 of Article 901 of the Civil Code of Ukraine, the agreement for the assisted reproductive technologies use applies the provisions of Chapter 63 of the Civil Code of Ukraine "Services. General Provisions on Services", unless this is without prejudice to the essence of these obligations and Chapter 53 of the Civil Code of Ukraine taking into account the specific features of these agreements.

The place of the agreement conclusion is determined by its particularities regarding safety, quality and assurance of the results of the service provision, the contractor's obligation to initiate the provision of the necessary information to the patient.

The essential condition of the agreement is a subject-matter – a medical service of the assisted reproductive technologies use. The customer can, as a rule, choose a service from those, provided by the contractor, and indicate the desired result without determining the order of the service provision itself. The provider of medical services is connected to the initiative instructions given by the customer, however, if such instructions are objectively void (contrary to the rules generally accepted in medicine, threaten by negative consequences or complicate the provision of services, etc.), they are not included in the agreement.

A doctor (a medical institution) as the contractor is obliged to provide necessary services in a timely manner, complete and accurate information about the services in order to ensure the consumer's right to choose the medical institution and the attending physician. This information should be provided before the conclusion of the agreement for the assisted reproductive technologies use, as it should be highlighted in the agreement for surrogacy maternity.

Concluding the agreement for the assisted reproductive technologies use, before the beginning of the implantation procedure, the parties must get full information about the options of fertilization and get a comprehensive and detailed consultation from a doctor (a medical institution) that will perform the embryo implantation procedure to the surrogate mother. Therefore, the agreement should clearly state the method of conception, which has been chosen as the most appropriate from the medical point of view in this particular case. This is an important term of the agreement.

The parties of the agreement must keep medical secrecy.

With regard to agreements for the assisted reproductive technologies use, a separate section should be singled out, namely, "Confidentiality", in which it is necessary to stipulate the contractor's obligation to keep confidential information secret regarding the customer's address for medical service for the assisted reproductive technologies use and other information obtained during their examination and treatment.

The right to the proper quality of services and the proper quality of services provision is ensured by the contractor's obligation to provide medical services with the use of modern diagnostic and treatment methods in full amount in accordance with the agreement, as well as the contractor's obligation to ensure the participation of highly qualified medical personnel to provide services under this agreement.

The agreement for the assisted reproductive technologies use should stipulate the consequences of not carrying the fetus, or the birth of a disabled child, a child

with physical or mental deficiencies, congenital anomalies or at stillbirth; monetary damages in different situations, the surrogate mother's obligation to transfer the child after the birth to the parents, the parents' obligation to accept the child. At giving birth to a child by a surrogate mother, artificial fertilization methods are used, which often leads to the birth of more than one child, so it is necessary to provide for a procedure for actions if twins are born.

If you compare the surrogacy maternity issue in Ukraine and the United States of America, it can be concluded that the American legal way of regulating this issue is quite different from the Ukrainian one. In the United States of America, there is no single common law-making base that regulates this type of artificial fertilization. The surrogacy maternity issue is enforced in the legislation of the states that is why, in some states, surrogacy maternity is commercial in nature, while in other states only a non-commercial surrogacy maternity is permissible.[32]

In such countries as Greece, Ireland, Finland, and Belgium, the involvement of surrogate mothers to the infertility treatment is not regulated by law. However, in some countries only a non-commercial surrogacy maternity is permissible – when a surrogate mother does not receive remuneration, the surrogacy maternity advertising and the surrogate mothers' selection are prohibited. This legislation applies in Australia, the United Kingdom, Denmark, Israel, Spain, Canada, the Netherlands and some states of America.

The law of Italy "On the Rules of the Assisted Reproductive Technologies" No. 40 of 19 February 2004, not only prohibits surrogacy maternity in full, but also substantially restricts other reproductive technologies. In accordance with this law, the reproductive programs involving a third party, that is, surrogacy maternity and donorship are prohibited.[33]

In Sweden, the agreements for surrogacy maternity are not recognized, and it is not permitted. However, there are cases where, interested in the possibility of concluding such agreements, couples travel to India for this purpose. As a result, the National Council of Medical Ethics of Sweden issued a report in 2013[34], in which matters related to surrogacy maternity were considered. In this report, the

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[32] M.V. Sopel, *Legal Aspects of Surrogacy Maternity: Ukraine and USA,* Lviv 2008, pp. 314–318.

[33] O.P. Dzhochka, *General Theoretical Aspect of Legal Regulation of Reproductive Function,* Lviv 2007, pp. 127–133.

[34] *National Council of Medical Ethics of Sweden, the report review 'Assisted Reproduction – Ethical Aspects'*, February 2013, http://www.smer.se/wp-content/uploads/2013/03/Slutversion-sammanfattning-eng-Assisted-reproduction.pdf.

majority of the members of the Council spoke in favor of that the altruistic surrogacy maternity "in particular conditions" can be "ethically acceptable method of the assisted reproduction". As an example, the following "particular conditions" were presented: "One of the conditions is the presence of close relations between a surrogate mother and future parents. A surrogate mother should have previous pregnancies and her own children; she should not be the genetic mother of the child being born. Other conditions apply to the fact that a surrogate mother and future parents must undergo a thorough examination, and have access to support and counseling during this process. The child from an early age should also receive information about how he/she was born and, upon reaching the adult age, should have the right to receive information about the surrogate mother." However, at this the Council considers that further studies are needed to reach an agreement on the list of such conditions. A minority of the Council members held the opinion that surrogacy maternity should not be permitted in Sweden due to the presence of too many uncertain issues as far as the psychological consequences for a surrogate mother and a child were concerned. Further arguments were presented concerning the difficulty of the informed consent assurance prior to the agreement for surrogacy maternity, risks of exploitation of socially and/or economically disfranchised women, as well as the consequences for the child, in case of the occurrence of complications after birth (for example, when the surrogate mother refuses to give the child back or when the future mother cannot establish a psychological contact with the child while he/she is growing). Nevertheless, the Council has agreed that commercial surrogacy maternity is not an ethically accepted method of the assisted reproduction. In Sweden, the discussion of this issue is continued, taking into account the increasing number of women who are unable to give birth in a natural way, and, therefore, require a solution that will allow them to have children.[35]

From the standpoint of private international law, international agreements for surrogacy maternity are particularly complex. The Hague Conference on Private International Law brought up the issue of controversial international private law on international surrogacy maternity at the 2012 meeting, at which the interim report on surrogacy maternity was discussed. The first such report was presented by the Conference in 2011[36], it has recognized that surrogacy maternity is a sphere, in

[35] *International Experience of Legislative Regulation of the Reproductive Technologies Use* (Including Surrogacy Maternity), Kyiv, 2013, pp. 14–15.

[36] For more information, see: http://www.hcch.net /upload/wop/genaff2011pd11e.pdf.

which there will always be "differences in the views on what the appropriate balance should be" to regulate different types of behavior. The 2012 meeting participants agreed that the Permanent Bureau will present a complete report on the problems of private international law related to the children status, including the issue of surrogacy maternity, in 2014, and keeping track of its work may be interesting.

According to the report of the Hague Conference on private international law of 2012, the greatest number of cases with complications at international agreements for surrogacy maternity arise regarding the legality of paternity and its consequences, namely the child's nationality. The report shows how the paternity issues are solved in different legal systems by courts when future parents cannot register a child as their own due to differences in surrogacy maternity mode between the country of a surrogate mother and their own country.

The report contains precautions regarding the children status that may arise as a result of legislation adoption, which complicates the mode of recognition of parental rights over a child by future parents.[37] For example, according to the Law of Great Britain on Human Fertilization and Embryology of 2008, a surrogate mother and her husband or legal partner of the same sex are considered to be the legal parents of the child, regardless of whether they are genetically related to the child. In case if a surrogate mother is single or her partner/husband does not agree on the procedure of the assisted child birth, the child's father may be a biological (future) father.[38]

Moreover, if future parents from Great Britain conclude an agreement for surrogacy maternity abroad, they should obtain a parental order when entering Great Britain with the child after his/her birth. At this, the law imposes several conditions on future parents: they must submit a statement at least in six weeks and not later than in six months after the child birth. This may be a problem if, under certain circumstances, this deadline will be missed by future parents, as the UK court has no right to extend this term.[39] Another condition is the parents' consent to the terms of the order, especially if they are divorced. In addition, at least one of the parents

[37] *Report of the Hague Conference on Private International Law*, "Issues of Private International Law on the Children Status, including Issues Related to International Agreements for Surrogacy Maternity", http://www.hcch.net/upload/wop/genaff2011pd11e.pdf.

[38] *Sections 35-37 of the Law of Great Britain on Human Fertilization and Embryology* (2008), http://www.legislation.gov.uk/ukpga/2008/22/contents#top.

[39] *International Trade and Assisted Reproductive Technologies, Regulatory Problems in Surrogacy Maternity*, "Journal of Legislation, Medicine and Ethics", 2013, p. 251, http://onlinelibrary.wiley.com/doi /10.1111/jlme.12016/abstract.

must live in Great Britain; the child should already be under the tutelage of future parents and live with them, and at least one of the parents has to be genetically related to the child (it means that future parents who both have no generative cells may not be the candidates for a parental order); and future parents should be a couple (married or in a civil marriage) – single parents cannot receive a parental order. Moreover, the court should be convinced that "no funds or other benefits (with the exception of reasonable expenses incurred) were not provided to any of the applicants for the maintenance or consideration of" the agreement[40], except the cases when it was authorized by the court. This requirement is intended to prevent future parents' attempts to bypass the ban on commercial surrogacy maternity by concluding a commercial agreement abroad. However, the judicial practice of Great Britain shows that judges usually allow the child registration based on his/her best interests.

The problem of surrogacy maternity permissibility is constantly debated. As an example, we can introduce the report of the French Senate (25 June 2008, No. 421), which proposed to allow surrogacy maternity for married couples of childbearing age who, for medical reasons, cannot have their own children. Such couples would have to conclude an agreement that was similar in nature to adoption, and the judge had to give them permit to transfer the embryo into the surrogate mother's organism. However, the government and society did not reach consensus on this issue and the decision was not taken.

For countries, prohibiting surrogacy maternity, a problem arises in the way how to prevent the use by their citizens of the possibility of addressing the problem of infertility in a prohibited way, including by leaving the country of citizenship for this purpose.

The most effective method is considered an imposition of criminal punishment. For example, the French legislator tried to solve this problem by qualifying surrogacy maternity as a threat to the child's legal status. It is actually equivalent to the child abandonment, which according to Article 227–13 of the Criminal Code of France (hereinafter referred to as CCF) is a delict and punishable by up to three years of imprisonment and a fine of up to 45 000 €. Also, according to Article 227–12 of the CCF, the instigation of parents or one of the parents to abandon a newborn child or a child to be born is punishable by imprisonment for a term up to six months and

[40] Section 54 (8), Human Fertilization and Embryology Act (2008), http://www.legislation.gov.uk/ukpga/2008/22/contents#top.

a fine of up to 7 000 €. In addition, mediation as for surrogacy maternity is also penalized by a fine and imprisonment.

In return, in Germany the criminal code does not primarily consider a surrogate mother or potential parents who want to use her services to be law breakers, but it recognizes the offence in a medical intervention as for the embryo implantation into the surrogate mother's organism.[41]

The same approach is also used by Spain. However, since such medical procedures are usually carried out abroad, such a sanction seems less effective. The same can be said about France, although there are other grounds of inefficiency. The offence, in which the parties of the agreement for surrogacy maternity may be accused, is an offence, not a crime. And since these offences also tend to occur abroad, then the general rule is used that a person may be punished for an offence only if in the country, where it has been committed, it is punishable. Consequently, those French citizens who conclude agreements for surrogacy maternity in the countries, where it is permitted – in particular – in Ukraine, are not punishable.

Therefore, based on the juridical inconsistency of these punitive rules, the main sanction in the private law sphere involves the insignificance of the agreement for surrogacy maternity. And the parties cannot avoid this legal consequence even by means of such an instrument of international private law as the choice of law in the agreement itself, choosing the right of the state of the citizenship of a surrogate mother, which recognizes such an agreement valid.

Women can be forced to conclude agreements for surrogacy maternity and can be exploited in this role. In particular, the studies in India show that surrogate mothers are subjected to pressure from their husbands who demand from them to become surrogate mothers[42]. Very often (in relation to India), mediation agencies and clinics receive financial benefits from agreements for surrogacy maternity, and a surrogate mother receives only a small portion of these funds.

The definition of trafficking in persons is set out in the UNO Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. It has three components: (a) an action – recruitment, transportation, transfer, concealment or reception of people; (б) a means – by threat of force or its use or other forms of coercion, kidnapping, deceitful practices, fraudulent conduct, abuse of authority

[41] P. Lagarde, *DieLeihmutterschaft: Problemeder Sach und des Kollisionsrechts* // Zeitschriftfur Europaisches Privatrecht 2015, No. 2, pp. 233–240.

[42] Centre of Social Studies of India, "Surrogacy Maternity – Ethical or Commercial", http://www.womenleadership.in/Csr/SurrogacyReport.pdf.

or helplessness, or by bribery, in the form of payments or benefits, to obtain the consent of the person controlling another person; (в) a purpose – for the purpose of exploitation, which also includes services.[43]

In March 2018, the UNO Special Rapporteur on child trafficking and sexual exploitation, Maud de Boer-Buquicchio, called for urgent action to protect the rights of children born by surrogate mothers. As she put it, the spread of such a service at the absence of international legal norms for its regulation threatens the fact that children can be turned into goods.[44]

It is necessary to create a system of international legal regulation concerning surrogacy maternity. The rules of the Family Code of Ukraine apply only to the rights of perspective parents and the woman giving birth to a child for them, but nothing about the rights of the child.

Currently, the surrogacy maternity program is in fact nothing more than trade, because a surrogate mother sells a child, whose embryo was transferred to her by the doctors, for the future parents whom were found for her by the mediators. Law enforcement officers deliberately register such messages under the preliminary assessment "trafficking in persons." Because this crime is particularly of serious nature and, accordingly, the request on the search to an investigating judge, access to documents and their retrieval is justified. But the investigation can only rely on detecting the facts of falsification of documents and abuse of official position (abuse of power) by the employees of the Civil Registration Departments. In the Criminal Code of Ukraine, the objective side of trafficking in people has a mandatory characteristic of criminal acts, a goal that is defined as the further exploitation of a person. In the context of surrogacy maternity, a mother or child exploitation is possible. A surrogate mother cannot be the object of this crime, because she is a conscious participant of the agreement for child carrying, she does it voluntarily and for a separate reward.

There are many disputes regarding the payment of such service, since mostly women who experience financial difficulties agree upon surrogacy maternity, and therefore their expression of will is perceived critically, because of the financial dependence on the child's future parents. But any agreement on service provision

[43] *UNO Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, 15 November 2000, http://zakon3.rada.gov.ua/laws/show/995_791.

[44] *Surrogacy Maternity: as Children are Turned into Goods*, https://uk.etcetera.media/surogatne-materinstvo-yak-ditey-peretvoryuyut-na-tovar.html.

on a paid basis stipulates that one party has a financial ability to pay, and the other one needs such a payment.

In addition, a surrogate mother carries a child who does not belong to her genetically, and therefore from the very beginning she does not have any maternal rights for her/him, which cannot arise in the future as well.

Since by law a child has a genetic affinity with at least one of the parents, then, accordingly, it also cannot be the object of trade. Trafficking in persons with subsequent adoption with the commercial purpose is criminally liable. Adoption is placement by the adopter in his/her family of a person as a daughter or a son, carried out on the basis of the court decision (and as for a child who is a citizen of Ukraine but resides outside of Ukraine, with the permission of the government body of the state administration on adoption and protection of the child rights). Commercial purpose at adoption means the goal, which is achieved by obtaining any material benefit or avoiding certain expenses due to adoption.

According to Article 123 of the Family Code of Ukraine, in case of transferring into the organism of another woman a human embryo, conceived by spouses (a male and female) as a result of the assisted reproductive technologies use, the parents of the child are the spouses. Therefore, the issue of paternity and maternity is resolved at the time of the child's registration; where in the birth certificate the persons who the embryo belonged to and who were the party of the agreement with the surrogate mother are indicated as parents.

3. Conclusions

In Ukraine, there is no actual prohibition to a single woman to use the assisted reproductive technologies, in particular, such technique as artificial fertilization. As for surrogacy maternity, the situation here is more difficult, because in most cases clinics refuse to carry out surrogacy maternity programs and recommend women to enter into marriage. In my opinion, such a refusal is a violation of the woman's maternity rights and the patient's rights. If a woman has medical indications to carry out a surrogacy maternity program, she can take advantage of it regardless of her marital status.

The surrogacy maternity procedure is successfully carried out both on a commercial (paid) and on a non-commercial (free) basis. But despite a rather successful practice, there are many controversial issues that require research and finding

solutions. At present such issues are: 1) the legal regulation of surrogacy maternity; 2) the medical and ethical aspects of this procedure.

I believe that "a surrogate mother" is a woman who, with the help of artificial fertilization carries and gives birth to a child for another person or family who, for medical reasons, do not have the ability to conceive and give birth to a child.

In order to protect the property and non-property rights and legitimate interests of persons participating in surrogacy maternity programs, in my opinion, the following legal means can be applied: preparation of the agreement for child carrying between a surrogate mother and biological parents; execution of the written consent of biological parents to carrying by a surrogate mother the embryo, received as a result of the extra-corporal fertilization; execution of the written consent of a surrogate mother for carrying biological parents' embryo; preparation of a surrogate mother's statement about the absence of claims to biological parents after the surrogacy maternity program completion; execution of a surrogate mother's consent for recording biological parents as the child's parents in the civil registration authorities.

I draw main attention to the fact that the agreement for surrogacy maternity is the reason for the conclusion of the agreement for the use of the assisted reproductive technologies. The agreement for the use of the assisted reproductive technologies is an agreement, under which one party (a doctor, a medical institution) is obliged to provide an appropriate medical service with the use of the assisted reproductive technologies, and the other party (the customer) is obliged to pay for it a monetary amount agreed upon by the parties.

For countries, prohibiting surrogacy maternity, a problem arises in the way how to prevent the use by their citizens of the possibility of addressing the problem of infertility in a prohibited way, including by leaving the country of citizenship for this purpose. The most effective method is considered the imposition of criminal punishment. For example, the French legislator tried to solve this problem by qualifying surrogacy maternity as a threat to the child's legal status. It is necessary to create a system of international legal regulation concerning surrogacy maternity. The rules of the Family Code of Ukraine apply only to the rights of perspective parents and the woman giving birth to a child for them, but nothing about the rights of the child. Accordingly, the legislation in the sphere of surrogacy maternity requires unification. At the moment, it is necessary to treat surrogacy maternity very carefully, taking into account the norms of the national legislation of both contracting parties, and to understand that inevitable negative consequences will come not only to the parties of the agreement, but above all to the child born as a result of these legal obligations.

CHAPTER III National and international standards of human dignity, maternity, paternity, and childhood

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International surrogacy arrangements: a global "Handmaid's Tale"?

1. Introduction and general approach

1.1. The "booming" of international surrogacy as a global issue

Surrogacy (and surrogacy arrangements) is not just a national issue, solvable through national legal means: globalization has had a great impact on this, and national actions aimed to properly address surrogacy, according to the views of every country, have proven to be unsuitable and ineffective. On the other hand, international surrogacy has become a "booming, global business."[1] This can be attributed to a convergence of scientific, demographic, legal and social developments:[2]

a) From the scientific standpoint, the technical improvement of reproductive technologies has make easier surrogacy, enabling the intended parents to have, at least in some cases, genetic links between them and the child: nevertheless, it has to be stressed that the majority of international surrogacy arrangements are "gestational surrogacy arrangements", in which there is not a genetic link between one or two of the intended parents and the child.[3]

[1] Permanent Bureau of the Hague Conference on Private International Law (hereinafter, HCCH), *Private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements* (11 March 2011), available at: https://assets.hcch.net/upload/wop/genaff2011pd11e.pdf (last accessed: 7 August 2018), p. 11.

[2] HCCH Permanent Bureau, *A Preliminary report on the issues arising from international surrogacy arrangements* (10 March 2012), available at: https://assets.hcch.net/docs/d4ff8ecd-f747–46da-86c3–61074e9b17fe.pdf (last accessed: 7 August 2018), No 4.

[3] HCCH Permanent Bureau, *Preliminary report on the issues arising from international surrogacy arrangements*, footnote 20.

b) From the sociological point of view, the increasing social (and legal) acceptance of parenting within the so-called alternative family forms in some States (remarkably in developed Western countries) has resulted in the growth of structurally infertile "family forms": to the traditional infertile couples (man and woman) on account of pathologic causes, we must add now the family forms that are infertile by their own internal structure[4] (same sex couples, specially male gay couples[5], single men wanting to be fathers, single women wanting to be mothers but without the inconveniencies or physical consequences of pregnancy). This has caused a sharp increase of the surrogacy demand, mainly in developed countries.

c) From the social point of view, the universalization of the Internet, making easier to have access to information about international resources related to international surrogacy, and the ease of international travel[6], have played a significant role, too: now it is much easier to know who to contact, where to go, and what to do to make an international surrogacy arrangement, and once this has been concluded, travel to the chosen country to get the child.

d) From the legal perspective, the way countries face surrogacy varies across the world, from the prohibition or restriction (even making surrogacy a criminal offence) to its permission, through the countries that have no specific regulation on the issue. The recent *Report of the United Nations Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material* (January 2018: hereinafter *UN Special Rapporteur Report*)[7], focused on international surrogacy and child trafficking, accurately summarizes the current situation as follows:

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[4] Indeed, same-sex couples have a non-procreative internal structure, while opposite-sex couples have a procreative internal structure: about this idea, briefly C. Martínez de Aguirre, *The Evolution of Family Law: Changing the Rules or Changing the Game?*, "BYU Journal of Public Law", 30–2 (2016), p. 237, available at: https://digitalcommons.law.byu.edu/jpl/vol30/iss2/5/ (last accessed: 7 August 2018); see also: C. Martínez de Aguirre, *Same-sex marriage in Spanish law*, "Prawo w Działaniu", 25/2016, pp. 215 and ff., available at: https://www.iws.org.pl/pliki/files/Carlos Martínez de Aguirre, Same-ex marriage in Spanish law.pdf (last accessed: 7 August 2018).

[5] In fact, there are specifically gay-oriented surrogacy websites: https://www.gayparentstobe.com (last accessed: 7 August 2018).

[6] HCCH Permanent Bureau, *Preliminary report on the issues arising from international surrogacy arrangements*, p. 6.

[7] *UN Special Rapporteur Report* is available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/007/71/PDF/G1800771.pdf?OpenElement (last accessed: 7 August 2018).

> National laws governing surrogacy vary across a spectrum from prohibitionist to permissive. This variation occurs across national boundaries and sometimes within national boundaries, as surrogacy is sometimes regulated primarily by local law, i.e., in Australia, Mexico and the United States. The most prohibitionist jurisdictions, such as France and Germany, ban all forms of surrogacy, including commercial and altruistic, and traditional and gestational. Most jurisdictions with laws governing surrogacy, including Australia, Greece, New Zealand, South Africa and the United Kingdom, prohibit "commercial", "for-profit" or "compensated" surrogacy, while explicitly or implicitly permitting "altruistic" surrogacy. Only a small minority of States explicitly permit commercial surrogacy for both national and foreign intending parents, thereby choosing to become centres for both national and international commercial surrogacy. Cambodia, India, Nepal and Thailand, and the Mexican State of Tabasco, are examples of States or jurisdictions which have served as centres for commercial international surrogacy arrangements but have recently taken steps to prohibit or limit such arrangements, generally in response to abusive practices. However, Georgia, the Russian Federation and Ukraine, and some states in the United States, have for a sustained period of time chosen to remain centres for international surrogacy arrangements.[8]

These different legal regulations have caused the so-called "international reproductive tourism":[9] intended (usually wealthy) parents from countries in which surrogacy is prohibited go to countries in which that sort of arrangements are allowed (and have legal measures to make sure that the intended parents will be the legal parents at the end of this process), and conclude an international surrogacy arrangement. Problems arise when these intended parents (now legal parents, according to the Law of the country in which the birth has taken place) go back to their own country,

[8] *UN Special Rapporteur Report*, No. 15. It must be noted that the situation is a changing one, on account of the reported abusive practices in international surrogacy: that is why countries that used to permit surrogacy, and that used to be reproductive tourism destination, have decided to adopt more restrictive regulations (for instance, allowing surrogacy only for their own citizens), this way avoiding international surrogacy. Since these abusive practices are still being reported, new legal changes can take place in the countries that permit surrogacy.

[9] *Spanish Bioethics Committee Report on the Ethical and Legal Aspects of Surrogacy*; available at: http://assets.comitedebioetica.es/files/documentacion/en/spanish_bioethics_committee_report_on_the_ethical_and_legal_aspects_of_surrogacy.pdf (last accessed: 7 August 2018), p. 18.

seeking to be considered as legal parents of the child by their national Law too: as the abovementioned *UN Special Rapporteur Report* says, "such travel intentionally evades prohibitionist laws and creates dilemmas for the jurisdictions involved. Competent authorities and courts are often placed in the situation of being asked to validate, after the fact, international surrogacy arrangements that are illegal in one or both jurisdictions. The imperative to protect the rights of these surrogate-born children adds to the dilemma. Sympathy for intending parents and their wish to engage in family formation further complicates the issues."[10]

These problems can specially harm children of surrogacy, frequently being left with "limping" legal parentage (i.e., different legal parentage established according to the laws of different States) and being cared for by persons not recognized as their legal parents in the State in which they live. In some cases, children are left "stateless", trapped in the State of birth, unable to leave and sometimes with no permission to stay.[11]

1.2. Dealing with international surrogacy

The problems that arise from this situation are national problems, but it is not possible to solve them only at the national level: international measures have to be taken if an effective solution is to be found. Indeed, two considerations can be made:

a) On the one hand, States that prohibit surrogacy find themselves unable to safeguard the goal they sought to safeguard through the prohibition, and thereby miss the chance to establish the legal requirements and guarantees that they deemed appropriate, allowing at the same time an activity in their territory which meets the demands of some citizens.[12]

b) On the other hand, taking into account that "international reproductive tourism", any national restrictive regulation that one country might wish to adopt in respect of surrogacy will have very limited efficacy: ultimately, the threshold of what is allowed and the effectiveness of the national laws that regulate these practices will, in good measure, be determined by the most

[10] *UN Special Rapporteur Report*, No. 17.

[11] HCCH Permanent Bureau (H. Baker), *A study of legal parentage and the issues arising from international surrogacy arrangements* (March 2014), No. 147. The study is available at: https://assets.hcch.net/docs/bb90cfd2-a66a-4fe4-a05b-55f33b009cfc.pdf (last accessed: 7 August 2018).

[12] *Spanish Bioethics Committee Report…*, p. 19.

> permissive regulation which exists and guarantees minimal legal certainty.[13] As the *UN Special Rapporteur Report* states, "the demand that domestic parentage orders be recognized globally without appropriate restrictions and without consideration of human rights concerns raises the related risk that a minority of jurisdictions with permissive approaches to commercial surrogacy, and with regulations that fail to protect the rights of vulnerable parties against exploitation, could normalize practices globally that violate human rights." [14]

Though reaching a complete international unanimity, which would be the only way to avoid such problems effectively, is almost impossible, a global agreement on international surrogacy could send a powerful message even to permissive, non-signatories countries, in the same way that the *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* did concerning international adoption.

In this regard, there has been a few initiatives at both European (European Parliament and Council of Europe) and global (Hague Conference on International Private Law and the United Nations) level, that this report is going to consider briefly in Section 4.

On the other hand, some decisions and Judgments of the national authorities and Courts of countries with prohibitive or restrictive laws, dealing with the abovementioned "international reproductive tourism", and trying to preserve their national Laws concerning surrogacy (laws usually considered part of their international public policy), have been contested before international human rights Courts: this is the case of Europe, where there are a significant number of judgments of the European Court of Human Rights (ECHR) concerning international surrogacy. These Judgments are going to be considered in Section 3 of this report.

Previously, in Section 2, the report is going to give some figures, and information, that can be useful for accurately assess international surrogacy arrangements.

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[13] *Spanish Bioethics Committee Report…*, p. 20.

[14] *UN Special Rapporteur Report*, No. 23.

2. The figures of international surrogacy: children, money, contracts

As mentioned above, international surrogacy has experienced a sharp increase in recent years[15], an increase that seems to be slowing down due to recent legal changes that have severely restricted surrogacy in some countries that used to be a destination of this reproductive tourism (India, Thailand, Mexico), banning all kinds of surrogacy or only for-profit surrogacy, or limiting surrogacy solely to their own citizens.[16] It is difficult to know neither the exact number of international surrogacy arrangements, nor the number of children born as a result of them. The NGO *International Social Services* propose an estimated of 20.000 children born each year, with numbers growing.[17] On the other hand, most children born of international surrogacy arrangements are born of gestational[18], for-profit surrogate arrangements (estimations reach 98%-99%).[19]

More data about the cost of surrogacy for the intended parents are available. A Spanish website specialized in surrogacy[20] gives the following estimated costs (not including travel and accommodation expenses): Canada – 60.000 € to 100.000 €; United States – 80.000 € to 240.000 €; Georgia – 40.000 € to 80.000 €; Greece – 40.000 € to 80.000 €; Russia – 50.000 € to 80.000 €; Ukraine – 26.000 € to 60.000 €[21].[22] Surrogacy has become a lucrative industry: in India, the estimated worth

[15] HCCH Permanente Bureau (H. Baker), *A Study of Legal Parentage…*, no. 125 y ss.

[16] C. Schurr, E. Militz, *The Affective Economy of Transnational Surrogacy*, available at: http://journals.sagepub.com/doi/10.1177/0308518X18769652 (last accessed: 7 August 2018), p. 2.

[17] See: International Social Services, *Call for action 2016. Urgent need for regulation of International surrogacy and artificial reproductive technologies*, available at: http://www.iss-ssi.org/images/Surrogacy/Call_for_Action2016.pdf (last accessed: 7 August 2018).

[18] HCCH Permanente Bureau (H. Baker), *A Study of Legal Parentage…*, No. 135.

[19] Committee on Social Affairs, Health and Sustainable Development of the Parliamentary Assembly of the Council of Europe (hereinafter PACE), *Report on Children's Rights Related to Surrogacy* (rapporteur P. de Sutter), p. 3, available at: https://bit.ly/2depDYl (last accessed: 7 August 2018); about this report, see below, section 4.1.2.: hereinafter PACE *Report on Children's Rights Related to Surrogacy*; HCCH Permanente Bureau (H. Baker), *A Study of Legal Parentage…*, No. 135.

[20] Since surrogacy arrangements are prohibited by the Spanish Law, the costs necessarily refer to international surrogacy agreements.

[21] Cf. https://www.babygest.es.

[22] More information about surrogacy arrangements costs in HCCH Permanente Bureau (H. Baker), *A Study of Legal Parentage…*, No. 135.

of surrogacy industry before the banning of commercial surrogacy was 2.3 billion dollars[23], and in USA some commentators consider that the surrogacy industry is now worth up to 6 billion dollars annually.[24]

A clear conclusion is easy to be drawn: international surrogacy is basically business and market, not altruism or solidarity. The financial significance of international surrogacy, in combination with the very relevant legal side of international surrogacy, explains the views of the *American Bar Association,* as reflected in the *UN Special Rapporteur Report:*

> The American Bar Association notes that "it is undeniable that the commissioning of children through surrogacy — for money — represents a market". The American Bar Association praises this "market", noting that "market-based mechanisms have allowed international surrogacy to operate efficiently". The American Bar Association rejects application of the best interests of the child standard to surrogacy, rejects most forms of suitability review and evaluation of parental fitness of intending parents, rejects caps for compensation for surrogate mothers and gamete donors, rejects licensing requirements for surrogacy agencies, rejects rights to birth records or origins information, rejects the Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, of 1993, as a "model for a surrogacy convention", and rejects bilateral treaties on surrogacy. The American Bar Association states that "any focus on regulating the international surrogacy market itself is misguided". Indeed, the American Bar Association urges that any international instrument on surrogacy not address human rights concerns; hence, it rejects "regulation of the surrogacy industry for the purpose of reducing human rights violations."[25]

Being international surrogacy, and reproductive tourism, a real industry, it makes sense that this is governed by the logic of commercial contracts. This logic explains

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[23] PACE *Report on Children's Rights Related to Surrogacy*, p. 3; See also: https://www.bbc.com/news/world-asia-india-34876458; https://www.reuters.com/article/us-india-women-surrogacy/indian-surrogate-mothers-grab-last-chance-to-make-babies-ahead-of-impending-ban-idUSKBN1530FL (last accessed: 8 August 2018).

[24] A. Finkelstein, S. Mac Dougall, A. Kintominas, A. Olsen, *Surrogacy Law and Policy in the U.S.: A National Conversation Informed by Global Lawmaking,* Report of the Columbia Law School Sexuality & Gender Law Clinic Columbia, available at: https://bit.ly/2KxibIJ (last accessed: 8 August 2018), p. 6.

[25] *UN Special Rapporteur report*, No. 27.

the way some conflicts between the intended parents and the pregnant mother are solved: given that there is a situation of imbalance between them, favoring the commissioning parents[26] (because they are paying the price for surrogacy, and a really high price), surrogacy arrangements usually give to the intended parents a strong control over the body, the health and the life of the pregnant mother during pregnancy.[27] Let us see some examples of real terms of surrogacy arrangements that clearly give the intended parents the abovementioned strong control over the pregnant mother:[28]

1. **Regarding confidentiality:**

> The surrogate expressly waives the privilege of confidentiality and hereby directs the release to the Intended Parents, upon their request, of the report and other information obtained as a result of any and all psychological, psychotherapy, or medical evaluations or testing obtained or performed as contemplated by this Agreement.

2. **Regarding abortion:**

> Surrogate specifically agrees to terminate prior to eighteen weeks at the election and discretion of the Intended Parents. With the exception of termination based on gender selection, which will not be permitted, the right of the Intended Parents to request termination/abortion is absolute and does not require any explanation or justification to the Surrogate, including but not limited to if any genetic abnormality or defect has been determined such as cerebral palsy or Down syndrome.

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[26] V. Bellver Capella, *¿Nuevas tecnologías? Viejas explotaciones. El caso de la maternidad subrogada internacional,* "SCIO. Revista de Filosofía", 11, November 2015, available at: https://proyectoscio.ucv.es/wp-content/uploads/2015/10/1-bellver.pdf (last accessed: 8 August 2018), p. 45.

[27] V. Bellver Capella, *Tomarse en serio la maternidad subrogada altruista,* "Cuadernos de Bioética" XXVIII 2017/2ª, available at: http://aebioetica.org/revistas/2017/28/93/229.pdf (last accessed: 8 August 2018), p. 235; *Spanish Bioethics Committee Report…,* p. 27.

[28] J. Lahl, *Contract pregnancies exposed: Surrogacy contracts don't protect surrogate mothers and their children*, "MercatorNet", 10 November 2017, available at: https://www.mercatornet.com/conjugality/view/contract-pregnancies-exposed-surrogacy-contracts-dont-protect-surrogate-mot/20694 (last accessed: 8 August 2018). For more contracts, see: http://www.allaboutsurrogacy.com/sample_contracts/contracts.htm, and http://www.surromomsonline.com/articles/ts_contract.htm (last accessed: 8 August 2018).

"TO THE EXTENT THAT THE SURROGATE CHOOSES TO EXERCISE HER RIGHT TO ABORT, OR NOT ABORT, IN A MANNER INCONSISTENT WITH THE INSTRUCTIONS OF THE INTENDED PARENTS, IT IS UNDERSTOOD THAT SUCH ACTION MAY BE DETERMINED TO CONSTITUTE A BREACH OF THIS AGREEMENT"[29]

3. **Regarding fetal reduction:**

The Intended Parents reserve the ultimate and sole legal right to selectively reduce before the completion of twenty (20) weeks of gestation… The Intended Parents have the sole right to determine the number of fetuses to selectively reduce taking into consideration the recommendation of the Surrogate's treating physician… The right of the Intended Parents to request a selective reduction is absolute and does not require any explanation or justification to the Surrogate.

4. **Regarding pregnant mother end-of-life decision making:**

If the surrogate is in her second or third trimester of pregnancy and in the event that medical life support equipment is required to preserve and maintain the life of the Surrogate and if requested by the Intended Parents, the Surrogate and her husband agree that the Surrogate's life will be sustained with life support equipment for a period to achieve viability of the fetus taking into account the best interests and well-being of the fetus … The Intended Parents will make the decision with regard to how long the life support should be continued prior to the birth of the Child taking into account the obstetrician or perinatologist's recommendation and the desires of the family of the Surrogate. The Surrogate's husband, or her next of kin, is solely responsible for determining the time at which life support treatment will be discontinued following the birth of the Child.

These contractual terms reveal the real mastery of the intended parents over the whole pregnant mother (body, health, privacy, decisions) during pregnancy; the conclusion is obvious: surrogacy is not merely "renting a womb", but "renting"

[29] The uppercase formatting is the one used in the original arrangement.

a body and a soul (privacy, decisions…), i.e., a human being as a whole. This mastery, given in exchange for money, can easily be labeled as exploitation of the pregnant mother, especially when she is a vulnerable woman.

3. The European Court of Human Rights on surrogacy

Reproductive tourism in Europa is very active. Many European countries that legally reject surrogacy arrangements have experienced the abovementioned problems arising from cross-border surrogacy. National Courts try to protect their national Laws banning or restricting surrogacy, and reject to establish legal parentage between the (national) commissioning parents and the child born abroad, as a consequence of international surrogacy agreements. Some of the final Judgments of national Courts have been challenged before the European Court of Human Rights (hereinafter ECHR), giving place to a certain number of Judgments, one of them from the Grand Chamber. These Judgments are the following: the cases of *Mennesson v. France* and *Labassee v. France* (26 June 2014, Chamber), *Foulon and Bouvet v. France*, (21 July 2016, Chamber); *Laborie v. France*, (19 January 2017, Committee) and *Paradiso and Campanelli v. Italy* (24 January 2017, Grand Chamber).[30] This report will deal with the cases of *Mennesson* and *Labassee* (3.1), *Foulon and Bouvet*, and *Laborie* (3.2), and *Paradiso* (3.3); finally, I will add some reflections concerning the ECHR case-Law about international surrogacy arrangements (3.4).

There are a few recent applications pending before the ECHR: *Pierre Anne Braun v. France* (No. 1462/18, lodged on 4 January 2018), *Saenz and Saenz Cortes v. France* (No. 11288/18, lodged on 2 March 2018) and *Martine Maillard and others v. France* (No. 17348/18, lodged on 10 April 2018). These three cases deal with the refusal to fully transcribe in the French civil registries the birth certificates issued abroad pursuant to a contract of surrogacy.

[30] The case of *D. and Others v. Belgium* (8 July 2014) is not going to be considered, because the ECHR declared partly inadmissible the applicant´s complaints, and decided to strike the case out of its list because the other part of the dispute had been resolved before the EHCR Judgment.

3.1. Cases Mennesson and Labassee

Since the ECHR Judgments regarding the cases *Mennesson* and *Labassee* can be considered twin-judgments (they were issued the very same day, with the very same substantive content regarding cross-border surrogacy), I will focus on the first one.

3.1.1. Facts

Dominique and Sylvie Mennesson were a married couple, unable to have a child due to the wife's infertility. To fulfill their desire of having children, they decided to enter into a gestational surrogacy agreement, which is forbidden under French legislation; so, they went to California, where this kind of arrangements are legal and binding. The husband provided the gametes, and the egg came from a donor; after the *in vitro* fertilization, the embryo was implanted in another woman (the pregnant mother). A few months later the surrogate mother was found to be carrying twins and, in a judgment of 14 July 2000, the Supreme Court of California ruled that Mr. Mennesson would be the "genetic father" and Ms. Mennesson the "legal mother" of any child to whom the surrogate mother gave birth within the following four months; the judgment also specified the particulars that were to be entered in the birth certificate and stated that the Mennesson spouses should be recorded as the children's father and mother.

Twins were born on October of 2000, and their birth certificates were drawn up in accordance with the terms stated by the Supreme Court of California, but the French consulate in Los Angeles refused to register them in the Register of births, marriages and deaths. After a long and complicated procedure (§ 17 and ff. of the Judgment), in 2011 the French Supreme Court (*Court de Cassation*) ruled that the refusal to register the particulars of a birth certificate drawn up in execution of a foreign court decision, is justified where that decision contains provisions which conflict with essential principles of French law. This decision was contested before the European Court of Human Rights. During all these years, the children lived and grew up with the Mennesson spouses.

I would like to underline a few relevant circumstances of this case: i) there is a biological (genetic) relation between the twins and Mr. Mennesson, who provided the male gametes: he is their biological father; ii) when the European Court of Human Rights issued its judgment, Mr. and Mrs. Mennesson and the children have lived together for almost fourteen years; iii) both the Mennesson and the children were applicants before the European Court of Human Rights.

3.1.2. Decision of the Court

The European Court ruled in June 2014, that there has been a violation of Article 8 of the European Convention of Human Rights with regard to the children's right to respect for their private life.[31] Some of the statements of the Court are worth emphasizing:

a) The Court underlined the lack of consensus in Europe on the lawfulness of surrogacy arrangements or the legal recognition of the relationship between intended parents and children thus conceived abroad. This lack of consensus confirms that the States must in principle be afforded a wide margin of appreciation, regarding the decision not only whether or not to authorize this method of assisted reproduction but also whether or not to recognize a legal parent-child relationship between children legally conceived as the result of a surrogacy arrangement abroad and the intended parents (§ 77–79). But, on the other hand, the Court also asserts that where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted (§ 77 and 80).

b) The Court accepted that the French Government may consider that its decision pursued two of the legitimate aims listed in the second paragraph of Article 8 of the Convention: the "protection of health" and "the protection of the rights and freedoms of others." More specifically, the Court understood that the reason France refused to recognize a legal parent-child relationship between children born abroad as the result of a surrogacy agreement and the intended parents, is that it seeks to deter its nationals from having recourse to methods of assisted reproduction outside the national territory that are prohibited on its own territory, and aims to protect children and surrogate mothers (§ 62).

c) The Court considered that the lack of recognition under French law of the legal parent-child relationship between the Mennesson spouses and the children necessarily affects their family life (§ 87–89): as the children do not have French civil-status documents or a French family record book, the

[31] Article 8 of the European Convention on Human Rights: "1.Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Mennesson are obliged to produce US civil documents accompanied by an officially sworn translation each time access to a right or a service requires proof of the legal parent-child relationship (for example, when registering the children with social security or applying to the Family Allowances Office for financial assistance): in addition, the children do not have French nationality, and this can affect to their right to remain in France once they attain their majority. On the other hand, the Court considered that whatever the degree of the potential risks for the applicants' family life, the Mennesson and the children have been able to overcome them during the years they have lived together in France, so these practical difficulties would not exceed the limits required by compliance with Article 8 of the European Convention of Human Rights (§ 92–93).

d) The Court stated that by preventing the children from the recognition and establishment under French law of their legal relationship with their biological father, France overstepped the permissible limits of its margin of appreciation, taking into account the importance of biological parentage as a component of the children's identity: "not only was the relationship between the third and fourth applicants and their biological father not recognized when registration of the details of the birth certificates was requested, but formal recognition by means of a declaration of paternity or adoption or through the effect of de facto enjoyment of civil status would fall foul of the prohibition established by the Court of Cassation in its case-law in that regard."

3.1.3. Advisory opinion of the European Court of Human Rights.

On 10 April 2019, the ECHR issued an *Advisory Opinion* concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, at the request of the French Court of Cassation.

This *Advisory opinion* concerns only the situation in which a child born through a gestational surrogacy arrangement abroad was conceived using the gametes of the intended father (who is the biological father), and the eggs of a third-party donor (*Advisory opinion* nrs. 27 and 28). The ECHR opinion is as follows:

> In a situation where, as in the scenario outlined in the questions put by the Court of Cassation, a child was born abroad through a gestational surrogacy arrangement and was conceived using the gametes of the intended father

and a third-party donor, and where the legal parent-child relationship with the intended father has been recognised in domestic law:

1. the child's right to respect for private life within the meaning of Article 8 of the Convention requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the "legal mother";
2. the child's right to respect for private life within the meaning of Article 8 of the Convention does not require such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad; another means, such as adoption of the child by the intended mother, may be used provided that the procedure laid down by domestic law ensures that it can be implemented promptly and effectively, in accordance with the child's best interests.

The ECHR states that *"what the child's best interests – which must be assessed primarily* in concreto *rather than* in abstracto *– require is for recognition of that relationship, legally established abroad, to be possible at the latest when it has become a practical reality"* (nr. 52): this *"practical reality"* seems to be connected to the duration of the cohabitation between the intended parents and the children (in the case *Mennesson,*almost fourteen years, as noted above).

Finally, it is worth underlining that, according to art. 5 of the 16 of the Protocol No. 16 to the European Convention on the Protection of Human Rights, *"advisory opinions shall not be binding"*.

3.2. Cases Foulon and Bouvet[32]

The cases of *Foulon* and *Bouvet* came from two different applications (but also, so to speak, "twin-applications") that the ECHR decided in the same Judgment, the facts and the arguments being very similar to each other. On the other hand, the reasoning of the Court focuses just in one legal issue, as we are going to see.

The main structure of the facts underlying the applications in the cases *Foulon* and *Bouvet,* were very similar to the facts that leaded to the judgments *Mennesson*

[32] The ECHR Judgment in the cases *Foulon and Bouvet* is available only in French.

and *Labasee*: international surrogacy arrangements, children born abroad, intended fathers trying to get the children registered as their own legal children in France, rejection of the request by French administrative and judicial authorities… That is why it is not worthwhile to detail the facts on which the *Foulon* and *Bouvet* applications were based. Anyway, I would like to briefly underline one fact, one omission and the legal point of debate:

a) The fact: the most relevant factual difference between the cases *Foulon/Bouvet* and the cases *Mennesson/Labassee* is that in the first two cases the international surrogacy arrangements were concluded between one man alone and the surrogate mother, and not between a married couple and the surrogate mother, as happened in the cases *Mennesson* and *Labasee*. So, the legal parent-child relationship at stake in these cases was the one linking one adult with one child (or two children, in the case *Bouvet*). However, this differential fact had no impact on the ECHR decision, nor has been underlined by the Court.

b) The omission: the *Foulon/Bouvet* judgment does not mention whether there are or not biological (genetic) ties between the intended fathers and the children: this omission must be stressed on account of the relevance given by the ECHR to biological ties in both the cases *Mennesson/Labassee* and *Paradiso-Campanelli*, as we are going to see below.

c) The legal point of debate: there is a very significant difference from the legal point of view between the ECHR Judgment in the joint cases *Foulon/Bouvet,* and the ECHR judgment in the cases *Mennesson* and *Labassee*: the French Supreme Court change of mind regarding its case-law concerning international surrogacy agreements, change that took place after the ECHR *Mennesson/Labassee* judgments. After this change, the recording of the legal parent-child relationship between children born abroad as a consequence of international surrogacy arrangements, and their biological parents, in the French registry of birth, marriages and death was allowed. In fact, the French Government alleged this change of the French case-law in support of its position against the *Foulon/Bouvet* applications. But, on the other hand, the French Government added that: i) regarding Mr. Foulon and "his" child, this change would not apply because of the *res iudicata* principle; ii) concerning Mr. Bouvet and "his" children, the solution suggested by the French Government was not completely clear: according to it, the legal ways leading to the establishment of the legal parent-child relationship between

> Mr. Bouvet and the children, were feasible (in French: "*envisageable*"), and the French Government said they were going to reflect on the possibility of a review procedure that can solve this sort of situations (§ 54). That is why the ECHR considered that the legal situation in France was far from being completely clear: the French Government explanations, and the way it suggested to solve the situations of the children involved, were merely hypothetical and did not guarantee the full respect of the children's rights. These are the reasons why the ECHR held that in these cases there had been a violation of Article 8 of the Convention with regard to the children's right to respect for their private life.

On 19 January 2017, the ECHR issue a judgment on the case of *Laborie v. France:* the main facts are very similar to the facts of the cases of *Foulon and Bouvet,* and so is the reasoning of the Court too.

These two judgments are a clear reaffirmation of the *Mennesson* doctrine: they relay on the reasons and arguments given in that judgment, and deal with a very different issue (new legal circumstances: the change of the French Supreme Court legal opinion), so their relevance concerning international surrogacy arrangements is secondary.

3.3. The case of Paradiso-Campanelli

3.3.1. Facts

Mrs. Paradiso and Mr. Campanelli were a married couple that, after having unsuccessfully tried to have a child, finally decided to attempt surrogate motherhood, which is prohibited by Italian Law. To that end, they contacted a Moscow-based clinic, and they entered into a gestational surrogacy agreement, the egg coming from a donor and the sperm supposedly coming from Mr. Campanelli. Mrs. Paradiso stated that she travelled to Moscow, transporting from Italy her husband's seminal fluid, which she handed in at the clinic. After the fertilization process, two embryos were implanted in the surrogate mother's womb in June of 2010, and the Russian clinic certified that Mr. Campanelli's seminal fluid had been used for the fertilization.

The child was born in Moscow on February 2011. On the same day, the surrogate mother gave her written consent to the child being registered as the Paradiso-Campanelli's son, her declaration being worded as follows:

> I, the undersigned… have given birth to a boy in the … maternity hospital in Moscow. The child's parents are an Italian married couple, Giovanni Campanelli, born on … and Donatina Paradiso, born on…, who expressed in writing their wish to have their embryos implanted in my womb.
> On the basis of the foregoing and in accordance with section 16(5) of the Federal Law on Civil Status and Article 51(4) of the Family Code, I hereby give my consent for the above couple to be entered in the birth record and the birth certificate as parents of the child to whom I have given birth…

Mr. Campanelli and Mrs. Paradiso were registered as the new-born baby's parents by the Registry Office in Moscow, that issued a birth certificate, which indicated that the applicants were the child's parents. The Italian Consulate issued the documents enabling the child to leave for Italy with Mrs. Paradiso, and they arrived in Italy on April 2011. From 5 May on, several proceedings were opened in Italy against the Paradiso-Campanelli spouses, based on the violation of Italian Law on adoption and reproductive technologies, and the Italian authorities refused the registration of the child. On 16 May 2011, the Minors Court placed the child under guardianship. On 1 August 2011 Mr. Campanelli and the child underwent DNA testing, and the result of these tests showed that there was no genetic link between them (and being the egg from a donor, it follows that there was not any genetic link between Mrs. Campanelli and the child: § 37, 133, 142). Mrs. Paradiso and Mr. Campanelli sought an explanation from the Russian clinic, that in a letter of 20 March 2012, informed them that they had been surprised by the results of the DNA test: the clinic stated that there had been an internal inquiry, since an error had clearly occurred, but it had proved impossible to identify the individual responsible for the error, given that there had been dismissals and recruitment of other staff in the meantime.

In October 2011, the Minors Court ordered that the child be removed from the Paradiso-Campanelli home, taken into the care of the social services and placed in a children's home. The child received a different family name, and was adopted by a new family in 2013. Italian Courts rejected all Paradiso-Campanelli spouses' efforts to recover the child, and finally they challenged all these decisions before the European Court of Human Rights. The Court, in a first judgment of the Chamber issued on 25 January 2015 ruled that Italy violated the Art. 8 of the European

Convention of Human Rights, because the Italian authorities failed to strike the fair balance between the interests at stake.[33] Italy appealed before the Grand Chamber.

I would also like to underline a few circumstances of this case: i) there was not any biological tie between the Paradiso-Campanelli spouses and the child; ii) the child has lived with the spouses for six months, preceded by a period of about two month's shared life between Mrs. Paradiso and the child in Russia; iii) the child was not a party in the proceedings before the Court, because the European Court ruled, from its very first decision (25 January 2015), that the applicant couple did not have the standing to act before the Court on behalf of the child.

3.3.2. Decision of the Court

The Grand Chamber ruled in its judgment January 2017, that there has been no violation of Article 8 of the Convention. I would also like to emphasize some of the statements of the Court:

1. Although the termination of their relationship with the child is not directly imputable to the Paradiso-Campanelli spouses, the Court stressed that this is the consequence of the legal uncertainty that they themselves created in respect by engaging in conduct that was contrary to Italian law (§ 156). In this respect, the Grand Chamber repeatedly mentions the unlawfulness of the behavior of the applicants, and justifies the decisions taken by the Italian Courts in order to protect the Italian Law (§ 199, 201 and ff.), but also in order to protect the women and children potentially affected by practices (as surrogacy arrangements) which Italy regards as highly problematic from an ethical point of view (§ 203).
2. Given the absence of any biological ties between the child and the intended parents, the short duration of the relationship with the child and the uncertainty of the ties from a legal perspective, the Court considered that the conditions enabling it to conclude that there existed a *de facto* family life have not been met (§ 157).
3. The Court considered that the measures taken by Italian authorities in respect of the child amounted to an interference with the applicants' private life, but considered also that that this interference was in accordance with the law,

[33] It needs to be noted that the Court also stated that "given that the child has undoubtedly developed emotional ties with the foster family with whom he was placed at the beginning of 2013, this finding of a violation in the applicants' case cannot therefore be understood as obliging the State to return the child to them" (§ 88).

pursuing legitimate aims, and necessary in a democratic society to reach these aims (§ 174, 175–178).

4. The Court asserted that its task is not to substitute itself for the competent national authorities in determining the most appropriate policy for regulating the relationship between intended parents and a child born abroad as a result of commercial surrogacy arrangements, which are prohibited in the respondent State (§ 180).
5. The Court stated that the legitimate aim of protecting children includes not merely the child in the specific case decided by the Court, but also children more generally (§ 197).

3.3.3. Concurring and dissenting opinions

The *Paradiso-Campanelli* judgment was accompanied by some concurring opinions (A), and one dissenting opinion (B).

A) Concurring opinions

Regarding the concurring opinions, I find especially interesting the one signed by Judges De Gaetano, Pinto de Albuquerque, Wojtyczek and Dedov, because this opinion directly faces surrogate motherhood. They regret that the Court has not taken a clear decision on surrogate motherhood (and surrogacy agreements), because they think: a) that gestational surrogacy, whether remunerated or not, is incompatible with human dignity, because it constitutes degrading treatment, not only for the child but also for the surrogate mother, and because it amounts to the sale of the child, according to the Article 2 of the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (according to which "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"). In addition, they mention other international instruments that can be considered as violated by gestational surrogacy arrangements: the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (Article 2), the Convention on the Rights of the Child (Article 35), or the principles adopted by the Ad Hoc Committee of Experts on Progress in the Biomedical Sciences of the Council of Europe; b) that surrogate motherhood deprives the child of his or her gestational mother, who completely disappears from the life of the child; c) That surrogacy forgets the strong biological and psychological relationship created between the mother and the child during the pregnancy.

In the same vein, I would like to stress a paragraph selected from the concurring opinion of Judge Dedov: "As regards solidarity, I do not believe in surrogate motherhood as a voluntary and freely-provided form of assistance for those who cannot have children; I do not believe that this is a sincere and honest statement. Solidarity is intended to help those whose life is at stake, but not those who merely desire to enjoy a full private or family life."

B) Joint dissenting opinion

The dissenting opinion was signed by Judges Lazarova Trajkovska, Bianku, Laffranque, Lemmens and Grozev: they do not share the view of the majority, because they think that in the specific circumstances of the present case Article 8 of the European Convention of Human Rights Convention has been violated. More specifically, they believe: 1) that although the period of cohabitation was in itself relatively short, the Paradiso-Campanelli spouses had acted as parents towards the child, hence there existed a *de facto* family life between them and the child (§ 5); 2) that the notion, coming from the Italian authorities, that the child was in state of "abandonment" because the applicants were not, legally speaking, the parents, was excessively formal, in a manner that is incompatible with the requirements stemming from article 8 of the Convention (§ 8); 3) That Italian Courts at no point ask themselves whether it would have been in the child's interest to remain with the persons who had assumed the role of his parents, and did not sufficiently address the impact that the removal would have on the child's well-being (§ 12); 4) In conclusion, that it has not been shown that the Italian authorities struck the fair balance that had to be maintained between the competing interests at stake in this case.

3.4. The ECHR judgments on international surrogacy arrangements issues: some conclusions and a few reflections

Now, it is time to draw some more general conclusions from these Judgments:

1) The European Court of Human Rights has not expressed a clear position in regard to surrogate motherhood. Rather, after underlining that there is not consensus among the European countries, so that the States have a wide margin of appreciation –particularly where the case raises sensitive moral or ethical issues – (*Mennesson* § 78, *Paradiso* § 194), the Court states that its task is not to substitute itself for the competent national authorities in determining the most appropriate

policy for regulating this issue (*Mennesson* § 78, *Paradiso* § 180). In particular, the *Mennesson* judgment does not endorse surrogate motherhood, because the Court does not decide directly about this issue. The decision of the Court is mainly based on two points: i) the biological link that exists between Mr. Mennesson and the twins, link that is part of the identity of the children, and whose legal recognition was prevented by French authorities; ii) the time that the Mennesson spouses and the children have lived together (almost fourteen years). From this point of view, it seems to be clear that is not the same, mainly for the children involved, living together for years, that only for a few months when being newborn children.

2) The judgments of the European Human Rights Court deal with the problems linked to the "reproductive tourism", inside or outside Europe: the cases in which a couple (or an individual) from a country that prohibits or restricts surrogate motherhood, go to a country in which this is legal, and after the birth try to register the child as son or daughter of them in their own country. This behavior entails a clear legal fraud, the intended parents trying to avoid their national prohibitive or restrictive Law: the ECHR is aware that endorsing this conduct through its judgments would be tantamount to legalizing the situation created by the intended parents, in breach of important rules of their national Law. That is why the ECHR emphasizes the relevance of the aims pursued by national Laws when banning or restricting surrogate motherhood.

This approach is more important in *Paradiso* than in *Mennesson*, where other considerations, linked to the identity and the best interest of the child (but also to the existence of biological ties, and the length of time the intended parents and the children have lived together), have proved to be paramount. Indeed, the consideration that the national rules that prohibit or restrict surrogacy are aimed to the protection of the women and children involved is very significant in the *Paradiso* Judgment.

3) Herein, I would like to stress one apparently isolated and incidental phrase of the *Paradiso* judgment, that in my opinion is a very important one: protecting children refers "not merely the child in the present case but also children more generally" (§ 197). Banning surrogacy is intended to protect women and children in general, and according to the ECHR, this protection has to take into account not only this particular child, but children (or women, if I may add) in general too: preventing children trafficking is a real way to protect children, even if in one particular case the child "sold" is living in a loving, caring family (the child's "buyers"). In other words, the "this particular child" approach seems to be insufficient, because this could lead to situations in which children trafficking is allowed, through legally

accepting the consequences of that trafficking. We will go back to this issue when dealing with the *UN Special Rapporteur Report*.

4) From both judgments, there arises the relevance of two circumstances mentioned above: the existence of biological ties, and the time that the intended parents and the children have lived together. In the case *Mennesson*, these circumstances were in the basis of the legal argumentation developed by the Court: indeed, Mr. Mennesson was the twins' biological father, and the Mennesson spouses and the children have lived together for almost fourteen years. In the case of *Paradiso*, things were very different: there was not a biological relationship between the spouses and the child, and they lived together for six months. From this point of view, the really quick response of the Italian authorities, removing the child from his intended parents, and placing him in a new family has proven to be key for getting a proper balance between the interest of the State and the best interest of the child, in the view of the EHCR. One could suggest that there is a sort of "communicating vessels" relation between the biological (genetic) ties and the length of time the intended parents and the children lived together: the more the time they have been together, the less the legal relevance of the biological ties (and conversely, the less the time they have lived together, the more the legal relevance of biological ties).

5) Also from this point of view, it is worth underlining the relevance that the ECHR gives to the biological ties, in order to assess the real existence of a family life, against some approaches that try to diminish, even to eliminate, the importance of biology regarding the Law of parent and children.[34]

4. International initiatives concerning surrogacy

4.1. European level

I would like to mention two different initiatives at European level: one, very short, from the European Parliament (4.1.1.), and the other, from the Parliamentary Assembly of the Council of Europe, that is not a real initiative as such, but the rejection of an initiative (4.1.2.).

[34] One of the best examples of this approach is a report drafted in France: Ministère des affaires sociales et de la santé and Ministère délégué chargé de la famille (I. Thery, A. M. Leroyer), *Filiation, origines, parentalité. Le droit face aux nouvelles valeurs de responsabilité générationnelle*, Paris 2014, available at: http://www.justice.gouv.fr/include_htm/etat_des_savoirs/eds_thery-rapport-filiation-origines-parentalite-2014.pdf (last accessed: 8 August 2018).

4.1.1. European Parliament

On 17 December 2015, the European Parliament adopted a *Resolution on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter* [35], whose number 115 "condemns the practice of surrogacy, which undermines the human dignity of the woman since her body and its reproductive functions are used as a commodity; considers that the practice of gestational surrogacy which involves reproductive exploitation and use of the human body for financial or other gain, in particular in the case of vulnerable women in developing countries, shall be prohibited and treated as a matter of urgency in human rights instruments." It has been considered striking that this resolution, that so clearly condemns surrogacy, asks only for the prohibition of gestational surrogacy (in which the egg comes from the intended mother, or from a donor, so the pregnant mother is not genetically related to the child she is carrying).[36] Anyway, it must be underlined on the one hand, that the Resolution condemns all types of surrogacy (not just gestational), an on the other hand that gestational for-profit surrogacy is by far the most practiced at international level.[37]

4.1.2. Parliamentary Assembly of the Council of Europe

Since 2014, the Parliamentary Assembly of the Council of Europe (hereinafter, PACE) has dealt with issues arising from surrogacy arrangements. But the history of this activity is somehow a history of rejections, focused on the report commissioned by the PACE.

A) *The Report.* On 1 July 2014, several members of the PACE initiated a draft resolution entitled *Human Rights and Ethical Issues Related to Surrogacy*.[38] In the autumn of 2014, the PACE decided to put the draft resolution on its agenda, and a rapporteur (Petra de Sutter) was chosen on 28 January 2015 by the Committee on Social Affairs, Health, and Sustainable Development to draw up a report. The result of this mandate was the first *Report on Human Rights and Ethical Issues Related*

[35] See: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2015–0470 (last accessed: 8 August 2018).

[36] PACE *Report on Children's Rights Related to Surrogacy*, p. 28: the rapporteur considers traditional surrogacy (in which the pregnant mother is also the genetic mother, becausse she has provided the egg) as the worst form of surrogacy.

[37] HCCH Permanent Bureau (H. Baker), *A study of Legal Parentage…*, No. 135. PACE *Report on Children's Rights Related to Surrogacy*, p. 3.

[38] Available at: https://bit.ly/2NVZr7W (last accessed: 8 August 2018).

to Surrogacy, drafted by P. de Sutter. This report was firstly discussed and rejected (16 to 15 votes) in the meeting of the Council of Europe's Social Affairs and Health Committee, on 15 March 2016.[39]

The report was redrafted, now mainly focusing on children's rights, and was given a new title according to its new approach (*Children's Rights Related to Surrogacy*, hereinafter, in this section, *Children's Rights Report*). This new, redrafted report focuses on commercial surrogacy, and does not deal with altruistic surrogacy (despite the favorable opinion of the rapporteur).[40] The *Children's Rights Report* strongly opposes to for-profit surrogacy, and underlines the risks of commercial surrogacy regarding women and children.

1. Regarding women, the *Children's Rights Report* states:

> Most surrogate mothers in for-profit arrangements, especially in developing countries, are relatively poor and not well-educated. They run all the risks of a medically-induced pregnancy and childbirth. Moreover, they are particularly vulnerable because they are bound to give up the child shortly after birth – usually, their (full) payment will depend on it. This brings with it psychological risks, compounded if the surrogate is also the genetic mother, receives no proper counselling and/or cannot stay in contact with the child. There is also the risk that the intending parents will interfere with the pregnancy (placing limitations on the decision-making of surrogate mothers regarding their health or even the continuation of the pregnancy), or refuse to accept and thus abandon a child which is not healthy or otherwise not wanted anymore.[41]

2. Regarding children, the risks that commercial cross-border surrogacy entails for them are also presented:

> But what does this mean for the child(ren) born of such cross-border surrogacy arrangements in practice? Such children face various risks from multiple actors (intending parents, surrogate mothers, third parties, states in which the children are born, states to which the children are connected via their

[39] PACE *Report on Children's Rights Related to Surrogacy*, p. 1.
[40] PACE *Report on Children's Rights Related to Surrogacy, cit.*, p. 6
[41] PACE *Report on Children's Rights Related to Surrogacy*, p. 11.

> intending parents), as noted above: falling victim to child trafficking; falling victim to abandonment and/or abuse; becoming stateless or being left with "limping" parentage; having their right to know their origins violated, with the attendant possible negative psychological (and even physical) repercussions.[42]

The final recommendations of this report were as follows:

> 31. In conclusion, I thus propose that the Assembly recommend that:
> 31.1. member States prohibit all forms of for-profit surrogacy in the best interest of the child;
> 31.2. member States and the Committee of Ministers collaborate with the HCCH with a view to including, as a minimum requirement, a restriction of access to surrogacy arrangements to resident nationals of their own state and country in any multilateral instrument that may result from the HCCH's parentage/surrogacy project;
> 31.3. member States take care not to violate children's rights when taking measures to uphold public order and discourage recourse to surrogacy arrangements;
> 31.4. and the Committee of Ministers explore the desirability and feasibility of drawing up European guidelines to safeguard children's rights in relation to for-profit surrogacy arrangements.
> 32. Finally, there are many ways in which most of our member States could make adoption a more viable alternative to surrogacy, thus providing a child in need with loving parents and fulfilling infertile couples' desire of having a child – the best outcome for all.

I would like to underline that these recommendations included the complete banning of commercial surrogacy by the member States (so, within Europe), and the provision of strong measures to discourage cross-border for-profit surrogacy arrangements, the best interest of the child being the only limit to these measures.

[42] PACE *Report on Children's Rights Related to Surrogacy*, p. 25.

B) The decision of the Committee on Social Affairs, Health, and Sustainable Development

On 21 September 2016, the Committee on Social Affairs, Health, and Sustainable Development, dismissed the draft resolution as proposed in the *Children's rights Report* and, in a very unusual way[43], only adopted a short draft recommendation to be proposed to the PACE; the text of this recommendation was as follows:

> The Parliamentary Assembly recommends that the Committee of Ministers:
> 1.1. consider the desirability and feasibility of drawing up European guidelines to safeguard children's rights in relation to surrogacy arrangements;
> 2.2. collaborate with the Hague Conference on Private International Law (HCCH) on private international law issues surrounding the status of children, including problems arising in relation to legal parentage resulting from international surrogacy agreements, with a view to ensuring that the views of the Council of Europe (including those of the Parliamentary Assembly and the European Court of Human Rights) are heard and taken into account in any multilateral instrument that may result from the work of the HCCH.

It is easy to see that the recommendation finally adopted by the Committee was much softer than the recommendations drafted by rapporteur Petra de Sutter in the *Children's Rights Report,* since the adopted recommendation does not mention the prohibition of commercial surrogacy, or the proposed restrictions to the access to surrogacy arrangements.

C) The decision of the Parliamentary Assembly of the Council of Europe

On 11 October 2016, the PACE rejected the draft recommendation on *Children's Rights Related to surrogacy*, by 83 votes against 77. The PACE also rejected two amendments to that draft recommendation: i) the first amendment, recommending to condemn "all forms of surrogacy", was rejected by 78 votes against 75; ii) the second amendment, that recommended "an international prohibition on all forms of surrogacy arrangement as necessary to protect and safeguard the human rights and dignity of women and children, including the need for legal measures to prevent

[43] See: https://eclj.org/surrogacy/pace/gpa--le-conseil-de-leurope-rejette-la-rsolution-mais-propose-une-recommandation-dcryptage-_ftn1 (last accessed: 8 August 2018).

the proliferation of surrogacy agreements" was rejected by a single vote: 79 votes for and 80 against.[44]

These results show the sharp division of the members of the PACE with regard to surrogacy: neither the complete banning (as proposed in the above-mentioned amendments), nor a limited acceptance have found enough votes to prevail.

Anyway, I would like to stress that the *Explanatory Memorandum*, that is the main content of the *Report on Children's Rights Related to Surrogacy,* is worth reading, because it has very interesting information and reflections about the risks of surrogacy, and about the problems that arise from it.

4.2. Global level

4.2.1. Hague Conference on International Private Law

The Hague Conference on International Private Law (hereinafter, HCCH) began working on surrogacy (but just from the point of view of international private law concerning the parent-child relationship) on 2010, as part of the work developed regarding international adoption:[45] the Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference on April 2010, included surrogacy as new topic.[46] In this document, the Council acknowledged the complex issues of private international law and child protection arising from the growth in cross-border surrogacy arrangements, noted the impact of cases of surrogacy on the practical operation of the Intercountry Adoption Convention, and decided to place this issue on the draft Agenda for the meeting of the Special Commission on the practical operation of the Intercountry Adoption Convention. The Council also agreed that the private international law questions relating to international surrogacy arrangements should be kept under review by the Permanent Bureau.

Following these recommendations, the Special Commission on the practical operation of the Hague Convention on Intercountry Adoption, in its 2010 meeting,

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[44] See: https://eclj.org/surrogacy/pace/lassemble-du-conseil-de-leurope-rejette-le-projet-de-recommandation-pro-gpa-de-petra-de-sutter (last accessed: 8 August 2018).

[45] For the steps prior to 2010 (including documentation), see: https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy/surrogacy-2010-and-prior (last accessed: 8 August 2018).

[46] See: https://assets.hcch.net/docs/910669ed-7210–4873–948c-2b414ce7c07a.pdf (last accessed: 8 August 2018).

discussed the interplay between international surrogacy cases and this Convention, and, after noting the increase of international surrogacy, considered as inappropriate the use of the Convention in cases of international surrogacy and recommended that the Hague Conference should carry out further study of the legal, especially private international law, issues surrounding international surrogacy.[47]

Since 2010, the HCCH began its work on international surrogacy[48]; this work has been developed until now, the last meeting of the HCCH Experts' Group on the Parentage/Surrogacy Project being held on February 2018, and the next meeting being scheduled for September/October 2018. A preliminary report on the issues arising from international surrogacy arrangements was drawn up by the HCCH Permanent Bureau in 2012. After sending questionnaires on this issue to States, legal practitioners, health professional and surrogacy agencies, the HCCH Permanent Bureau published a preliminary document entitled *The Desirability and Feasibility of Further Work on the Parentage / Surrogacy Project*[49], accompanied by a long and interesting document entitled *A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements.*[50] The preliminary document recommended the "formation of an Experts' Group to facilitate further exploration of the feasibility of a binding multilateral instrument (or possible non-binding measures) in this area". That Expert's Group was convened in 2015[51], during the Council on General Affairs and Policy of the Conference. Since 2015 the Experts' Group has been working, but this work has proven to be a difficult task "owing to the complexity of the subject and the diversity of approaches by States to these matters", so that "definitive conclusions could not be reached at the meeting as to the feasibility of a possible work

[47] *Conclusions and Recommendations Adopted by the Special Commission on the practical operation of the Hague Convention on Intercountry Adoption* (June 2010), No. 25–26, available at: https://assets.hcch.net/docs/2ed33240–387f-4270-a418-d7de4ca0e464.pdf (last accessed: 8 August 2018).

[48] For the steps from 2011 onwards, including documentation, see: https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy/surrogacy-2011–2015 (last accessed: 8 August 2018). For the key documents, see: https://www.hcch.net/es/projects/legislative-projects/parentage-surrogacy (last accessed: 8 August 2018).

[49] This preliminary document is available at: https://assets.hcch.net/docs/6403eddb-3b47–4680-ba4a-3fe3e11c0557.pdf (last accessed: 9 August 2018).

[50] This study is available at: https://assets.hcch.net/docs/bb90cfd2-a66a-4fe4-a05b-55f33b009cfc.pdf (last accessed: 9 August 2018).

[51] Cf. https://assets.hcch.net/docs/8e756bba-54ed-4d3e-8081–1e777d6950dc.pdf (last accessed: 8 August 2018).

product in this area and its type or scope." [52] These difficulties still remain, and an agreement about how to deal with international surrogacy arrangements from the International Private Law perspective seems to be far from being reached, due to the different approaches to the issue from the States, but also from the experts gathered in the Expert's Group.[53]

Before finishing this section, I would like to add two remarks:

1. The HCCH began working on international surrogacy in the context of international adoption: though from the very beginning the HCCH considered that the use of the 1993 Hague Intercountry Adoption Convention in cases of international surrogacy was inappropriate, and though the use of the legal rules concerning international adoption was meant to solve the legal problems of filiation that arise from cross-border surrogacy, connecting surrogacy and adoption can provide a useful (but partial) perspective about how to deal with international surrogacy arrangements.
2. There is also a strong division within the HCCH –including both States and experts– regarding how to deal with international surrogacy, and this division has made more difficult (so far, impossible) to reach an agreement because the issue at stake is not just a legal-technical one, but affects basic legal issues that have to do with human rights and human dignity of women and children.

4.2.2. The 2018 Report of the United Nations Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material

The report presented to the UN Human Rights Council by the special rapporteur on the sale and sexual exploitation of children, on 2018[54], after giving a short information about the special rapporteur activities (*UN Special Rapporteur Report,* No. 1 to 6), also contains a thematic study on surrogacy and sale of children, and a few

[52] *Report of the February 2016 Meeting of the HCCH Experts' Group on Parentage / Surrogacy*, No. 16: https://assets.hcch.net/docs/f92c95b5–4364–4461-bb04–2382e3cod50d.pdf (last accessed: 8 August 2018).

[53] For the *Report of the Experts' Group on the Parentage/Surrogacy Project (31 January – 3 February 2017)*, see: https://assets.hcch.net/docs/ed997a8d-bdcb-48eb-9672–6d0535249doe.pdf (last accessed: 8 August 2018), No. 38.c) and 39; for the *Report of the Experts' Group on the Parentage/Surrogacy Project (6–9 February 2018)*, see: https://assets.hcch.net/docs/0510f196–073a-4a29-a2a1–2742c95312a2.pdf (last accessed: 8 August 2018), No. 44, 45, and 47.

[54] The report is dated to 15 January 2018. The sesion of the Human Rights Council was held from February to March 2018.

recommendations on how to uphold the prohibition of, and how to prevent, the sale of children through surrogacy (*UN Special Rapporteur Report,* numbers 7 to 78). It is not possible to give detailed notice of the content of this thematic study in this report[55], so I am going to make some remarks about that content:

1. The study is presented as a logical follow-up to the study on illegal adoptions (No. 8), and examines when surrogacy arrangements constitute the sale of children under international human rights law (No. 9); the implications of surrogacy for women's rights are beyond the scope of the study, except as regards issues that affect both children's rights and women's rights, or certain clear rights violations that illuminate regulatory or enforcement issues (No. 11).
2. The study underlines the existing division concerning the best way to deal with international surrogacy arrangements: regulating both altruistic and commercial surrogacy, prohibiting all forms of surrogacy, prohibiting commercial surrogacy while permitting altruistic surrogacy… (No. 20).
3. In order to avoid the difficulties tied to that division, the report identifies "a safe harbour, in a simple premise: all States are obligated to prohibit, and to create safeguards to prevent, the sale of children. While the imperative to prohibit and prevent the sale of children does not provide answers to all policy debates over surrogacy, it does narrow the scope of permissible approaches" (No. 22).
4. The report warns against the risk that States and the international community would attempt to legalize and normalize the sale of children and other human rights violations when regulating surrogacy. Concerning the problems arising from cross-border surrogacy, the report says: "the demand that domestic parentage orders be recognized globally without appropriate restrictions and without consideration of human rights concerns raises the related risk that a minority of jurisdictions with permissive approaches to commercial surrogacy, and with regulations that fail to protect the rights of vulnerable parties against exploitation, could normalize practices globally that violate human rights" (No. 23).
5. The study highlights the connection between international adoption and international surrogacy, but not considering international adoption as

[55] The full text of the report is available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/007/71/PDF/G1800771.pdf?OpenElement (last accessed: 8 August 2018).

a means to legalize the situation of children born from surrogacy, but noting that many of the arguments provided in support of some legal regimes for commercial surrogacy could, if accepted, legitimate practices in other fields, such as adoption, that are considered illicit (No. 24). The report asserts that there is a risk of relinquishing gains made in the development of child rights norms and standards, including those developed in the context of adoption (No. 25), taking into account that the commercial surrogacy industry and its advocates have insisted that the kinds of systems rejected by the international community in regard to adoption be accepted in regard to surrogacy systems (No. 26). In this respect, the report stresses that certain human rights principles are applicable to both adoption and surrogacy, including the prohibition of the sale of children, the best interests of the child as a paramount consideration, the lack of a right to a child, strict regulations and limitations regarding financial transactions, rights to identity and access to origins, and protections against exploitation (No. 28).

6. An important part of the report is devoted to show that commercial surrogacy, as currently practiced, usually constitutes sale of children as defined under international human rights law, because the three elements in the definition of sale of children according to Article 2.a of the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*[56], concur in commercial surrogacy arrangements: there is remuneration or any other consideration (payment), there is transfer of a child, and there is exchange of payment for transfer of the child (No. 42 and ff.).
7. The report strongly opposes the use of the expressions "right to procreate" (noting that this terminology is not found in international human rights instruments) and "right to a child", that does not exist under international Law: "a child is not a good or service that the State can guarantee or provide, but rather a rights-bearing human being. Hence, providing a 'right to a child' would be a fundamental denial of the equal human rights of the child. The 'right to a child' approach must be resisted vigorously, for it undermines the fundamental premise of children as persons with human rights" (No. 64).

[56] "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."

8. The report accepts that altruistic surrogacy does not entail sale of children, but warns about the development of organized surrogacy systems labeled "altruistic", which often involve substantial reimbursements to surrogate mothers and substantial payments to intermediaries: payments to intermediaries and significant reimbursements or payments made using open-ended categories such as "pain and suffering" or "professional services" may be considered as indications of commercial surrogacy (No. 69).
9. Regarding the situation faced by States that prohibit or restrict surrogacy, the study asserts that "given the risk of sale of children in both regulated and unregulated commercial surrogacies, States generally should not automatically recognize parentage orders or birth records from foreign States in respect of commercial surrogacies, but should review carefully the proceedings abroad. The State of the intending parents is responsible for conducting post-birth best interest determinations, protecting the child's identity rights and access to origins, and making independent assessments as to parentage, and also for inquiring into the treatment and post-birth consent of the surrogate mother. (…) The States concerned, namely the State(s) of the intending parents and the State in which the child is born, are responsible for ensuring that statelessness does not occur" (No. 70).
10. The *Special Rapporteur Report* concludes with some recommendations addressed to the States (No. 77) and to the international community (No. 78).

10.1) From the recommendations to the States, I am going to select three, concerning commercial and altruistic surrogacy:

(c) Create safeguards to prevent the sale of children in the context of commercial surrogacy, which should include either the prohibition of commercial surrogacy until and unless properly regulated systems are put in place to ensure that the prohibition on sale of children is upheld, or strict regulation of commercial surrogacy which ensures that the surrogate mother retains parentage and parental responsibility at birth and that all payments made to the surrogate mother are made prior to any legal or physical transfer of the child and are non-reimbursable (except in cases of fraud) and which rejects the enforceability of contractual provisions regarding parentage, parental responsibility, or restricting the rights (e.g. to health and freedom of movement) of the surrogate mother;

(d) Create safeguards to prevent the sale of children in the context of altruistic surrogacy, which should include, where altruistic surrogacy is permitted, proper regulation of altruistic surrogacy (e.g. to ensure that all reimbursements and payments to surrogate mothers and intermediaries are reasonable and itemized and are subject to oversight by a court or other competent authority, and that the surrogate mother retains parentage and parental responsibility at birth);
(j) Protect the rights of all surrogate-born children, regardless of the legal status of the surrogacy arrangement under national or international law, including by protecting the best interests of the child, protecting rights to identity and to access to origins, and cooperating internationally to avoid statelessness;

10.2.) And from the recommendations addressed to the international community, I am going to select two:

(c) Create safeguards to prevent the sale of children in the context of commercial surrogacy, which should include either the prohibition of commercial surrogacy until and unless properly regulated systems are put in place to ensure that the prohibition on sale of children is upheld, or strict regulation of commercial surrogacy which ensures that the surrogate mother retains parentage and parental responsibility at birth and that all payments made to the surrogate mother are made prior to any legal or physical transfer of the child and are non-reimbursable (except in cases of fraud) and which rejects the enforceability of contractual provisions regarding parentage, parental responsibility, or restricting the rights (e.g. to health and freedom of movement) of the surrogate mother;
(d) Create safeguards to prevent the sale of children in the context of altruistic surrogacy, which should include, where altruistic surrogacy is permitted, proper regulation of altruistic surrogacy (e.g. to ensure that all reimbursements and payments to surrogate mothers and intermediaries are reasonable and itemized and are subject to oversight by a court or other competent authority, and that the surrogate mother retains parentage and parental responsibility at birth).

5. Final remarks

Drawing general conclusions from the previous sections of this report is not an easy task. Anyway, some general trends can be identified:

1. The first one is probably **division**. Surrogacy, and particularly international surrogacy is a very divisive issue, because of what is at stake (dignity and human rights of women and children, but also money and business): i) there is division in the European Court of Human Rights, not only on account of the slightly different approaches of the cases *Mennesson* and *Paradiso,* but within the Court itself, as evidenced by both the concurring and dissenting opinions in the case *Paradiso*; ii) there is division in the Parliamentary Assembly of the Council of Europe, that has been unable to arrive to a decision about this; iii) there is division within the Hague Academy of International Private Law Expert's Group on Parentage and Surrogacy, that keep working on this issue because of the different views of the States and the experts.
2. This division makes very difficult to reach a **global agreement** regarding international surrogacy, and how States (mainly the States that prohibit or restrict surrogacy) have to face the situation of children born abroad as a consequence of international surrogacy arrangements. In this respect, two further considerations can be made:
   2.1. Till an agreement is reached, any national prohibitive or restrictive regulation that one country might adopt in respect of surrogacy will have very limited efficacy, because the threshold of what is allowed and the effectiveness of the national laws that regulate these practices will be determined by the most permissive regulation which exists and guarantees minimal legal certainty.
   2.2. There appears to be a growing consensus that the national answer to these situations that lies only in taking into account the individual interest of the particular child involved in every specific case, is insufficient, because this could lead to situations in which children trafficking is allowed: so, the interest of children in general has to be considered. That is why, as the *UN Special Rapporteur Report* suggests, States should not automatically recognize parentage orders or birth records from foreign States in respect of commercial surrogacies, but should review carefully the proceedings abroad in order to avoid the sale of children.

3. There are growing concerns about how international surrogacy arrangements could impact on children and women's right, and about the risks of sale of children and commodification and exploitation of vulnerable women. Indeed, international surrogacy is basically business and market, not altruism or solidarity: that is why international surrogacy arrangements are governed by the logic of commercial contracts, giving to the intended parents a strong control over the body, the health and the life of the pregnant mother during pregnancy. According to the content of these contracts, surrogacy is not merely "renting a womb", but "renting" a body and a soul (body, health, privacy, decisions…), i.e., a human being as a whole.
4. Taking adoption (and more specifically international adoption) in consideration can be of help to address the issues stemming from international surrogacy, and the risks linked to this, because they are quite similar to the ones arising from international adoption: the rules adopted to prevent abuses and sale of children, and to protect the rights of children and women in international adoption could be used as template to draft parallel rules regarding international surrogacy. However, there is a basic concern that needs to be addressed first of all: while adoption itself is undoubtedly a fair way to become a father or a mother, there are serious doubts about surrogacy, because this necessarily requires the "use" of a woman as pregnant mother, and that "use", can easily be considered itself as an abuse. So, while prohibition of international adoption has no sense, complete prohibition of surrogacy can (and must) be considered as a reasonable option.

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Motherhood under domestic constitutional principles (at the example of the 1997 Polish Constitution)[1]

1. Introduction

In the light of the Preamble to the Constitution of the Republic of Poland of 1997 (hereinafter: The Constitution), the Republic of Poland is obliged to guarantee the development of future generations and the possibility of transferring to them the tradition of the Nation. In this context, it can be recognized that motherhood, in connection with the family, plays a key role, due to the fact that it would be difficult to imagine without it the succession of generations that could continue the National Tradition.

The Article 18 of the Constitution requires that the Polish State provide protection and care to specific entities ("natural persons") in the situations when they occur in specific "social roles."[2] According to Article 18: "Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed

[1] In the course of preparation of this article, the author has used the research conducted during the work on the commentary on the Constitution of the Republic of Poland edited by M. Safjan and L. Bosek (*Konstytucja RP. Tom I. Komentarz* – art. 1–86 [Constitution of the Republic of Poland. Vol. I. Commentary to Articles 1–86], Warszawa 2016).

[2] Cf. A. Mączyński, *Konstytucyjne podstawy prawa rodzinnego* [The constitutional grounds of family law], [in:] *Państwo prawa i prawo karne. Księga Jubileuszowa Profesora Andrzeja Zolla* [The state of law and criminal law. The Jubilee Book of Professor Andrzej Zoll], vol. 1, ed. P. Kardas, T. Sroka, W. Wróbel, Warszawa 2012, p. 774; R. Puchta, *Ochrona rodziny i małżeństwa w Konstytucji RP* [Protection of family and marriage in the Constitution of the Republic of Poland], [in]: *Minikomentarz dla maksiprofesora. Księga jubileuszowa profesora Leszka Garlickiego* [Mini-commentary for the maxi-professor. Jubilee Book of Professor Leszek Garlicki], ed. M. Zubik, Warszawa 2017, p. 167.

under the protection and care of the Republic of Poland." This article protects the four basic values (marriage, family, motherhood and parenthood) related to the functioning of the natural person in society, including motherhood as a specific type of interpersonal relationship.[3] It is a structural principle as well as the basis for formulating specific subjective rights, which are developed and confirmed in many other provisions of the Constitution (e.g. Article 47, Article 48, or Article 71 of the Constitution).[4]

Indication in the Article 18 of the Constitution one after another four values: marriage (with the indication that it is the union between a woman and a man), family, motherhood and parenthood, indicate a clear will of the legislator to show the relationship existing between them and expresses the basic principles of constitutional axiology.[5] The protection of the motherhood, as a family relationship, carried out by the public authorities must, therefore, take into account the vision of the family adopted in the Constitution as a persistent relationship between a man and a woman steered at the motherhood and the responsible parenthood.[6]

Maternity, although the word does not appear directly in this article, is also protected by Article 71 section 2 of the Constitution. According to it: "A mother, before and after birth, shall have the right to special assistance from public authorities, to the extent specified by statute." The social role in which a woman appears in society through the fact of her motherhood is the role of the mother. Motherhood

[3] Similarly, interpersonal relationships protected under Article 18 of the Constitution are marriage and parenthood.

[4] Judgment of the Constitutional Court of 29 April 2003, SK 24/02, OTK-A [Official Journal of the Constitutional Court; Polish: *Orzecznictwo Trybunału Konstytucyjnego. Zbiór Urzędowy*] 2003, No. 4, item 33.

[5] Cf. judgment of the Constitutional Court of 4 May 2004, K 8/03, OTK-A 2004, No. 5, item 37; R. Puchta, *Ochrona…*, p. 170; L. Garlicki, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz, tom III* [Constitution of the Republic of Poland. Commentary. Vol. III], ed. L. Garlicki, Warszawa 2003, Article 18, No. 4, p. 2; L. Garlicki, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz I. Wstęp. Art. 1–29* [Constitution of the Republic of Poland. Commentary. Vol. I. Introduction. Articles 1–29], ed. L. Garlicki, M. Zubik, Warszawa 2016, Article 18, No. 4, p. 490. Cf. judgment of the Highest Administrative Court of 20 March 2012, II FSK 1704/10, LEX No. 1124342.

[6] Judgment of the Constitutional Court of 12 April 2011, SK 62/08, OTK-A 2011, No. 3, item 22. Cf. A. Siostrzonek-Sergiel, *Kilka uwag na temat zakresu konstytucyjnej ochrony rodziny* [Some comments on the scope of constitutional protection of the family], MoP 2015, No. 23, p. 1257. According to L. Garlicki, [in:] *Konstytucja* (2016), Article 18, No. 13, p. 503: "The indication of 'motherhood' and 'parenthood' among values which are under the care and protection of the state that the legislator prefers the model of family of at least two generations. This preference should be respected by the legislator, who should create detailed regulations, to encourage marriages for motherhood and parenthood, and the future mothers to end the pregnancy by giving a birth to a child."

is therefore a relationship between her as a parent and her child (or children). Article 71 section 2 of the Constitution should also be treated as a specification of the structural principle of the protection of the motherhood expressed in Article 18 of the Constitution, because it affects the interpretation of this concept by defining both the time limits for protection and care (time before and after childbirth), as well as its content (right to special assistance from public authorities).[7] In this first provision, the legislator imposed additional obligations on the Polish state due to the importance of the motherhood in the legal system.[8]

The high position of motherhood in the Constitution is evident in the light of Article 18 of the Constitution, in which the lawmaker is obliged to provide the motherhood not only with protection but also with care, and also in the light of Article 71 section 2 of the Constitution, which obliges the lawmaker to provides a special assistance to the mother before and after childbirth. The consequence of constitutional regulation is the necessity to create an institutional guarantee in the legislation for such a value as motherhood.[9] Therefore, in Poland exists a legal obligation for the state to establish appropriate legal institutions that ensure the permanent place of the institution of motherhood in the Polish legal system.

[7] This provision complements the general principle of care and protection over maternity and parenthood contained in Article 18 of the Constitution (cf. judgment of the Constitutional Court of 8 May 2001, P 15/00, OTK 2001, No. 4, item 83 and judgment of the Constitutional Court of 13 April 2011, SK 33/09, OTK-A 2011, No. 3, item 23).

[8] In the jurisprudence and in the literature, it is emphasized that this provision structure one of the elements of the so called social state – cf. judgment of the Constitutional Court of 10 July 2000, SK 21/99, OTK 2000, No. 5, item 144; judgment of the Constitutional Court of 18 November 2014, SK 7/11, OTK-A 2014, No. 10, item 112; cf. B. Banaszak, M. Jabłoński, [in:] *Konstytucje Rzeczypospolitej oraz komentarz do Konstytucji RP z 1997 r.* [The constitutions of the Republic of Poland and a commentary to the Constitution of the Republic of Poland of 1997], ed. J. Boć, Wrocław 1998, p. 131.

[9] Cf. judgment of the Constitutional Court of 18 May 2005, K 16/04, OTK-A 2005, No. 5, item 51; judgment of the Constitutional Court of 4 September 2007, P 19/07, OTK-A 2007, No. 8, item 94 and judgment of the Constitutional Court of 25 July 2013, P 56/11, OTK-A 2013, No. 6, item 85; B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz* [Constitution of the Republic of Poland. Commentary], Warszawa 2012, Article 18, No. 7, p. 152.

2. The history of the Polish regulation

2.1. Constitutions of the Second Polish Republic and the Polish People's Republic

In the historical development of Polish constitutionalism, Article 103 section 3 of the so-called March Constitution of 1921 was the first reference to the institution of the motherhood.[10] The indicated article provided that "[s]eparate laws regulate the care of motherhood." The legislator probably meant in this respect with detailed provisions scattered over various laws protecting women during pregnancy and childbirth.[11] No special law on the motherhood protection was issued during the period when the March Constitution was in force. The provision of Article 103 section 3 of the March Constitution was also not upheld in force by Article 81 section 2 of the so-called April Constitution of 1935.[12]

The protection of motherhood was also "a matter of concern" of the socialist legislator. In the first version of Article 67 section 1 of the Constitution of the Polish People's Republic of 1952[13] stated that: "Marriage and the family are under the care and protection of the Polish People's Republic. The State gives particular care to families with many children."[14] Therefore, this article did not refer directly to motherhood. This provision was later amended by the Constitutional Amendment Act of 10 February 1976[15] and after renumbered as Article 79 of the Constitution of

[10] The Constitution of the Republic of Poland of 17 March 1921, Journal of Laws No. 44, item 267 with amendments (further as the March Constitution).

[11] Cf. Law on the work of adolescents and women of 2 July 1924 (Journal of Laws 1924, No. 65, item 636, with amendments), similarly cf. Law on Social Assistance of 16 August 1923 (Journal of Laws 1923, No. 92, item 726, with amendments).

[12] The Constitution of the Republic of Poland of 23 April 1935, Journal of Laws 1935, No. 30, item 227 (further as the April Constitution).

[13] The Constitution of the Polish People's Republic of 22 July 1952, Journal of Laws, No. 33, item 232 with amendments (further as the Constitution of the Polish People's Republic). Official translation is available at: http://libr.sejm.gov.pl/teko1/txt/kpol/e1952a.html.

[14] For more on this declaration, see: J. Gwiazdomorski, M. Grudziński, S. Kaleta, A. Wolter, *Założenia prawa rodzinnego w świetle Konstytucji Polskiej Rzeczypospolitej Ludowej* [Principles of family law in the light of the Constitution of the Polish People's Republic], [in:] *Zagadnienie prawne Konstytucji Polskiej Rzeczypospolitej Ludowej. Materiały Sesji Naukowej PAN, 4–9 lipca 1953 r., t. III* [Legal issues of the Constitution of the Polish People's Republic. Materials of the Polish Academy of Science Scientific Session of 4–9 July, 1953, vol. III], Warszawa 1954, p. 52 et seq., and especially p. 79 et seq.

[15] Journal of Laws No. 5, item 29. Official translation of of the Constitution of the Polish People's Republic after the changes from 1976 is available at: http://libr.sejm.gov.pl/teko1/txt/kpol/e1976.html.

the Polish People's Republic in section 1 he stated that: "Marriage, motherhood and family shall be safeguarded and protected by the Polish People's Republic. The State shall extend special protection to families with several children."[16] At the same time, Article 5 point 7 of the Constitution of the Polish People's Republic (also introduced by the Constitutional Amendment Act of 10 February 1976), also stated that: "The Polish People's Republic concerned about national development, shall protect the family, motherhood and the education of the young generation." This provision was located in the first chapter of the Constitution of the Polish People's Republic concerning the political structure of the State.

The aforementioned provisions were complemented by Article 66 section 2 point 2 of the Constitution of the Polish People's Republic, which in its original form provided that the equality of rights of women is guaranteed, *inter alia*, by "mother-and-child care, protection of expectant mothers, paid holidays during the period before and after confinement." This provision was also subsequently amended by by the Constitutional Amendment Act of 10 February 1976 and renumbered as Article 78 of the Constitution of the Polish People's Republic, with a new paragraph 3, which provided, among others, that "[t]he Polish People's Republic shall consolidate the position of women in society, especially of mothers working for profit and women, in general."[17]

2.2. Works in the Constitutional Committee of the National Assembly

The key to contemporary analysis about the constitutional concept of motherhood is the issue how the concept of motherhood (and the concept of parenthood, which is inevitably associated with it) were understood in the course of work in the Constitutional Committee of the National Assembly. In the case of the Constitution, which is adopted in a nationwide and popular referendum, it is extremely important how the understanding of certain constitutional concepts took shape during the discussions

[16] About amendments introduced by the Constitutional Amendment Act of 10 February 1976 – cf. Z. Radwański, *Zmiany konstytucyjne PRL dotyczące rodziny* [Constitutional changes in the Polish People's Republic Constitution regarding of the family], "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1977, No. 2, pp. 1–9.

[17] Cf. further Z. Radwański, *Konstytucyjna ochrona małżeństwa, macierzyństwa i rodziny* [Constitutional protection of marriage, motherhood and family], [in:] *Prace cywilistyczne* [Studies of the civil law], ed. S. Wójcik, Warszawa 1990, p. 233 et seq.

preceding the referendum, which was obviously influenced by the discussions in the course of work on the Constitution.

The necessity of the constitutional regulation of issues related to the family was pointed out at the early stages of work on the draft of the Constitution. It was underlined that the draft of the future Constitution could not omit the issues concerning family rights (protection of the family, marriage, motherhood and the child). It was pointed out that although this is not "individual right, but the right of the smallest community", it must be regulated in the chapter on the freedoms and rights of persons and citizens.[18]

The content of the current Articles 18 and 71 of the Constitution derives from the first version of the provision on family protection prepared by Wiktor Osiatyński. It stated in the first section that "[f]amily and parenthood are protected by law."[19] At the same session of the Subcommittee on Citizens' Rights and Obligations of the Constitutional Committee of the National Assembly on 2 December 1994, Leszek Wiśniewski presented a draft provision protecting marriage and a family whose section 1 was similar to the proposal of Wiktor Osiatyński and stated: "Marriage, family and motherhood are under the protection of law"[20], and in the fourth section: "Before and after childbirth, the mother has the right to special state aid, the scope of which is determined by the statute." The draft prepared by Wiktor Osiatyński was recommended by the Subcommittee for further work.[21]

In the course of work in the Editorial Subcommittee of the Constitutional Committee of the National Assembly (Polish: *Podkomisja Redakcyjna Komisji Konstytucyjnej Zgromadzenia Narodowego*), were submitted two new versions of the provision concerning protection of the family and motherhood.

The first version contained in section 1 a declaration, according to which "[f]amily and parenthood are protected by law." The second version stated in section 1 that "[f]he family as a basic and primary community in relation to the state has its own and inalienable rights", and in section 2: "Marriage as a union of a woman and a man, the family and motherhood are under the protection of the state."[22]

[18] Statement of Alicja Grześkowiak from 30 September 1994, Bulletin of the Constitutional Committee of the National Assembly 1995, No. 9, pp. 27–28.

[19] Project submitted at the meeting of the Commission held on 2 December 1994 – Bulletin of the Constitutional Committee of the National Assembly 1995, No. 10, p. 155.

[20] Bulletin of the Constitutional Committee of the National Assembly 1995, No. 10, p. 155.

[21] Bulletin of the Constitutional Committee of the National Assembly 1995, No. 10, p. 156.

[22] Bulletin of the Constitutional Committee of the National Assembly 1995, No. 11, p. 228.

During the discussion, it was noted that in section 2 of the second draft was also referring to motherhood, and it is difficult to "imagine motherhood in the case of a marriage of two men or two women." It was also proposed to confer section 1 of the first draft the wording: "Family and parenthood are under the protection of state and law."[23] In the response, it was emphasized that although the natural marriage of the aforementioned couples is not possible, there is also "legal motherhood, for example in the case of the relation of two homosexuals."[24]

There were also several other proposals for constitutional regulation of the aforementioned issues. The first of them – presented by Maria Kurnatowska and Lidia Błądek – after the amendment of its authors stated in the first section that: "Family and parenthood are protected by law." This project was initially approved by a small majority of the members of the Commission, and then rejected, due to the fact that it lost in a voting with the above-described variant of the provision prepared in the Editorial Sub-Committee of the Constitutional Committee of the National Assembly.

In the course of the further discussion it was proposed to extend the wording of the Article 15a of the draft Constitution by giving it the following content: "Family, marriage and motherhood are under care and protection of the Republic of Poland." It was pointed out that the provisions of the Constitution of the Polish People's Republic, which were during that time maintained in its force, contain a very similar formula and that there is no reason not to include much the same formula in the draft of the new Constitution.[25] This proposal was approved in the discussion in which it was indicated that its adoption would mean maintaining the norm contained in Article 79 section 1 of the Constitution of the Polish People's Republic, due to the fact that such a formula has "a specific normative content and defined historical background". Because of the fact that "this formula has some consequences for the codification of family and guardianship law" one should not change something what worked in foregoing practice.[26]

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[23] Statement of Maria Kurnatowska from 4 April 1995, Bulletin of the Constitutional Committee of the National Assembly 1995, No. 17, p. 33.

[24] Statement of Piotr Andrzejewski, 4 April 1995, Bulletin of the Constitutional Committee of the National Assembly 1995, No. 17, p. 33.

[25] Statement of Tadeusz Mazowiecki, 10 December 1996, Bulletin of the Constitutional Committee of the National Assembly 1997, No. 42, p. 15.

[26] Statement of Kazimierz Działocha, 10 December 1996, Bulletin of the Constitutional Committee of the National Assembly 1997, No. 42, p. 15.

To the draft, which became the current Article 18 of the Constitution, after the second reading in the National Assembly there were reported seven amendments.[27] *Inter alia*, it was postulated to replace the word "motherhood" with the word "parenthood" or to add to the text of the provision a phrase about the obligation of the state to take care and protection over "parenthood."[28] It was stated, that the intention of the reporters was "to introduce a category wider than motherhood", which would include paternity, in situations where fathers raise their children alone. It was emphasized that "parenthood includes both motherhood and fatherhood."[29]

During the discussion, it was stressed that Article 18 of the Constitution should be completed by the notion of parenthood, and it cannot be agreed to "replace motherhood with parenthood." It was pointed out that: "the motherhood is associated with physiological and psychological functions of the mother that are something else than parenthood" and the parental function is not "identical to the maternal function", and the lonely father, without any family, may have certain parental rights.[30] In opposition to this opinion, it was claimed that "a single father, as the notion suggests, must have a child, and if so, there the family exists."[31]

In the voting the members of the Commission rejected the amendment, which aim was replacing the concept of motherhood with the concept of parenthood and adopted an amendment that included the parenthood in the content of the draft.

Another amendment (numbered 53) was submitted by Stefan Pastuszka. Aim of this amendment was to give Article 18 ensuing wording: "Marriage, as a union of a woman and a man, family and motherhood are under the care and protection of the Republic of Poland."[32] At the beginning of the discussion it was raised out that if the amendment of Izabela Jaruga-Nowacka was previously approved in the voting and which aim was inclusion in the content of Article 18 of the draft the notion of the parenthood, the same notion should also be introduced as an auto-amendment to the submitted proposal. It was noted that if Stefan Pastuszka gave the amendment

[27] Bulletin of the Constitutional Committee of the National Assembly 1997, No. 43, p. 22.

[28] Proposal submitted by Izabela Jaruga-Nowacka discussed on the meeting held on 7 March 1997, Bulletin of the Constitutional Committee of the National Assembly 1997, No. 44, pp. 29–30.

[29] Statement of Piotr Marciniak, 7 March 1997, Bulletin of the Constitutional Committee of the National Assembly 1997, No. 44, p. 30.

[30] Statement of Jerzy Ciemniewski, 7 March 1997 Bulletin of the Constitutional Committee of the National Assembly 1997, No. 44, p. 30.

[31] Statement of Marek Borowski, 7 March 1997, Bulletin of the Constitutional Committee of the National Assembly 1997, No. 44, p. 30.

[32] Bulletin of the Constitutional Committee of the National Assembly 1997, No. 44, p. 31.

the following wording: "Marriage, as a union between a woman and a man, family, motherhood and parenthood are under the care and protection of the Republic of Poland", then "we would have a version, which could be acceptable by all."[33] A proposal to give such a content to Article 18 of the draft was approved by the members of the Commission, although Irena Lipowicz emphasized that: "Motherhood and parenthood are crossing concepts, because motherhood is a kind of parenthood, so it would be more logical to mention [in the draft] motherhood and fatherhood."[34] Despite these objections, the content of the provision corresponding to the current wording of the Article 18 of the Constitution was subsequently approved in the voting. In the voting 23 members of the Constitutional Committee of the National Assembly approved the draft, 8 members were against it and nobody abstained from voting.[35]

3. Influence of the international regulations on the Constitution of the Republic of Poland

When the Constitution was elaborated the protection of the motherhood contained in Article 18 of the Constitution did not have its historical source only in the March Constitution and the Constitution of the Polish People's Republic. Also, Article 25 section 2 sentence 1 of the International Bill of Human Rights[36] stated that: "Motherhood and childhood are entitled to special care and assistance."[37]

At the time of the adoption of the Constitution the explicit protection of the motherhood in the constitutional provisions of foreign countries occurred rather rarely (which is prevalent also currently). The motherhood is usually protected by the rules protecting the notion of family. A different regulation is, *inter alia,* foreseen in Article 31 sections 1 and 2 of the Constitution of the Republic of Italy of 27 December 1947, according to which the Italian Republic assists the formation of

[33] Statement of Marek Borowski, 7 March 1997, Bulletin of the Constitutional Committee of the National Assembly 1997, No. 44, p. 31.

[34] Statement of Irena Lipowicz, 7 March 1997, Bulletin of the Constitutional Committee of the National Assembly 1997, No. 44, p. 31.

[35] Bulletin of the Constitutional Committee of the National Assembly 1997, No. 44, p. 31.

[36] International Bill of Human Rights, 10 December 1948 (Resolution of the United Nations No. 217/III A).

[37] This provision supplement Article 16 section 3 of the Universal Declaration of Human Rights, which states that: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

the family and the fulfilment of its duties, with particular consideration for large families, through economic measures and other benefits and protects motherhood, children and the young by adopting necessary provisions.[38] To motherhood also indirectly refers Article 39 section 2 of the Constitution of Lithuania, dated to 25 October 1992, which states that "[t]he law shall make a provision for working mothers to be granted paid leave before and after childbirth, as well as favorable working conditions and other concessions."[39]

The protection of motherhood in the international human rights acts that have been issued since the adoption of the Universal Declaration of Human Rights is rather rare. However, usually motherhood is protected by guarantees granted to the family or which are associated with the protection of social rights. Examples of such regulations are Article 33 section 1 of the Charter of Fundamental Rights[40] or Article 8 of the European Social Charter[41], which confirms mothers' rights to protection from dismissal for a reason connected with maternity (either before or after childbirth) and the right to paid maternity leave and to parental leave following the birth or adoption of a child.[42]

[38] Official translation is available at: https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf.

[39] Translation available at: http://www3.lrs.lt/home/Konstitucija/Constitution.htm.

[40] Charter of Fundamental Rights (UE 2007 C 303/1 with amendments).

[41] European Social Charter, 18 October 1961 (Journal of Laws 1999, No. 8, item 67 with amendments).

[42] An example of protection of the motherhood through the protection of the family is Article 33 section 1 of the Charter of Fundamental Rights, according to which "The family shall enjoy legal, economic and social protection". Article 33 section 2 of the Charter of Fundamental Rights stated that: "To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child". Similarly Article 8 of the European Social Charter stated that, with a view to ensuring the effective exercise of the right of employed women to protection, the Contracting Parties undertake: (1) "to provide either by paid leave, by adequate social security benefits or by benefits from public funds for women to take leave before and after childbirth up to a total of at least twelve weeks"; (2) "to consider it as unlawful for an employer to give a woman notice of dismissal during her absence on maternity leave or to give her notice of dismissal at such a time that the notice would expire during such absence;"; (3) "to provide that mothers who are nursing their infants shall be entitled to sufficient time off for this purpose"; (4) to regulate the employment of women workers on night work in industrial employment and to prohibit the employment of women workers in underground mining, and, as appropriate, on all other work which is unsuitable for them by reason of its dangerous, unhealthy, or arduous nature.

4. The meaning of the motherhood and the notion of parenthood and fatherhood

The Constitution does not define the notion of "motherhood". It is undoubtedly connected with the concept of "mother" and means the relationship that exists between the child and his mother from the beginning of pregnancy, through the childbirth, to the death of one of them.[43] As it was noticed in the judgment of the Constitutional Tribunal of 28 May 1997, K 26/96[44], "The concept of motherhood expresses the necessary relationship between the mother and the child, and this relationship occurs on many levels: biological, emotional, social and legal. The function of this relationship is the proper development of human life, in its initial period in which it requires special care."[45]

The scope of the concept of "motherhood" as a relationship between a child and his mother falls within the concept of "parenthood" as a relationship between a parent and a child.[46] Due to the fact that Article 18 of the Constitution uses the more general notion of parenthood to describe the relationship between a parent and his child, the legislator could resign from the concept of motherhood. Alternatively, beside the notion of motherhood, he should use the notion of fatherhood, omitting the notion of parenthood. The proposals of such a distinction could be found at the

[43] Judgment of the Constitutional Court, 28 May 1997, K 26/96, OTK 1997, No. 2, item 19, in which court stated that "[t]he use of the noun by constitutional provisions indicates a specific relationship between a woman and a child, including a conceived child." Differently M. Nazar, *Niektóre zagadnienia małżeństwa i rodziny w świetle unormowań Konstytucji RP z dnia 2 kwietnia 1997 r.* [Some issues connected with the marriage and the family in the light of the norms of the Constitution of the Republic of Poland of 2 April 1997], "Rejent" 1997, No. 5, p. 115, who refers to the notion of motherhood only to a special relationship between a pregnant woman and her unborn child.

[44] Judgment of the Constitutional Court, 28 May 1997, K 26/96, OTK 1997, No. 2, item 19.

[45] M. Dobrowolski, *Status prawny rodziny w świetle nowej Konstytucji RP* [The legal status of the family according to the Constitution of the Republic of Poland], Przegląd Sejmowy 1999, No. 4, p. 25; L. Garlicki, [in:] *Konstytucja* (2016), Article 18, No. 13, p. 502. Cf. W. Borysiak, [in:] *Konstytucja RP. Tom I. Komentarz – art. 1–86* [Constitution of the Republic of Poland. Vol. I. Commentary to Articles 1–86], ed. M. Safjan, L. Bosek, Warszawa 2016, Article 18, No. 155, p. 490–491.

[46] A. Mączyński, Małżeństwo jako instytucja prawa konstytucyjnego [Marriage as an institution of constitutional law], [in:] Czynić postęp w prawie. Księga jubileuszowa dedykowana Profesor Birucie Lewaszkiewicz-Petrykowskiej [Make progress in law. A Jubilee Book dedicated to Professor Biruta Lewaszkiewicz-Petrykowska], ed. W. Robaczyński, Łódź 2017, p. 467. Cf. T. Smyczyński, Rodzina i prawo rodzinne w świetle nowej Konstytucji [The family and the family law in the light of the new Polish Constitution], „Państwo i Prawo" 1997, Nos 11–12, p. 189.

stage of the works of the Constitutional Committee of the National Assembly (cf. above point 2b of this article).

The analysis of the works of the Constitutional Committee of the National Assembly expressly indicates that the distinction between motherhood and parenthood was deliberate and its aim was to emphasize the social importance of motherhood. Article 18 of the Constitution simultaneously protect motherhood and parenthood due to the will of the legislator to emphasize in this way "the importance of the procreative function of the family."[47] Moreover, the adoption of the protection of motherhood in the aforementioned provision was justified by the legislator's will to emphasize that care and protection include a situation before the birth of a child, which could raise doubts if only the concept of parenthood would be adopt in the constitutional provisions.[48] A clear regulation in the Constitution the protection of the motherhood has also been made due to the fact that protection of motherhood also includes a child, which is conceived but not yet born.[49]

Although the legislator emphasized in Article 18 of the Constitution, the social meaning of motherhood, however, he did not decide at the same time to do the same in relation to paternity. The special protection of motherhood in the constitutional provisions does not mean that protection of paternity is automatically reduced or abolished. The paternity is undoubtedly protected by Article 18 of the Constitution and the notion of parenthood established there and is not diminish because of protection of motherhood either in Article 18 or Article 71 section 2 of the Constitution.[50] It is highly controversial to point out that the adoption of protection of motherhood in the Constitution reduces the legal protection of the paternity and excludes "promotion of the child's care by men from the earliest period after childbirth."[51] The protection of motherhood should therefore be correlated by

[47] A. Mączyński, *Konstytucyjne…*, p. 774; cf. issued on the ground of Article 79 section 1 of the Constitution of the Polish People's Republic judgment of the Constitutional Court of 28 May 1997, K 26/96, OTK 1997, No. 2, item 19.

[48] A. Mączyński, *Konstytucyjne…*, p. 767.

[49] Judgment of the Constitutional Court of 28 May 1997, K 26/96, OTK 1997, No. 2, item 19.

[50] L. Garlicki, [in:] *Konstytucja* (2016), Article 18, No. 13, p. 502 stated that the introduction of the concept of parenthood to the Constitution, along with the notion of motherhood, was justified by the fact, that: "reference to the protection and care of the state only to motherhood would lead to a complete omission of the father's role".

[51] T. Smyczyński, *Rodzina…*, p. 189 and B. Banaszak, *Konstytucja…*, Article 18, No. 6, p. 151; differently, however unclear, *K. Complak*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz* [Constitution of the Republic of Poland. Commentary, ed. M. Haczkowska, Warszawa 2014, Article 18, No. 3, p. 33.

the legislator with the protection of paternity. In the legal literature, it is indicated that this applies to determining parental authority over a child in all proceedings concerning him or her.[52]

5. The subjective and objective scope of the concept of motherhood

5.1. Introduction

The concept of "motherhood" includes not only the relationship of a woman to her already born child, but also the relationship of a woman to a child that is not yet born during the course of pregnancy.[53] This understanding of the notion of motherhood is in accordance with the general language, in which this term also covers the period of pregnancy of a woman. It was also accepted in the jurisprudence and in the legal literature on the ground of Article 79 section 1 point 1 of the Constitution of the Polish People's Republic.[54] The broad understanding of the concept of "motherhood" in the general language and the Constitution of the Republic of Poland is also reflected in Polish legislation. For example, in Polish Family and Guardianship Code – which is basic regulation in the field of Polish family law – the term "mother" refers to both a woman who has already given a birth to a child and to a pregnant woman (cf. e.g. Article 142 of the Family and Guardianship Code).

The jurisprudence has adopted that view that protection of motherhood does not only mean protection of the interests of a pregnant woman and mother, but also includes the life of a conceived child, "without whom the relationship of motherhood would be ceased."[55] As it was noticed in the judgment of the Constitutional Tribunal of 28 May 1997, K 26/96[56], an equal subject of protection of motherhood is also the already conceived child and its proper growth. The object of constitutional protection under Article 71 section 2 of the Constitution is the "mother" itself, although undoubtedly in an indirect way, the special help given to the mother before the birth of the child also directly affects it.

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[52] T. Smyczyński, *Rodzina…*, pp. 189–190.

[53] M. Dobrowolski, *Status…*, p. 25; L. Garlicki, [in:] *Konstytucja* (2016), Article 18, No. 13, p. 502. Similarly, T. Smyczyński, *Rodzina…*, p. 190.

[54] Judgment of the Constitutional Court of 28 May 1997, K 26/96, OTK 1997, No. 2, item 19 and Z. Radwański, *Konstytucyjna…*, p. 236.

[55] Judgment of the Constitutional Court, 28 May 1997, K 26/96, OTK 1997, No. 2, item 19.

[56] Judgment of the Constitutional Court, 28 May 1997, K 26/96, OTK 1997, No. 2, item 19.

Motherhood – as an object of the constitutional protection – is a self-existence (intrinsic) value, in the sense that it is not necessarily connected with the institution of marriage.[57] Article 18 of the Constitution (in conjunction with Article 71 section 2 of the Constitution) determines that the Constitution of the Republic of Poland protects motherhood with the same intensity regardless of whether the mother is or is not a whomsoever wife. Therefore, the special assistance from public authorities includes all mothers before and after childbirth, regardless of their marital status.[58]

The Constitution protects motherhood with the same intensity regardless of whether the child comes from the mother's husband, that is, whether the relationship of motherhood is derived from a marriage or an extramarital relationship.[59] The aforementioned principle also results from the fact that according to Article 72 and Article 32 of the Constitution child born in the marriage and in extramarital relationships is subject of the same protection.[60] Protection of motherhood is also independent of the fact whether the family (in a constitutional understanding) exists.[61]

Protection of motherhood is also independent of the mother's financial situation and her social status.[62] Consequently, also mothers who are not in a difficult financial and social situation within the meaning of Article 71 section 1 of the Constitution have the right to such special assistance. However, as it was indicated in the legal literature, the legislator can diversify "the scope and forms of assistance depending on the financial and social situation of the mother, as long as are respected the general requirements resulting from the principle of equality."[63] However, it should be pointed out that also mothers who are in a perfect financial and social situation cannot be deprived entirely of the assistance provided for in Article 71 section 2 of the Constitution (e.g. rights to health care or maternity leave).

It should be also emphasized that the Constitution does not restrict the special protection of motherhood to mothers who are Polish citizens. Therefore, the mothers,

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[57] Identically on the ground of Article 79 section 1 of the Constitution of the Polish People's Republic: Z. Radwański, *Konstytucyjna…*, p. 236. Similarly, R. Puchta, *Ochrona…*, p. 171.

[58] M. Dobrowolski, *Status…*, p. 28; A. Mączyński, *Konstytucyjne…*, p. 769; P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.* [Commentary to the Constitution of the Republic of Poland of 2 April 1997], Warszawa 2008, p. 172.

[59] On the ground of Article 79 section 1 of the Constitution of the Polish People's Republic – Z. Radwański, *Konstytucyjna…*, p. 237.

[60] Cf. W. Borysiak, [in:] *Konstytucja RP…*, Article 72, No. 49, pp. 1660–1161.

[61] W. Borysiak, [in:] *Konstytucja RP…*, Article 72, Nos 87–89, p. 1643–1644.

[62] P. Winczorek, *Komentarz…*, p. 172; L. Garlicki, [in:] *Konstytucja* (2003), Article 71, No. 7, p. 6.

[63] L. Garlicki, [in:] *Konstytucja* (2003), Article 71, No. 7, p. 6.

who are not Polish citizens, and their relationship to their children are subject to the protection provided for in the Constitution.[64] Obligations of public authorities in the form of protection and care over motherhood therefore applies in practice to every family residing in the territory of the Republic of Poland. So, they also include families of foreigners. The consequence of this is also the fact that this protection also applies to the relation of motherhood and parenthood, which was created in the ground of foreign legislation.

As it was indicated in the Polish legal literature, the phrase "mother before the birth of a child", which is used in Article 71 section 2 of the Constitution, means "a real mother", i.e., a woman being currently in pregnancy, and not "a potential mother", i.e., a woman who may become pregnant for the first time or become pregnant again.[65] This opinion should be considered undoubted according to the aim of this provision. As a consequence, it would not be possible to derive from the aforementioned provision the protection of a woman, who has the intention to undergo in vitro fertilization or a woman, who has entered into an agreement for surrogate motherhood abroad.

5.2. Motherhood and the procedure of the in vitro fertilization

In the literature, it is pointed out that the basic feature of the relationship of motherhood is that "it arises as a result of natural occurrences."[66] The development of medical sciences may sometimes have an effect on the questioning of the notions such as "mother" and "motherhood." An important question is if the child's mother is the so-called genetic mother (i.e. the woman from whom the egg cell has been fertilized) or the "factual mother", the woman who carried the baby during pregnancy and gave birth. According to both of aforementioned constitutional provisions, it is necessary to firmly support the opinion that only motherhood based on the fact of pregnancy is protected.

In the light of the two aforementioned constitutional provisions, the mother is a woman who gave birth to a child. Such an interpretation is justified by the purpose

[64] B. Banaszak, *Konstytucja…*, Article 18, No. 8.

[65] G. Kowalski, *Założenia prawa rodzinnego w świetle Konstytucji Rzeczypospolitej Polskiej* [Principles of family law in the light of the Constitution of the Republic of Poland], [in:] *Prawo rodzinne w dobie przemian* [Family law in the era of changes], ed. P. Kasprzyk, P. Wiśniewski, Lublin 2009, p. 46.

[66] A. Mączyński, *Małżeństwo…*, p. 467.

of both of these provisions, which is the functional protection of the mother, especially during pregnancy and after childbirth.[67] Such interpretation is supported by a literal wording of Article 71 section 2 of the Constitution ("mother before and after childbirth") which would lose its sense if a woman who was the donor of an egg cell would be treated as a mother, apart from the fact that she was whenever pregnant. Another interpretation would also be contradictory with the principles of systematic interpretation of the notions established in the Constitution, since the Constitution undoubtedly connects the concept of motherhood with the concept of mother. This interpretation was also presented on the ground of Article 79 section 1 sentence 1 of the Constitution of the Polish People's Republic, which is clear argument for the continuity of Polish legislation in this area.[68] Similarly, in Article 18 of the Constitution motherhood is connected with the parenthood what clearly determines the necessity of such an understanding of the scope of the protection of the mother.[69] It should also be emphasized that the aforementioned opinion is also confirmed by the jurisprudence of the European Court of Justice.[70] The interpretation based on the Constitution is also reflected in legislation, including the most important act in the field of family law – the Family and Guardianship Code – in Article 61^9 the Family and Guardianship Code[71] a mother is clearly defined as a woman who gave birth to a child.

From the above-mentioned arguments, it appears that "genetic mothers", who did not carry the child during pregnancy, or after they did not give birth, are not protected on the ground either of Article 18, or Article 71 section 2 of the Constitution. However, the legislator may grant them protection in co called "ordinary legislation."[72] However, he is not entitled to modify the decision of the lawmaker

[67] As T. Smyczyński, *Rodzina…*, p. 190, stated the Constitution "protects motherhood as the whole of biological and social phenomena and efforts and sacrifices of women related to pregnancy, childbirth and caring for a child after its birth."

[68] Z. Radwański, *Konstytucyjna…*, p. 236, who, referring to the efforts and pain associated with pregnancy and childbirth, notices that "ethical and social considerations should outweigh the doubts that a person, who in such situation should be considered as the mother of a child". Cf. also Z. Radwański, [in:] *Aspects de l'évolution récente du droit de la famille (Journées turques), Travaux de l'Association Henri Capitant*, vol. XXXIX (1988), Paris 1990, p. 144 (quoted after T. Smyczyński, *Rodzina…*, p. 190).

[69] T. Smyczyński, *Rodzina…*, p. 190.

[70] Cf. two judgments of ECJ of 16 March 2014, case C-363/12 *Z. v A Government department in The Board of management of a community school* and case C-167/12 *C.D.* v. *S.T.*

[71] Introduced to the Family and Guardianship Code with the amendment of 6 November 2008 (Journal of Laws No. 220, item 1431) – after the entry into force of the Constitution.

[72] T. Smyczyński, *Rodzina…*, p. 190, who referring to provisions of ordinary legislation stated: "From the mere fact of genetic parenting, (…) for the egg donor, there are no entitlements and claims

and grant protection in ordinary legislation to "genetic mothers" in a broader scope than to biological mothers. On the ground of the provisions of the Constitution, it is inadmissible to conclude contracts for surrogate motherhood and "transfer of a child", due to the fact that such a contract would be contrary with other constitutional provisions, especially those relating to the dignity of the mother and the child.[73]

6. Scope of care and protection over motherhood

6.1. Introductory remarks

The analysis of the constitutional notion of motherhood would be incomplete without even providing an outline of the basic assumptions of its constitutional protection. According to the aforementioned constitutional principles, the legislator first of all has the obligation to establish and regulate the institutions of motherhood and parenthood. This is due to the need to regulate the legal situation of the child in the family, in particular with regard to his mother and father. Without such a preliminary assumption, "it would be impossible to implement detailed constitutional provisions that precisely on the basis of family or maternity relation determine the rights and duties of mothers, parents and children."[74]

As it was mentioned above, the establishment of regulations for the care and protection of motherhood is left to the legislator. However, he cannot regulate and protect motherhood completely arbitrarily, due to the fact that he is limited not only by the wording of Article 18 of the Constitution, but also other provisions of the Constitution, including those governing the relationship between parents and children (cf. e.g. Article 48 and Article 72 of the Constitution) or protection of the family (e.g. Article 71 section 1 of the Constitution).

In the literature it is assumed that, on the ground of Article 18 of the Constitution, the concept of "protection" encompasses the duty of public authorities to take actions in relation to external entities towards the mother and her children aimed at preventing them from the endangerment of these values.[75] The shape of the protection should be made in such a way as to ensure the harmonious creation

in the field of civil (family) law or social law".

[73] T. Smyczyński, *Rodzina*…, p. 190.

[74] Z. Radwański, *Konstytucyjna*…, p. 240.

[75] A. Mączyński, *Konstytucyjne*…, p. 774; L. Garlicki, [in:] *Konstytucja* (2003), Article 71, No. 18, p. 5; L. Garlicki, [in:] *Konstytucja* (2016), Article 18, No. 15, pp. 504–505.

of family relations between mother and her children for the benefit of all of those people.[76] These obligations apply to all areas of law.

The notion of "care" has a broader scope than the term "assistance" appearing in the same provisions of the Constitution. It means that public authorities are obliged to take actions aimed at strengthening interpersonal relations mentioned in Article 18 of the Constitution, and need to address it to people who create such relations.[77] The subject of care are both the mother and her children (with whom she creates the family) and the family that those people are form.

The notion of "special assistance" in accordance with Article 71 section 2 should be understood in the same way as in the context of Article 71 section 1 sentence 2 of the Constitution.[78] Therefore, it is an assistance granted in a wider scope than for other entities ("which exceeded usual assistance"[79]). Its scope should remain open, due to the fact that it may change due to the economic development.[80] The assistance, to fulfil its role, "cannot be illusory" and "the law must guarantee its real dimension."[81]

According to the express wording of Article 71 section 2 of the Constitution, the ordinary legislation defines the scope of assistance provided to mothers and the nature of the benefits granted to them. This excludes the freedom of legislator to regulate these issues with provisions, which rank is lower the statutory rank.[82] The Constitution does not specify autonomously forms or scope of special assistance to mothers before and after childbirth, leaving them to be defined precisely by the legislation.[83] Hence, in the jurisprudence and literature it is assumed that "legislator

[76] Cf. judgment of the Constitutional Court of 16 July 2007, SK 61/06, OTK-A 2007, No. 7, item 77 and judgment of the Constitutional Court of 25 July 2013, P 56/11, OTK-A 2013, No. 6, item 85.

[77] A. Mączyński, *Konstytucyjne…*, p. 774; L. Garlicki, [in:] *Konstytucja* (2003), Article 18, No. 8, p. 6; L. Garlicki, [in:] *Konstytucja* (2016), Article 18, No. 15, p. 505.

[78] Judgment of the Constitutional Court of 8 July 2014, P 33/13, OTK-A 2014, No. 7, item 70; B. Banaszak, *Konstytucja…*, Article 71, No. 3, p. 425.

[79] P. Winczorek, *Komentarz…*, p. 172.

[80] B. Banaszak, M. Jabłoński, [in:] *Konstytucje…*, p. 131; similarly, M. Gołowkin, *Rodzina jako wartość chroniona w konstytucji na tle europejskich standardów ochrony praw człowieka* [Family as a protected value in the Constitution in the light of European standards of human rights protection], [in:] *Polska wobec europejskich standardów praw człowieka* [Poland towards European standards of human rights], ed. T. Jasudowicz, Toruń 2001, p. 99; cf. M. Zubik, *Podmioty konstytucyjnych wolności, praw i obowiązków* [Subjects of constitutional freedoms, rights and obligations], "Przegląd Legislacyjny" 2007, No. 2, p. 42.

[81] Judgment of the Constitutional Court of 13 April 2011, SK 33/09, OTK-A 2011, No. 3, item 23.

[82] Judgment of the Constitutional Court of 30 January 2006, SK 39/04, OTK-A 2006, No. 1, item 7.

[83] Judgment of the Constitutional Court of 13 April 2011, SK 33/09, OTK-A 2011, No. 3, item 23.

has a far-reaching freedom to concretize this assistance, both when he chooses means and when he defines the scope of individual benefits."[84] However, the legislator must take into account other constitutional provisions, including Article 68 section 3 of the Constitution and may not violate the essence of regulation expressed in Article 71 section 2 of the Constitution, i.e., provide for solutions that do not give any assistance to mothers before and after childbirth in a broader scope than that provided for other entities.[85]

Special protection of the mother before and after childbirth – according to Article 71 section 2 of the Constitution – exists regardless of the protection of families in a difficult financial and social situation, including incomplete families (Article 71 section 1 sentence 2 of the Constitution). The hypothesis of the last of those norms includes also women who have given birth to a child or children in a marriage or a permanent cohabitation and currently raise them alone.[86] Other mothers are protected on the ground of Article 71 section 2 of the Constitution, and their relation to the child is protected on the ground of Article 18 of the Constitution through the protection of motherhood and parenthood.

6.2. Time limits of care and protection

Since the mother is subject to protection and care even before the child's birth, it should not raise doubts that the protection and care of motherhood begins at the moment of conception of the child.[87] It would be difficult to determine any other moment from which the lawmaker could link the beginning of such a special assistance. From the moment of conceiving, there is a child, and thus at the same time "protection" of motherhood is started on the ground of Article 18 of the Constitution, as well as it starts the special duty of the state to create special assistance for the mother on the ground of Article 71 section 2 of the Constitution.

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[84] Judgment of the Constitutional Court of 13 April 2011, SK 33/09, OTK-A 2011, No. 3, item 23; L. Garlicki, [in:] *Konstytucja* (2003), Article 71, No. 7, p. 6; similarly, W. Skrzydło, *Konstytucja Rzeczypospolitej Polskiej. Komentarz* [Constitution of the Republic of Poland. Commentary], Warszawa 2013, Article 71, No. 1, pp. 85–86.

[85] L. Garlicki, [in:] *Konstytucja* (2003), Article 71, No. 7, p. 6.

[86] W. Borysiak, [in:] *Konstytucja RP*…, Article 71, Nos 87–89, pp. 1643–1644.

[87] T. Smyczyński, *Rodzina*…, p. 190; G. Kowalski, *Założenia*…, p. 46.

Neither Article 18 nor Article 71 section 2 of the Constitution defines the temporal borders of the constitutional protection of the mother after childbirth. Therefore, the legislator should make such an assessment on its own, taking into account the factual situations of the particular mother, e.g., the case when the childbirth took place in a situation which was dangerous for her. However, the family relationship between the mother and her child is protected even after the child has reached the age determined by the legislator (e.g. the age of majority) by protecting the parenthood. In addition, the mother's relation to the child may also be protected on the ground of Article 71 section 1 sentence 2 of the Constitution, e.g., when a family became incomplete as a result of the death of the child's father.[88]

In the jurisprudence of the Constitutional Tribunal it was expressed that legislator could differentiate the intensity of protection of the mother in different periods of motherhood, i.e., before and after the birth of the child.[89] This opinion should be considered as a valid one.

6.3. Elements creating the protection of motherhood

Neither Article 18 nor Article 71 section 2 of the Constitution specify the measures and scope of care, protection and special assistance for mothers before and after the birth of the child, leaving it to the clarification by the legislation. In the literature, as examples of already existing regulations protecting motherhood during pregnancy are indicated, e.g., adopted in Article 176 of the Labour Code, the ban on pregnant women for specific works (particularly onerous or harmful to their health) or adopted in Article 92 section 1 point 2 of the Labour Code, the statutory determination of the amount of the sick benefit.[90] Examples of regulations protecting the mother and the relationship of motherhood after childbirth include among others a ban on performing by women any work that is particularly onerous or harmful

[88] L. Garlicki, [in:] *Konstytucja* (2003), Article 71, No. 7, p. 5.

[89] Judgment of the Constitutional Court of 13 April 2011, SK 33/09, OTK-A 2011, No. 3, item 23; L. Garlicki, [in:] *Konstytucja* (2016), Article 18, No. 13, p. 502.

[90] M. Bartoszewicz, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz* [Constitution of the Republic of Poland. Commentary], ed. M. Haczkowska, Warszawa 2014, Article 71, No. 4, p. 146.

to their health right after the childbirth[91], inclusion of breastfeeding to the time of work[92], family benefits and favorable fiscal policies.[93]

The expression of constitutional protection of motherhood are also Article 47[94], Article 48[95], Article 68 section 3 and Article 71 section 1 of the Constitution. Motherhood is also one of the biological and social elements that can lead to the differentiation of rights between women and men in accordance of Article 33 of the Constitution, including granting women specific privileges (including pension entitlements).[96]

[91] This solution cannot be considered as a violation of Article 33 of the Constitution. Cf. further judgment of the Constitutional Court of 29 September 1997, K 15/97, OTK 1997, Nos 3–4, item 37; B. Banaszak, M. Jabłoński, [in:] *Konstytucje…*, p. 72; L. Garlicki, [in:] *Konstytucja* (2003), Article 71, No. 33, p. 8; W. Borysiak, [in:] *Konstytucja RP…*, Article 33, Nos 116 et seq., p. 863 et seq.

[92] M. Bartoszewicz, [in:] *Konstytucja…*, Article 71, No. 4, p. 146.

[93] T. Smyczyński, *Rodzina…*, p. 190.

[94] This article protects the relations of people who are members of the family (in the relation of affinity), i.e., parents towards their natural or adopted children. Protection and care of motherhood and parenthood is also reflected in the protection of private and family life of its members.

[95] One of the elements of protection of motherhood after childbirth is also the recognition of the mother's right (as a parent) to raise her children in accordance with her religious belief – cf. P. Sobczyk, *Małżeństwo i rodzina w orzeczeniach Trybunału Konstytucyjnego. Art. 18, 48 i 71 Konstytucji RP* [Marriage and family in the judgments of the Constitutional Tribunal. Articles 18, 48 and 71 of the Constitution of the Republic of Poland], [in:] *Matrimonium Spes Mundi. Małżeństwo i rodzina w prawie kanonicznym, polskim i międzynarodowym. Księga pamiątkowa dedykowana ks. prof. Ryszardowi Sztychmilerowi* [Marriage and family in canon, Polish and international law. A memorial book dedicated to Priest Professor Ryszard Sztychmiler], ed. T. Płoski, J. Krzywkowska, Olsztyn 2008, p. 382.

[96] Cf. on the ground of Article 79 section 1 of the Constitution of the Polish People's Republic judgment of the Constitutional Court of 24 October 1989, Kw 6/89, OTK 1989, No. 1, item 7; cf. also judgment of the Constitutional Court of 24 September 1991, Kw 5/91, OTK 1991, No. 1, item 5.

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Protection of women's rights and health in international law versus "surrogacy business"

Introduction

The legal and ethical issues of surrogate motherhood have long been a subject public debate.[1] In the context of protecting both children's and women's rights, its legal status is being considered by national and international lawmakers alike.[2] Different nations have different approaches to surrogate motherhood. Some allow both commercial and altruistic surrogacy, some prohibit it, and others do not regulate it at all. In some countries without regulation, surrogacy may be practiced relatively easily, while in others it may be very difficult. The debate on legalization of surrogacy at the international level, most commonly held on the forums of international organizations, has not yielded regulation in the form of binding international norms. Often, and especially on these and scientific forums, it is proposed that surrogacy be adopted for the protection of both children's and women's rights.[3] The purpose

[1] As far as scholarship is concerned, the debate became associated with public opinion after the first commercial surrogacy agreements appeared. We should mention here the case of Kim Cotton, who in 1985 became the first "commercial mother" in Great Britain; and the case of "Baby M," which sparked public debate in the US in 1988. See: Y. Margalit, "From Baby M to Baby M(anji): Regulating International Surrogacy Agreements", *Brooklyn Journal of Law and Policy*, 2016, Vol. 24, No. 1, p. 2. Brooklyn Journal of Law and Policy, Vol. 24, No. 1, 2016, p. 2.

[2] Richard Blauwhoff and Lisette Frohn, "International Commercial Surrogacy Arrangements: The Interests of the Child as a Concern of Both Human Rights and Private International Law", [in:] Ch. Paulussen, T. Takacs, V. Lazić, B. Van Rompuy, *Fundamental Rights in International and European Law. Public and Private Law Perspectives*, T. M. C. Asser Press, The Hague, 2016.

[3] Katharina Boele-Woelki, "(Cross-Border) Surrogate Motherhood: We Need to Take Action Now! A Commitment to Private International Law, [in:] *A Commitment to Private International Law, Essays*

of this discussion is to identify and analyze the norms of international, public and selected regional laws that could apply in case of violation of women's rights, in particular women's health.

This article contains an introduction, two substantive sections, and a conclusion. The introduction describes the research problem and the theoretical perspective of the analysis. The first substantive section presents regulations pertaining to human dignity that could apply to the protection of women's rights in the context of surrogacy. The second substantive section discusses legal norms pertaining to the protection of family and private life. The conclusion deals with issues pertaining to women's health. Additionally, *de lege ferenda* postulates, formulated in reference to the norms of international law, are duly discussed. This work is based on analysis of legal documents, in particular those relating to international regulations adopted by the United Nations, as well as legal norms of the Council of Europe and the European Union. Secondary texts from the wide range of literature on the subject (primarily in English) were also analyzed. As indicated above, the subject of women's rights in the context of surrogacy is often debated publicly in Europe, the USA, and other countries where surrogacy is practiced on a large scale (e.g. in India).

1. Definition of terms

The term "surrogate mother" should be understood in accordance with the definition adopted by the Hague Conference on Private International Law, namely, "[t]he woman who agrees to carry a child (or children) for the intending parent(s) and relinquishes her parental rights following the birth."[4] Documents from the conference define "intending parents" as "The person(s) who request another to carry a child for them, with the intention that they will take custody of the child following the birth and parent the child as their own. Such person(s) may, or may

in Honour of Hans van Loon, The Permanent Bureau of the Hague Conference on Private International Law, Intersentia Publishing Ltd. Cambridge – Antwerp – Portland 2013, p. 47 et seq.

[4] The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project, Preliminary Document No. 3 B of March 2014 for the attention of the Council of April 2014 on General Affairs and Policy of the Conference, Hague Conference on Private International Law, Prel. Doc. No. 3 B, March 2014, Annex A – Revised Glossary, p. iii, https://assets.hcch.net/docs/6403eddb-3b47–4680-ba4a-3fe3e11c0557.pdf (last accessed: 10 October 2018). The document states that "this term is used to include a woman who has not provided her genetic material for the child." In some states, such surrogates are called "gestational carriers" or "gestational hosts."

not be, genetically related to the child born as a result of the arrangement."[5] It should be pointed out that considerations on the violation of women's rights also address protection of the rights of intending mothers. The term "genetic mother" is distinct from the term "intending mother" in that it refers to a woman who provides the genetic material used to conceive the child.[6]

The concept of "women's rights" has been developing since the end of the 19th century. Today, the scope of such rights is wide. In the context of surrogate motherhood, human dignity is a fundamental value and basis for the protection of other human rights. Furthermore, important to women who are parties to a surrogacy agreement are the right to respect for family life (in particular, parental rights), the right to privacy (including autonomy in decisions regarding procreation), and the right to both physical and psychological health. Proper medical care of women involved in surrogacy should also be addressed. The surrogacy business is usually based on surrogacy arrangements, which can be concluded between intending parents residing in one country, and the surrogate mother residing in another. According to the Hague Conference, we should therefore use the term "international surrogacy arrangement" to refer to such arrangements.[7] Surrogacy arrangements may also be "traditional,"[8] whereby the surrogate mother is genetically related to the child; or "gestational,"[9] whereby the surrogate mother is not genetically related to the child (i.e. the genetic material comes from the intending parents or third parties). Sometimes, surrogacy arrangements are "for-profit," where "profit" refers to a payment to the surrogate mother that exceeds her "reasonable expenses."[10] Such payment can be stipulated by both traditional and gestational surrogacy agreements. However, it

[5] Ibid.

[6] Ibid., "The person(s) who have provided their genetic material for the conception of the child. In some languages, this is referred to as 'biological parentage.' In surrogacy situations, such person(s) may not be (and often will not be), the legal parent(s) of the child."

[7] Ibidem, "A surrogacy arrangement entered into by intending parent(s) resident in one State and a surrogate resident (or sometimes merely present) in a different State. Such an arrangement may well involve gamete donor(s) in the State where the surrogate resides (or is present), or even in a third State. Such an arrangement may be a traditional or gestational surrogacy arrangement and may be altruistic or for-profit in nature (see below)."

[8] Ibidem, "A surrogacy arrangement where the surrogate provides her own genetic material (egg) and thus the child born is genetically related to the surrogate. Such an arrangement may involve natural conception or artificial insemination procedures. This may be an altruistic or for-profit arrangement."

[9] Ibidem. Before concluding such an arrangement, the woman must undergo in vitro fertilization.

[10] For-profit surrogacy arrangements may refer to remuneration as "compensation" for "pain and suffering," or simply as the fee that the surrogate mother charges for having the child. See: Ibidem.

is not stipulated by "altruistic" surrogacy arrangements,[11] which only regulate the coverage of reasonable expenses.

2. Protection of human dignity in the context of contracts for surrogate motherhood

The protection of women's rights in the context of surrogate motherhood is not universally regulated by international law. However, in the absence of specific regulations, existing provisions may be used as a reference. Above all, we shall mention those that indicate human dignity as a superior value. The first is the preamble to the Universal Declaration of Human Rights.[12] Nearly identical wording can be found in the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, both adopted by the United Nations framework.[13] Aside from the examples above, many international documents acknowledge human dignity as a fundamental value. Especially important among these is the Charter of Fundamental Rights of the European Union, whose first chapter is entitled "Dignity." Detailed provisions regarding dignity are contained in Art. 1 of this chapter, which states that "Human dignity is inviolable. It must be respected and protected."[14] Aside from dignity in Art. 1, Chapter I, the Charter regulates the right to life (Art. 2), the right to the integrity of the person (Art. 3), the prohibition of torture and inhuman or degrading treatment or punishment (Art. 4),

[11] Ibidem.

[12] "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, (…)," Universal Declaration of Human Rights, United Nations General Resolutions 217 (III) of 10 December 1948, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/217(III) (last accessed: 10 October 2018).

[13] "Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, (…)," International Covenant on Civil and Political Rights, adopted and opened for signature in New York 19 December 1966, (*Journal of Laws*, 29 December 1977), https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (last accessed: 10 October 2018). See also the International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature in New York 19 December 1966. *Journal of Laws*, 1977, No. 38, item 169.

[14] Charter of Fundamental Rights of the European Union, *Official Journal of the European Union*, 26 October 2012, C 326/391, https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=celex-%3A12012P%2FTXT (last accessed: 10 October 2018).

and the prohibition of slavery and forced labor (Art. 5).[15] The right to the integrity of the person in Art. 2 includes prohibition of eugenics practices,[16] prohibition of making the human body and its parts as such a source of financial gain, and prohibition of the reproductive cloning of human beings. Especially important to surrogacy arrangements are the former two. Indicated as an interpretational reference and the source of the latter prohibition are the provisions of the European Convention on Human Rights and Biomedicine, adopted by the Council of Europe.[17] The provision most important to surrogacy arrangements is Art. 21, which states that "the human body and its parts shall not, as such, give rise to financial gain."[18] The need to respect human beings, both as individuals and as representatives of the human race, as well as recognition of the importance of ensuring dignity to human beings, were also emphasized in the Convention's preamble.[19] As indicated above, Chapter 1, Art. 1 of the Charter of Fundamental Rights also contains regulations on the prohibition of forced labor. Their provisions should be read with consideration for other EU legal acts addressing this issue.[20]

It is often argued that the dignity of women who arrange to become surrogate mothers, as well as that of the children born, is violated. The mother and child are both objectified and commodified.[21] In India, the fee for undergoing pregnancy and childbirth is around 25–30,000 USD. In developed countries like the US, it is around 75–100,000 USD.[22] An analysis of the case of Paradiso and Campanelli

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[15] Charter of Fundamental Rights…, *op. cit*.

[16] Explanations relating to the Charter of Fundamental Rights, *Official Journal of the European Union*, 14.12.2007 C 303/17, p. 2. https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32007X1214(01)&from=en (last accessed: 10 October 2018).

[17] European Convention on Human Rights and Biomedicine, adopted by the Committee of Ministers 19 November 1996 ETS 164, https://rm.coe.int/168007cf98 (last accessed: 10 October 2018).

[18] Ibidem.

[19] Ibidem.

[20] These include the Annex to the Europol Convention, Chapter VI of the Convention implementing the Schengen Agreement and the Council Framework Decision of 19 July 2002 on combating trafficking in human beings.

[21] Law Commission of India, "Need for Legislation to Regulate Assisted Reproductive Technology Clinics as well as Rights and Obligations of Parties to A Surrogacy", Report No. 228, August 2009, par. 1.8 http://lawcommissionofindia.nic.in/reports/report228.pdf (last accessed: 10 October 2018).

[22] S. Jolly, *Cross – Border Surrogacy: Indian State Practice, Private International Law. South Asian States' Practice*, eds. S. R. Garimella, S. Jolly, Springer Nature, Singapore 2017, p. 178, and the following source cited therein: Law Commission of India…, *op. cit.*, par. 1.7.

v. Italy in 2017 revealed that in Russia, the fee is 50,000 EUR.[23] Breaking the natural bond between the mother and the child is also a violation of the mother's dignity.[24] Indigent women in developing countries are often exploited, and agree to surrogacy out of economic concern or due to family pressure.

The regulations of international law do not contain specific provisions on the protection of women's rights within commercial surrogacy arrangements, neither at the universal nor regional level. It should therefore be considered whether these norms, in the absence of more detailed provisions, are used by international judicial authorities in matters concerning women's rights within surrogacy arrangements. In the ruling of Mannesson v. France in 2014, the European Court of Human Rights investigated compliance with Art. 8 of the European Convention on Human Rights[25] of refusal to enter birth certificates of children born out of a surrogacy arrangement with a surrogate in the US (where such arrangements are legal) into the French register of births, marriages and deaths. The plaintiff, Dominique Mannesson, was the biological father. The French government determined that the refusal was legal, citing the rulings of the *Cour de cassation* (France's highest court) of 31 May 1991 and 29 June 1994, which indicated the principle of inalienability of the human body and civil status. The refusal fell within the scope of the principle of public order, which precluded granting parental status based on a surrogacy arrangement.[26] The decision of the European Court of Human Rights was based on Art. 8 of the Convention. Its considerations concerned violation of the private and family life of the accusers (this will be addressed further below), and the "inalienability of the human body and civil status", as presented by the French government.

A direct reference to the need to protect the dignity of women who act as surrogate mothers in accordance with a surrogacy arrangement, regardless of whether the arrangement is concluded for commercial or altruistic purposes, was included in the concurring opinion of judges De Gaetano, Pinto de Albuquerque, Wojtyczka and Dedova on the ruling of the European Court of Human Rights in the 2017 case

[23] Paradiso and Campanelli v. Italy, application No. 25358/12, 24 January 2017, http://hudoc.echr.coe.int/eng?i=001–170359 (last accessed: 10 October 2018).

[24] Law Commission of India…, *op. cit*., par. 1.8

[25] The Convention for the Protection of Human Rights and Fundamental Freedoms, drafted on 4 November 1950 in Rome, subsequently amended by Protocols No. 3, 5 and 8, and supplemented by Protocol No. 2 (better known as the European Convention on Human Rights), *Journal of Laws*,1993, No. 61, item 284.

[26] Mannesson v. France, application No. 65192/11, 26 June 2014, http://hudoc.echr.coe.int/eng?i=001–145389 (last accessed: 10 October 2018).

of Paradiso and Campanelli v. Italy.[27] The judges indicated that surrogacy arrangements constitute degrading treatment of both the child and surrogate mother. They also indicated that there is medical proof that the prenatal period has an essential influence on further human development. The time of pregnancy, "with its worries, constraints and joys, as well as the trials and stress of childbirth, create a unique link between the biological mother and the child."[28] Surrogacy arrangements focus on "drastically severing this link." According to the principles of surrogacy, the surrogate mother must "renounce developing a life-long relationship of love and care [and the] unborn child is not only forcibly placed in an alien biological environment, but is also deprived of what should have been the mother's limitless love in the prenatal stage." The judges, in their concurring opinion, stressed that the child and mother are not treated as a value in themselves, but as a means of satisfying the desires of others. Surrogacy was deemed incompatible with the values underlying the Convention, especially if for commercial purposes.[29]

3. The need to have a child and the right to protect private and family life

An essential value protected in the context of surrogate motherhood is private and family life. Yet it has been repeatedly emphasized that international human rights law does not enshrine the right to have a child or be a parent.[30] However, the needs of a human being within a family, including the desire to raise children, should be indicated as motivating factors in the conclusion of surrogacy arrangements. In analyzing the rights of women who are parties to surrogacy agreements, we

[27] Paradiso and Campanelli v. Italy…, *op. cit*. Joint concurring opinion of judges De Gaetano, Pinto de Albuquerque, Wojtyczek and Dedov. The case concerned a child born to a surrogate mother in Russia in 2011 on the basis of an arrangement concluded between her and the intending mother and father. The intending parents could not prove biological relation to the child during the proceedings. The child was then brought illegally to Italy, where it was considered an abandoned child in accordance with the law, and transferred to a public orphanage for adoption. The intending parents were not informed of the child's whereabouts, and did not have permission to contact the child. The child received a birth certificate in 2013, which listed the parents as unknown persons. The Italian court also ruled that the intending parents did not have the right to adopt the child, as they were neither its parents nor relatives.

[28] Ibidem.

[29] Ibidem.

[30] Paradiso and Campanelli v. Italy…, *op. cit*.

should again ask, who is the protected entity? It seems that the response should consider the rights of both surrogate and intending mothers. On the one hand, this constitutes a violation of parental rights and the right to family life by severing the natural bond between the surrogate mother and the child she has carried. On the other is violation of the abovementioned rights by the failure of law to recognize the emotional bond between the child and the intending mother, especially if the bond has lasted long enough to create a significant relationship.

The right to establish a family was included in Art. 16, Paragraph 1 of the Universal Declaration of Human Rights.[31] Paragraph 3 of the article states that "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." A similar provision can be found in Art. 23 of the International Covenant on Civil and Political Rights.[32] Family and private life is also protected under international European regulations, namely Art. 8 of the European Convention on Human Rights,[33] and Art. 7 of the Charter of Fundamental Rights of the European Union.[34]

Once again it must be stressed that none of these regulations enshrines the right to have a child or be a parent. There are also no regulations that specifically address the parental rights of surrogate or intending mothers. Despite this, conclusion of surrogacy arrangements necessitates a reaction from state authorities in case the civil status of a child or the parental rights of intending parents must be regulated. The ruling of the European Court of Human Rights in Paradiso and Campanelli v. Italy was significant in this respect.[35] In their application to the European Court of Human Rights, the intending parents alleged violation of Art. 8 of the European Convention on Human Rights by seizure of their child, failure to recognize their parenthood established abroad and refusal to register the child's birth certificate. When deliberating the meaning of the term "family," the European Court of Human

[31] Article 16. 1. "Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family." See: Universal Declaration of Human Rights…, *op. cit*.

[32] Article 23. 1. "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State." See: International Covenant on Civil and Political Rights…, *op. cit*.

[33] "Right to respect for private and family life 1. Everyone has the right to respect for his private and family life, his home and his correspondence." See: Convention for the Protection of Human Rights…, *op. cit*.

[34] "Respect for private and family life. Everyone has the right to respect for his or her private and family life, home and communications." See: Charter of Fundamental Rights…, *op. cit*.

[35] Paradiso and Campanelli v. Italy…, *op. cit*.

Rights confirmed that it refers not only marriage-based relationships, but also to relationships in which the parties live together outside of marriage, or in which other factors indicate longevity. However, Art. 8 of the Convention does not enshrine the right to establish or desire to establish a family. Application of the article requires a minimum relationship that has the potential to develop, e.g., that between a child born outside of marriage and his or her biological father. For this case, the Court had to determine whether the concept of "family life" includes the relationship between a child born of a surrogate mother and the intending parents. This would mean the existence of authentic personal ties in the absence of biological or legal ties. The European Court of Human Rights assessed the role of the intending parents in the life of the child, and examined the duration of the child's cohabitation with the parents. It was indicated that the accusers voluntarily agreed to become parents, and formed close bonds with the child from the day it was born. The duration of cohabitation was determined to be 8 months, but it was made clear that there can be no minimum duration of cohabitation, as circumstances and the quality of bonds are specific to each case. The Court ruled that the existence of a family life could not be confirmed due to the lack of biological ties between the intending parents and child, the short duration of cohabitation and the legal uncertainty of all other ties. However, the Court also stated that the concept of "private life" includes emotional ties between adults and children created despite a lack of legal or biological relationship, as they impact the life of the individual and his or her social identity. It indicated that the intending parents have the right to desire to become parents, as parenthood provides an opportunity for personal development through the care and love of a child. Therefore, on the bases of the "right to privacy," the European Court of Human Rights ruled that the state authorities shall only be competent to determine the existence of a legal relationship between intending parents and a child born out of a surrogacy arrangement, hence justifying the decisions of the Italian authorities. Italian national law prohibiting the arrangement of private adoption helps protect children against illegal practices, including human trafficking.[36] This internal law contains an absolute prohibition of surrogacy arrangements.

In this case, the Court repeatedly referred to the relationship between biological fathers and their children, as the plaintiff and intending father claimed he had acted in the belief that he was the biological father. In consideration of the parental rights of both intending parents, the court stated that although the emotional sufferings

[36] Paradiso and Campanelli v. Italy…, *op. cit.*

of persons who cannot become parents must not be ignored, this fact cannot mean legalization of circumstances that violate the law. In their concurring opinion on the case, judges De Gaetano, Pinto de Albuquerque, Wojtyczek, and Dedov indicated the need to consider the rights of the surrogate mother, underlining the bond that forms between the biological mother and the child during pregnancy.

Literature expresses hope that this ruling will be the beginning of a real discussion on the acceptability of surrogacy.[37] It also emphasizes that recognition of the need for a biological tie between the intending parents and the child, and thus the inability to qualify a relationship between these persons if this tie is lacking and the period of cohabitation as a "family" is too short, objectifies filiation issues and at least partially prevents eugenics practices.[38]

4. The issues of health protection and health care in relation to a surrogate mother and an intentional mother

An important issue in surrogacy is the protection of women's health. Once again, we should consider here whether the state and the international community should aim only to protect the health rights of surrogate mothers, or address also the health issues of intending mothers, which are mainly psychological. Studies concerning the health of surrogate mothers are unrepresentative and incomplete. But what about studies on the health of intending mothers? On what scale are they conducted, and how representative are they?[39] This issue is receiving increasing attention from

[37] G. Puppinck, C. de La Hougue, "Surrogacy: general interest can prevail upon the desire to become parents – about the Paradiso and Campanelli v. Italy Grand Chamber judgment of 24th January 2017", p. 6 (English translation of article published in *Revue Lamy de Droit Civil*, 2017, No. 146 available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2979255 (accessed 16 August 2017), as cited in Ł. Mirocha, "Tzw. macierzyństwo zastępcze (surrogacy, Leihmutterschaft) w bieżącym orzecznictwie Europejskiego Trybunału Praw Człowieka w Strasburgu", Institute of Justice, Warsaw 2017, p. 30. https://iws.gov.pl/wp-content/uploads/2018/08/IWS-Mirocha-Ł.-Tzw.-macierzyństwo-zastępcze-surrogacy-Leihmutterschaft-w-bieżącym-orzecznictwie-Europejskiego-Trybunału-Praw-Człowieka-w-Strasburgu.pdf (last accessed: 10 October 2018).

[38] Ł. Mirocha, "Tzw. macierzyństwo zastępcze…", *op. cit.*, p. 30.

[39] See also: R.J. Edelmann, "Surrogacy: The Psychological Issues", *Journal of Reproductive and Infant Psychology*, 2004, Vol. 22, Issue 2, pp. 123–136, V. Jadva, S. Imrie, S. Golombok, "Surrogate mothers 10 years on: A longitudinal study of psychological well-being and relationships with the parents and child", *Human Reproduction*, Vol. 30, Issue 2, 1 February 2015, pp. 373–379, N. Ruiz-Robledillo, L.Moya Albiol, "Gestional Surrogacy and Psychosocial Aspects", *Psychosicial Intervention*, Vol. 25, No. 3, 2016, pp.187–193 and the literature listed there. University of Surrey , Roehampton and University of Keele, UK

researchers of the medical sciences (i.e., medicine and public health) and social sciences (i.e., sociology, psychology and family studies). Analyses have indicated additional factors that influence the health of persons who are parties to surrogacy arrangements, namely the fact that such agreements are often international, and as such are subject to varying laws.[40]

Opponents of the legalization of surrogacy often indicate loss of fertility, miscarriage, premature menopause, tumors in the reproductive system, stroke and even death.[41] In case of gestational surrogacy arrangements, which assume that the genetic material comes from the intending parents or third parties via assisted reproductive technologies, they assert that the mothers are at higher risk of preeclampsia and high blood pressure,[42] and the children are at risk of low birth weight, fetal abnormalities and high blood pressure.[43] They also claim that surrogacy breaks the natural bond between the mother and the child formed during pregnancy. This has permanent negative effects for both the mother and the child. Finally, they argue that legalization of surrogacy would legalize these damages.[44] These claims have not been confirmed by scientific studies, including systematic reviews conducted in recent years.[45] Though the authors themselves admit that these studies are subject to serious methodological limitations, they conclude on the basis of available data that the majority of surrogacy arrangements are successful. Furthermore, they

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[40] K. L. Armour, "An Overview of Surrogacy Around the World: Trends, Questions and Ethical Issues", *Nursing for Women's Health*, June–July 2012, Vol. 16, Issue 3, pp. 231–236.

[41] Alarmingly high mortality rates for mothers in India were indicated in: Anu, P. Kumar, D. Inder, N. Sharma, "Surrogacy and women's right to health in India: issues and perspective", *Indian Journal of Public Health*, April–June 2013, Vol. 57, Issue 2, p. 65.

[42] *Stop Surrogacy Now Statement*, http://www.stopsurrogacynow.com/the-statement/#sthash.nmHk5Ry4.dpbs (last accessed: 10 October 2018).

[43] Ibidem.

[44] Ibidem.

[45] A very interesting comparison of studies on the physical and psychological effects of surrogacy in surrogate mothers, their children and intending parents can be found in: V.Söderström-Anttila, U.Wennerholm, A. Loft, A. Pinborg, K. Aittomäki, L. Bente, R. Bergh, "Surrogacy: outcomes for surrogate mothers, children and the resulting families – a systematic review", *Human Reproduction Update*, Vol. 22, Issue 2, 1 March 2016, pp. 260–276; the text is also available online at: https://academic.oup.com/humupd/article/22/2/260/2457841 (accessed 10.10.2018). The authors analyzed English-language and Scandinavian studies published through 2015 from the databases of PubMed, Cochrane, and Embase concerning relations between surrogate mothers and intending parents, the experiences of surrogate mothers after the transfer of their children to the intending parents, premature birth, low birth weight, birth defects, perinatal mortality, child developmental psychology, relations between children and intending parents, and disclosure of origin to the children. Of 1,795 studies, the authors selected 55 that met the research criteria.

maintain that the majority of surrogate mothers are positively motivated and have few problems separating from their children after birth. However, they stress that these results should be interpreted "with caution," and encourage further study in this area.[46]

Proper medical care for surrogate mothers during pregnancy is also an important issue, especially in developing countries. In India, for example, many allegations have been made against surrogacy practices regarding the proper medical supervision of pregnant mothers, the frequency of ultrasound scans and amniocentesis, and in certain cases, potentially harmful hormonal therapy. Other concerns include regulation of the termination of pregnancy, and the lifestyle changes required of surrogate mothers.[47] Women acting as surrogate mothers are often forced to change their place of residence due to the requirements of the clinics intermediary to the conclusion of surrogacy arrangements, as well as in order to avoid social stigmatization.[48] Indeed, being a surrogate mother in India is sometimes considered tantamount to rendering sexual services.[49] Social stigmatization doubtlessly impacts the psychological health and social function of surrogate mothers. Intending mothers can be stigmatized as well, as the role of women is often strongly associated with motherhood. Not becoming a mother in general may therefore also result in stigmatization.

The above concerns pertain to the physical and mental health of both surrogate and intending mothers. Yet surrogacy can also affect the social functioning of the surrogate and intending mothers. The preamble of the Constitution of the World Health Organization defines "health" as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."[50] Article 25

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[46] Ibidem.

[47] A. F. Murray, *Surrogate Motherhood in India, Understanding and Evaluating the Effects of Gestational Surrogacy on Women's Health and Rights*, Stanford University 2008, https://web.stanford.edu/group/womenscourage/Surrogacy/health.html (last accessed: 10 October 2018).

[48] See: A. Arvidsson, P.Vauquline, S.Johnsdotter, B.Essén, "Surrogate mother – praiseworthy or stigmatized: a qualitative study on perceptions of surrogacy in Assam, India", *Glob Health Action*, 2017, Vol. 10, No. 1; the text is also available online at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5496060/#CIT0011 (last accessed: 10 October 2018). See also: a press article by Ch. Sachdev, "Once the go-to place for surrogacy, India tightens control over its baby industry", 4 July, 2018; https://www.pri.org/stories/2018-07-04/once-go-place-surrogacy-india-tightens-control-over-its-baby-industry (last accessed 10 October 2018). Surrogate mothers often change their place of residence and remain isolated from their families under the care of the clinics intermediary to their surrogacy arrangements.

[49] A. Pande, "Not an 'angel', not a 'whore': surrogates as 'dirty' workers in India", *Indian Journal of Gender Studies*, June 2009, Vol. 16, Issue 2, p. 141 et seq.

[50] "The preamble defines health positively, as complete physical, mental and social well-being, not merely negatively as the absence of disease or infirmity." See: the Preamble, the Constitution of the

of the Universal Declaration of Human Rights states that, "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family (…)." This right also includes access to medical care and other necessary social services.[51] The International Covenant on Economic, Social and Cultural Rights contains binding healthcare norms. The provisions of Art. 12 state that the parties to the Covenant "recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."[52] States should take the necessary steps to realize this right. Given the above health concerns in surrogacy, these should include reducing the rates of stillbirth and infant mortality, treating and preventing disease, and creating conditions that ensure care and aid in case of illness.[53]

The right to healthcare was not provided for by the European Convention on Human Rights. However, it seems that the provisions of Art. 8, which grant the right to private life, including physical and mental integrity, could be a basis for resolving healthcare issues for women who are parties to surrogacy arrangements.[54] Medical treatment or examination without patient consent falls within the scope of this provision, which in certain cases could mean legal protection under Art. 8. In the context of surrogacy, the European Court of Human Rights has made no decisions regarding women's healthcare based on the provisions of Art. 8 of the European Convention of Human Rights, yet this does seem possible. An important regulation concerning integrity is Art. 3 of the Charter of Fundamental Rights of the European Union, which states that "Everyone has the right to respect for his or her physical and mental integrity."[55] The Charter enshrines specific regulations on medicine and biology concerning informed consent, expressed in accordance with the procedures set out in the Act, prohibition of eugenics practices, especially those whose aim is selective breeding, and prohibition of using the human body or its parts as a source of financial gain.[56] Protection of health is additionally provided

World Health Organization, the Agreement concluded by the States represented at the International Health Conference, and the Protocol concerning the Office international d'hygiène publique, signed in New York, 22 July 1946, *Journal of Laws*, 1984, No. 61 item 477.

[51] Universal Declaration of Human Rights…, *op. cit.*

[52] Art. 12 Paragraph 1 of the International Covenant on Civil and Political Rights, adopted and opened for signature in New York 19 December 1966, *Journal of Laws*, 1977, No. 38 item 169.

[53] Ibidem, Art. 12 Paragraph 1.

[54] Convention for the Protection of Human Rights…, *op. cit.*

[55] Charter of Fundamental Rights…, *op. cit.*

[56] Ibidem, Art. 3 Paragraph 2.

for by Art. 35 of the Charter of Fundamental Rights of the European Union, which grants everyone the right to "preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices." All policies and practices defined and implemented by the European Union should aim to ensure a high level of healthcare.[57]

5. *De lege ferenda* postulates

The above-mentioned provisions of international law, both at the universal and European level, may be applied to the protection of women who are parties to surrogacy arrangements. Notwithstanding, these regulations are very general. The 37th session of the Human Rights Council, held on 6 March 2018 in Geneva, postulated the need to develop international law – both public and private – that would regulate surrogacy issues.[58] The Special Rapporteur on the sale and sexual exploitation of children presented a report that attempts to summarize the actual state of and legal norms concerning surrogate motherhood globally.[59] It indicated that the number of surrogacy arrangements is dramatically increasing in the absence of relevant international standards. Cross-border surrogacy arrangements are currently varied. The vast majority of intending parents come from developed countries like Australia, Canada, France, Germany, Israel, Italy, Norway, Spain, Great Britain and Northern Ireland, and the United States. In recent years, surrogate mothers have come from developing countries like Cambodia, India, Laos, Nepal and Thailand. However, California and other American states that have legalized surrogacy are becoming centers of international commercial surrogacy arrangements. The same is true of European countries that allow commercial surrogacy, such as Russia and Ukraine. Intending parents from China use the services of surrogate mothers from Southeast

[57] Ibidem.

[58] Summary of side event on surrogacy and the sale of children, United Nations Human Rights Office of the High Commissioner, 6 March 2018, https://www.ohchr.org/EN/Issues/Children/Pages/SurrogacySummary.aspx (last accessed: 10 October 2018).

[59] Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, Human Rights Council, 37th session, 26 February–23 March 2018, Agenda item 3, A/HRC/37/6, p. 3 et seq. The Report is available online at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/007/71/PDF/G1800771.pdf?OpenElement (last accessed: 10 October 2018).

Asia or the United States.[60] National laws differ significantly between countries, and range from complete prohibition of surrogacy, as in France or Germany, to allowance of non-profit forms, as in the United States and Great Britain, to allowance of commercial forms, as in Russia or Ukraine.[61] There are also countries with no legal regulations. This essentially puts the burden of regulation in the hands of national courts, which apply legal provisions concerning parental rights or adoption. As the Special Rapporteur's findings indicate, defining the rights and obligations resulting from surrogacy arrangements and the norms of applicable law may be very complicated, as surrogate mothers sometimes undergo in vitro fertilization in one country, and then change their place of residence and give birth in another country. Meanwhile, the intending parents may be from a third country.[62] Numerous violations of the rights of children and surrogate mothers, in combination with the fact that commercial surrogacy arrangements usually involve sale of the child as defined in international human rights law, call for more specific international solutions.[63] The report contains the position that, upon fulfillment of appropriate conditions for the precise legal protection of women's rights, commercial surrogacy arrangements should not be considered the sale of children. It indicates that a surrogate mother should be considered the mother at the time of childbirth, and have the parental right to keep her child after birth, with no contractual penalties under the surrogacy arrangement. Any payments resulting from the arrangement must be made before the child is transferred to the intending parents and shall be non-refundable, even if the surrogate mother decides to retain her parental right to keep the child after its birth. The law should also regulate the division of custody between the surrogate mother and the intending parents, if the surrogate mother wants to keep the child. Arrangements may not contain provisions stipulating the renunciation of parental rights by the surrogate mother, as this renunciation must be a voluntary act on the part of the mother after the child is born.[64] Surrogate

[60] Ibidem, pp. 4–5.

[61] Ibidem, p. 5.

[62] Ibidem, p. 6. The authors of the report refer to the findings of "A study of legal parentage and the issues arising from international surrogacy arrangements," Preliminary Document No. 3 C of March 2014 for the attention of the Council of April 2014 on General Affairs and Policy of the Conference, Hague Conference on Private International Law, Prel. Doc. No. 3C (The Study), March 2014. Accessible online at: https://assets.hcch.net/docs/bb90cfd2-a66a-4fe4-a05b-55f33b009cfc.pdf (last accessed: 10 October 2018).

[63] Ibidem, p. 12.

[64] Ibidem, p. 18.

mothers should also be guaranteed the right to decide on all aspects of healthcare, including moving and travelling. it also recognized the need to regulate all medical and financial issues related to surrogacy arrangements, as well as the role of intermediaries in concluding such arrangements.

In summarizing existing surrogacy practices, the report emphasized that legal systems allowing commercial surrogacy shall guarantee the right of the surrogate mother to keep the child, even if it is not genetically related to her.[65] It also noted that intending parents withdraw from surrogacy arrangements more often than surrogate mothers decide to retain parental rights.[66] It once again stressed that commercial surrogacy arrangements are permissible if the legal system in which they are concluded operates on the traditional principle that the woman who carries the child is its mother at the time of birth. The law should also precisely outline the procedures for transfer of the child. The report evaluated conclusion of commercial surrogacy agreements in a state without regulation as a high risk.[67] It also recommended that legal systems adopt internal regulations that would allow courts and other state authorities to supervise the process of conclusion and execution of surrogacy agreements. Furthermore, it impressed the need to regulate the protection of surrogate mothers, including by limiting the number of embryos that can be implanted simultaneously.[68] Criminal and civil liability for unlawful surrogacy arrangements should be imposed primarily on intermediaries. State authorities should also collect, analyze and publish information on surrogacy. This seems especially justified in the context of protecting the health of surrogate mothers, as it would allow representative studies to determine the impact of surrogacy on their health.

The UN Special Rapporteur on the sale and sexual exploitation of children notes that international law does not provide for the "right to have a child." Future international regulations on surrogate motherhood should protect the rights of the child, surrogate mother and intending parents. In case of recognition of parentage in international surrogacy arrangements, or recognition of foreign judicial decisions on parentage or other foreign determinations on parentage, states should take the necessary steps to protect the rights of the mother and child, and prevent situations that would constitute sale of the child, states should take the necessary steps to protect the rights of the mother and child, and prevent situations that would

[65] The report gives examples of regulations adopted in the Russian Federation. See: Ibidem.
[66] Ibidem.
[67] Ibidem.
[68] Ibidem.

constitute sale of the child. The Rapporteur also postulates cooperation between institutions dealing with the protection of human rights, such as the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women, in conducting further research on surrogacy and its impact on the rights of surrogate mothers and other interested parties. The development of norms and standards for human rights will help prevent abuses and violations in this area.

Summary

Protection of women's rights, in particular with regard to health, should be a determining factor in considerations on the permissibility and regulation of surrogacy arrangements. However, we should deliberate on whether or not it is possible to adopt such regulations internationally. The only realistic answer seems to be "no," given that regulations vary highly from state to state. This indicates a lack of international consent on key issues, especially the permissibility of surrogacy. International legal norms on the protection of women's rights within surrogacy are antiquated and very general. Nevertheless, international judicial authorities such as the European Court of Human Rights use these general norms in the absence of more precise norms. In the above rulings on disputes arising from surrogacy arrangements, particular reference was made to the protection of human dignity and the protection of family and private life as set out in Art. 8 of the European Convention on Human Rights. At the 37th session of the UN Human Rights Council, held on 6 March 2018 in Geneva, the Special Rapporteur on the sale and sexual exploitation of children underlined the need to adopt regulations on surrogate motherhood, indicating as high-risk the conclusion and execution of surrogacy arrangements in states where legal norms do not exist.[69]

[69] Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, Human Rights Council, 37th session, 26 February–23 March 2018, Agenda item 3, A/HRC/37/6, p. 18. Report available online at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/007/71/PDF/G1800771.pdf?OpenElement (last accessed: 10 October 2018).

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Dark side of diversity. Actions undertaken in the system of the Council of Europe with regard to the issue of surrogate motherhood[1]

1. Introduction

"Preservation of human society" appears to be one of the fundamental values explicitly affirmed in the preamble of the Statute of the Council of Europe, adopted in London on 5 May 1949. Such a formulation of the issue and close editorial proximity to the evocation of "devotion to the spiritual and moral values", should not be surprising if the context of the documents adoption – period immediately following the Second World War – is taken into account.[2] Content of the preamble of the Statute of the Council of Europe, along with Article 1 of the document (listing the aims of the organization) allow to perceive the atmosphere in which it was drafted. At the same time, the document is open to interpretation, therefore it enables the Council of Europe to react to new challenges in the spirit of strengthening international cooperation and "achieving greater unity between its members."

Already in the 1970s, the Council of Europe institutions have noticed that, among these challenges, bioethical problems have raised, as linked to the afore-mentioned "preservation of human society." It was as a result of unprecedented development in

[1] I would like to thank Magdalena Olkiewicz for her extraordinary support in editing this paper.

[2] Establishing of the Council of Europe is considered to be "institutional response to the Second World War", see: Nigel Lowe, "The impact of the Council of Europe on European family law", [in:] *European Family Law Volume I. The Impact of Institutions and Organizations on European Family Law*, ed. Jens M. Scherpe, Edward Elgar Publishing Limited 2016, p. 96.

the field of biomedical sciences.[3] An impulse for actions aiming to research these issues came directly from the Parliamentary (Consultative) Assembly of the Council of Europe[4] in 1985. As a consequence, the Expert Committee on Bioethics (the *ad hoc* Committee of Experts on Bioethics – CAHBI) was set up by the Committee of Ministers on the basis of Article 17 of the Statute of the Council of Europe.[5] A few years after the foundation of the CAHBI, the matter of surrogate motherhood has been noted in the scope of its interests. Since the end of 1980s, surrogate motherhood has become a subject of numerous proceedings and pronouncements of the Council of Europe institutions, as well as rulings of the European Court of Human Rights in Strasbourg. Unfortunately, those attempts have not resulted in adoption of any legally binding document, whereas verdicts of the Strasburg Court do not provide any uniform standard to be applied to the discussed problem.

This study aims to present and analyze actions performed in the system of the Council of Europe with respect to the problem of surrogate motherhood. It might be valuable for practicing lawyers and especially helpful for every legislator who – just as the Polish one – has not dealt with the problem directly. The chapter elaborates both, achievements of the Council of Europe institutions and the Strasburg Court judgements. Bearing in mind the above, "the system of the Council of Europe" is indicated in the title.[6]

In my study, I use the phrase "surrogate motherhood", which is not indisputable, however commonly used also in the commented documents.[7] Terminological

[3] See: Oktawian Nawrot, *Ludzka biogeneza w standardach bioetycznych Rady Europy*, Wolters Kluwer Polska 2011, p. 70.

[4] *Bioethics at the Council of Europe* (booklet published on behalf the Council of Europe), https://www.coe.int/en/web/bioethics (last accessed: 8 March 2018).

[5] *Information document concerning the DH-BIO*, 13 December 2017, https://rm.coe.int/inf-2017–5-e-info-doc-dh-bio/168077c578 (last accessed: 8 March 2018).

[6] European Court of Human Rights in Strasburg is not an organ of the Council of Europe. The Strasburg Court was established on the basis of Article 19 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), adopted by Member States of the Council of Europe in Rome 4 November 1950.

[7] It is popular to speak about "surrogacy", which – when detached from the parental affiliation – could indicate civil law institution. Literature concerning the problem in question either proposes to use the phrase "surrogate wife", John A. Robertson, "Matki zastępcze: nowsza odsłona nienowych dylematów", [in:] *Początki ludzkiego życia. Antologia bioetyki. Vol. 2*, ed. Włodzimierz Galewicz, Kraków 2010, p. 354, or prefers "surrogate mother" instead to "surrogate motherhood"; see: Marta Franaszek, "Umowy o surogację", *Prawo i Medycyna*, http://www.prawoimedycyna.pl/?str=artykul&id=1029 (last accessed: 8 March 2018). The most accurate seems to be either the term "surrogate birth-giving" or "surrogate pregnancy", both of which reflect the essence of this phenomenon.

controversies will be underlined in further parts of the paper, while examining subsequent documents.

2. The Council of Europe institutions involved in the problem of surrogate motherhood

According to Article 10 of the Statute of the Council of Europe, its organs are: the Committee of Ministers and the Consultative Assembly, since 1994 known as the Parliamentary Assembly. According to Article 17 and Article 24 respectively, the afore-mentioned organs may set up committees and commissions. In case of the Committee of Ministers, those institutions have advisory and technical character and could be set up "for such specific purposes as it may deem desirable." Assembly could create those institutions "to consider and to report it any matter which falls within its competence."

One of the institutions established in such a way was the afore-mentioned CAHBI, transformed in 1992 into Steering Committee on Bioethics (CDBI), and afterwards in 2012 into still functioning Committee on Bioethics (DH-BIO). Its tasks encompass, among others, "assessing ethical and legal challenges raised by developments in the biomedical field."[8] Surrogate motherhood regularly appears in the scope of the Committee interests.

Due to its multidimensional character, the discussed phenomenon, was the subject of analysis conducted by other subsidiary institutions of the Council of Europe. Most of all, the following are worth mentioning:

- the Steering Committee for Human Rights (CDDH) established in 1976, whose actions were focused on the problem from the human rights perspective[9],
- the Committee of Experts on Family Law (CJ-FA),
- the Committee on Legal Co-operation (CDCJ)[10] functioning since 1963,

[8] *Information document concerning the DH-BIO…*, p. 3.

[9] See: Steering Committee for Human Rights Report CDDH(2016)R85, 2 August 2016, https://rm.coe.int/16806aff88 (last accessed: 8 March 2018).

[10] See: Report on Principles Concerning the Establishment and Legal Consequences of Parentage – "The White Paper" (CJ-FA(2006)4e), 23 October 2006, https://rm.coe.int/16807004c6 (last: accessed 8 March 2018).

- the Committee on Social Affairs, Health and Sustainable Development.[11]

It should be emphasized that scopes of interests of these institutions often overlap and, what is more, are defined with open text terms, indicating that it should be interpreted widely. For example, DH-BIO copes with the issues of surrogate motherhood or organ donation, equally as with the matter of gender equality.[12] What is important, the Council of Europe institutions cooperate closely, which bears fruit in joint drafts of their reports. As an example, CDDH exchanges observations on surrogacy with representatives of the DH-BIO.[13]

2.1. Pronouncements and other actions of the Council of Europe institutions regarding surrogate motherhood

As it was underlined at the beginning, the efforts undertaken by the Council of Europe institutions with respect to the problem of surrogate motherhood, have not yet led to adoption of legally binding document. Mainly, those attempts resulted in reports of ancillary institutions, elaborated in various phases of its work. Generally, those documents consist of reporting part, concerning previous steps dedicated to the issue; normative part – a draft of principles regarding medically assisted procreation, including surrogate motherhood or the problem of parental affiliation; and explanatory part. Hitherto, none of those documents were adopted by the Council of Europe organs, what would allow it to be treated as a recommendation – political instrument of sort-law.[14] The exception in this field represents "The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine", drafted by the CDBI and adopted by the Committee of Ministers on 19 November 1996.[15] The instrument constitutes a legally binding international agreement.[16] This part of the study is dedicated to other actions performed by the Council of Europe institutions, while the latter focuses on the Convention.

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[11] See: Children's Rights Related to Surrogacy Report, 23 September 2016, http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=23015&lang=en (last accessed: 8 March 2018).

[12] *Information document concerning the DH-BIO*…, p. 12.

[13] See: Steering Committee for Human Rights Report CDDH (2016)R85, p. 14.

[14] On the problem of legal character of recommendations and other Council of Europe instruments and also way of its creation, see: Nigel Lowe, *The Impact of the Council of Europe*…, pp. 98–99.

[15] See: Oktawian Nawrot, *Ludzka biogeneza w standardach bioetycznych Rady Europy*, pp. 83–95.

[16] *Bioethics at the Council of Europe*…

2.2. Report on human artificial procreation drafted by the CAHBI (1989)

The report of CAHBI on human artificial procreation, published in 1989 was one of the earliest acts of the Council of Europe, which could be seen as a response for unprecedented development in the area of techniques of human artificial procreation. The report and incorporated principles[17] directly referred to the problem of surrogate motherhood. Despite numerous subsequent endeavors to regulate the issue under the auspices of the Council of Europe, given documents are still influential, widely commented and quoted, both in academic literature[18] and case law.[19]

The draft of recommendation refers to all techniques of human artificial procreation, among others to artificial insemination, *in vitro* fertilization, donation of embryos and gametes, embryo manipulation ("General conditions for the use of artificial procreation techniques"). The document defines a surrogate mother as "a woman who carries a child for another person and has agreed before pregnancy that the child should be handed over after birth to that person" ("Scope and definitions"). The draft is of conservative nature, what could be easily observed in its general principles concerning all techniques of artificial procreation. Access to the above-mentioned methods was restricted to "[a] heterosexual couple when appropriate conditions exist for ensuring the well-being of the future child". One of the conditions allowing to benefit from the human artificial procreation techniques is *ultima ratio* principle, according to which they were restricted – as the Principle 1.1. states – to the situation when:

a. – other methods of treatment of infertility have failed or are not appropriate in the particular case or offer no prospect of success; or a serious risk exists of transmitting to the child a grave hereditary disease; or there is a serious risk that a child would suffer from some other disease which would result in his early death or severe handicap; and

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[17] Accessible in "Texts of the Council of Europe on Bioethical Matters: Volume II", available at: https://www.coe.int/t/dg3/healthbioethic/texts_and_documents/ (last accessed: 10 March 2018).

[18] See: Adam Sikora, *Życie ludzkie w fazie przedimplantacyjnej w dokumentach Rady Europy w aspekcie moralnym*, Wydawnictwo Uniwersytetu im. Adama Mickiewicza w Poznaniu 2011, p. 101; M. Kramska, „Problematyka prawna zastępczego macierzyństwa – regulacje prawnomiędzynarodowe i krajowe", *Prawo i Medycyna*, http://www.prawoimedycyna.pl/index.php?str=artykul&id=688&PHPSESSID=74177a443c2491416d-dc85368946d1dd (last accessed: 10 March 2018).

[19] See: The European Court of Human Rights judgement in *Paradisco and Campanelli v. Italy*, 24 January 2017, application No. 25358/12, para 79.

b. – there is a reasonable chance of success and there is no significant risk of adversely affecting the health of the mother or the child.

The draft forbids the use of methods of human artificial procreation for the purpose of positive eugenics (Principle 1.2). According to the next provision "Any act required by artificial procreation techniques and procedures carried out on embryos and manipulations connected therewith must be performed under the responsibility of a physician and within an establishment authorized by the competent authority of the state or an authority set up by the state for that purpose." It might be relevant in case of the gestational surrogacy. The following principles are dedicated to the problem of conscience clause in the field of commented techniques and also the requirement to receive free and informed consent from persons decided to use medically assisted procreation (Principles 3 and 4).

In the context of surrogate motherhood, regulations regarding the donation of gametes and embryos could be applied. Principle 9.1 states that "No profit shall be allowed for donations of ova, sperm, embryos or any element collected from them. Only loss of earnings as well as travelling and other expenses directly caused by the donation may be refunded to the donor", while Principle 13 provides anonymity of the donors, with the exception that, national law may grant the child born as a result of donation the access to "information relating to the manner of his or her conception or even to the identity of the donor."

From the perspective of surrogacy, the following principles are crucial. Principle 14.1 reflects the traditional Latin sentence *mater semper certa est*, stating that "The woman who gave birth to the child is considered in law as the mother." The problem of paternity is regulated as follows:

2. In case of utilization of sperm of a donor:
   a. the mother's husband is considered as the legitimate father and, if he has consented to the artificial procreation, he may not contest the legitimacy of the child on the grounds of artificial procreation;
   b. if the couple is not married, the mother's companion who gave his consent cannot oppose the establishment of parental responsibilities in relation to the child, unless he proves that the child was not born as a result of artificial procreation.

3. Where the gametes donation is made through the intermediacy of an authorized establishment, no filial relationship may be established between the donor of the gametes and the child conceived as a result of artificial procreation. No proceedings

for maintenance may be brought against a donor or by a donor against a child. (Principle 14.2–3).

Principle 15.1 excludes the use of artificial procreation techniques to conceive a child carried by a surrogate mother: "No physician or establishment may use the techniques of artificial procreation for the conception of a child carried by a surrogate mother", what in conjunction with other Principles mentioned in the draft, leads to the prohibition of the surrogate motherhood. The next provision acknowledges unenforceability of surrogate motherhood contracts. Principle 15.3 reiterates the prohibition of commercial intermediary and advertisement in the field of surrogacy, stipulated among principles devoted to donation. Paragraph 4 provides the exception from absolute prohibition of surrogate motherhood arrangements, provided that it is recognized by the national law and under following conditions: (a) the principle of unenforceability is observed, (b) surrogate mother will not gain any benefit for carrying a child and, (c) surrogate mother will be able to keep the child after birth.

The above-mentioned act has not been adopted by any of the organs of the Council of Europe and is still treated as a draft recommendation. Apart from the direct prohibition of surrogacy and use of the exception technique in favor of states that acknowledge such contracts as legal, it is clearly visible that the CAHBI intention was to guarantee non-commercial character of this contract for both, surrogate mother and other parties. As it stems from General Principles, involving surrogate motherhood should be treated as ultimate measure and only on condition that medical reasons occur. It is easy to notice that current legal practice is far from these ideals. Commercial nature of such contracts is accepted by Ukrainian and Russian legislators (therefore Member States of the Council of Europe), as well as – until recently – Indian and some of the US states (California, Texas).[20] The need to take advantage of surrogacy is often driven by the desire for professional development or other, exclusively aesthetic premises.

[20] R. Cascão, "The Challenges of International Commercial Surrogacy: From Paternalism Towards Realism?", *Medicine and Law*, 35, 2016, pp. 151, 152–153; V.R. Guzman, "A Comparison of Surrogacy Laws of the U.S. to Other Countries: Should There Be a Uniform Federal Law Permitting Commercial Surrogacy?", Houston Journal of International Law 38, 2016, pp. 619, 645.

2.3. Report on principles concerning the establishment and legal consequences of parentage – "The White Paper" drafted by the CDCJ (2004)[21]

Works on the document were triggered by the XXVII Colloquy on European Law on "Legal problems relating to parentage", held in Valletta, Malta in 1997. At that time, the decision was made to prepare, under the auspices of the Council of Europe, an instrument concerning legal status of a child, that would take into account contemporary challenges of medicine development.[22] It was the CJ-FA which initiated the actions and determined that an act should take a form of recommendation, due to the fact that a large number of Member States of the Council of Europe "were revising their national laws on these issues at the time", so 'it was not advisable to prepare a new Convention which could become rapidly out of date or which could be in contradiction with new internal laws."[23] Finally, because of small interest of states during the consultation of the document, it was formatted as a report.

The document consists of three parts. The first one concerns "principles relating to the establishment of legal parentage", second one encompasses "principles relating to legal consequences of parentage", while the last part describes "possible legal consequences where parentage has not been established." As it is emphasized in the general principles of the document, the best interest of a child should play supreme role in its interpretation, stipulating the necessity of establishing parentage "as from the moment of the birth and, secondly, to give stability over time to the established parentage." Interests of others – parents or state – could be taken into account only additionally. Thus, the law can disregard biological bond as a criterion of legal parentage in case of medically assisted procreation. As the draft states: "Therefore the law may opt not to allow the parentage to be established on the basis of biological affiliation, for instance in cases of medically assisted procreation with an anonymous donor of sperm." Significant change of the terminology should be noticed. While the CAHBI Principles of 1989 were based on the phrase "techniques of human artificial procreation", the White Paper refers to "medically-assisted procreation" (MAP), meaning that "naturalness" is omitted as the criterion of conditioning those practices. It could be derived from the normative layer of the document, purpose

[21] Source: https://rm.coe.int/168070004c6 (last accessed: 10 March 2018).

[22] See: Nigel Lowe, *The impact of the Council of Europe*…, p. 118.

[23] Report on principles concerning the establishment and legal consequences of parentage – "The White Paper", p. 3.

of which was to "reflect a balance between 'the biological truth', reflecting primarily biological and genetic parentage, and 'the social parenthood' reflecting the fact with whom the child is living and who is taking care of him or her."[24]

With respect to the problem of maternity, "The White Paper" repeats the principle included in the CAHBI Report of 1989 and acknowledged by the case law of the European Court of Human Rights[25], which stresses that "The woman who gives birth to the child shall be considered as the mother" (Principle 1). CJ-FA has noticed a great development in the field of MAP and ensuing popularization of surrogacy arrangements. Not only did the Report recognize the CAHBI Principles of 1989, but it also required that the states which treat surrogate motherhood as a binding contract, should introduce procedures enabling "transfer of legal parentage from the surrogate mother to the new legal mother." The document confirms unenforceability of commented agreements. It states that "previous circumstances concerning the conception and pregnancy (e.g. cases of surrogacy) and any subsequent modification of the legal parentage (e.g. adoption by another person) will not affect the legal maternal affiliation at the moment of birth." It appears that, in the light of such pronouncement, possible surrogacy contracts should be treated as preliminary agreements, which could be validated after the birth of a child. However, those observations stem from the explanatory part of "The White Paper" – they are not expressed in a form of principle.

When it comes to the issue of establishing parentage status in the contexts of MAP techniques, the Report suggests that the Member States should make the traditional family law presumptions, incorporated in their legal systems. First of all, presumption of paternity of the mother's husband, also when the child was born after legally specified period after the termination of the marriage; and presumption of paternity of the man who cohabitated with the mother. Principle 10.2 determines the prohibition of questioning paternity by the husband or companion who gave his consent for using MAP, unless he proofs before the court that the child was not conceived as a result of those techniques ("The mother's husband or companion who gave his consent to the treatment cannot oppose the establishment of his paternity, unless the court finds that the child was not born as a result of the treatment he consented to").

[24] Report on principles concerning the establishment and legal consequences of parentage – "The White Paper", p. 7.

[25] Classic judgement from the case of *Marckx v. Belgium*, 13 June 1979, application No. 6833/74, is quoted.

Principle 17, the last one from the first part of the Report, is dedicated to the problem of surrogate motherhood. The phrases "surrogate motherhood" or "surrogacy" were not directly indicated in its content, however it states that "Any new form of change of parentage shall take place under the control of the competent authority in procedures which have due regard to the best interests of the child. Any such form should be subjected to the same safeguards as adoption." The provision opens the door to development of the discussed institution, since it does not treat surrogacy as an exception – in contrast to the CAHBI Report of 1989 (compare Principle 15.4 of the CAHBI Report which states "However, states may, in exceptional cases fixed by their national law, provide…"). However, it emphasized that surrogacy agreement should not be entirely a private contract, but entered into under state's control. Prohibition of commercial surrogacy – previously indicated in the CAHBI Principles – could be found in the White Paper as well.

2.4. Draft recommendation on the rights and legal status of children and parental responsibilities prepared by the CDCJ (2011)[26]

The document directly refers to the problem of surrogate motherhood, commenting on "surrogacy arrangements" in provisions 7.3 and 8.2. The act confirms the principle that as legal mother should be considered the woman who gave birth to the child, however the postscript "regardless of genetic connection" is added (Principle 7.1). Further part of the document indicates that states whose laws regulate the issue of surrogacy, can disregard this Principle ("States having legislation governing surrogacy arrangements are free to provide for special rules for such cases"). As a consequence of this exemption, the document foresees the entitlement of such states to regulate the methods of questioning the maternity in case of surrogacy (Principle 8.2). The explanatory part of the Draft states that the purpose of providing for these principles was not to encourage Member States to legalize surrogacy contracts, but only to enable it.[27] However, at later stage of works on the

[26] Available at: https://7676076fde29cb34e26d-759f611b127203e9f2a0021aa1b7da05.ssl.cf2.rackcdn.com/eclj/Draft-recommendation-rights-legal-status-children-CDCJ-2011–15.pdf (last accessed: 10 March 2018).

[27] "Draft Recommendation on the Rights and Legal Status of Children and Parental Responsibilities", p. 16.

recommendation, fear of persuasive effects of these paragraphs was articulated.[28] Members of the Parliamentary Assembly were addressing the Committee of Ministers in written, demanding that the document should contain a direct confirmation of non-mandatory character of surrogacy agreement principles, not only in the explanatory part, but also in the normative one.[29]

The explanatory part of the Draft applies terminology usually used in the practice of surrogacy arrangements. As a result, affiliation consequences are described: "In such cases, it is the 'commissioning woman' who is the legal mother and not the woman giving birth, or, in the case of an implanted embryo, the 'commissioning spouses' and not the woman giving birth and her spouse or partner are regarded as the legal parents."

Paragraphs which do not directly refer to the discussed issue, also seem to be of great importance. Firstly, it should be underlined that preamble of the Draft points out the construction of "the best interest of the child." What is particularly significant in the context of "procreative tourism", the document indicates that "For the purposes of this recommendation, 'parents' mean the persons who are considered the parents of the child according to national law." (Principle 2). The Draft grants children the right of access to information concerning their origins (Principle 4).

Regarding medically assisted procreation, the Draft obliges states, whose legal systems regulate this matter, to adopt provisions on affiliation status of children born as a result of those techniques. It might be emphasized that gamete or embryo donors would not be acknowledged as legal parents, while husband or registered partner of the woman whose child was born as a result of MAP, would be acknowledged as a legal father, if he gave his consent for using MAP. As Principle 17.1.c. states, "the man who is the co-habiting partner of the woman whose child was conceived as a result of such a procedure is considered as the legal father provided both he and the woman give written consent before or at the time of the procedure." The document requires establishment of regulations allowing contest affiliation, among others, in case when parentage status stems from the presumption, but the person considered as legal parent did not give its consent for using MAP techniques by its spouse or partner (Principle 18).

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[28] See: Synopsis from 17 January 2012 meeting of Group on Legal Co-operation, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805cb6fd (last accessed: 11 March 2018).

[29] See: Written question No. 607 by Mr Volonté: "The Draft Recommendation on the Rights and Legal Status of Children and Parental Responsibilities", https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cc0aa (last accessed: 14 March 2018).

The Draft does not refer to the CAHBI Report of 1989, but its explanatory part mentions "The White Paper" (2004). The document lacks the provisions forbidding commercial surrogacy what could be explained as resignation from condemning this practice on one hand, but on the other hand it could stems from the general character of the document – it does not focus on surrogacy problems.

2.5. "Children's rights related to surrogacy" report drafted by Committee on Social Affairs, Health and Sustainable Development (2016)[30]

The Report prepared by Petra De Sutter is the latest pronouncement of the Council of Europe institutions with respect to the problem of surrogacy. It consists of the following: the draft recommendation of Parliamentary Assembly; the explanatory part – written in quite a personal manner; and the appendix – "Glossary prepared by The Hague Conference on Private International Law" concerning the issue of surrogate motherhood. The draft recommendation is very brief, so it is reasonable to cite it *in extenso*:

> The Parliamentary Assembly recommends that the Committee of Ministers:
> 1.1. consider the desirability and feasibility of drawing up European guidelines to safeguard children's rights in relation to surrogacy arrangements;
> 1.2. collaborate with the Hague Conference on Private International Law (HCCH) on private international law issues surrounding the status of children, including problems arising in relation to legal parentage resulting from international surrogacy agreements, with a view to ensuring that the views of the Council of Europe (including those of the Parliamentary Assembly and the European Court of Human Rights) are heard and taken into account in any multilateral instrument that may result from the work of the HCCH.

In the explanatory part the author defends position, according to which, altruistic gestational surrogacy should be permitted, whereas other forms of surrogacy must not, especially commercial surrogacy contracts, as for-profit surrogacy violates the principle of human dignity and treats a child as a commodity. (The question

[30] Available at: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=23015&lang=en (last accessed: 14 March 2018).

if altruistic surrogacy is consistent with human dignity could be easily addressed). What is more, surrogacy may put the child at risk of abandonment. Moreover, as the report warns, surrogacy might lead to abuse of surrogate mothers, who usually are not able to give free and informed consent to participate in such an agreement. The Report makes a reference to initial rulings of the European Court of Human Rights, concerning given matter, which would be elaborated in the following parts of the study. It is worth emphasizing that conclusions stemming from those judgements – even if disapproving surrogacy – ensured human rights protection of children and, as a result, meant legitimization of this phenomenon. In the author's opinion, from the perspective of children rights protection, the most accurate solution would be to totally prohibit commercial surrogacy, however she is aware that it would be difficult to establish and enforce such provision. Taking it into account, she recommends that, in countries where surrogacy is allowed, access to it should be limited to resident citizens, in order to reduce "procreative tourism" phenomenon. Those assumptions formed the basis of former drafts prepared by Petra De Sutter, which were previously rejected. In the previous version of the report, Petra De Sutter proposed adoption of the following recommendations, which were rejected during works of Committee:

- Member States prohibit all forms of for-profit surrogacy in the best interest of the child;
- Member States and the Committee of Ministers collaborate with the HCCH with a view to include, as a minimum requirement, a restriction of access to surrogacy arrangements to resident nationals of their own State and country in any multilateral instrument that may result from the HCCH's parentage/surrogacy project;
- Member States take care not to violate children's rights when taking measures to uphold public order and discourage recourse to surrogacy arrangements;
- the Committee of Ministers explore the desirability and feasibility of drawing up European guidelines to safeguard children's rights in relation to for-profit surrogacy arrangements.

Eventually, the afore-mentioned two-point draft was rejected by the Parliamentary Assembly in October 2016, by 83 votes against to 77 votes in favor, with 7 abstention votes.[31] It was the first report in which cross-border problems stemming from surrogate motherhood were observed.

[31] Results of the voting are available at: http://assembly.coe.int/nw/xml/Votes/DB-VotesResults-EN.asp?VoteID=36189&DocID=16001&MemberID= (last accessed: 14 March 2018).

3. Other actions of the Council of Europe regarding surrogate motherhood

Further to Article 1.a. of the Status of the Council of Europe, "The aim of the Council of Europe is to achieve a greater unity between its members (…)". As presented above, attempts to achieve this goal in the area of surrogate motherhood are undertaken. Normative statements of the Council of Europe are based on research and studies concerning legal systems of the Member States. It is a primary condition allowing to follow development trends and perform actions leading to greater convergence. Such analysis is conducted, *inter alia*, in the form of regularly updated questionnaires addressed to Member States' delegations.[32]

Additionally, academic studies concerning family law are elaborate, for instance, *A Study into the Rights and Legal Status of Children Being Brought up in Various Forms of Marital or Non-marital Partnerships and Cohabitation*, conducted in 2009 by Professor Nigel Lowe as a report requested by CJ-FA.[33] The document raises the problem of surrogate motherhood with regard to the legal systems of member states; nevertheless, it is of no normative nature.

Furthermore, institutions dealing with surrogacy issues arrange meetings of experts in the field. In 2016, the CDDH attended a lecture given by Professor Frederique Dreifuss-Netter, covering the problem of surrogate motherhood and parental affiliation. The presentation referred to a significant ruling of the European Court of Human Rights in the case of *Mennesson and Labassée v. France* (commented hereafter). The author has enumerated crucial arguments of the dispute, commenting on the risk of abusing surrogate mothers, objectification of children and the best interests of the child. In the course of her lecture, she pointed out that – paradoxically – summoning the best interest of the child as the argument in favor of surrogacy, could lead to infringement of human rights, regulations regarding adoption or – to put it bluntly – to human trafficking. Her conclusion was pessimistic. She claimed that achieving unity among the Member States in the area of MAP is not possible;

[32] See: DH-BIO Abridged Report, 16 December 2016 (DH-BIO/abr RAP 10), https://rm.coe.int/10th-abridged-report-e/1680726b2e, pp. 5, 12 (last accessed: 14 March 2018); DH-BIO Abridged Report, 15 December 2015 (DH-BIO/ abr RAP 8), https://rm.coe.int/168058f2f1 (last accessed: 14 March 2018); Steering Committee for Human Rights Report CDDH(2016)R85, p. 14.

[33] N. Lowe, *A Study into the Rights and Legal Status of Children Being Brought up in Various Forms of Marital or Non-marital Partnerships and Cohabitation*. A Report for the attention of the Committee of Experts on Family Law by Nigel Lowe; available at: https://rm.coe.int/16807004bf (last accessed: 14 March 2018).

therefore, it is necessary to work over legal conflicts rules. As prof. Dreifuss-Netter stated: "This example illustrates the fact that, while it is unrealistic to attempt to standardize assisted reproduction practice across Europe owing to the diversity of cultures, there is a pressing need for common rules to resolve conflicts of law, thus helping to protect citizens' freedom in a globalized world, as well as human rights, especially in the regions where they are most at risk, without weakening the laws of states that are expressing their own values."[34]

Apart from the actions directed to adopt legal instruments, the Council of Europe institutions also make efforts in the area of education and popularization of knowledge about MAP techniques. In the handbook titled *Bioethical Issues. Educational Fact Sheets* (2009) published by the Council of Europe, surrogate motherhood occurs in the contexts of MAP and its various interpretations by different European countries. The book presents an opinion that many states permit non-profit surrogacy. According to the handbook, "Surrogate motherhood is a pregnancy carried to term by a woman for the benefit of a couple who cannot have children. The gametes that enabled the embryo to be created may have come from one or both members of the couple, or have been donated. The woman bearing the child is commonly known as a 'surrogate mother'."[35] It is worth noting that surrogacy is treated by the authors as a remedy for infertility, not as an instrument allowing to achieve life comfort by a person or a couple, who wants to have child without any inconvenience caused by pregnancy.

In this category falls a book titled *Handbook on European law relating to the rights of the child* (2015), published by the European Union institutions (namely the European Union Agency for Fundamental Rights), in cooperation with the Council of Europe. In the handbook, the *Mennesson v. France* case is presented. It stands as an example when the European Court of Human Rights granted the Member States of European Convention of Human Rights a wide margin of appreciation in the field of surrogacy (including prohibition of this contract) and establishing its affiliation consequences. The above margin is limited by the children's right to its identity. The handbook also indicates the EU Court of Justice case, according to which, refusal to grant parental leave to commissioning mother shall not be identified

[34] Steering Committee for Human Rights Report CDDH(2016)R85, pp. 16, 54–59.

[35] *Bioethical Issues. Educational Fact Sheets*, pp. 24, 28 (Council of Europe Publishing 2009), https://edoc.coe.int/en/educational-tools/5506-bioethical-issues-educational-fact-sheets-pdf-2009-.html (last accessed: 14 March 2018).

as discriminatory (*Z v. A Government Department, The Board of Management of a Community School* [GC], 18 March 2014, C363/12).[36]

4. Surrogate motherhood and Convention on Human Rights and Biomedicine

Circumstances of the drafting of *The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine*, were described in the earlier part of this chapter. It is worth reminding that the document is a legally binding international agreement. The act does not establish any international body to defend its observance, however, it obliges its parties to ensure that legal instruments are provided on national level to fulfil that (Articles 23–25). From the perspective of surrogate motherhood, three aspects of the Convention appear to be crucial.

First of all, we should bear in mind numerous references to the category of human dignity. The title of *The Convention* embodies it, as well as its *Preamble* ("Conscious that the misuse of biology and medicine may lead to acts endangering human dignity") and normative part (Article 1: "Parties to this Convention shall protect the dignity and identity of all human beings"). Apart from the direct evocations to human dignity – which, as Oktawian Nawrot states, is "[a] cornerstone of the human rights protection system and its central value"[37] – the Convention proclaims the principle of the primacy of human being over the sole interest of society or science (Article 2). Ethicists questioning moral permissibility of the surrogacy (especially those considered as personalists), affirm that it is contradictory to the essence of human dignity, both of a surrogate mother and a child, due to the fact that it leads to commodification of them.[38] The above reasoning was represented in the works

[36] *Handbook on European Law Relating to the Rights of the Child*, pp. 61, 67, 157 (Publications Office of the European Union 2015), https://www.echr.coe.int/Documents/Handbook_rights_child_ENG.PDF (last accessed: 14 March 2018). The Handbook contains a mistake in this field, because contrary to the quoted judgement, it claims that such a practice is discriminatory.

[37] O. Nawrot, *Ludzka biogeneza w standardach bioetycznych Rady Europy*, p. 150.

[38] See: Adam Sikora, *Życie ludzkie w fazie przedimplantacyjnej…*, pp. 102–103; Halina Ciach, *Istota ludzka czy osoba ludzka. Krytyka bioetyki początków życia Petera Singera*, Wydawnictwo Św. Stanisława BM 2013, p. 217.

of the aforementioned institutions; it is also acknowledged in concurring opinions to judgements commented hereafter.[39]

The next hint for the purpose of discussed field, that could be derived from the Convention, is prohibition of commercial usage of human body, provided for in Article 21, which states that "The human body and its parts shall not, as such, give rise to financial gain." It is interpreted as the prohibition of for-profit surrogacy. The countries in which commercial surrogate motherhood is permitted, e.g., Ukraine or Russia, did not ratify the Convention.

Third group of the rules proclaimed by the Convention, which may have influence on the commented problem, includes provisions concerning MAP techniques. Article 13 limits legal interventions in the human genome to predictive, therapeutic or diagnostic purposes, and only under the condition that it would not cause "modification in the genome of any descendants." Subsequent provision forbids the use of such techniques if their aim is selection of child's sex, "except where serious hereditary sex-related disease is to be avoided."

5. European Court of Human Rights case law related to the problem of surrogate motherhood[40]

The case law of the European Court of Human Rights directly related to the problem of surrogacy is not widely developed. Hereafter, I would like to comment on judgements in three cases, the first of which was finalized with the ruling of 26 September 2014. It was the first judgement of the ECHR concerning the problem of surrogate motherhood, what does not mean that meaningful rulings regarding surrogacy side issues, like *in vitro* fertilization[41], international adoption[42], acknowledge of documents, had not been given previously.

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[39] For the information on the category of human dignity in the European Court of Human Rights case law, see: Tadeusz Jasudowicz, "Odzyskiwanie godności w europejskim systemie ochrony praw człowieka (Cz. II – bez cz. I i zakończenia)", *Prawo i więź*, No. 22, 2017.

[40] In this part of the paper, I depend on a study written for Instytut Wymiaru Sprawiedliwości [*The Institute of Justice*] entitled: *Tzw. macierzyństwo zastępcze (surrogacy, Leihmutterschaft) w bieżącym orzecznictwie Europejskiego Trybunału Praw Człowieka w Strasburgu*, Warszawa 2017.

[41] See: judgement in *Evans v. United Kingdom*, 10 April 2007, application no. 6339/05; judgement in *S. H. i others v. Austria*, 1 April 2010, application np. 57813/00, both commented by O. Nawrot, [in:] *Ludzka biogeneza*…, pp. 194–217.

[42] See: judgement in *Wagner and J.M.W.L v. Luxembourg*, 28 June 2007, application no. 76240/01.

5.1. ECHR (Fifth Section) judgement in the case of *Mennesson v. France*, 26 June 2014, application no. 65192/11[43]

An application was lodged by spouses – French citizens, and their two children – American citizens, born as a result of surrogacy (§ 1). First two applicants have decided to take advantage of surrogate motherhood due to infertility of the woman (§ 7), the decision has been made after unsuccessful attempts at *in vitro* procreation. Applicants concluded gestational surrogacy agreement, and obliged themselves to redress surrogate mother's costs (§ 8). Applicants were recognized as parents by the Supreme Court of California before children's birth, which was entered into their birth certificates (§ 9–10).

After birth of their children, applicants were making unsuccessful efforts to register children's birth certificates in French register of births, marriages and deaths, with assistance of French consulate in Los Angeles (§ 11). At the same time, the investigation against adult applicants was carried out in France, as a result of false representation in the scope of children's legal status. The proceedings also concerned acts of intermediary in surrogacy agreements, because such practice was forbidden in France (§ 14–15). Investigation was discontinued, due to the fact that potential crimes were committed on US territory (§ 16). It was the reason of original registration of children`s data in French register of births, marriages and deaths (§ 17), which was annulled after public prosecutor's intervention. The intervention was based on the ground that ruling of the Supreme Court of California was contradictory to the French public policy, among all, the principle of inalienability of legal status (§ 18). The following proceedings undertaken before French organs were unsuccessful for applicants. Reasoning of its decisions was based on Articles 16–7 and 16–9 of the French civil code, according to which surrogacy agreement is null and void, which is contained within Chapter 2 of French civil code, was treated as a matter of public policy.[44] What is more, it was noticed that reference to child's best interests, could not *ex post* validate previous act – questioned surrogacy

[43] I use English and French versions of cited judgements accessible on the ECHR official web page: http://hudoc.echr.coe.int/; "§" symbols which are in use in the following parts of the present text refer to particular sections of the judgement in question.

[44] Respectively: "All agreements relating to procreation or gestation for the benefit of another are null" and "The provisions in this chapter are of public order"; for the sake of the present essay, I use translations available on the following web page: https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations (last accessed: 18 March 2018).

arrangement, which was invalid (§ 24). French bodies claimed also that, if applicants have lived together for over a decade, there could not be any infringement of the right to family life (§ 26–27).

As a consequence, applicants have lodged a complaint to the ECHR, claiming that Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: European Convention or Convention) was breached by French authorities which refused to recognize family bonds of applicants and their children (children-parent relationship) due to fact that they were born after surrogacy (§ 43). The ECHR has pointed out that violation of children's private life is as important in this case as the right to respect family life (§ 48–50). In such a situation, the Court's task was to determine whether limitation clauses of Article 8 were not overstepped.

Applicants have questioned accordance of the government's actions with the law, but this allegation was dismissed by the Court (§ 57–58). The ECHR has also shared the authorities' view on the matter of legitimate aim of French law. The government has claimed that France supports ethical and moral principles by virtue of which human body cannot be instrumentalized and a child cannot be treated as a commodity. Thus, the statue's aim was prevention of crime, protection of health and the rights and freedoms of others (§ 60), what appeared convincing to the Court.

With respect to the problem of necessity in a democratic society, applicants have underlined that the case does not concern the question wheatear surrogacy should be legal or not (in this context wide margin of appreciation was obvious for them), but it involves the issue of refusal to register civil data, including those about genetic father. Applicants have indicated judgement in the case of *Wagner v. Luxembourg*, as a confirmation of the role of children's best interest in the ECHR case law (§ 63). Moreover, they have questioned government's consequence in protection of inalienability of legal status principle, showing its liberal approach to the rights of transsexuals or recognizing women who benefited from *in vitro* fertilization with gametes given by donors as mother (§ 66). In applicants' opinion, French law has established the concept of intended parent. Finally, they have claimed that measures used by the authorities were disproportional to governmental aims, especially when legal consequences for children were taken into account. Children had no French citizenship, passports, valid residence permit (the truth was that as children they could not be deported) (§ 68). Government has questioned those claims, stating that applicants have not made any efforts to obtain French nationality for their children, they owned full parental rights, and documents which they possessed – American

birth certificates – allowed them to exercise parental authority and even ensured to inherit by virtue of American law (§ 71). In governmental arguments, claims about lack of legal consensus among Member States on surrogacy, could be found. According to its position, it should result in granting wide margin of appreciation for the state (§ 73).

Strasbourg judges have acknowledged substantial margin of appreciation in the area of estimating limitation clauses, however they found that this margin was somehow overstepped in the case (§ 75). In the ECHR perspective, results of comparative study have revealed sensitive, ethical nature of the problem of surrogate motherhood, what could be the basis for wide margin of appreciation, both for the problem of legality of surrogacy and recognizing parent-child status (§ 79). On the other hand, the Court emphasized that an essential element of human identity (parent-child relationship) was the core problem in the case (§ 80). Judges admitted that recognizing foreign documents could be interpreted as tacit permission to surrogacy (§ 83), nevertheless they concluded that it is crucial to make sure that society interest is balanced correctly with individual (applicants') interest (§ 84).

The judgement presented distinguishes between the situation of parents and the situation of children, and above all the matter of the right to privacy of children and the issue of infringement of the right to family life of all four applicants. As it comes to this last problem, the Court has acknowledged that government actions indeed caused some inconvenience to the applicants' life; nonetheless, they were not as severe in character to be considered a veritable breach of the Convention (§ 94). A different approach was presented by the ECHR towards infringement of the right to privacy and, stemming from it the right to identity, which encompasses, e.g., the parent-child legal status or nationality. In this field, with regard to minor applicants, it was acknowledged that there has been infringement, margin of appreciation was overstepped (§ 100). Thus, the ECHR decided that there was a violation of Article 8 of the Convention with respect to children, but altogether dismissed the remaining claims of the application.[45]

[45] The problem of recognition of parent-child legal relationship has found continuation in the "Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother" delivered on 10 April 2019 by Grand Chamber of ECHR in response to the French Court of Cassation request no. P16-2018-001. In the Opinion ECHR suggests which form of acknowledgement could be considered as compliant with the Convention.

The *Mennesson* case is the first ruling in which the ECHR debated on the problem of consequences of surrogacy arrangement. It could be considered as a kind of compromise between reasons raised by opponents of surrogacy, mainly based on personalist and Kantian arguments, and reasonable interests of children, for who (paradoxically) prohibition of surrogacy is established. In my opinion, despite the fact that direct condemnation of surrogacy agreement was not expressed, the Court has observed surrogacy as complex problem, since it has shared great part of the French government arguments.

Judgement has encountered the following objections. The first one stressed that, as a result of *de facto* acceptance of surrogacy arrangement, the ruling omits the problem of protection of surrogate mothers.[46] The second allegation was based on the risk that it could be seen as supporting the trend, according to which, personal autonomy tends to be the basic value of the Convention, instead of personal dignity.[47] It should be underlined that authors of the quoted objections, demanding that the ECHR should directly express condemnation of surrogacy, forget that the Court works in *post factum* circumstances, when children from surrogacy have already been born and struggle with consequences of severe law. The ECHR should not pass over children's interests in the case, however above-mentioned objections are accurate as far as they show that the commented judgement might have encouraging effects (on potential commissioning parties). The reasons of opponents of the *Mennesson* judgement are similar to a slippery slope argument.

It should be noted that, at the same time, another pending case (*Labassee v. France*, application no. 65941/11), has been concluded with the same result.[48] Similar decisions, admitting violation of Article 8 of the Convention with regard to children, were made in cases of *Didier Foulon v. France* (application no. 9063/14) and *Phillipe Bouvet v. France* (application no. 10410/14). These judgements concerned surrogacy

[46] N. Bala, "The Hidden Costs of the European Court of Human Rights' Surrogacy Decision", *The Yale Journal of International Law Online* 11, 2014, p. 40.

[47] G. Puppinck, C. de La Hougue, "ECHR: Towards the Liberalisation of Surrogacy"; English translation of the previously published article, [in:] *Revue Lamy de Droit Civil*, No. 118, 2014, p. 78; available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2500075 (last accessed: 18 March 2018).

[48] For information about the Polish approach to the issue of recognition of foreign birth certificates in the case of surrogacy, see: P. Mostowik, "O problemach ze stwierdzeniem obywatelstwa dziecka prawdopodobnie pochodzącego genetycznie od obywatela polskiego niebędącego mężem tzw. rodzicielki zastępczej (surrogate mother). Uwagi aprobujące wyroki NSA z dnia 6 maja 2015 r. (II OSK 2372/13 i II OSK 2419/13)", *XVI Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*, 2018.

arrangements concluded with Indian surrogate mothers. First of the applicants was a single father, while the second one lived in a homosexual partnership, therefore both judgements are interpreted as a sign of the ECHR acceptance for "untraditional" concept of a family.[49]

5.2. ECHR (Second Section) decision in the case of *D. and Others v. Belgium*, 8 July 2014, application no. 29176/13

Application in this case was lodged by Belgian spouses who have concluded surrogacy agreement with a Ukrainian citizen. As a result of the arrangement, a child was born, for whom the Ukrainian authorities issued a birth certificate in which the applicants were registered as parents. Surrogacy itself was not mentioned in the certificate (§ 5–6). After the child`s birth, the applicants requested the Belgian embassy to issue a passport for a child (§ 7), but due to the fact that they did not enclose documents confirming parent-child relationship (e.g. certificate of pregnancy), the embassy refused to issue a passport (§ 8). As a result, the applicants have asked Belgian court to issue a travel document for the child (§ 9) and also to recognize the Ukrainian birth certificate (§ 10). The court of first instance declared the application unfounded because the applicants' files left many questions unanswered (concerning the surrogate mother and the method of procreation used). In courts' view, the data provided by applicants did not allow to *prima facie* estimation of biological bond between the child and the parents. Belgian law considers a woman who gave birth as a legal mother. Spouses had to leave the child in Ukraine with a hired nanny (§ 14). An appeal lodged by the applicants was enriched with many further documents confirming biological bond between the child and the applicant. In this situation, the court of second instance has recognized applicants' claims, indicating that all the requirements of the Ukrainian law in these types of contracts were met, and consequently, ordered the necessary *laissez-passer* documents to be issued. The court concluded that the documents could be granted before the legal status of the child have been established, because of the importance of applicants' interests (the right to respect of family life) (§ 16).

[49] I. Kriari, A. Valongo, "International Issues Regarding Surrogacy", *The Italian Law Journal*, No. 2, 2016, pp. 331, 353. At present, other cases against France are pending, see: *Braun v. France*, application no. 1462/18 and *Saenz and Saenz Cortes v. France*, application no. 11288/18.

Belgian law does not regulate the problem of surrogate motherhood in a direct way (§ 19). Registration and recognition of foreign documents is provided for by the Code of Private International Law, according to which compatibility with the law of issuing state is required to recognize a given document (§ 20).[50] The Ukrainian Family Law Code states that if spouses provide surrogate mother with an embryo, they are acknowledged as parents. Consequently, the first condition requires conjugal status of intended parents, and the second that at least one gamete must come from commissioning party (§ 25–26).[51] Belgian case law has allowed recognition of birth certificate of children born as a result of surrogacy (§ 22), as well as for issuing certain documents in urgent cases, when biological bond of a child and a father was at least *prima facie* proven (§ 23).

In the complaint lodged to the ECHR, the applicants claimed that Belgian authorities violated Article 8 of the Convention by refusal to issue documents allowing to transport a child from Ukraine to Belgium and, stemming from it, separation between applicants and their child (§ 28). Due to the above-mentioned circumstances, allegation of violation of Article 3 of the Convention (i.e. inhuman treatment) was also raised.

The government has admitted that the case falls into the scope of Article 8 of the Convention and that the situation might have been difficult for the applicants, however there was no infringement of the Convention (§ 38). Belgian authorities underlined that separation between the parents and the child lasted only three months, during which the applicants visited the child twice, each time for one week (§ 39). Governmental position was based on the fact that procedure of recognizing documents was necessary and the complainants were provided with the right to appeal (§ 40). Previous refusal to accept the birth certificate resulted from the fact

[50] Article 27 of the Code: "A foreign authentic instrument shall be recognized by any authority in Belgium without the need for any procedure if the validity is established in accordance with the law applicable by virtue of the present statute and more specifically with due regard of Articles 18 and 21. The instrument must satisfy the conditions necessary to establish authenticity under the law of the State where it was drawn up. To the extent that is required, Article 24 is applicable. In the event that the authority is refusing to recognize the validity of the instrument, an appeal may be lodged before the Court of First Instance without prejudice to Article 121, in accordance with the procedure set out in Article 23."

[51] Article 123 of the Code: "If an embryo conceived by the spouses by means of assisted reproduction techniques is transferred into the body of another woman, the spouses are the parents of the future child."

that applicants had not enclosed in their files any documents concerning biological tie between the father and the child (§ 41).

Applicants emphasized their fears about the child having been left in Ukraine, they claimed that the child might have been acknowledged as abandoned. They alleged the refusal to issue *laissez-passer* documents as having no legal basis, legitimate aim and being disproportional inconvenience to their family life (§ 44–45).

For the Strasbourg judges, there was no doubt that governments' actions had legal basis (§ 51). Regarding "legitimate aim", the ECHR has confirmed that governments' actions arose from the will to prevent crime, especially human trafficking; earlier underlined in the *Rantsev v. Cyprus and Russia* judgement (application no. 25965/04) (§ 52). Similar to the *Mennesson v. France* ruling, the Court has treated protection of a child and a surrogate mother as legitimate aim in Conventions' meaning (protection of the rights and freedoms of others) (§ 53). Strasbourg judges could not find disproportion between the period of parents-child separation and the government's legitimate aim (§ 58). The ECHR admitted that it cannot be requested from the state authorities to allow uncontrolled transfer of children before checking their legal status (§ 59). What was significant, the applicants should have foreseen that procedure of bringing a child to Belgium – in such circumstances – could take time, especially having in mind that they were assisted by professional intermediaries (§ 60). To sum up, the Court declared that the government did not overstep the margin of appreciation (§ 63). Due to fact that the problem was partly resolved before its examination by the ECHR (the child came to Belgium), the application was partly struck the list of cases and partly dismissed as manifestly ill-founded by virtue of Articles 35 § 3 a) of the Convention (§ 64).

In the commented decision, similar to the judgement in *Mennesson v. France*, the Court avoided to answer the crucial question about acceptance of surrogate motherhood. Judges focused on side issue of separation between intended parents and a child born as a result of surrogacy.

Despite the fact that it was unfavorable for applicants, the ruling shows what was in Courts' perspective decisive to determine existence of family life. In the past few years remarkable changes in this area have occurred. Those are exemplified by judgements like *Goodwin v. United Kingdom* (11 July 2002, application no. 28957/95), in which procreative function was questioned as crucial for the concept of family; or *Schalk and Kopf v. Austria* (24 June 2010, application no. 30141/04), in which it was admitted that stability of long-term relationship, irrespective of the sex of partners,

constitutes an essential element of family life[52]. In the *Mennesson* case, the applicants had real opportunity to establish family bond over the years of co-living; while in the Belgian case the intended parents' (of whom only the man was genetically tied with the child) cohabitation with the child lasted for a very short period. It is hard to decide whether relations similar to these between parents and children could be established during such short time, however the Court did not even try to answer this question. Applicants' intentions and biological bond of one of them appeared sufficient to constitute family life in the meaning of the Convention.

5.3. ECHR (Grand Chamber) judgement in case of *Paradiso and Campanelli v. Italy*, 24 January 2017, application no. 25358/12

Applicants were Italian spouses (§ 8), who after unsuccessful attempts to take advantage of MAP techniques and international adoption (§ 9–10), decided to conclude surrogacy agreement in Russia. The arrangement concerned gestational surrogacy and clinic performing fertilization confirmed that applicant's semen was used (§ 11–12). Russian authorities issued a birth certificate in which the applicants were registered as child's parents (§ 16). Italian consulate in Moscow informed Italian minor court, the Ministry of Foreign Affairs and local authorities that the documents referring to the child's birth encompasses false data (§ 19). At the same time, the Italian public prosecutor initiated proceedings concerning misrepresentation about civil status of the child (Article 567 of the Italian Penal Code), usage of false documents (Article 489 of the Penal Code) and violation of Adoption Act (§ 21). Before the minor court proceedings leading to recognize the child as abandoned were commenced, what was the first step to enable adoption of the child by persons other than applicants. The custodian was established for the child (§ 22). After the DNA testing it was revealed that the applicant in not a biological father of the child – there was no genetic tie between them (§ 28–30). Ministry of the Interior requested to refuse to register birth certificate data to the registry, and the Registry Office of the Colletorto Municipality obeyed this hint (§ 29, 32). The court has decided to locate the child in child care home (*casa famiglia*) (§ 35–36), because the applicants did

[52] See: F. Edel, *Case Law of the European Court of Human Rights Relating to Discrimination on Grounds of Sexual Orientation or Gender Identity*, respectively 102, 119 and 16, 31, 92 (Council of Europe 2015).

not prove biological bond with the child, the bond being a condition of gestational surrogacy. The court observed that not only were the principles of criminal law breached, but also these concerning international adoption and prohibiting usage of heterologous assisted reproductive technologies (§ 37). During the legal proceedings, public policy principles were also indicated (§ 47). The child was granted a new birth certificate, in which the real birth date and place was registered, leaving the "parents" column as "unknown" (§ 48). The child was placed in a child care home for over a dozen of months, after that he was adopted (§ 49–50, 53).

According to the Italian private international law: "the legal parent-child relationship is determined by the national law governing the child at the time of his or her birth" (§ 57). By virtue of the Presidential Decree of 3 November 2000, "declarations of birth concerning Italian nationals which have been drawn up abroad must be transmitted to the consular authorities (…) to the municipality in which the individual concerned intends to take up residence." Documents contradictory to the public policy shall not be registered, especially when it comes to civil status and family relationships (§ 58). Italian Medically Assisted Reproduction Act prohibits the usage of heterologous (with gamete donation) assisted reproduction techniques or financial penalty of 300,000 to 600,000 EUR may be imposed (§ 59). However, this prohibition has been declared by the Italian Constitutional Court as unconstitutional in case of infertile heterosexual couples (§ 60). In this judgement (no. 162 of 9 April 2014) the Constitutional Court has recognized surrogacy prohibition as well founded (§ 61).[53] International adoption is permitted in Italy but only of an abandoned child and what is more, it requires intermediary of authorized organization and participation of some state bodies. It is criminalized to bring a child into Italian territory in order to gain any benefits. Person punished for this crime shall not become guardian and shall not foster children (§ 67).

The Italian Court of Cassation has previously decided in surrogacy cases. In the judgement given on 26 September 2014, no. 24001, it stated that it is in accordance with the law to place children, whose intended parents had no genetic bonds with them, in a child care. In this specific case, the child was born by a Ukrainian surrogate mother. The Court has emphasized that surrogacy had not legal effect in line to the Ukrainian law, due to the fact that there was no genetic tie with at least one of commissioning party (§ 70).

[53] See: I. Kriari, A. Valongo, "International Issues Regarding Surrogacy", *The Italian Law Journal*, No. 2, 2016, pp. 342–349.

At the time of birth of applicants' child, Russian law stated that spouses could be recognized as parents if surrogate mother give her consent to it after childbirth. The matter of genetic bond between commissioning parties and the child was not regulated (§ 73) till 1 January 2012, when gestational surrogacy arrangement was defined in Russian law, as a contract by virtue of which intended parents must be providers of gametes (§ 74).

What is significant, in its ruling, the ECHR indicates aforementioned report on human artificial procreation adopted by the CAHBI, as well as "The Parentage/Surrogacy Project" led by the Hague Conference on Private International Law (§ 79–80).

The case was submitted to the Grand Chamber of the ECHR because of government request. First instance judgement delivered 27 January 2015 was in favor of applicants. It was stated, among all, that genetic bond is not necessary for existence of family life, when *de facto* family life was established.[54] The basis of assuming violation of Article 8 of the Convention was conviction, that Italian authorities did not balanced public interest with applicants' interest in adequate way (§ 101). The case examined by the Grand Chamber concerned in its nature the issue of separation between the applicants and the child (§ 98).

In the government's view, "Article 8 did not guarantee either the right to found a family or the right to adopt" (§ 120) and what was worth emphasizing, wide margin of appreciation should be granted to the state in the field of medically assisted procreation cases (§ 122). Subsidiary function of the Court was also meaningful for Italian position (§ 128). Government's intent was to prevent "reproductive tourism" and for-profit dimension of surrogacy (§ 130). According to its conclusions, these reasons gave grounds to dismiss the application.

The ECHR adopted the following facts. Applicants decided to conclude a surrogacy agreement with a duty of 50,000 EUR payment. Gametes that were used in the procedure came from unknown donors, so the applicants were not biologically tied with the child. The Russian authorities have issued a birth certificate stating that the applicants are legal parents (§ 131). The Court has observed that in contradiction to the *Mennesson* and *Labassee* cases, in the last one, there is no genetic bond between applicants and the child, and the core problem is factual separation between them, caused by national bodies (§ 132–133).

The Grand Chamber judgement admits government's claims that Article 8 of the Convention does not guarantee the right to establish a family, nor the right to

[54] I. Kriari, A. Valongo, op. cit., p. 351.

adoption. This provision refers to already existing family. However, the Court has quoted many previous decisions, confirming that genetic tie is not necessary to establish family life (§ 141, 148). To support *de facto* family life concept, judgements in *Moretti and Benedetti v. Italy* (application no. 16318/07), *Kopf and Liberda v. Austria* (application no. 1598/06) and *Wagner and J.M.W.L. v. Luxembourg*, were commented (§ 149–150). What is significant, the ECHR acknowledged that "It is therefore necessary, in the instant case, to consider the quality of the ties, the role played by the applicants *vis-à-vis* the child and the duration of the cohabitation between them and the child" (§ 151), which was missing in the afore-mentioned Belgian case. Taking this into account, the Court decided that in the commented case, *de facto* family life was not established, because of the lack of genetic bonds and short period of cohabitation between the applicants and the child (§ 157–158). As a result, the issue of violation of the right to respect private life remained to examine. Referring to private life provision, a few judgements concerning techniques of medically assisted procreation were cited. Those included *Dickson v. United Kingdom* (application no. 44362/04) and *S.H. and Others v. Austria* (application no. 57813/00). According to those rulings, the demand of the right to conceive a child using gametes coming from donors lies in the scope of Article 8 of the Convention (§ 160). As a consequence, elaborated facts should also be decided from the perspective of the right to private life (§ 163–165). It was necessary to consider limitation clauses of Article 8.

The Court admitted that "accordance with the law" provision was obeyed (§ 168–173). As a "legitimate aim", the Italian government, not unlike authorities of states in other cases concerning surrogacy, mentioned prevention of disorder and protection of the rights and freedoms of others, which was respected by judges (§ 177). As usually, the most disputable was the provision of "necessity in a democratic society". Once again, the ECHR has devoted a lot of attention to the margin of appreciation doctrine, pointing out the basis of its usage, e.g., broad diversity among European states towards the problem of surrogacy and ethical encumbrance of this issue (§ 182–184, 194). In the reasoning, it was raised that in opposition to the first judgement in the case, the Grand Chamber considers it from the perspective of the right to respect applicants' private life. It was observed that the aim of Italian government regulations and actions was to protect children in general, and not only the child who was involved in the case. It occurred that for the ECHR, it was sufficient basis for Italian actions (§ 196–199). The Grand Chamber admitted that the measures undertaken by Italy were proportionate to their aim, because "the public interests at stake weigh heavily in the balance, while comparatively less

weight is to be attached to the applicants' interest in their personal development by continuing their relationship with the child. Agreeing to let the child stay with the applicants, possibly with a view to becoming his adoptive parents, would have been tantamount to legalizing the situation created by them in breach of important rules of Italian law." (§ 215). The court held by eleven votes to six that there has been no violation of Article 8 of the Convention. Three concurring opinions[55] and one dissenting opinion were attached.

The judgement has met positive reaction from opponents of permissibility of surrogacy. They indicated the main conclusion stemming from it, i.e., prevalence of some general, reasonable interests over subjective desire of having a child. In the judgement, they see the beginning of the real discussion about moral permissibility of surrogate motherhood.[56] Such interpretation of the ruling is probably too optimistic, however *Paradiso and Campanelli* judgement deserves appreciation. Positive aspect of the ruling constitutes the directly expressed requirement of existence of biological bond between intended parents and the child, at least in the situation when (due to the short period of time spent / lived together), *de facto* family life has not been established. Existence of genetic ties, on the one hand allows to objectivize parental affiliative issues, on the other hand, it prevents from eugenic desires.

Certainly, it is a step forward. The question is if it would be starting a point for a new trend in Strasbourg case law (it should be reminded that the judgement occurs as remarkable exception from previously binding tendency concerning *de facto* family life), and if so, would it refer only to the problem of surrogacy or not, would it occur as a unique excess of the Court? In favor of the first interpretation, treating *Paradiso and Campanelli* judgement as starting point of a new, more conservative approach, bears witness that the judgement was delivered by the Grand Chamber. What is more, national regulations, even in countries allowing surrogacy, usually refer to genetic criterion. (It is symptomatic that, starting from *Mennesson* case, the Court prefers to decide on surrogacy cases on the basis of the right to private life, rather than the right to respect family life). In favor of a contradictory interpretation,

[55] It is worth noting that in their concurring opinion, judges De Gaetano, Pinto De Albuquerque, Wojtyczek and Dedov have questioned compliance of gestational surrogacy with the principle human dignity (§ 7).

[56] G. Puppinck, C. de La Hougue, "Surrogacy: General Interest Can Prevail upon the Desire to Become Parents – About the Paradiso and Campanelli v. Italy Grand Chamber Judgment of 24th January 2017", English translation of the previously published article, [in:] *Revue Lamy de Droit Civil*, No. 146, 2017, p. 6; https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2979255 (last accessed: 18 March 2018).

seeing commented judgement as a unique episode in the ECHR case law (not to be continued) proclaims that a great number of judges voted contra, and more than half of judges establishing majority, has submitted concurring opinions. The fact that, on international forums, further efforts to regulate the issue of surrogate motherhood are made, would also be taken into account by the Court.

6. Final remarks

The Council of Europe legislation with regard to the issue of surrogate motherhood has experienced a remarkable evolution. The act that could have regulated the problem in the most comprehensive and also the most conservative way, was the CAHBI report of 1989. The following attempts undertaken on the fora of subsidiary institutions referred to this report in their explanatory parts, however, results of these efforts did not express prohibition of for-profit surrogacy or the *ultima ratio* principle. It was the reason for doubt whether those drafts would not be read by national legislators as encouragement to legislate surrogate motherhood. Until Petra De Sutter's report, surrogacy was seen as one of the forms of medically assisted procreation and as the problem of bioethical character. In comparison, the 2016 report tries to present the issue also in the light of human rights, which could be considered as the sign of relevance between the ECHR and the Council of Europe actions. The newest pronouncement of the Council of Europe institutions seems to be an expression of acceptance of the situation in which some of Member States give their permission for surrogacy. It is also a calling to regulate the issue on the level of private international law.

None of the above-described drafts concerning the issue of surrogate motherhood which originated within the Council of Europe became legally enforceable. It could be interpreted as a result of a broad divergence of national legislations towards the issue in question. This phenomenon is also shown by comparative studies made by the ECHR and the related judgements. It should be underlined that in the field of family law, the Council of Europe is not such an influential organization, as it was in the 1960s or 1970s. The leading role in this dimension tends to be played by the European Union and the Hague Conference on Private International Law.[57]

[57] N. Lowe, *The Impact of the Council of Europe on European Family Law*…, p. 122.

The role of the ECHR in determining the directions of approach to the problem of surrogacy looks slightly better. It is true that according to Article 46.1 of the Convention, the Court's judgements are binding only for proceeding parties, so *de iure* they do not have *erga omnes* power among the Member States of the Convention. However, it does not mean that judgements are ineffective and cannot be taken into account by states that are not a party to a certain case. This influence stems from the ECHR authority and authority of its judgements (this could differ and depend on by which majority judgement was passed, or if it is a first instance judgement or a decision of the Grand Chamber).[58] At the same time, constantly present conflict between evolutionary interpretation and margin of appreciation doctrine in the Courts case law, often – especially in the context of ethically controversial issues – makes attempts to read any uniform standard from the judgements difficult. Surrogacy issues, in the present ECHR case law development, seem to be placed in such a "pre-standard" level. Due to this fact, national legislator could expect that it would be granted with a wide margin of appreciation when regulations adopted by it would be questioned before the ECHR.

Based on such insufficient study material, efforts to infer judicial trends about surrogate motherhood are limited to the following observations: first of all, the ECHR judges prefer to decide surrogacy cases in the field of the rights to respect private life, rather than the rights to respect family life; second of all, the Court emphasizes the protection of children born through surrogacy, rather than taking into account intended parents' interests: this is probably because commissioning parties were conscious of possible legal obstacles connected with surrogacy; third of all, the Court – which is obviously determined by the circle of the applicants – does not refer to the problem of potential negative effects of the surrogacy on surrogate mothers. This aspect of the ECHR case law is criticized[59]. References to the situation of surrogate mothers are made only in the scope of estimation on the "legitimate aim" provision included in Article 8 of the Convention (protection of the rights and freedoms of others). The last point is that the Court seems to treat the genetic bond between intended parents and the child as legally relevant.

It should be emphasized that Strasbourg judges have not yet faced really dramatic circumstances, which sometimes occur as a result of surrogacy arrangements. For

[58] See: M. Balcerzak, "Oddziaływanie wyroków Europejskiego Trybunału Praw Człowieka w sferze inter partes i erga omnes", [in:] *Precedens w polskim systemie prawa*, A. Śledzińska-Simon, M. Wyrzykowski, eds., Warszawa 2010.

[59] N. Bala, *The Hidden Costs*…, p. 12; I. Kriari, A. Valongo, op. cit., p. 353.

instance, a situation when intended parents refuse to accept responsibility for the child's wellbeing, due to the couple's separation, as in the Baby Manji case or in the Buzzanca case, or because the child does not fulfil their expectations, e.g., it suffers from a genetic defect, as in the Baby Gammy and Baby Doe cases.[60]

From the ECHR perspective, the status of surrogacy is still an open issue and, in my opinion, it will remain like that, until overwhelming majority of national legislators would express their position on this problem. It would be naive to expect that the ECHR will earlier directly opt for one of the two main ethical positions towards the problem: this founded on human dignity and equal to disagreement for this practice; or more realistic, based on individual autonomy and leading to regulation instead of prohibition. Probably the Court would be considering cases *ad casum* and giving its decision over side questions.[61] Only those decisions, concerning background issues, would became material for further examination on actual Strasbourg position on the surrogacy. Similar strategy was used by the ECHR in case of other morally sensitive issues, such as abortion[62] or *in vitro* fertilization.

[60] See: V.R. Guzman, *A Comparison of Surrogacy Laws of the U.S.*…, p. 620; M. Soniewicka, "Prokreacja medycznie wspomagana", [in:] J. Stelmach, B. Brożek, M. Soniewicka. W. Załuski, eds., *Paradoksy bioetyki prawniczej*, Wolters Kluwer Polska 2010, pp. 108–109.

[61] For example, application in *R.F. and Others v. Germany* (no. 46808/16) awaits decision. A complaint was lodged by a lesbian couple, as both women demand that they should be acknowledged as legal mothers of the child; one of the women was an egg donor, while the second carried the child. Semen came from an unknown donor.

[62] See: G. Puppinck, "Procedural Obligations Under the European Convention on Human Rights: An Instrument to Ensure Broader Access to Abortion", *Zeszyty Prawnicze UKSW*, Vol. 13, No. 1, 2013, p. 215.

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Maternity and paternity in Constitutional Tribunal cases – judgments and obiter dicta

1. Terminological problems

In the considerations on legal aspects of so-called surrogacy motherhood, problems should be indicated in the first place concerning the terminology applied in the Polish legal language for "motherhood" and other terms relating in different ways thereto ("fatherhood", "parents", "bonds"). This requires a prior reference to certain issues involved in medically assisted procreation. With the development of effective methods of transferring human embryos created *in vivo* or *in vitro* to the uterus of a woman from whom the embryo's genetic material does not originate, the Roman paroemia of *mater semper certa est*[1] – at least in the factual dimension – has ceased to be categorical in its nature. Indeed, the rule has been broken under which the child's biological mother (i.e. the woman who was pregnant with, and gave birth to the child) is always, at the same time, the child's genetic mother (i.e. the person from whom the genetic material originates). The afore-mentioned methods of transferring embryos are applied often – but not always – in the performance of contracts for the so-called surrogacy motherhood.[2] Noteworthy at this point is the important distinction between the donation of female gametes, the institution of embryo donation and the institution of surrogacy motherhood. A constitutive characteristic of the latter is that a woman gives birth to a child for another person – the woman

[1] The mother is always certain; motherhood does not have to be proven.

[2] They are not used when the surrogate mother (biological mother) is to be, at the same time, the genetic mother and the fertilization is done through insemination (all-artificial insemination) or through transferring gametes (one of its types is the GIFT, gamete intrafallopian transfer).

who wants to be the child's mother, wanted the child to be conceived and intends to raise him or her. The woman who executes with the so-called surrogate mother a contract for motherhood and who plans to develop emotional and family bonds with the child to be born, is termed sociological (social) mother.[3] It sometimes happens that as many as three women are engaged in the process of giving life to a child with the use of the institution of surrogacy motherhood: the genetic mother (the oocyte donor), the biological mother (that is the surrogate mother who is to give birth to the child, and the sociological mother (the woman expecting the child to be born).[4]

The Polish legislator has taken note of the problem involved in the potential lack of the identity of the genetic and biological bond between the biological mother and the child. Until 2009, the issue of the child's origin regarding motherhood was not regulated in the Act of 25 February 1964 – Family and Guardianship Code (hereinafter: FGC). The absence of regulation of this matter in the FGC was due to the essential certainty, during the period when the law was adopted, as to the legal relationship of motherhood based on the fact of giving birth. The possibilities offered by contemporary medicine have significantly undermined this certainty and because of that, by the Act of 6 February 2008 amending the Act – Family and Guardianship Code and Certain Other Acts[5], a separate chapter devoted to the matters of motherhood was introduced in the amended statute. As straightforwardly stipulated in Article 61^9FGC: "The mother of the child is the woman who gave birth to the child." Thus, also in a situation where the child does not genetically originate from the woman who has given birth to him or her, she is the child's legal mother. The motherhood relationship is therefore determined in each case by the biological bond existing between the woman and the child she has given birth to rather than

[3] See: M. Fras, D. Abłażewicz, "Reżim prawny macierzyństwa zastępczego na tle porównawczym", *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*, 2008, No. 6, p. 33; J. Holocher, M. Soniewicka, "Analiza prawna umowy o zastępcze macierzyństwo", *Prawo i Medycyna*, 2009, No. 3, pp. 44–45; M. Soniewicka, "Dylematy zastępczego macierzyństwa, Debata: Jak uregulować kwestię macierzyństwa zastępczego?", p. 2; Marek Andrzej Lebensztejn, "Macierzyństwo zastępcze – problemy etyczne i prawne", *Miscellanea Historico-Iuridica*, 2014, book 2, p. 300.

[4] See: M. Mikluszka, *Zagraniczne procedury tzw. macierzyństwa zastępczego (surrogacy motherhood) w świetle zakazu handlu ludźmi – zagadnienia węzłowe*, Warszawa 2017, https://iws.gov.pl/wp-content/uploads/2018/08/IWS-Mikluszka-M.-Zagraniczne-procedury-tzw.-macierzy%C5%84stwa-zast%C4%99pczego-surrogacy-motherhood-w-%C5%9Bwietle-zasady-handlu-lud%C5%BAmi-%E2%80%93-zagadnienia-w%C4%99z%C5%82owe.pdf.

[5] Dz.U. /Journal of Laws/ 2008 No. 220 item 1431.

the genetic bond.[6] Article 61[9] FGC introduces a legal rule since the applicable regulations do not provide for any exception in this regard. As Barbara Trębska notes: "The solution which has been adopted does not enable the protection of potential rights of the genetic mother including the conclusion that the child originates from her in the genetic sense. Neither does it ensure protection of the child's right to find out about his or her own genetic origin […]."[7] Even in an extreme situation where the child is born as a result of the application of the in-vitro fertilization procedure under which the oocyte of another female patient treated for infertility is applied in the laboratory by mistake, the child's mother, under Polish law, will be the woman who gives birth to, but who is not genetically related to the child.[8]

In conclusion to the themes addressed so far, as a result of the development of biological sciences, it becomes increasingly frequent to distinguish and use, against the background of widely understood disputes relating to legal motherhood, the terms "genetic motherhood", "biological motherhood" and "sociological motherhood" which relate, as a rule only, to one (and the same) woman – the mother. In the case of "fatherhood" the matter is simpler because – for obvious reasons – reference can only be made to "biological fatherhood" and "sociological fatherhood" even though it seems that now the terms: "genetic fatherhood" and "sociological fatherhood" would be more relevant. These terminological differences have been taken account of in the doctrine for a dozen or so years[9], and in the case-law of administrative courts[10] for at least several years now. However, a reflection of these relatively new problems is nowhere to be found in the case-law of the Constitutional

[6] See: B. Trębska, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. J. Wierciński, Warszawa 2014; see also: J. Haberko who notes that "[a] consequence of the solution adopted in Article 61[9] FGC is the rejection of the concept of so-called genetic motherhood in favor of 'biological' or 'birth-based motherhood'), and always resulting from giving birth to a child". J. Haberko, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. H. Dolecki, T. Sokołowski, Warszawa 2013, Article 61, Note No. 5.

[7] B. Trębska, uwaga do art. 61[9] k.r.o., [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. J. Wierciński, Warszawa 2014.

[8] The fact that it is not a purely academic problem is evidenced by the mistake, tragic in its consequences, made in the Assisted Procreation Laboratory in Police. A woman gave birth to a baby girl with inborn defects who, in biological terms, is not her child. It transpired that her husband's semen had been fused with an egg cell of another woman.

[9] One of the first representatives of the legal doctrine to have addressed this problem was M. Safjan.

[10] See: IV SA/Wa 581/16 – Judgment of the Regional Administrative Court (WSA) in Warsaw of 2016-05-18; II OSK 2372/13 – Judgment of the Supreme Administrative Court (NSA) of 2015-05-06; II OSK 2419/13 – Judgment of the NSA of 2015-05-06.

Tribunal.[11] Even though the Constitutional Tribunal has interpreted a number of times terms such as "motherhood", "fatherhood" or "parenthood", usually examining the compliance with the Constitution of various regulations on the matters of filiation, it has not had a chance to date to refer to the values protected by Article 18 of the Constitution in the context of medically assisted procreation and surrogacy motherhood. This notwithstanding, to the extent to which the contents of the afore-mentioned terms have been reconstructed in the case-law of the Tribunal during the 21 years in the course of which the Constitution of the Republic of Poland has been in force, they are relevant for the considerations on surrogacy motherhood.

It is to be noted at this point that the statutory understanding, based on biological bonds, of the notion of motherhood (mother) does not have a determinative relevance for considerations at the level of the Constitution. In an interpretation of constitutional notions, special account is to be had of the nature and function of the Constitution. As a consequence, which the Constitutional Tribunal recalled a number of times, constitutional terms should be interpreted in an autonomous manner, taking into consideration the entirety of the provisions of the Constitution and their axiological assumptions. An interpretation of constitutional notions may not consist in an arbitrary transfer, to this level of the sources of law, of definitions adopted by the ordinary legislator because that would lead to undermining the principle of supremacy of the Constitution (Article 8(1) of the Constitution). Thus, the meaning of particular notions adopted in the statutes, including the FGC, may not determine the manner of interpretation of constitutional provisions and terms. The legislative practice, current statutory solutions (including legal definitions) and the case-law and the doctrine developed on their basis may be auxiliary but not decisive.[12]

[11] The Tribunal has taken the position presuming the certainty of the legal relationship of motherhood based on the fact of giving birth since 1996 "[…] the term "motherhood" expresses in itself the necessary bond between the mother and the child and this bond is formed in many dimensions – biological, social and legal. A function of this bond is a correct development of human life during its initial stage where special care is required. At the earliest stage, this care, exercised above all in the biological dimension, is irreplaceable. No one else but the mother is capable then of supporting the conceived child's life" [Judgment of the CT of 28.05.1997, Ref. No. K 26/96].

[12] See, *inter alia*, P 5/99, K 27/00, SK 9/13, K 1/13, SK 39/15.

2. Autonomous and systemic meaning of Article 18 of the Constitution in the light of the case-law of the Constitutional Tribunal

Article 18 of the Constitution, which is included in the chapter devoted to the basic systemic rules of the Republic of Poland, stipulates that: "Marriage, being a union of a man and a woman, the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland." The Constitutional Tribunal consistently emphasizes that the afore-mentioned provision sets the aims and tasks for the public authorities by imposing upon them the obligation of "protection and care" of the values mentioned there. This general declaration, concretized in many other provisions of the Constitution (e.g. in Article 70(3), Article 71 or Article 72) and in the statutes, remains a program rule only[13] (a state policy rule[14], a program provision[15]). It means – as the Constitutional Tribunal clearly concludes – that no personal rights may be derived directly from Article 18 of the Constitution and it may not be the basis for asserting claims and, hence, it may not be a benchmark for review in proceedings initiated by a constitutional complaint. There is no reason, however, why this provision of the Constitution should not be a benchmark for reviewing sub-constitutional acts of law in proceedings initiated by a legal question or motion.[16] The Constitutional Tribunal has noted, on a number of occasions, that the requirement of "protection", expressed in Article 18 of the Constitution, means that the state should take measures to strengthen the bonds between the persons within a family, and in particular between the parents and the children and between the spouses.[17] This also involves the prohibition for the legislator to design legal solutions which would threaten the durability of family bonds, widely understood, e.g., fiscal, economic or social concepts that might induce the spouses to dissolve the marriage. In one of its judgments, the Tribunal held that the protection guaranteed by the provision under discussion also means that "acting through its bodies, both

[13] SK 7/11, item 71; e.g., judgments of: 9 November 2010, Ref. No. SK 10/08, OTK ZU No. 9/A/2010, item 99, 10 July 2000, Ref. No.SK 21/99, OTK ZU No. 5/2000, item 144, 27 January 1999, Ref. No. K 1/98, OTK ZU No. 1/1999, item 3, 12 April 2011, Ref. No. SK 62/08, OTK ZU No. 3/A/2011, item 22.

[14] SK 21/99; SK 62/08; K 24/07.

[15] Judgment of 10 March 2015, Ref. No. P 38/12.

[16] Judgment of 4 May 2004, Ref. No. K 8/03, OTK ZU No. 5/A/2004, item 37; judgment of 18 May 2005 Ref. No. K 16/04, OTK ZU No. 5/A/2005, item 51.

[17] Judgment of 18 May 2005, Ref. No. K 16/04, OTK ZU No. 5/A/2005, item 51; judgment of 4 September 2007, Ref. No. P 19/07, OTK ZU… [72].

in the sphere of creating and applying the law, the state shall not allow the marriage, family, motherhood and parenthood to be threatened by third parties in the moral, social, economic, ethical or religious spheres."[18]

The foregoing notwithstanding, Article 18 of the Constitution identifies the values indicated therein as significant elements of constitutional axiology.[19] In the view of the Constitutional Tribunal, "[t]his […] is an interpretative doctrine for other constitutional and statutory provisions, requiring the fullest possible pursuance of the principle of protection of motherhood, parenthood and marriage."[20] In other words, constitutional and statutory provisions should be applied having regard to the fullest possible pursuance of the principle of protection of the marriage, family, motherhood and parenthood, and the care of them.[21]

In order to more comprehensively demonstrate the normative meaning of Article 18 of the Constitution, at least a summary reference is needed to its systemic dimension, i.e., the special (direct or indirect) relationship between the values protected by this provision and certain constitutional rights and principles. Due to its primary meaning to the individual, note is to be made in the first place of everyone's right to decide about their personal life, guaranteed by Article 47 of the Constitution. As the said regulation stipulates that "[e]veryone shall have the right to legal protection of their private and family life, honor and good reputation and to make decisions about their personal life."[22] The individual's right of freedom to decide about his or her personal life is very strongly correlated with Article 30 of the Constitution[23] which makes human dignity a constitutional value of central

[18] Judgment of the CT of 04.09.2007, Ref. No. P 19/07.

[19] Judgment of 11 May 2011, Ref. No. SK 11/09, item 83.

[20] See, *inter alia*, judgments of the CT of: 11 April 2006, Ref. No. SK 57/04, OTK ZU No. 4/A/2006, item 43; 11 May 2011, Ref. No. SK 11/09, OTK ZU No. 4/A/2011, item 32; 3 December 2013, Ref. No. P 40/12, OTK ZU No. 9/A/2013, item 96.

[21] K 24/07 [5].

[22] It is hard to find another provision in the Constitution with such an accumulation of the rights of the individual and with differentiated normative structures. Referring briefly to its wording, one can say that it was devised in a light-hearted way, to say the least – the right of freedom of essential significance, that is the right of the individual to decide about his or her private life, is placed in the ending part of the provision whilst it is preceded by four rights, strictly speaking, of secondary nature. Note is made thereof also by M. Wild, see: M. Wild, uwaga nr 1 do art. 47 konstytucji, [in:] *Konstytucja RP. Komentarz do art. 1–86*, vol. I, eds. M Safjan, L. Bosek, Warszawa 2016.

[23] The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect for, and protection thereof shall be the obligation of public authorities.

relevance for reconstructing the axiology of the current constitutional solutions[24] (in other words: the axiological basis and a prerequisite for the entire constitutional order[25]) and also expresses the principle of respect for and protection of dignity and the personal right to legal protection of dignity (a personal right with autonomous legal significance).[26] Respect for and protection of personal dignity, characteristic of the *homo sapiens* involves the need to ensure a certain sphere of autonomy to the individual within which the individual can pursue his or her social goals. As the Constitutional Tribunal emphasizes: "These are elements most important for the individual's identity which pertain to his or her self-identification, physical and mental integrity, maintenance of relations with other people as well as his or her secure place in the community. The activities of public authorities may not lead to the creation of legal or factual situations which would violate this autonomy, depriving the individual of his or her dignity. […] a human should be treated as a free, autonomous entity, capable of developing his or her personality and forming his or her conduct."[27] The right to decide about one's personal life means the freedom to live one's own life, at one's own will (in particular the right to decide about the aims and forms of one's personal life) and the obligation, correlated therewith, of other parties and public authorities not to interfere into this sphere of human life, as well as the obligation of public authorities to counteract such interferences and provide protection where this right is violated.[28] This right thus operates in both vertical and horizontal dimensions. The notion of "personal life" used by the constitutional legislator in Article 47, is widely understood in the doctrine, as opposed to "public life" – it comprises in particular private and family life of the individual and, to a certain extent, it also concerns the individual's honor and good reputation.[29] Hence,

[24] Judgment of 30 September 2008, Ref. No. K 44/07, OTK ZU No. 7/A/2008, item 126; judgment of 18 October 2017, Ref. No. K 27/15, OTK ZU A/2017, item 74. Art. 30 of the Constitution is a leading provision for the interpretation and application of all other provisions on the rights, freedoms and obligations of the individual. This is also emphasized by the Preamble to the Constitution which calls upon all those who apply the Constitution "to do it whilst making sure that the inherent human dignity is respected…", and also Article 233(1) of the Constitution, "prohibiting, in an absolute manner, any violation of human dignity even where a condition of emergency is introduced in the state."

[25] Judgment of 9 July 2009, Ref. No. SK 48/05.

[26] Judgment of 30 September 2008, K 44/07; judgment of 28 June 2016, Ref. No. K 31/15, OTK ZU A/2016, item 59; judgment of 15 October 2002, Ref. No. SK 6/02, OTK ZU No. 5/A/2002, item 65.

[27] K 27/15.

[28] Judgment of 2 April 2001, Ref. No. SK 10/00, OTK ZU No. 3/2001, item 52.

[29] The spheres of the individual's personal life are additionally emphasized by the legislator by formulating the rights to their legal protection.

the right to decide about one's personal life comprises the right of the individual to decide about his or her family life, including the freedom to have a family and freedom to take and pursue procreation decisions (freedom of procreation).

As regards systemic bonds, the provisions of Article 47 of the Constitution – to which the Constitutional Tribunal points straightforwardly – also remain in a close relationship with Article 18 of the Constitution and should be read in its context.[30] Article 47 of the Constitution expresses straightforwardly the right to legal protection of family life which, in a way, makes complete the right to freedom referred to above and which comprises, in particular, due protection of the marriage, family, motherhood and parenthood as values of special significance for society.[31]

Additionally, in the Constitutional Tribunal's view, what can be derived from Article 47 of the Constitution is the right to legal protection of parenthood which is closely related to the constitutional principle of protection of parenthood and which serves both the parents in a marriage and the parents of extramarital children. Within it, the Constitutional Tribunal identifies, in the first place, the right of the parents to establish their parenthood in accordance with the actual state of affairs, which means the establishment of the biological bonds (identification of the biological mother or biological father of the child). The establishment of the fact of parenthood is undoubtedly a pre-condition for ensuring legal protection of parenthood. Importantly, the right of the parents to establish parenthood overlaps partially with the right of the child to establish his or her biological origin.[32]

It is to be noted at this point that none of the afore-mentioned constitutional rights of the individual are absolute in their nature. The Constitution provides for the ordinary legislator to limit these rights if it is necessary for ensuring the protection of other constitutional values whilst the limitations which are set must be within the precincts set by Article 31(3) of the Constitution.[33]

In conclusion to this part of the considerations, it is worth noting that Article 18 of the Constitution also remains in a close relationship with Article 72(1) sentence 1 thereof, expressing the principle of protection of the child (principle of protection

[30] Judgment of 26 November 2013, P 33/12.

[31] Ibidem.

[32] SK 18/02, SK 61/06, P 33/12, SK 18/17.

[33] Hence, limitations of the exercise of constitutional freedoms and rights may be imposed by statute only and only where necessary in a democratic state for the protection of its security and public policy or for the purpose of protection of the environment, health and public morals or the freedoms and rights of other parties. Such limitations may not, at the same time, infringe upon the essence of the freedoms and rights.

of the child's good). The wording of this provision is as follows: "The Republic of Poland shall ensure protection of the rights of the child." The Constitutional Tribunal emphasizes that the good of the child is a sort of a constitutional general clause which should be reconstructed through a reference to the constitutional axiology and general systemic assumptions. What is of significant relevance in this context is the provision of Article 18 of the Constitution, placed amongst the basic principles of the constitutional order, which guarantees the protection provided by the Republic of Poland to the marriage, family and parenthood. In the light of the Tribunal's case-law there may be no doubt as to whether the "child's good" is an autonomous constitutional value, and, at the same time, it is protected within a wider formula of the "good of the family" under Article 18 of the Constitution. As Paweł Sarnecki notes, "The pursuance of the 'child's good' consists in ensuring that the child grows in a full family, in conditions corresponding to the human being's dignity, with due respect for the child as a person and being provided with the necessary help and care by the public authorities."[34] One of the elements constituting the notion of the child's good is the correct formation of filiation bonds. In accordance with the constitutional axiology, the axiology of international law and the commonly accepted view, the principle of the child's good is realized to the fullest in the family, including in a natural family, that is through parental care exercised by the persons tied to the child by a biological bond.[35] As a rule, the child's interest (child's good) coincides with the interests of his or her biological parents – both with regard to the issue of filiation and the exercise of parental rights, the primacy of biological bonds is assumed as regards the formation of family bonds. However, account is to be had at this point of two issues.

First, the basic statutory legal mechanisms concerning filiation, i.e., presumptions of the child's origin or the institution of acknowledging the child, do not guarantee that the legal bonds established thereunder will correspond to the substantive truth. For instance, in the light of the prevailing law, the acknowledgement of the child by the child's mother's partner is not subject to any verification for substantive truth which in practice may lead to the creation and petrification of a family bond in law which is not based on the actual biological relations. What is more, with respect to assisted procreation procedures, in the case of the acknowledgement

[34] Judgment of the CT of 28 April 2003, Ref. No. K 18/02.

[35] P. Sarnecki, "uwaga nr do art. 72 konstytucji", [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. II, eds. L. Garlicki, M. Zubik, Warszawa 2016.

of fatherhood before the germ cells originating from an unknown donor or from embryo donation are transferred to the woman's body, we deal with filiation fiction in law which is intended to secure the interests of the child to be born.[36]

Second, paradoxically, however, it is the need to protect the child's welfare that, in certain circumstances (e.g. the need to ensure to the child safety, due conditions for life and health, sense of life stabilization) may require the relinquishment of the principle of primacy of natural family and of the biological bond as the basis for forming the family relationships, for example in favor of adopting other prerequisites for forming the family bonds (adoption, foster family, prevention of undermining legal bonds which are contrary to the biological reality). From the perspective of the constitutional principle of the child's welfare expressed in Article 72(1) sentence 1, the family does not have necessarily to be based on bonds of kinship, in certain circumstances these may be sociological bonds only.

As indicated by the considerations so far, the establishment of the meaning of the constitutional notions of "motherhood", "parenthood", "family" and "marriage" is of key relevance not only in order to specifically define the normative meaning of the provision of Article 18 of the Constitution, but also in order to formulate conclusions as to the subject of protection and the contents of the constitutional rights of the individual expressed in a number of further provisions of the Constitution.

3. Constitutional notion of motherhood in the case-law of the Constitutional Tribunal

The Constitution does not define the notion of "motherhood" (or "mother") which does not mean that an attempt cannot be made to reconstruct the contents/meaning of this term based on its provisions. The notion of "motherhood" occurred, beginning from the 1970s, in the previously applicable constitutional provisions which were then kept in force under Article 77 of the Constitutional Act of 17 October 1992 on Mutual Relations between the Legislative and the Executive Powers of the Republic of Poland and the Local Government.[37] In accordance with Article 79(1)

[36] This requirement pertains to men not married to a partner with whom they wish to produce a child with the use of medically assisted procreation.

[37] The Constitution of the People's Republic of Poland, of 1952 originally stipulated in Article 67 thereof that "[t]he marriage and the family shall be under the care and protection of the People's Republic of Poland. Families with multiple offspring shall be covered by particular care by the state".

of the then Constitution of the Republic of Poland: "Marriage, motherhood and family shall be under the care and protection of the Republic of Poland. The state shall take particular care of families with multiple offspring."[38]

The said provision was one of the review benchmarks in the proceeding in which the Constitutional Tribunal examined the constitutionality of a number of regulations of the Act of 30 August 1996 Amending the Act on Family Planning, Human Embryo Protection and the Conditions when Abortion is Allowed and Amending Certain Other Acts, including the regulation making the protection of life at its prenatal phase dependent on an arbitrary decision of the ordinary legislator and the regulation allowing abortion for so-called social reasons.[39] The Constitutional Tribunal adjudicated in the matter in rather special circumstances – in a situation of a deficit of constitutional regulations on fundamental human rights and, at the same time, on the eve of the coming into force of the new Constitution based directly on the axiology of these rights. In the absence of a constitutional regulation on the protection of human life, it therefore decided, *inter alia*, whether it follows from the principle of protection of motherhood relied upon in the motion initiating the proceeding that the life of a *nasciturus* is a constitutionally protected value. It noted, as early as at the beginning of its considerations, that the protection of motherhood may not mean solely the protection of the interests of a pregnant woman or of a mother.[40] In the view of the Constitutional Tribunal: "The use by constitutional regulations of the nominal term points to a certain relationship between the woman and the child, including a newly conceived child. The entirety of this relationship, under Article 79(1) of the constitutional regulations is in the nature of a constitutional value thus encompassing the life of the fetus without which the motherhood relationship would be broken. Hence, the protection of motherhood cannot be understood as protection effected solely from the viewpoint of the interests of the mother/pregnant woman."[41] As Witold Borysiak notes, referring to the Tribunal's statements, in such meaning motherhood commences together with the outset of pregnancy and continues during the childbed period and later, until the death of

Besides, in Article 66(2)(2), the legislator noted that one of the constitutional guarantees of the equality of the woman is "[…] care over the mother and the child."

[38] The afore-mentioned wording of Article 79(1) of the Constitution of the People's Republic of Poland was set by the constitutional act (Dz.U. /Journal of Laws/ 1976.7.36 – abridged text) which came into force on 21.02.1976.

[39] Dz.U. Nr 139, item 646.

[40] Judgment of the CT of 28.05.1997, Ref. No. K 26/96.

[41] Ibidem.

the mother or of her child.[42] The relationship between the mother and the child encoded in the notion of motherhood is complex in its nature – depending on the stage of the child's life, it is pursued in the biological, emotional, sociological and also in the legal dimensions. The function of these bonds is primarily to ensure correct development of human life, during its initial period (childhood) when particular care is required. In the opinion of the Constitutional Tribunal, during the prenatal stage of human life, this care is primarily exercised in the biological dimension which is irreplaceable. As the Constitutional Tribunal put it firmly: "No one else but the mother is capable, at this stage, of supporting the life of the conceived child."[43] There may be no doubt that in the light of the development of medically assisted procreation techniques, one can hardly attribute the value of truth to this latter statement by the Constitutional Tribunal. If we assume that, from the medical point of view, the mother of the child is the woman from whom the genetic material originates, the institution of surrogacy motherhood offers the possibility of this biological care – continuing for about 9 months – to be provided by a woman who is not the child's mother. It is worth noting that amongst all of the categories of bonds, listed by the Tribunal, which are related to motherhood, it is the emotional bond category which is essentially the most durable one as it does not disappear either once the child becomes full of age (that is upon the moment the protection under the principle of the protection of motherhood ceases to be valid) or even once the child becomes independent.[44]

During the work on the draft of the new Constitution, the editorial committee for general issues and regulations implementing the Constitution, proposed to add to Chapter I of the draft, Article 15a to read as follows: "The family shall be under the care and protection of the Republic of Poland." Tadeusz Mazowiecki moved to extend the provisions of Article 15a to read as follows: "The family, marriage and motherhood shall be under the care and protection of the Republic of Poland." He emphasized that the provisions of the 1952 Constitution, kept in force, contain a very similar formula and there is no reason for a similar provision not to be included in

[42] W. Borysiak, "uwaga nr 154 do art. 18 konstytucji", [in:] *Konstytucja RP. Komentarz do art. 1–86*, Vol. I, eds. M Safjan and L. Bosek, Warszawa 2016.

[43] Ibidem. This statement was repeated by the CT in its judgment of 22.07.2008, Ref. No. K 24/07, given when the Constitution of the Republic of Poland of 1997 was already in force.

[44] And when does this emotional bond arise? On the part of the child – we do not know. On the part of the mother, it usually starts to form upon her becoming aware of her pregnancy but a statement can also be risked that an emotional approach to the child may arise also from the intentional – after all – moment of *in vitro* creation of the embryo originating from her.

the draft of the new Constitution. The motion was supported by, *inter alia*, Kazimierz Działocha, who said that acceptance of that proposal would mean taking over of the existing provision formulated as Article 79(1) of the constitutional provisions, kept in force, having "specific normative contents and specific background". He noted that certain consequences followed from that formula for the codification in the area of family and guardianship law and that something that had worked should not be changed. The Constitutional Commission of the National Assembly (hereinafter: CCNA) adopted Article 15a in the wording proposed by Tadeusz Mazowiecki.[45] After a stormy discussion, however, during the second reading of the draft Constitution at the National Assembly, the editorial unit of the provision of Article 18 was changed to ultimately read as follows: "The marriage, as a union of a woman and a man, the family, motherhood and parenthood shall be under the protection and care of the Republic of Poland."

During the term of the Constitution of the 2 April 1997, the Constitutional Tribunal did not have many chances to speak about the constitutional notion of motherhood. Interpreting the notion of motherhood referred to in Article 18 of the Constitution, the Constitutional Tribunal referred to its statements to date relating this notion to the special relationship between the mother and the child (following, *inter alia*, from the biological specificity of the woman's body and the specificity of the process of pregnancy) and indicating that it pertains to the period both before and after the child is born. It also notes that the principle of protection of motherhood, formulated in Article 18, is made complete by two other provisions of the Constitution.

One of these is Article 68(3), in the part in which it imposes on public authorities the obligation to provide children and pregnant women with special care. A shared characteristic of the parties listed in Article 68(3) of the Constitution is that they usually have a higher demand for health care services. "Special health care" goes, by definition, beyond the sphere of ordinary universal health care, and hence it should be intensified and adapted to the specificity of the needs characteristic of the particular group of parties. Neither may it be reduced to services related directly to the birth nor the health services are to be provided only in the event of an illness or injuries; it should also comprise diagnostic and preventive medical checks done when a pregnant woman is in a good general condition. The Constitutional Tribunal

[45] Contributions of T. Mazowiecki and K. Działocha at a session of the CCNA held on 10.12.1996, see: CCNA Bull. 1996, No. 42, pp. 15–16.

notes that both Article 18 and Article 68(3) express the same axiology in the light of which widely understood "motherhood" is a value provided with express constitutional guarantees.[46]

The other provision, concerning the situation of the mother that links directly to the principle of the protection of motherhood, is Article 71(2) of the Constitution to the effect that: "A mother, before and after birth, shall have the right to special assistance from public authorities, to the extent specified by the statute." Importantly, this provision is not limited to an axiological function but expresses directly the personal right of pregnant women and mothers during the first period after childbirth.[47] Examples of services in the exercise of the right under Article 71(3) of the Constitution may be the maternity leave and the maternity benefit. Besides, this right is exercised through the statutory imposition on employers of a number of prohibitions and orders concerning the permissibility for pregnant or breastfeeding women to do specific types of work and limiting the time of their providing work. It is to be emphasized that in the light of Article 71(3) in conjunction of Article 81 of the Constitution, the legislator has far-reaching freedom to determine the scope and forms of exercising this legal right. It may, at the same time, take into account, *inter alia,* demographic, economic and social criteria. There is no reason, therefore, for the legislator not to differentiate between the scope and forms of assistance depending on the financial and social standing of the mother, as long as the requirements under the principle of equality are followed. It is also allowed to differentiate between the protection intensity during both periods of "motherhood" referred to in the provision hypothesis – that is a "before" and "after" childbirth.[48] The prohibition to breach the "essence" of the right as discussed remains an absolute barrier for the legislator. It means in particular the prohibition to introduce solutions which do not provide for any "special assistance" to mothers referred to in Article 71(2) of the Constitution or which make the assistance "illusory."[49]

As the Constitutional Tribunal finds: "Assistance (care) which may be of 'special' nature points to the need for public authorities to take actions that go beyond the normal standard of protection of freedoms and rights. What is meant are actions which exceed this ordinary level of constitutionally guaranteed protection. The use of the term "special" should be read as a requirement, addressed to the public

[46] Judgment of the CT of 22.07.2008, Ref. No. K 24/07.
[47] Ibidem.
[48] Judgment of the CT of 13.04.2011, Ref. No. SK 33/09.
[49] Judgment of the CT of 9.07.2012, Ref. No. P 59/11.

authority, to more intensively treat a certain group of parties due to the factual situation they are in. In this sense, the protection provided for under Article 71(2) of the Constitution to mothers before and after childbirth is to mean a clear improvement in the standard of protection and assistance which the legislator awards anyway to mothers (motherhood), parents (parenthood) and the family […]. The assistance which is to be of special nature, means the need for preferential treatment of persons who are within a particular category of parties, getting ahead of the constitutional protection of "normal" intensity.[50]

It follows implicitly from Article 18, Article 68(3) and Article 71(2) of the Constitution that the legislator itself differentiates between the scope and standard of motherhood protection, intensifying protection with respect to women who are pregnant and who are in the first period after childbirth.

In the opinion of Witold Borysiak, "[i]n the light of Article 18, it is to be concluded that it is only factual motherhood relating to the fact of pregnancy that is subject to protection. Such an interpretation is supported by the aim of this provision which is functional protection of the mother, particularly during pregnancy and from the child's youngest years. Similarly, this is supported by the literal provision of Article 71(2) of the Constitution of the Republic of Poland ("mother before and after childbirth") which would lose its point if the woman being the donor of the egg cell were to be treated as the mother, detached from the fact of her being pregnant. Any other interpretation would be contrary to the rules of systemic interpretation of constitutional notions because the essential statute undoubtedly combines the notion of motherhood with that of the mother."[51]

With reference to the position of Borysiak, we wish to point to several related issues.

Firstly, it is doubtful whether the hypothesis of the provision formulated in the catalogue of social, economic and cultural rights may definitively determine the subject of protection of one of the systemic principles which is undoubtedly the (general) principle of protection of motherhood formulated in Article 18 of the Constitution. If the interpretation adopted by Borysiak were consistently adopted, we would come to the conclusion that the constitutional notions of mother and motherhood do not comprise, *inter alia*, the adoptive mother either. This would mean

[50] Ibidem.

[51] W. Borysiak, "uwaga nr 160 do art. 18 konstytucji", [in:] *Konstytucja RP. Komentarz do art. 1–86*, Vol. I, eds. M. Safjan and L. Bosek, Warszawa 2016.

that the relationship between the adoptive mother and the child is not protected by the constitutional principle of protection of motherhood. It is to be remembered that – as the Constitutional Tribunal noted – the entirety of the relationship between the mother and the child, and hence not only the biological bond, form a constitutional value.

Secondly, social changes and civilization progress sometimes support a re-interpretation of the provisions of the Constitution. This may consist, *inter alia*, in including in the process of interpretation of the Constitution new matters not taken into account by the historical legislator.

Finally, thirdly, it is not Article 18 at all of the Constitution of the Republic of Poland that is of primary importance for the conclusion whether surrogacy motherhood and, possibly, what forms thereof, are allowed in the light of the Constitution of the Republic of Poland. In order to resolve this issue, it is necessary, above all, to establish whether the use of the institution of surrogacy motherhood is within the limits of the individual's constitutionally guaranteed freedom of procreation, and if so, whether it is reconcilable with such values as human dignity and the child's good.

4. Constitutional notion of "parenthood" in the case-law of the Constitutional Tribunal

The notion of parenthood did not appear in the previously prevailing constitutional regulations. Characteristically, the proposal to constitutionalize this notion occurred several times at an early stage of the work on the draft Constitution but was not approved by the members of the CCNA.[52] Reference is to be made here primarily to the submission of Witold Osiatyński who proposed the following formula: "The family and parenthood shall be under the protection of the law." It was asserted about the proposal, so formulated, *inter alia*, that the notion of parenthood is unclear and the issue could be limited to ensuring constitutional protection of the family.[53] At the final stage of its work, the CCNA returned to constitutional protection of parenthood. Two amendments on parenthood were notified to Article 18 of the draft which, at that stage, was worded as follows: "The family, marriage and motherhood are under the care of the Republic of Poland." The first one, proposed by Jolanta Banach,

[52] See: CCNA Bulletin 1994, No. 10, p. 155.
[53] Ibidem.

consisted in replacing the word "motherhood" by the word "parenthood", and the other, authored by Izabela Jaruga–Nowacka – in adding the word "parenthood." As Piotr Marciniak explained: "The intention of Deputy Jaruga–Nowacka was to introduce into the regulation a category wider than motherhood. What is meant is also fatherhood because there are cases where fathers raise their children on their own. Parenthood comprises both motherhood and fatherhood."[54] Ultimately, the CCNA recommended the other of the amendments and, as a result, both motherhood and parenthood are values occupying a major position in the constitutional axiology.

As is the case of motherhood, the constitutional scope of meaning of the notion of parenthood may essentially be reconstructed. As noted by language dictionaries, parenthood means "being parents"[55], "fatherhood, motherhood"[56], "being a mother or a father and the related experienced, feelings, responsibilities and privileges."[57] These synthetic dictionary terms are harmonized with the intention of the authors of the Constitution presented above. The constitutional notion of parenthood thus comprises the relation between the child and his or her parents or parent. The noun "parenthood" – as such – refers to these complex relations from the perspective of the parents / parent. There does not exist, as it seems, a term which would fully define this relation from the child's perspective. We could, at most, attempt to point to the term "childhood" but we may not forget that "childhood" refers only to the first period in human life whilst the parenthood relation ends essentially as late as upon the death of the parents/parent or the child.

It is worthwhile to recall at this point that because of the type and permanence of the relation between the child and the adult, distinction can be made in particular between genetic, biological and sociological (social) parenthood. The increasingly frequent need to identify different forms of parenthood is the effect of not only that assisted procreation techniques have become popular (including in vitro insemination with the use of the gamete/s of an anonymous donor or a donated embryo), but are also due to profound and – as sociologists emphasize – permanent transformations affecting the hitherto family paradigm (in this context, writings use the

[54] Contribution of Piotr Marciniak at a CCNA session on 7 March 1997, see: CCNA Bull., No. 44, p. 30.

[55] *Słownik języka polskiego* [Polish language dictionary], ed. W. Doroszewski, vol. VII, Warszawa 1996.

[56] Ibidem.

[57] *Wielki słownik języka polskiego* [Polish language dictionary], http://www.wsjp.pl/index.php?id_hasla=4951&ind=0&w_szukaj=rodzicielstwo.

phrase of heterogeneous post-modern family[58]) and the social roles of the woman and of the man. Pedagogical sciences note that despite many different models and socio-cultural changes which are under way, contemporary parenthood retains certain unchangeable and inalienable attributes and is expressed in permanent areas of actions and functioning of mothers and fathers who are responsible for providing the child with care, upbringing, education, that is for creating optimum and appropriate conditions for the child's development.[59] As Danuta Opozda emphasizes: "Regardless of the commitment, interest and effectiveness with which parents undertake and pursue the aims relating to such actions, parenthood involves the stability of certain attributes. A permanent attribute is the fact that parenthood is a multi-faceted system of the bonds between the parent and the child included in the structure of the family and intra-family relations."[60]

The legislator, including the constitutional one, should not pretend that it does not notice the afore-mentioned changes. Clearly, it does not mean that all problems involved in transformations within the family and parenthood, including the problems involved in the procreative freedom of the individual and its consequences should be the subject of legal regulations. The starting assumption should be quite opposite, just because of the autonomy of human which is closely linked to human dignity. At the constitutional level, it may only exceptionally prove necessary to introduce a relevant formal change.[61] The legislator may regulate specific areas of

[58] D. Marciniak-Budecka, "Rodzicielstwo do-it-yourself, czyli refleksyjność współczesnego rodzicielstwa", [in:] *Pogranicze. Studia Społeczne*, vol. XXIV, 2014, p. 132. First, next to the traditionally understood multi-generation family based on relationships by blood and marriage, there is currently an increase in the so-called "nuclear families", often based not on marriage but on partnership. Second, apart from complete families, there are incomplete families a characteristic of which is that one of the parents raises the child or children on her or his own. Third, matrimony and factual relationships can be identified which intentionally decide not to have children. Fourth, the notion which has become exceptionally popular during the past decade in the Polish everyday language and mass media is the so-called "patchwork" (reconstructed) family. Finally, there are non-formalized (and formalized in some states) unions of homosexual persons.

[59] D. Opozda, "Zróżnicowane rodzicielstwo – zarys refleksji", [in:] *Rodzicielstwo w wybranych zagadnieniach pedagogicznych*, eds. D. Opozda, M. Leśniak, Lublin 2017, p. 21.

[60] Ibidem, p. 21.

[61] An example of such an exceptional situation may be the amendment of Article 119 of the Constitution of Switzerland which, in its original wording, excluded the permissibility of pre-implantation diagnostics of human embryos created in vitro. In relation to an advanced political debate on that problem, a constitutional referendum was held on 14 June 2015 in which a majority of the citizens voted for introducing in Article 19(2) of the Constitution an amendment enabling the legalization of the said diagnostic procedure. After all, the Federal Constitution of the Swiss Confederation of 18.04.1999 is characterized by casuistry, which is not encountered anywhere, as regards the issues of the

human life only when it is necessary due to the need to protect other, appropriately major legal values.[62] After all, not always will the newly created social context require special regulation; quite frequently, it can be taken account of by the application, for that matter, of an interpretation of the statute in conformity with the Constitution.

Interpretation of the constitutional notion of parenthood was not the subject of particular interest of representatives of the constitutional law doctrine. Analyzing the values mentioned in Article 18 of the Constitution, Andrzej Mączyński concludes: "It is the easiest to define the meaning of the term 'parenthood.' It means the biological fact – the child originating from the parents and the legal relationship between these persons, based thereon, occurring in two forms – as motherhood and parenthood."[63] In our view (which we have already emphasized in the deliberations on motherhood), it is constitutionally illegitimate to adopt such a narrow scope of the notion under discussion. As a result of considering the fact of the biological origin of a child (biological bond) as the absolute and only determinant of the legal relationship of parenthood, this notion does not comprise adoption parenthood for that matter. As a result of such an interpretation, adoptive parents would not have the right to raise their children in accordance with their own beliefs (Article 48 of the Constitution), to provide their children with upbringing and moral and religious teachings following their own beliefs (Article 53(3) of the Constitution) and the right to choose for their child a school other than a public school (Article 70(3) of the Constitution). The care of a child exercised by adoptive parents would not fall within the notion of "parental care" which is used by the legislator in Article 72(2) and that would not be reconcilable with the *ratio legis* of this regulation, which is the protection of the child (child's good).

In the view of Leszek Garlicki, the notion of parenthood finds its expression, in the first place, in the autonomy of the parents to take a decision on procreation and then – with respect to the period of childhood – the exercise by the parents

development of biomedicine but also other areas of civilizational progress (see: Article 119 – Artificial insemination and genetic engineering with respect to the human, Article 120 – Genetic technology with respect to other than human life).

[62] For instance, the situation itself in which two men raise together a child of one of them should not be legally regulated as opposed to a situation in which they demand legal acknowledgement of the partner's father to be the child's parent.

[63] A. Mączyński, "Konstytucyjne podstawy prawa rodzinnego", [in:] *Państwo prawa i prawo karne. Księga Jubileuszowa Profesora Andrzeja Zolla*, vol. 1, eds. P. Kardas, T. Sroka, W. Wróbel, Warszawa 2012, p. 772.

of their parental power and the obligations of the parents to their children.[64] It is worth noting that in the first of the periods indicated by the author, we deal, at most, with potential parents as it is hard to refer to parenthood in a situation where the other party to the relation is not there yet.[65] The decision itself on conceiving a child (regardless of whether that is to be done naturally or with the use of any of assisted procreation techniques) is an expression of the exercise of procreation freedom. In the other of the dimensions for the pursuance of the parental function, mentioned by Leszek Garlicki, the position of the parents is equal, following the constitutional principle of equality in personal and property relationships provided, however, that having regard to biological conditions, the Constitution itself determines, in Article 71(2) thereof, the qualified legal status of the mothers before and during the first period after giving birth to the child by awarding them the right to special care.

The maternity leave, as we have already noted, is one of the forms, provided for in the statutes, of the exercise of the right formulated in Article 71(2) of the Constitution. The function of this leave is to protect the health of the female employee and her child, to both enable the mother to regenerate physically and mentally and to ensure for the child her personal care during the first period of the child's life.[66] Characteristically, in this case the legislator takes account of the transformations, indicated above, which have taken place at the level of the social roles of women and men because in accordance with the prevailing regulation, the maternity leave is obligatory during a period of at least 14 weeks after childbirth, whilst in its remaining extent (depending on its length set in accordance with Article 180 § 1 of the Act of 26 June 1974 – Labour Code), this leave may be shared between the mother and the father raising the child and may not – because of the child's good – be shortened upon a request from the female employee. To a significant extent, after the woman get back to her normal condition after pregnancy and childbed, it is therefore the parents themselves, following their own preferences, divide the child care responsibilities between them, household chores and their careers. A different function is performed by the parental leave and other leaves pertaining to the child – their *ratio*

[64] L. Garlicki, "uwaga nr 13 do art. 18 konstytucji", [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. I, eds. L. Garlicki, M. Zubik, Warszawa 2016.

[65] Unless we assume – contrary to the position of the CT expressed in 1997 – and following L. Garlicki, that the right to decide to have a child may be understood more widely, also as the right to decide on giving birth to the child. Cf. judgment of the CT of 28.05.1997, Ref. No. K 26/96 and notes of L. Garlicki to Article 18 of the Constitution, as above.

[66] See: judgment of the CT of 09.07. 2012, Ref. No. P 59/11 and judgment of the CT of 13.04.2013, Ref. No. SK 33/09.

legis is to exercise personal care of the child by one of the parents (which is to be an alternative to institutionalized care). In accordance with the prevailing regulations, future adoptive parents are entitled to a leave upon the terms and conditions of the maternity leave, a parental leave and a child-raising leave. All the afore-mentioned institutions are an expression of the implementation of Article 18 of the Constitution to the extent concerning the exercise by the state of protection and care over the constitutional value of parenthood. It seems that concept of "a leave upon the terms and conditions of the maternity leave" could be useful to regulate the rights of so-called surrogate mother and the woman for whom the surrogate mother gave birth to a child. In such a case, the rights should be appropriately formulated relating, on the one hand, to the protection of the health of the surrogate mother and, on the other hand, to the care of the child during the first period after the child is born, essentially exercised by the target mother.[67]

In the light of the constitutional provisions, the right to protect parenthood which has already been mentioned, serves not only parents who are in a marriage relationship but also parents whose relationship is based on factual bonds and, ultimately, the parents who are only bound by the fact of having common offspring. This is due, *inter alia*, to that it is not the bonds between the parents but the bonds between the parents/parent and the child are the essence of the constitutional notion of parenthood.

As regards the judgments in which the CT referred to the constitutional notion of parenthood, it is worth noting that they were issued in cases in which the filiation regulations, widely understood, concerning the legal relationship of paternity were challenged.

One of the first of such cases concerned the conformity with the Constitution of two regulations contained in the FGC: the regulation making the possibility of acknowledging the child on the mother's consent (Article 77) and the regulation setting out a catalogue of parties who can file a suit for establishment of paternity in court which catalogue does not include the child's father (Article 84).[68] In the opinion of the Ombudsman, these regulations in fact deprived the biological father

[67] In the context of the judgment given by the Court of Justice of the European Union (CJEU) on 18 March 2014 in Case C.D. vs. S.T., C-167/12 , see: paragraphs 46–49 and 51–52 formulated by Advocate General Juliane Kokott in the opinion concerning the case presented on 26.09.2013 [request for a preliminary ruling made by the Employment Tribunal Newcastle upon Tyne (UK)]; https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX%3A62012CC0167.

[68] Judgment of the CT of 16 July 2007, Ref. No. SK 61/06.

of the possibility to autonomously claim his rights regarding his status and because of this, they should be changed. The Tribunal endorsed some of the arguments of the Ombudsman concerning Article 84 FGC and found that the regulation to the extent to which it excludes the right of the man who is the biological father of the child to claim the acknowledgement of fatherhood is contrary to Article 45(1) and Article 77(2) and Article 72(1) sentence 1 in conjunction with Article 31(3) of the Constitution.

In the case concerned, the point of the dispute was the manner of understanding of the constitutional principle of the good of the child (72(1) sentence 1 of the Constitution). Identifying the constitutional problem, the Tribunal concluded that the key thing was to establish whether that principle also included the need to form family relationships in such a way as to enable the determination of the legal bond relating to parenthood between biological parents and the child. In other words – the Tribunal checked whether the right of the biological parent to initiate the appropriate procedure intended to establish the origin of the child in accordance with the biological reality may be deemed to be a sort of a correlate of such principle.

The Tribunal noted, to begin with that "one of the elements constituting the notion of the child's good is to correctly form the filiation bonds (…) The principle of the child's good expressing the primacy of bonds based on the actual biological origin expresses (…) only the dominating tendency which means that in certain conditions and circumstances the child's good might require a reference to be made to other prerequisites for the forming of family relationships within which it is the child's interest that will prevail over the interest of the biological parents and will require the protection of family relationships based on the existence of bonds of a type other than the biological bond (adoption, foster family, but also stabilized family relations established contrary to the biological truth, which may not be legally undermined anymore). This follows from the understanding of the child's good which accentuates in the first place the interest of the minor child to provide such child z with suitable conditions for upbringing and development. An unmitigated pursuit of the primacy of family might sometimes be at the expense of the child's good. It is already these preliminary general considerations that lead to the conclusion that the Polish family law does not respect in absolute terms the filiation right of the biological father." The Tribunal also recalled another constitutional value which is the good of the family. It emphasized at the same time that it is existing family relationships, also those which are not based on the biological bond, that are subject to constitutional protection.

As a result, the Tribunal found that: "First, the constitutional principle of protection of the child's good, in accordance with the assumptions and axiology of the system, expresses a preference for such a formation of the filiation mechanisms which will enable the establishment of family relations in accordance with the biological bond (actual origin of the child). Second, such preference will be restricted in all the cases where the need to protect the good of the child requires the maintenance of stable family relations previously formed between the child and the persons having the attribute of legal parents. Elimination from the legal system of the possibility to establish the family bond in accordance with the biological reality must, however, be substantiated by other constitutional values. Third, constitutional regulations do not determine directly the forms and mechanisms of filiation of an extramarital child, leaving this issue to be formed by the ordinary legislator. Neither does the Constitution provide grounds for valuing the particular methods of establishing the origin of an extramarital child."

In the case concerned, the Tribunal permitted a solution whereby the mother's objection could prevent the biological father of an extramarital child from acknowledging the child. As the CT emphasized, "the act of acknowledgement enters directly the sphere of the woman's personal rights." At the same time, the Tribunal noted that the Polish legislator had envisaged an alternative method of filiation in the form of establishment of fatherhood in court. The latter mechanism was, however, in the Tribunal's view, formed in an incorrect manner. The Tribunal found the deprivation of the child's biological father of his right to file for the acknowledgement of fatherhood contrary to the protection of the child's rights, guaranteed under Article 72(1) of the Constitution. Analyzing the said concept, the CT found that "Correct establishment of the civil status is of essential importance both for the protection of its non-financial interests (right to own biological identity, existence of a personal bond with the natural parent and his family), as well as financial ones (alimonies, inheritance)."

In another case, concerning non-permissibility of the acknowledgement of a child after the child's death without leaving offspring, the Tribunal referred to these findings.[69] It noted in addition that even though the mechanism of acknowledgement is to primarily serve the purpose of protecting the good of the child, this is not the only value which lies at the foundations of the analyzed institution. As the CT noted, "The acknowledgement of a child enables the father to pursue his rights

[69] Judgment of the CT of 28 April 2003, K 18/02.

and obligations to the child. It thus enables the pursuance of the deepest human needs pertaining to family life. The possibility to acknowledge a child can also be significant also in a situation where the child is dead. The acknowledgement of a child after the child's death may, on the one hand, meet the inner need to establish the identity of the deceased child and confirm the fact of parenthood and, on the other hand, may be of relevance for the property relationships, and in particular for the order of inheritance after the deceased child." In the analyzed context, in the absence of other effective instruments which would enable the father to establish the fatherhood after the child's death, the CT found the non-constitutionality of the challenged regulation. The analyzed solution was found to be a non-permissible restriction of the constitutional right to the protection of family life.

In the statement of grounds, the Tribunal placed considerable attention on the need to protect parenthood. In the opinion of the CT, it is amongst the values protected by the Constitution. What is more, "the right to protect parenthood may be derived from the Constitution. This right is vested not only in parents who are in a marriage relationship but also the parents of extramarital children (…) The protection of parenthood comprises, *inter alia*, the right of the man to establish the origin of his child and the concretization of this right is the responsibility of the legislator who has wide discretion in this regard (…) The constitutional protection of parenthood requires not only appropriate legislative solutions concerning the relations between the parents and their child but may also require appropriate legislative solutions for the event of the child's death. The parents' feelings should be respected and their need to establish the parenthood of the child should be taken account of in a situation where it was impossible to establish the parenthood before the child's death. The parents' right to establish parenthood covers also a child who died before or after birth, even though such establishment cannot lead to the formation of a family bond with the child. The challenged regulation makes it impossible in fact to establish parenthood in the situation as described."

The basis for the Tribunal's considerations on the protection of parenthood were also the regulations on denial of fatherhood. In its judgment of 26 November 2013, the Tribunal found the nonconformity with the Constitution of regulations making it impossible to deny fatherhood after the child's death.[70] The challenged solution was part of a general principle of non-permissibility of challenging the civil status of a deceased person. As the CT found, the "Rule excluding the instituting by anyone

[70] Judgment of the CT of 26 November 2013, Ref. No. P 33/12.

the litigation to establish or deny the origin of a deceased person is substantiated by that the filing of a suit after the child's death would aim, in the first place, at the pursuance of financial claims relating to the order of inheritance. The legislator found that after the death of a person, the establishment of the person's civil status should be left only to the persons having a direct, non-property interest therein, that is the descendants of the deceased plaintiff." In the Tribunal's view, the solution adopted constituted, however, a disproportionate restriction of the right to protect parenthood, following from Article 47 of the Constitution.

The Tribunal found that "(…) the right to protect parenthood (including the right of the parents to establish their parenthood to correspond with the reality) comprises also a negative aspect, i.e., the possibility to challenge the existence of a blood relationship between the persons. In the context of the foregoing, this element is relevant not only in itself, but also in connection with that a prior denial of motherhood or fatherhood conditions the establishment of the motherhood of a woman other than the one entered as the mother in the birth certificate or the establishment of the fatherhood of a man other than the husband of the mother of a child born during the marriage (…)." Looking from this perspective, "the institution of denial of fatherhood (pursuing the aim to establish parenthood in accordance with the actual biological origin) corresponds to the general postulation of the correspondence between the civil status and so-called biological truth and thus respects one of the fundamental human rights which is the right to know one's own origin."

The juxtaposition of the general principle of not changing the civil status after the death of a person with the guarantees following from the right to protect family life led to the finding that the legislator had breached constitutional guarantees. As the CT argued: "A conflict arises against the background of the regulations challenged in the present case (…) between the good protected thereunder and the interests of the mother, the husband of the mother and the actual father of the child. In other words, in the name of the respect for the statutory value in the form of definitive determination, as a result of the death of the person concerned, his/her family status and property relations with his/her heirs, significant values under Article 47 in conjunction with Article 18 of the Constitution and Article 8 of the Convention were violated. Thus, as opposed to the state of affairs desired by the legislator (as disclosed in Article 71 FGC), the constitutional right of the man to establish parenthood in accordance with the reality and the good of the family created by the mother of the deceased child and the good of the family of the child's alleged father

remains more significant." The Tribunal referred more also broadly to the position it had previously taken in its judgment SK 61/06.

The CT's judgment was argued with in his separate vote by the CT's Judge Marek Kotlinowski. In his opinion, the challenged regulation of the FGC was aimed, contrary to what the Tribunal found, primarily to protect the rights of the deceased child. The Judge pointed to a number of regulations which, sometimes contrary to the actual state of affairs, serve the purpose of stabilizing the child's civil status. Besides, in the Judge's view, the Tribunal's reference to its earlier judgment issued in Case SK 61/06 was failed. He emphasized at the same time that "there are arguments in support of allowing the establishment of fatherhood after the child's death other than the arguments supporting the permissibility of denial of fatherhood after the child's death" such as, for instance, the mother's property interest. In his opinion, the challenged solution corresponded to the basic concepts of civil law and had a well-established legal tradition.

The manner of forming the institution of denial of fatherhood was also the subject of an analysis of the CT in its judgment of 16 May 2018.[71] In the case concerned, what was challenged were the rules for calculating the time limit the legislator set for filing a suit fir denial of the fatherhood of the mother's husband. For the child, that time limit passed after the expiry of three years after the child becomes full of age. Without denying the permissibility itself of the legislator using the statutory time limits, setting the timeframe within which the person concerned may assert denial or establishment of the person's relations with others, the Tribunal found that in the case of the challenged regulation the legislator had violated the Constitution.

In the statement of grounds, the Tribunal accentuated that setting the beginning of the run of the time limit for filing a suit for denial of fatherhood, the legislator disregarded completely the moment at which the child became aware that he or she did not originate from the mother's husband. In the opinion of the CT, however, it is this particular time limit that is relevant from the viewpoint of the aim of the analyzed legal concept and serves the purpose of guaranteeing the constitutional right to find out about one's own roots. In the opinion of the CT, in such a case, the award by the legislators of the priority to stabilizing the legal relationships led to the situation in which the exercise of the right to find out about one's own roots was only a semblance of a right. Indeed, the entitled party was not provided with a real possibility to take a decision on exercising its right. Additionally, the concept was

[71] Judgment of the Constitutional Tribunal of 16 May 2018, ref. No. SK 18/17.

inconsistent with the right of the prosecutor, unlimited in time, to file the said suit. The award to the prosecutor of wide possibilities to interfere in stabilized family relations, with the parallel deprivation of such rights of the directly affected person using the constitutional right to establish and have legally acknowledged his or her actual biological identity, cast doubt on the *ratio legis* of the challenged regulation.

It is worth accentuating that in the judgment concerned, the Tribunal elaborated on its earlier findings on the link between Article 30 and Article 47 of the Constitution. In this regard, referring to its case-law to date, it placed particular attention on the deliberations on the legal right under the Constitution to get to know one's own identity and establish bonds with other persons. In the opinion of the CT, "reference can be made under the Constitution to the existence of the legal right to get to know one's own biological identity and have it legally established. This right is a 'special, personal legal right under the Constitution' (judgment Ref. No. K 18/02). It remains closely linked to the right to legal protection of human dignity (Article 30 of the Constitution), and the right to legal protection of private and family life (Article 47 of the Constitution). Indeed, the possibility to establish one's roots and identify the ancestors in accordance with the biological truth conditions the possibility to develop one's personality and the relations with other persons with full awareness of the circumstances of conception, birth and biological origin. As the Tribunal already noted, 'reference to Article 30 of the Constitution always remains valid when the subject of the assessment is legal protection relating to the respect for most vested interests of any individual that is ones that refer to life, health and bodily integrity' (judgment of the 1 September 2006, Ref. No. SK 14/05, OTK ZU No. 8/A/2006, item 97). The right to get to know one's own biological identity and have it legally acknowledged is also subject to protection under Article 47 of the Constitution. Indeed, the awareness of one's own actual biological identity ultimately conditions the decisions the individual takes in the sphere of his or her personal, private and family life. Besides, it affects the quality of emotional relationships in the family. In turn, legal establishment of the relations of origin in accordance with the biological truth determines the contents of the legal relationships between the person concerned and the other family members and persons from outside of the family."

5. Conclusions

In the considerations on the legal permissibility of execution of contracts for so-called surrogate motherhood, the starting point should be a reference to the notion of procreation freedom of the individual being an emanation of the individual's right to privacy. Most generally speaking, procreation freedom – in a positive sense – means, above all, the freedom to take decisions about having or not having offspring and the possibility to decide about one's own reproductive capacities.[72] The negative aspect of this freedom amounts, on the other hand, essentially, to the prohibition for the state (vertical action) and private bodies (horizontal action) to enter into the sphere of human procreation freedom. This excludes, in particular, the introduction of legal compulsion of procreation and vice versa – its legal prohibition. One ought to bear in mind that the legislator's role in the case of procreation freedom amounts to setting its limits. The Constitution does not set the limits of procreation freedom in a definitive manner because this freedom is not absolute in its nature. The constitutional limits of this freedom are therefore in the nature of *prima facie* ones and may ultimately – with the conjunctive fulfilment of the requirements set forth in Article 31(3) of the Constitution – be set at the level of statutes. The legislator's interference in such a sensitive sphere of human privacy may not be arbitrary. In practice – in the view of the development of advanced techniques of medically assisted procreation – many new problems have arisen relating to the procreation freedom of the individual. It could be considered, *inter alia*, whether procreation freedom includes the freedom of taking decision on how a child is to be conceived (choice of any technique of assisted procreation), the choice of the child's gender (by appropriate selection of gametes), the child's phenotypic features, execution of contracts for so-called surrogate motherhood, etc. The last of the problems should be considered both from the perspective of surrogate mother and the target mother, and with the consideration of the nuance of which of them, or maybe none, is to be the genetic mother of the child to be born.

It is worth emphasizing once again how different the motivations might be of the parties making contractual arrangements as to surrogate motherhood. On the party of the couple wishing to have a child these might be such surprising reasons

[72] For more details on this subject, see: A. Niżnik-Mucha, *Prawna regulacja medycznie wspomaganej prokreacji w Polsce i wybranych państwach europejskich. Wybrane problemy*, Kraków 2016, pp. 97–114.

as the loss of a slim silhouette or heavy workload, but also the woman's infertility or a burden of an illness which is a contraindication for pregnancy. A surrogate mother may be economically motivated in essence, but it may be a gesture of genuine self-sacrifice on her part.

The constitutional notions of "motherhood" and "parenthood" may be useful in attempts to address the afore-mentioned concerns but they cannot be decisive. Nonetheless, some of the representatives of the doctrine focus on an interpretation of Article 18 and Article 72(3) of the Constitution, losing sight of the other constitutional regulations.

In the context of the axiology of the Polish Constitution, Article 18 and Article 68(1) thereof in particular, special attention should be placed in the problem of infertility of the couple trying to produce a child. In the case of the woman, infertility may be absolute (*sterilitas absoluta*) which amounts to permanent impossibility to get pregnant or relative (*sterilitas relativa*) where it is not impossible to get pregnant but the pregnancy cannot be carried through to give a live birth.[73] In this other case, the use of the services of a surrogate mother may be the only chance for the couple to overcome the problem of infertility and have their own offspring. Concerns may arise, however, whether a situation in which some couples suffering from infertility can use advanced techniques of assisted procreation in their strife to have offspring and, thanks to the legal regulation of the institution of donation of gametes and donation of embryo[74], omit such barriers as absolute infertility and use relevant regulations on establishing the legal origin of the child whilst other couples are essentially deprived of such opportunities, is reconcilable with the constitutional principle of equality.

[73] The reason may be, *inter alia*, anatomic defects of reproductive organs and certain autoimmune diseases).

[74] See: Act of 25 June 2015 on Treating Infertility.

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Surrogate motherhood in legal and political activities of the institutions of the European Union

1. General remarks regarding EU's legal competences

At the beginning the reasons for the European Union's integration were economic motivations. At the end of the 19th century, the economic reasons were displaced by a political cause, as a result of huge political changes in Eastern Europe and worldwide. Therefore, European Communities were established and built on the basis of the economic cooperation between countries of Western Europe. European Union, however, was created pursuant to the Maastricht Treaty of 1992, in 1999. So, at the beginning of the 21st century the European Community was transformed into the European Union, pursuing the economic but also a political cooperation of western European states.

As a result of the Treaty of Nice adopted in 2004, the European Union accepted 10 new members, which originated in Central Europe, and subsequently the Union has also become a form of political cooperation.[1] A major change in the political tasks before the European Union was caused by the failure of so called Constitutional Treaty, which was objected and turned down by the European societies in a referendum in which objections against this new Treaty were raised (the 2004 referenda in France and Netherlands).[2] The circumstances in which the Treaty of

[1] The first wave of integration in 2004: Poland, the Czech Republic, Hungary and Cyprus. The second wave of integration in year 2009: Bulgaria, Estonia, Latvia, Lithuania and Romania. The third wave of integration in 2012: Croatia, Slovenia.

[2] The Constitutional Treaty was rejected in Netherlands and France (where 45.13% voted for the Treaty and 54.87% voted against).

Lisbon was adopted in 2007 included: Euroscepticism and the lack of or mistrust in democracy which European societies declared, indicating their disbelief in the democratic legitimation of European authorities.[3] This is why the European Union became transformed in an international organization having a legal personality and being characterized by features of institutional and ideological integrity.

In its political shape today, the European Union is similar to a State making laws for the Member States.[4] The Treaty on the European Union and the Treaty on the Functioning of the European Union anticipate a certain plurality of the political and economic cooperation globally (internationally) as well as within the European Union itself, among its Member States and under the European Union's supervision.

The Treaty of Lisbon is a kind of compromise that brought about many good political changes. For example, it provided the Union with a legal personality and a status of an international organisation. Furthermore, the Treaty was concluded for an unlimited period of time (Art. 53 The Treaty on the European Union). Currently the European Union is based on close economic as well as political cooperation, and solidarity between the Union's Member States, and the mutual connections mean not only common economy but also joint foreign political actions. In that way, the Treaty of Lisbon serves enhanced political cooperation between Member States under the Union's leadership and supervision. These actions are executed on the principle of competences divided among the EU Member States. There are 28 Member States (including the UK). Hence the European society consists of over 508 million people, and the official Forum representing them is the European Parliament assembling their representatives – Euro deputies. The decision-making office is the Council of the European Union, which is a legislative body as well.

Most important EU legal acts are regulations and directives. Some regulations may be adopted only by a part of Member States acting as a group in the formula of enhanced cooperation.[5] Other Member States do not have to apply this law, but may, at any time later, join the enhanced cooperation method. This method was adopted in 1999 in the Treaty of Maastricht, but in the first years of the functioning of the

[3] The prime idea was to create, from the beginning, a new uniform Union's Treaty, so called the "Constitutional Treaty." Facing the failure of the French and Dutch referenda, these measures were given up and a certain synthesis of the basic assumptions was made, leading to a new "old, but reworked treaty" – The Treaty of Lisbon.

[4] Treaty of Lisbon – Preamble (O.J.E.U.C 83 of 30.03.2010).

[5] Quoted after: E. Piontek, *Wzmocniona współpraca – otwarty problem* [in:] E. Piontek, K. Karasiewicz (ed.) *Quo vadis Europo?*, Warszawa 2008.

Lisbon Treaty, it did not find broad application and was at the beginning only used sporadically for the purposes of EU patent law. The cross-border judicial cooperation is one of the important elements of dealing with matters related to the European citizenship and free movement of persons. An example of a direct influence of the free movement of people on the family law is, for instance, an implementation of enhanced cooperation for the purpose of adopting regulation No. 1259/2012 regarding the provision of family law applicable to divorce matters.

2. EU Family law in the context of European citizenship

Cross border living is a feature of the European Union. EU citizenship is a certain glue of binding the Union's society (called: European *demos*) and a special binding between citizens of Union's Member States. The idea of European citizenship, built around a common citizenship of all European populations, was conceived in the 1950s, but received a definite shape just upon the foundation of the Treaty of Maastricht (1991–1992). Thanks to the Spanish efforts and Spanish Presidency in the Council, the principles of European citizenship were finally adopted to the Treaty (Art. 8–8a-8e) in February 1991.

European citizenship has a political significance because of its dependence on the individual citizenship of a Member State, as it cannot exist without it. This citizenship gives the Europeans a bunch of rights. They are not only political rights, such as for example the right to participate in the elections to the European Parliament, but also economic rights like the right to be employed in another Member State, or to set up an individual business or form a partnership. European citizenship is based on the free movement of persons, which encourages people to travel across EU countries freely. Hence European citizens make use of the possibility of getting employed, or settling themselves in another country for longer period of time, or even for a lifetime. European Citizenship follows the provisions of the Charter of Fundamental Rights of the European Union in the scope of the protection of this citizen's rights. The Charter of Fundamental Rights (CFR) is linked to international Human Rights, especially the principle on non-discrimination sourced in the International Covenant

on Civil and Political Rights (ICCPR), which is a multilateral treaty of 23 March 1976 (when it came into force).[6]

European Citizenship and free movement of persons, together with the Charter of Fundamental Rights have an impact on social rights, especially regarding family relations. Among them are the principles applicable to European citizen that have been referred to in the Treaty and developed in the Charter of Fundamental Rights, for example the principle of non- discrimination, of human dignity and of the integrity and protection of family living. The latter means the right to marriage, protection of the best interest of the child, and children's right to contact with both parents.[7]

However, protection of family relations is not mentioned in the Treaties,[8] but has been included in the Charter of Fundamental Rights, among the provisions on economic rights. They create and guarantee, among other things, the equal access of men and women to employment (Art. 23 of the Charter), protection of young children on the labor market (Art. 32 of the Charter), protection of women and maternity (Art. 33 *in fine* Charter). Family matters and priorities (Art. 9 of the Charter) can also be found in the axiological provisions of the Charter, and they include, for example, the freedom of setting up a marriage and the right to be married, without however, defining the marriage itself. This definition is included in internal family laws of individual Member States.[9] These principles are today widely applied, because cross-border migration contributes to setting up a social or personal relations and bonds between citizens of different Member States. In the first decade of the 21st century almost 16 million (about 13%) from among 122 million

[6] Charter of Fundamental Rights of the European Union of 14.12.2007 (O.J. E.U. C83/02 of 30.3.2010 p. 389 et. seq.). A facultative protocol to the ICCPR (Dz. U. of 1994, No. 23, item 80) ratified by Poland in 1994.

[7] Point No 4 of the European Parliament resolution of 16 January 2008: "*Towards an EU strategy on the rights of the child*" (2009/C 41 E/04) and point No. 1 of a EU "*Agenda for the Rights of the Child*" COM (2011) 60 final, Brussels 15.2.2011.

[8] P. Mostowik, *Władza rodzicielska i opieka nad dzieckiem w prawie prywatnym międzynarodowym*, Kraków 2014, pp. 40–41.

[9] The European Union does no exclude a wide definition of marriage (or the marriage of same-sex couples). On the other hand, the tendency for EU law to cover family law relations which do not fall within the scope of the EU's legislative competences is opposed in the Polish and European doctrine of law, see e.g. P. Mostowik, Karolina Sondel-Maciejewska (quoted): *Materialnoprawne rezultaty unijnej współpracy sądowej w sprawach rodzinnych* (in): *Współczesne wyzwania prawa prywatnego międzynarodowego*, *J. Poczobut* (ed.), *Materiały ogólnopolskiej konferencji „Współczesne wyzwania prawa prywatnego międzynarodowego"* Warszawa 19–20 April 2012, Warszawa 2013, p. 175.

marriages in all Union were international.[10] In 2007 out of 2.7 million marriages concluded in the EU about 30.000 were cross-border marriages. Differences which arise in family laws of individual Member States caused legal uncertainty and frequent legal conflicts which must be resolved and judged by domestic courts using their respective collision norms of international private law.

As a result of the international, cross-border marriages concluded within the EU, there are many parental relations created, and sometimes they include declarations of a divorce, and conflicts regarding parental responsibility of the children born in the marriage. There are also controversies concerning the definition of marriage or partner relations existing between European citizens. Additionally, the fast development of medicine and biotechnology enforces the legislative and the judiciary of Member States to cross over the borders of today's definitions of family law (judgments of the European Court of Justice in cases: *Brüstle* (C-34/10)[11] and *International Stem Cell Company* (C-364/13).[12] Another example is questionable surrogate motherhood, as it may have a potential influence on Member States in cross-border relations.[13] Hence a question arises about the competence of the EU to deal with the above mentioned matters and about ways of solving them. Would it be sufficient if the European Union took only an official stance and articulated it through the European Parliament as its official institution regarding internal matters, and in a global scale? Is there a need to take a more determined action by European Union? For example, should there be certain activities expressed to take a common legal regulation that would be adopted by all or the majority of Member States?

3. Legal actions of the European Union regarding legal protection of European citizens

Since the Constitutional Treaty establishing the Constitution for Europe (signed on the 29th October 2009; commonly referred to as the European Constitution, or as the Constitutional Treaty) failed, the European Union prepared and formulated

[10] Communication of the European Commission on clarifying the legal situation as regards property rights of international couples, COM (2011) 125 final.

[11] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62010CJ0034

[12] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62013CJ0364

[13] EU Parliament's annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter (2015/2229(INI)).

new priorities of its internal policies. These priorities were declared in the Hague Programme in 2005, following the meeting in The Hague in Netherlands.[14] The objective of the Hague Program was to improve the common capability of the Union and its Member States to guarantee the fundamental rights,[15] to ensure the minimum procedural safeguards and access to justice, especially by cross-border recognition of judgments.[16] However, the Hague Program itself does not emphasise the need for taking actions to adopt legislative acts governing family law matters. What it does is that it fixes the direction of handling civil matters of which family law seem to be a part.

The failure of the Constitutional Treaty showed the need for a recapitulation of some general directions of the internal policy of the European Union. Its effect was the adoption of the Lisbon Treaty (2007) and the Stockholm Program (2009). The Stockholm Program is called "*An Open and Secure Europe Serving and Protecting the Citizens*." This program was adopted by the European Council in December 2009, and it provided a framework for EU actions on the issues of citizenship, justice, security, asylum, immigration and visa policy for the period 2010–2014. It focuses on the strengthening the position of the EU citizen.[17] It also called for a coherent policy response that goes beyond the area of freedom, security and justice.[18] It included external relations, development cooperation, social affairs and employment, education and health, gender equality and non-discrimination. In addition to the family living matters, the Stockholm program calls only for the protection of the rights of children.[19] In the matter of family living, the program provides legal norms on the way of the development of judicial cross-border cooperation.[20] However, both programs lack some clear indication of the legal competences of the EU for creating legislative acts in the matter of family law.

On the other hand, in the second decade of the 21st century, in the execution of the Treaty principles (Art. 8 of the Treaty on the functioning of the European Union) the European Union is focused on social well-being and consolidation of

[14] O.J. EU, L 53, of 3.3.2005, p. 1.

[15] Para 1 (Preamble), para 7, and point III. 1.1. of the Hague Program.

[16] Para 3.4. of the Hague Program.

[17] O.J. EU, L 115, of 4.5.2010, p. 1. More in: A. Sapota, *Program Sztokholmski zapowiedzią dalszej unifikacji prawa prywatnego w Unii Europejskiej*. Przegląd Sądowy February 2011 p. 100 et seq.

[18] Para 3.1.2. and 3.4.

[19] Para 2.3.2.

[20] A. Sapota, *Program Sztokholmski zapowiedzią dalszej unifikacji prawa prywatnego międzynarodowego w Unii Europejskiej*, Przegląd Sadowy February 2011, p. 101, pp. 106–109.

inter-generational solidarity. Those principles comprise the rights of the elderly. In this respect, on 20 November 2009 the Council of the European Union concluded a statement *"Healthy and dignified aging"* and the European Parliament adopted on 1 November 2010 a Resolution termed the *"European Parliament resolution on demographic challenges and solidarity between the generations"*, being the European Parliament's and the Council of EU's decision No. 940/2011/UE of 14 September 2011 termed *"European Parliament resolution on demographic challenges and solidarity between the generations."* Mirroring these activities are the Commission's green and white papers, as for example: the White paper termed *"An agenda for adequate, safe and sustainable pensions"* (Brussels COM 2012, 55/2). Regarding legal actions undertaken by the European Union, what can be indicated is the *Strategy and action plan for healthy aging in Europe, 2012–2020,* (Regional Committee for Europe EUR/RC62/10, 10–13 September 2012, and of 18 July 2012.[21]

4. Other EU actions and initiatives taken internally and externally regarding rights of citizens with special attention given to the protection of women

The European Union, within the limits of its powers under the Treaties, is taking various measures, both within and outside the Union, to achieve the objectives of protecting the rights of individuals, in particular against discrimination. An example of this is the Union's commitment to combating inequalities between men and women. In addition, the Union is committed to combating all forms of exploitation of human beings, in particular slavery and trafficking in human beings (point 4.4.2 of the Stockholm Program), illegal immigration the Stockholm Program (point 1.6) and the Hague Program – (point 1.7.1) Border controls and the fight against illegal immigration, the Hague Program last paragraph, p. 7). In the area of external action, the EU has for years systematically taken action to reduce poverty.[22]

In 2010, the Union acted on the basis of the competences provided for in Article 21 TEU (EC Green Paper): *Commission's Green Paper EU development policy in support of inclusive growth and sustainable development. Increasing the impact of EU*

[21] http://www.euro.who.int/__data/assets/pdf_file/0006/170727/RC62wd10add1-Eng.pdf.

[22] Millennial Aims of Development O.J. EU. C 33 E of 9.2.2006 p. 311.

development policy.[23] The Union bases its action on the principles of democracy, the rule of law, the protection of human rights and human dignity. In addition, it respects the Charter of the United Nations and international law.[24] In this context, EU assistance actions are implemented on the basis of Articles 208 to 211 TFEU, of the principles of mutual cooperation between the Union and interested countries and international organizations. Examples of the European Union's commitment in international relations with regard to the protection of women are its efforts to reduce inequalities, promote gender equality and social protection (point 2.2 of the Commissions Green Paper of 2010 "*Growth for human development*") and its strategies for social inclusion (point 3.1 of the Commissions Green Paper of 2010).[25]

On internal issues relating to social living, the protection of women and gender equality, the Union acts through taking a position through the European Parliament, which is the voice of European society. These positions take the form of various European Parliament resolutions. In addition, the European Commission presents the results of the application of the Charter of Fundamental Rights in its annual reports to the European Parliament, the European Economic and Social Committee and the Committee of the Regions (European Commission communications). In its 2017 *Communication on the application of the Charter of Fundamental Rights in 2016*, the European Commission highlighted measures to promote the right to family life (Article 7 of the Charter) and to protect the rights of the child in the context of immigration. In the introduction to the Communication (point No 1), the Commission also highlighted the promotion of women's rights and gender equality.[26]

Protection of women's rights is now one of the main priority actions of the European Union on the basis of the Treaty of Lisbon. In its resolutions since 2008, the European Parliament has been dealing with the protection of women's reproductive health and control over their own fertility, as well as with family planning and other areas of women's lives, too. This equality is to apply to the protection of fundamental rights (point A) of economic equality (point E), education (point L) and protection of sexual and reproductive health (point M).[27] Family planning also means keeping

[23] Green book of the European Commission, Brussels 10.11.2010. COM (2010) 629.

[24] UN Convention on liquidation of all forms of discrimination against women of 18 December 1979 (Dz.U.RP 2 April 1982).

[25] Commission's green paper, Brussels 10.11.2010. COM (2010) 629.

[26] Commission's communicate, Brussels 18.5.2017. COM (2017) 239 final.

[27] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0072+0+DOC+XML+V0//EN (O.J. E.U. 2018/C 50/15).

the spacing between deliveries and making reproductive decisions free from discrimination and coercion. These actions are intended both for the Member States and for third countries with which the Union cooperates. This is particularly the case for developing countries, which receive financial assistance from the Union (Resolution 6–7). On the basis of the afore-mentioned resolution of the European Parliament of 2008, it can be seen that the Union has been considering the issues of protection of women and their reproductive health for almost a decade already.

In the scope of European Parliament's Resolution of 8 March 2016 *on Gender Mainstreaming* (2015/2230(INI)) in the work of the European Parliament, the general part of social living is equality between man and woman has been stated (point A and G of Resolution of 2016). It concerns a lack of the right balance on the leading positions and in the economical living. Thus, the equality will be enforced in every aspect of EU politics.[28]

One example of measures taken to protect young women and girls is the European Parliament resolution of 14 March 2017 *on empowering girls in EU education* (2016/2249(INI))[29] which points out that, in EU society too, women are dedicated to and involved and in the reproduction and prolongation of the traditional social and economic structures. Women should more often develop their secondary and tertiary education and have the opportunity to become involved in the labor market. Equality between women and men is a fundamental right of the European Union enshrined in the Treaties and in the Charter of Fundamental Rights; whereas the European Union's objective in this area is also to guarantee equal opportunities and equal treatment between men and women and to combat all forms of discrimination based on gender (point C).

Education and training of girls and women is an essential European value, a fundamental human right and an indispensable element for the empowerment of girls and women at social, cultural and professional level and for their unhindered and full enjoyment of other social, economic, cultural and political rights (point M), as well as subsequent prevention of violence against women and girls; whereas free, compulsory universal education is a *sine qua* non condition for guaranteeing equal

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http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017–0073+0+DOC+XML+V0//EN (O.J. E.U.2017/C 316/01).

[28] (http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0072+0+DOC+XML+V0//EN (O.J. E.U.2018/C 50/15).

[29] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0073+0+DOC+XML+V0//EN (O.J. E.U.2017/C 316/01).

opportunities for all, as they should be available to all children, without any discrimination and regardless of their residence status; whereas the fight against gender inequality starts at pre-school age and requires constant pedagogical supervision of curricula, development aims and learning outcomes.

In points (A – H), it is stated that sexual and reproductive health and rights are fundamental human rights and an essential element of gender equality and self-determination; they must also be taken into account in the EU's health strategy.[30] The resolution provides for the protection of women's human rights, dignity, equality and self-esteem by encouraging them to make informed decisions in their personal and professional lives. Summarizing the activities of the European Union on the basis of Article 8 TFEU in the field of women's protection, the objectives to be achieved are the protection of their personal and sexual integrity, as well as their reproductive health.

5. UE Legal competence in relation to international private law and family law

One of the objectives described in the Treaty is to create space for judicial cooperation in civil matters having cross-border implications, as provided for mentioned in Art. No 67(1). of TEU (Treaty on European Union). The European Union has competence to legislate Article No 288 of TFEU (Treaty on Functioning of EU) in order to achieve the objectives set out in the Treaty. Those acts are to be adopted in areas where the Union may have to legislate EU law comprises directives, decisions, recommendations and opinions that are not directly applicable. Regulations are directly applicable in all Member States. Directives are addressed only to Member States' authorities and are only applicable in terms of outcome and need to be properly reflected in national law. Decisions are binding only on the addressees to whom they are addressed. Recommendations and opinions do not have direct binding force and are therefore called "soft law."

One of these areas is cooperation in civil matters (Article No 81(2) TFEU). To this end, the Union develops judicial cooperation in cross-border cases. In order to

[30] European Parliament resolution of 14 March 2017 on equality between women and men in the European Union in 2014–2015 (http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017–0073+0+DOC+XML+V0//PL).

ensure the proper functioning of the internal market, the European Union acts most often on the basis of directives or regulations. Article 83(3) TFEU provides for the possibility to legislate on family effects. However, this requires a special legislative procedure and unanimity. Therefore, in the area of family law, the European Union only creates rules of procedure for cross-border cases.

EU family law regulations are crucial for the harmonious integration of European societies. A full development of this law is limited by the fact there is no distinct EU competence provided in the Treaties for creation of such a law. Traditionally, only the Member States can create a substantive family law, and only in their internal legal order. Thus family laws of Member States exist outside of Union's legal competence.[31] However, the development of EU family law is limited by the fact that the Treaty provisions do not provide for the creation of family law regulations, since the substantive family law of the Member States traditionally falls outside the scope of direct European Union legislation.[32] On the basis of Article 80 TFEU and Article 3(2) TEU, European Union creates an area of freedom, security and justice and guarantees access to justice within the framework of the harmonization of procedural standards by facilitating cooperation between the courts of the various Member States.[33]

In a situation where it is not possible to achieve unanimity on matters relating to family law, the European Union uses the enhanced cooperation method. Recently, two new regulations have been adopted in that way, which are regulations on conflict of law rules in applicable law and on jurisdiction in matters of matrimonial property regimes and registered partnerships.[34] Consequently, this law is not family substantive law within the meaning of the family code. The provisions of Union law

[31] Judgement of 5 June 2018 of the European Court of Justice (Luxembourg) in case C -679/16 Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept against Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne (item 37).

[32] A. Mączyński, Program haski a polskie prace kodyfikacyjne w dziedzinie prawa prywatnego międzynarodowego, Kwartalnik Prawa Prywatnego 2009, No. 1 p. 239 et seq., P. Mostowik, *Kwestie kompetencji Unii Europejskiej oraz warunków pomocniczości i proporcjonalności prawodawstwa unijnego na tle projektów rozporządzeń o jurysdykcji, prawie właściwym i skuteczności zagranicznych orzeczeń w majątkowych sprawach małżeńskich i partnerskich*, ZP 2011/2, pp. 9–41.

[33] Further harmonization of private law is not favored in the EU: S. Weatheril, *Why Object to the Harmonization of Private Law by the EC?,* ERPL 2004, No. 5, p. 633 et seq.; P. Legrand, *Against a European Civil Code*, Modern Law Reveu 1997, No. 60, p. 44 et seq. quote p.106.

[34] M. Sokołowski, Stosowanie rozporządzenia 2016/1103 przez polskie sądy – nowe majątkowe prawo małżeńskie a sytuacja obywateli polskich, EPS 2017, No. 11.

on family law are of a technical nature and are designed to strengthen cross-border cooperation between the courts of the Member States in family law matters.

6. Competence with regard to the aspects of surrogacy as part of family law and measures to protect women's rights

The European Union exercises a broadly defined competence, as provided for by Article 8 TFEU, aimed at promoting gender equality. The previous paragraphs have dealt with the implementation of this competence in various areas of the Union's social life. In connection with the development of biotechnology, particular attention should be paid to the issue of surrogate motherhood. Surrogate motherhood is a controversial issue and may lead to a new form of exploitation of women. The European Union is taking a negative stance in this area, as reflected in the European Parliament's resolutions in recent years. In particular, the latest European Parliament Resolution of 14 March 2017 *on equality between women and men in the European Union in 2014–2015*, taking action to ensure the legal protection of women and girls in connection with human exploitation, demonstrates the interest that this issue arouses at the European level.[35]

The above-mentioned resolution refers to the Annual Report of 30 November 2015 *on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter* (2015/2229(INI)). The Report calls for condemnation of surrogacy (item 114). There was a special motion dedicated to surrogacy for European Parliament from 15.4.2016 *for a resolution on the subject of condemnation of surrogacy motherhood* too.[36] The resolution, report and motion together draw attention to the danger of the exploitation of women and the threat to women from less developed countries through such exploitation, recommending at the same time a ban on surrogate motherhood.[37]

To sum up the issue of surrogacy, it must be said that the European Union does not adopt a clear position. This is evidenced by the motions for resolutions from the

[35] (2016/2249(INI)); source: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2017–0073&language=EN.

[36] Source: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8–2015–0344+0+DOC+XML+V0//EN ,

[37] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0073+0+DOC+XML+V0//EN

European Parliament, which have not been followed up after the year 2015 There are two reasons for this. Firstly, some European countries allow surrogacy in their national laws, such as the United Kingdom, while in most EU countries there is no clear regulation allowing or prohibiting surrogacy (e.g. Poland). On the other hand, many countries worldwide allow such a form of parenthood in law, or in fact, e.g. Russia, Israel, or some states of the USA. The other reason may be the current lack of clear regulations in international law, e.g. in the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine of the Council of Europe of 4 April 1997 there is no provision for surrogate motherhood. However, the Convention itself prohibits the treatment of a human body or part of a human body as a source of profit.

Similarly, the 1997 Oveido Bioethical Convention provides for the prohibition of the profit making and use of parts of the human body. This raises the question of the any need for the European Union to regulate this issue and of the possible competence of the Union in this area. With regard to the first question, a general need to regulate the issue of surrogate motherhood can be distinguished. This is due, on the one hand, to the provisions of the general part, i.e., Articles 2–3 of the Treaty on European Union, which deals with equality, human dignity and the protection of children's rights. It also follows in detail from Article 8 of the Treaty on the Functioning of the EU, which provides for the promotion of equality between women and men. In addition, the provisions of the Charter of Fundamental Rights in the section on equality and protection of children call for the equality between men and women in all areas (Article 23), and Article 24 requires the protection of the best interests of the child. In addition, Article 24(2) of the CFR provides for the right of the child to have contact with both parents, while the lack of regulation of surrogate motherhood makes it difficult to determine who the child's mother is.[38] Thus, there is an indirect implication for the Union to act accordingly.

On the other hand, the issue is the question of the appropriate legislative competence of the European Union in matters relating to surrogacy motherhood. This issue belongs to family law. Substantive family law does not fall within the competence of the European Union.[39] However, it is a fact that over the last decade the

[38] *It can cause difficulties how to fix (who is) a mother, whether a genetic mother (who gave a gametes) or a biological mother (who was pregnant and finally gave a birth). That's why an indirect need arises to set up an official standpoint, certainly by the European Union.*

[39] Quoted: P. Mostowik, Władza rodzicielska i opieka nad dzieckiem w prawie prywatnym międzynarodowym, Kraków 2014, pp. 40–41.

Union has acted in areas of family life for which its competence was not clear. An example is cross-border judicial cooperation in family matters. The EU set out the rules of conflict of law of private international law in this area: the Rome III divorce regulation (Regulation No. 1259/2010) and the two different property regulations of spouses and persons in registered partnerships (EU Regulations No. 2016/1103 and No. 2016/1104). However, these regulations take the form of enhanced cooperation, which enables them to be adopted by only a few Member States as part of the EU's consensus.

Truthfully, the best way of solution are not directives and regulations but the soft law. Nevertheless, it seems that some regulation in the form of recommendations and opinions could be considered. It is not advisable, however, to adopt a regulation, not even within the framework of enhanced cooperation because the Member States must not be forced to adopt regulations that have a direct impact on national family law. Therefore, it is not possible to apply a directive either, which leaves a great deal of room for interpretation to the Member States, but requires implementation by all Member States. Truthfully, the best means are not regulations or directives, but the soft law mechanism and consequently the form of recommendations that should be considered in the judicial practice of the courts and authorities of the Member States.[40]

7. Final thoughts

Undoubtedly, there is a need to provide for the normative regulation of surrogate motherhood by the Union. On the one hand, this is a consequence of the axiology of the Union based on the Treaties and on the Charter of Fundamental Rights. In particular, this is supported by the principle of the protection of the best interests of the child and the principle of the protection of the rights of citizens of the Union. In the future, EU citizenship will cover both surrogate mothers and their children. There is a need to harmonize or substantially approximate practices and standards in this area in order to protect their rights. This is important in the context of a clear family relationship or Civil State Acts. On the other hand, the legislative competence

[40] The Roquette freres judgment in Grimaldi demonstrates the obligation of States to take into account recommendations for the interpretation of their laws in accordance with the spirit and the letter of the Treaties.

of the Union is not strong enough to adopt a single act such as a Unions regulation. This is all the more so, since the admissibility of surrogacy is a matter for individual domestic family laws. EU legal actions may only support those carried out by the Member States within their respective spheres of competence (Article 2(5) TFEU). However, the action of the European Union will not replace the competences of the autonomous Member States. This is because the regulation of surrogacy and its effects on family law and civil status is a matter for the Member States to decide themselves. This is an element of the domestic substantive family law.

In this case, there is a need for common, similar standards of action to be adopted by all Member States in the context of a common protection of the Treaty principles. This applies to matters relating to the principles of non-discrimination and protection of human rights, gender equality and the rights of the child, as set out in the Treaty. The Union's action in the field of surrogacy will allow for the establishment of a general common regulatory approach. It does not appear that the Union has the competence to explicitly prohibit surrogacy when it is a fact of life. This would be a too far-reaching interference in the family life of the societies in the Member States. Therefore, the actions undertaken by the European Union should ensure that the rights of women and the rights of children born in such a relationship are protected. In this case, Union needs to bring its Member States closer together and apply common rules of handling by all Member States. It concerns the matters mentioned in the Treaty as for example non-discrimination and protection of Human rights, equality of men and women and Rights of the Child. For that reason alone, Union's activities should lead to guarantee some reasonable protection of women and children born in such biological relations. In this protective area the Union's competences seem to be clear and should be accepted.

Specifically, the issue of the admissibility of surrogate motherhood for same-sex marriages needs to be addressed. The right to conclude these marriages, which has been granted in some Member States, should not be equated with the right to have children. Since in same-sex marriages the offspring cannot be conceived naturally between the two spouses or partners, any treatment to this effect should be classified as circumventing the law. This would be a situation where the law would act against nature. It would therefore be advisable to strongly advocate that the Union would exclude such practices. Such an approach is justified from the point of view of the fundamental law of nature and the protection of children's rights. Under Article 24(3) of the Charter of Fundamental Rights, the child has a right of access to both parents. Thus, not only the legal parent, but also the natural parent can be

classified as a parent. This is supported by the case law of the European Court of Human Rights (*Anayo* judgment).[41]

Meanwhile, we hear about the adoption of children by homosexual couples, who thus produce for themselves a "family substitute." A woman cannot be prevented from getting pregnant, even if she is married to another woman. On the other hand, men in a homosexual relationship should not adopt children, either from their partners or from strangers, as this would allow them to form a quasi-family. However, this would only be a "family substitute" while the (child's) right to live and be brought up by a traditional heterosexual family should be guaranteed in the Union. The rights of same-sex people should give way to the protection of children's rights in the most elementary area of family life. Surrogate motherhood may be an element of the abuse of human rights and exploitation of women from poorer countries. Substitute motherhood, whether poorly regulated or non-regulated at all, threatens to create specific "children farms." Such farms would be set up either in Europe or in less developed countries neighboring the Union. During World War II, Europe was confronted with such situations as part of the racist policy of the Third Reich. Today, Europe cannot step on this way again.

Legal vacuum is not advisable. The European Union should postulate that surrogate motherhood need to be regulated by the Member States. Substitute motherhood should be allowed only for married couples and registered partnerships of heterosexual couples. This will ensure that the best interests of the child on the basis of Article 24 of the Charter of Fundamental Rights are respected. Children will have the chance to grow up in a stable natural family. Homosexual relationships seem to be less durable than heterosexual relationships.

The crisis of the family and fertility of Western European societies[42] is conducive to the development of surrogate motherhood. A soft impact formula should be proposed, as the Union does not have legislative competence in this area. Even the enhanced cooperation method does not seem advisable here. The European Union can and should participate in the discussion on surrogate motherhood under the general axiology of the Treaty. Of this axiology, the most important is the protection

[41] Judgment of the European Court of Human Rights of 21 December 2010, Case 20578/07 (right of access to a biological father to his child).

[42] Europeans are also having fewer children: whereas, in the 1960s, over 2 live births per woman were the norm, today the EU fertility rate average stands at 1.58. As an illustration, fertility rates in Ireland and Portugal were above 3 and today they stand below 2. Quoted after: *Commission's Reflection paper on the social dimension of Europe*. Brussels 24 April 2017 COM (2017) 206 final, page 14.

of women's rights and the children's rights. The regulation should take the form of soft law, i.e., recommendations of the European Union. However, it is important to warn against the appropriation of the issue of surrogate motherhood by LGBT groups, which would undoubtedly lead to a distortion of this technology in the name of specifically understood protection against discrimination. The European Union must give priority to protecting the fundamental rights of children over the reproductive rights of adults.

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Surrogacy – a solution that brings new problems. International organizations and surrogate motherhood

1. Introduction

The issue of surrogacy has a long history.[1] Since biblical times, there have been situations in which, in case of impossibility of having one's own child by spouses, the possibility of giving birth to a child by another woman (most often enslaved), and then bringing it up as one's own was allowed. In this case, however, the child had the opportunity to be only a natural child of one of the parents, and the level of development of medical sciences at that time did not allow the existence of other possibilities. The issue of surrogacy is deeply rooted in history. Ever since biblical times situations were known where spouses, unable to bear a child of one's own, admitted the possibility of having a child born by another woman (in most cases a slave), and then bringing the child up as their own. In such cases however, the child was genetically related to one of the parents as the medical advancement at that time did not admit any other possibilities.

[1] J. M. Caamano, "*International*, *Commercial*, *Gestational Surrogacy through* the *Eyes* of. *Children Born through Surrogates Thailand*: A *Cry* for *Legal Attention*", *Boston University Law Review*, Vol. 96, 2016, p. 574; K. Brugger, "International Law in the Gestational Surrogacy Debate", *Fordham International Law Journal*, vol. 35, Issue 3, 2012, p. 667; M. Franaszek, "Umowy o surogację", *Prawo i Medycyna*, http://www.prawoimedycyna.pl/?str=artykul&id=1029 (last accessed: 26 August 2018); critically: H.T. Krimmel, "Argument przeciwko rodzicielstwu zastępczemu", [in:] *Początki ludzkiego życia. Antologia bioetyki*, Vol. 2, ed. W. Galewicz, Kraków 2010, p. 341.

The situation changed in 1978, when assisted reproduction through *in vitro*[2] was mad possible. This technique admitted the possibility of extracorporeal fertilization and subsequent implementation of an embryo in a woman's body. Initially, this solution was applied only in the case of defects that prevented the intended parents from conceiving naturally. Over time however, the "extracorporeal" nature of fertilization has also enabled other configurations as far as a child's genetic provenance was concerned. In the contemporary understanding of this term, surrogacy can also extend to situations where a child is not genetically related to the father, or the mother. In consequence, the possibilities have led to the development of several aspects of surrogacy:[3]

1. *sensu stricte* surrogacy – the situation in which a woman and a man become parents of a child genetically derived from them, the embryo of which has been implemented in another woman, who then gives birth to the child and relinquishes it[4] to its "genetic" parents;
2. *sensu largo* surrogacy – the situation in which a woman and a man become parents of a child genetically derived from the woman (in which case the semen comes from a third party) or a man (in which case the egg cell comes from a third party), regardless of the fact that another woman was pregnant and gave birth to the child and that the child is genetically related (partly) to another (fourth) person;
3. *quasi* surrogacy – the situation in which a woman and a man become parents of a child genetically related to another couple, regardless of the fact that another woman was pregnant and the child was born of her;
4. pseudo-surrogacy – is a situation in which two persons acquire the legal status of a mother or parents No. 1 and No. 2, although by nature a situation in which both would be genetic or biological parents is impossible (e.g. a single parent or a homosexual couple), regardless of the fact that another woman was pregnant and gave birth to the child.

The assumed division leads to the following factual possibilities:

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[2] Ch. B Kleinpeter, T. Boyer Lee, M. E. Kinney, "Parents' Evaluation of a California-Based Surrogacy Program", *Journal of Human Behavior in the Social Environment*, 2006 13: 4, p. 2; Preliminary Report on the issue arising from international surrogacy arrangements, drawn up by the Permanent Bureau Preliminary Document No. 10 of March 2012 for the attention of the Council of April 2012 on General Affairs and Policy of the Conference Prel. Doc. No. 10, March 2012, p. 6.

[3] P. Mostowik, Project paper, unpublished.

[4] The issue of "relinquishing" shall be elaborated on further in the paper.

1. The child is genetically derived from a woman and a man despite the fact that the child was born to a third party;
2. The child is genetically derived from a woman yet the embryo is the result of the semen donation, where the child was carried and born to a third party;
3. The child is genetically derived from a man yet the embryo is the result of egg cell donation, where the child was carried and born to a third party;
4. The child is genetically derived from third parties – through ova and semen donation; the child was carried and born to a third party;
5. The child is genetically derived from a woman and the embryo is the result of the semen donation, where the child is born to the woman from whom the embryo originates and who wants to raise the child;
6. The child is genetically derived from a man and the embryo is the result of egg cell donation, where the birth is given by a woman who wants to raise the child;
7. The child is genetically derived from third parties – there has been egg cell and semen donation, the child is born by a woman who wants to raise the child.

Consequently, we have a numerous group of participants of the entire process which concerns surrogacy. The group includes: a surrogate mother[5], egg cell donor, semen donor, intended father/parent[6], intended mother/parent. It should be borne in mind however that these roles may overlap, i.e., an egg cell donor may as well be the surrogate mother, just as the intended mother may be an egg cell donor. One should not exclude a situation in which the intended parent is a single parent – for example a man hiring a surrogate mother for his child, born of his genetic material. The possibility of a one-person initiative is also admitted in a situation where one of the spouses (or persons living in a partnership) undertakes the task of finding a surrogate mother, and then carries out the fertilization and the relinquishing process. Such a case may trigger questions as to how the other spouse (partner) should react. If they were not informed of the other spouse's (partner's) initiative, can they

[5] The woman who agrees to carry a child (or children) for the intending parent(s) and relinquishes her parental rights following the birth. In this paper, this term is used to include a woman who has not provided her genetic material for the child. In some States, in these circumstances, surrogates are called "gestational carriers" or "gestational hosts" – glossary prepared by the Hague Conference on Private International Law.

[6] The person(s) who request another to carry a child for them, with the intention that they will take custody of the child following the birth and parent the child as their own. Such person(s) may, or may not be, genetically related to the child born as a result of the arrangement – glossary prepared by the Hague Conference on Private International Law.

give a *post-factum* consent? Would the unwillingness to issue such consent stand as a reason of dissolving the union (marriage, partnership)?[7] Would the spouse who was not the initiator of the process have any definite rights and obligations towards the child (e.g. in case of the initiator's death)? These issues are unregulated in both domestic and foreign law[8], which appears to be deeply worrying, especially in view of the fact that in most cases this is a cross-border process.

The purpose of this study is to present the views of international organizations on the given issue. The review covers organizations operating globally. The initiatives analyzed were those of both intergovernmental organizations and joint initiatives of intergovernmental organizations and organizations of domestic law acting globally.

2. Definitions and terminology

The term surrogacy usually refers to a situation in which a child is born by a woman who has no intention of raising it or from whom it does not originate genetically. However, the term is highly ambiguous. In literature and documents of international organizations the following definitions of surrogacy can be found:

- whereby a woman carries a child for someone else with the intention of handing the child over at birth[9];
- an arrangement whereby a woman agrees to carry a fetus for another individual or individuals and deliver it after birth[10];
- the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth[11];

[7] The legal doctrine with regard to extracorporeal fertilization without the consent of the spouse before the entry into force of the regulations requiring express consent, i.e., before 1 November 2015, art. 20 Ustawa z dnia 25 czerwca 2015 r. o leczeniu niepłodności Dz.U. 2015 poz. 1087, cf. J. Ignatowicz, K. Piasecki, J. Pietrzykowski, J. Winiarz, *Kodeks rodzinny i opiekuńczy z komentarzem*., ed. J. Pietrzykowski, Warszawa 1990, p. 123.

[8] For example, the resolution on surrogacy prepared in the framework of the Council of Europe was not accepted.

[9] N. Gamble, L. Ghevaert, "The Chosen Middle Ground: England, Surrogacy Law and the International Arena", *International Family Law*, 2009, p. 223.

[10] Y. Margalit, "From Baby M to Baby M(anji): Regulating International Surrogacy Agreements", *Brooklyn Journal of Law and Policy*, Vol. 24, No. 1, 2016, p. 44.

[11] M. Warnock, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*; Cmnd 9314 (London, HMSO, 1984), p. 42.

- refers to the process through which a woman intentionally becomes pregnant with a baby that she does not intend to keep[12];
- refers to a form of "third party" reproductive practice in which the intending parent(s) and the surrogate mother agree that the surrogate mother will become pregnant, gestate, and give birth to a child[13];
- means a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the[14];
- the gestational carrier of any embryo, a *fetus*, or a child.[15]

All these definitions clearly indicate the intention to hand over the child to a person other than the woman who gave birth to it. This approach generates the possibility of two types of surrogacy. The first is a traditional surrogate, which is that the surrogate provides her own genetic material, and consequently the child is genetically related to her. In such a case both natural conception and insemination procedures are accepted. The second possibility is gestational surrogacy, in which a surrogate gives birth to a child which is not genetically related to her, in which case the pregnancy is initiated through artificial insemination. In such cases, genetic material may be derived from either both intending parents, one of them or none of them.[16]

In both cases indicated, we may deal with one more possible division of the practice of surrogacy which is determined by the motives underlying it. These motives may be personal, but not aimed at achieving financial satisfaction – the so-called altruistic surrogacy. In this case, the only funds received by the surrogate are the "justified expenses" ("reasonable expenses"). On the other hand, it may be

[12] In the Matter of Baby M, 537 N.J. 396, 410 (1988), by: B. Stark, "Transnational Surrogacy and International Human Rights Law", *ILSA Journal of International & Comparative Law*, Vol. 18, 2011, p. 369.

[13] Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, A/HRC/37/60, p. 3.

[14] The Surrogacy (Regulation) Bill, 2016, Bill No. 257 of 2016; previous definition covers "intending couple after the birth means an arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention to carry it and hand over the child to the person or persons for whom she is acting as a surrogate", Assisted Reproductive Technology (Regulation) Bill and Rules – 2013.

[15] Draft ABA Model Surrogacy Act, Section of Family Law Adoption Committee and ad hoc Surrogacy Committee, *Family Law Quarterly*, Vol. 22, No. 2, Special Issue on Surrogacy (Summer 1988), p. 125.

[16] Annex A of Preliminary Document No. 3B of April 2014 on "The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project": www.hcch.net/upload/wop/gap2015pd03b_en.pdf.

determined by financial motives, then we are talking about commercial surrogacy. In this case, the funds received by the surrogate exceed the amounts of "justified expenditure" ("reasonable expenses") and constitute payment for "pain and suffer" or simply for the service.[17] It should be borne in mind that even in cases of altruistic surrogacy securing the risk of failure to transfer funds is not always possible. The process of surrogacy is aimed at cooperation between the surrogate and the intended parents, as a result of which their meetings are frequent and casual. This considered, there exists a risk of "unofficial" transfer of funds for the participation in the surrogacy process. It should also be noted that, even if the financial benefits do not constitute "payment" as such, they do cover the costs of measures taken by the healthcare institution where the artificial insemination was carried out, the work of intermediaries or, finally, the sums paid to the surrogate to meet special pregnancy needs (clothing, food, medical examinations, medical visits). These may also be considered dubious, as pointed out in the work of the Hague Conference on Private International Law, for example, if the surrogate is an unemployed woman, and "reasonable expenses" also include the loss of salary.[18]

What is also important is that the typical understanding of surrogacy excludes a situation which may appear in the case of the impossibility (resulting, for example, from defects in genetic material) of having one's own children, namely a situation where we are dealing only with the donation of ova and semen (together or separately). This means that the surrogate covers only the birth and not the creation of the embryo. Consequently, no distinction is made between the mother-parent and genetic mother.

As the definitions and introductory remarks indicate, the issue of surrogacy is a complex and multifaceted issue, which require solving a number of dilemmas, not only legal, but also medical and ethical ones. The works of international organizations presented below attempt to solve these dilemmas, as well as elaborate on the points made earlier and indicate a much wider range of issues than surrogacy seems to initially be linked with. It should be noted that in spite of how the problem is

[17] Annex A of Preliminary Document No. 3B of April 2014 on "The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project": www.hcch.net/upload/wop/gap2015pd03b_en.pdf.

[18] *The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project*, Preliminary Document No. 3 B of March 2014 for the attention of the Council of April 2014 on General Affairs and Policy of the Conference, Prel. Doc. No. 3 B, March 2014.

perceived either by the international community and individual domestic entities, the legal regulations still remain patchy.[19]

3. Overview of the Organization and Committees involved in consideration of surrogacy process

The issue of surrogacy is widely discussed by international human rights organizations and NGOs. These issues are dealt with by organizations that dedicate their activities to the protection of children's and women's rights, as well as entities aimed at harmonizing private law regulations. However, these activities are not always comprehensive, systemic and synchronized. In fact, the only ones that could be qualified as comprehensive are the work of The Hague Conference on Private International Law. The scope of consideration includes more than 20 works of organizations within the framework of their own or joint reports and recommendations. Some of the initiatives are joint initiatives of international and non-governmental organizations, while other NGOs have developed their own work using governmental or national or own resources. The scope of this work is also highly diversified, these are often minor remarks made in the context of wider problems (e.g. trafficking in human beings or women's rights), and some of them are studies dedicated to the issue of surrogacy.

[19] National legislation should be categorized as follows: countries in which both commercial and altruistic surrogacy is allowed by law include Russia, Ukraine, Belarus, Georgia, Armenia, Cyprus, India, South Africa, certain states of the United States of America (Arkansas, California, Florida, Illinois, Texas, Massachusetts, Vermont); countries where only altruistic surrogacy is allowed by law: Australia, Canada (except Quebec), the United Kingdom, the Netherlands, Denmark, Hungary, Israel, and certain states of the United States of America (New York, New Jersey, New Mexico, Nebraska, Virginia, Oregon, Washington); countries in which all types of surrogacy are expressly prohibited by law Germany, France, Belgium, Spain, Italy, Switzerland, Austria, Norway, Sweden, Iceland, Estonia, Moldova, Turkey, Saudi Arabia , Pakistan, China, Japan, Canada (Quebec), some states of the United States of America (Arizona, Michigan, Indiana, North Dakota); countries lacking unambiguous legal regulations, but their regulations tend to inadmissibility of any form of surrogacy. These countries should include Poland. The regulation that goes in the direction of recognizing as a mother a woman who had a child physically born should be considered the dominant in the European circle. This may be the result of the most dedicated to this problem of discussions at the international level; for more information, see: A. Wedeł-Domaradzka, "Macierzyństwo – od pewności do wątpliwości. Aspekty prawne i bioetyczne w kontekście urodzenia dziecka", [in:] *Kądziel – Kołyska – Łoże: Atrybuty kobiecości na przestrzeni dziejów*, eds. K Grysińska-Jarmuła, A. Głowacka-Penczyńska, M. Opioła-Cegiełka, Bydgoszcz 2017.

3.1. Treaty bodies and other bodies of the UN system

3.1.1. Committee on the Elimination of Discrimination against Women (CEDAW), Human Rights Treaties Division (HRTD), Office of the United Nations High Commissioner for Human Rights (OHCHR)[20]

The Committee on the Elimination of Discrimination against Women (CEDAW) – the body of independent experts that monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women.

The Human Rights Treaties Division (HRTD) – division responsible for implementing Subprogramme 2 of the Secretary-General's Strategic Framework entitled "Supporting human rights treaty bodies."

The Office of the United Nations High Commissioner for Human (OHCHR) – United Nations agency for promotion and protect the human rights. Established by the UN General Assembly on 20 December 1993.

The Committee on the Elimination of Discrimination against Women, The Human Rights Treaties Division and The Office of the United Nations High Commissioner for Human have issued a common statement against surrogacy. In their opinion, surrogacy is a particular form of misappropriation of women's reproductive capacity, which consequently results in controlling their lives during pregnancy. During this period, they cease to be free and should comply with the guidelines given to them by those in charge of the surrogate process (agencies, clinics) and intended parents. Thus, in the opinion of the presented organizations, a situation arises in which women's struggle for the right to freedom is forgotten. The surrogacy process also leads to the dehumanization of a mother and child, because its aim is to intentionally create a state of sacrifice and abandonment. What is more, pregnancy loses its fundamental human act and becomes only a mechanical process aimed at singling out goods, which will then be sold. Therefore, there is no room for any feelings, thoughts or emotions which bond the mother and the child during pregnancy.

The organizations also referred to the term "gestational carrier", which, in their opinion, is of a demeaning nature, and the consequence of its use is that the emotional

[20] Committee on the Elimination of Discrimination against Women (CEDAW), Human Rights Treaties Division (HRTD), Office of the United Nations High Commissioner for Human Rights (OHCHR), ONU Resolution – Surrogate, 23 March 2017, Se non ora quando – Libere 1, Palais Wilson – 52, rue des Pâquis, CH-1201 Geneva (Switzerland).

relations between mother and fetus are omitted. The document under discussion devotes a great deal of attention to the situation of the surrogate herself. Firstly, it is pointed out that the practice of surrogacy has a significant impact on a woman's situation, her private life and her right to make decisions concerning herself. In this context, situations in which a surrogate not only is not a decision-maker, but also is not consulted on matters relating to her own health, pregnancy or childbirth itself, have been identified as particularly dangerous. According to CEDAW, HRTD and OHCHR, such practices are a restriction of women's freedom, and akin to slavery. The denial of the right to decide is determined primarily by caring for the interests of the "client", who could suffer if the surrogate put herself or her relations with the child first, regardless of the "ordering party" and their interests. The resolution emphasizes the disproportion between the material situation of surrogates and that of intended parents. This disproportion is particularly evident in India, while in the United States, to minimize the risk of commercial surrogate detection, women from the lower middle class are the preferred candidates.

Surrogacy should not be regarded as a reproductive technique, but rather as a certain social practice which uses mechanisms created for completely different purposes (in vitro fertilization). This practice has been commercialized because of the huge demand for procreation. This demand resulted in the emergence of a huge market, the value of which is estimated at several billion a year.

Within the framework of the resolution against surrogacy, a very detailed analysis of the legal acts with which this practice contradicts has also been carried out. Above all, it has been noted that the legalization of commercial surrogacy would be a failure of the system of protection of women's rights. It violated the Convention on the Elimination of All Forms of Discrimination against Women[21], particularly in the context of appropriation of women's reproductive capacities.[22] The contradiction of surrogate practices is also foreseen by the UN Slavery Convention[23] to the extent that it acquires ownership of a woman's body and a person for the purpose

[21] Convention on the Elimination of All Forms of Discrimination against Women, adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979 entry into force 3 September 1981, in accordance with article 27(1).

[22] The contradiction also includes Article 6 of the Convention on the Elimination of All Forms of Discrimination against Women, which deals with counteracting trafficking in women, for which the use of their economic situation should also be recognized.

[23] UN Slavery Convention, signed in Geneva on 25 September 1926, Article 1, which defines slavery as "status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised".

of obtaining a child. A number of contradictions are also generated by the surrogacy in the context of the Convention on the Rights of the Child[24] in particular the violation of the child's right to know his or her own parents[25], to separate the child from the parents against their will[26], or to sell or traffic in children for any purpose and in any form.[27] Surrogacy was also considered to be covered by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime[28], in particular as regards the definition of trafficking in human beings.[29] Protection against infringements resulting from surrogate practices is also indicated in relation to adoption instruments: insofar as they relate to the need to obtain the mother's free consent to the adoption procedure[30] and to acts prohibiting the human body from being treated as a source of profit.[31]

The resolution also highlights the rather widespread criticism of surrogacy practices, both regionally and universally, and the consequent need to step up action at global level. Without international cooperation, it is not possible to put an end to current practices, for the simple reason of being able to move around easily, thereby circumventing even very restrictive national rules. Consequently, it seems necessary for the UN to work towards the abolition of surrogacy at international level, which should include mechanisms to prevent the movement of persons for the purpose of surrender (from countries where this is prohibited to countries that allow such practices), as well as the adoption of repressive mechanisms against intermediaries in this type of practice. For pending cases, however, the child's right to know his

[24] Convention on the Rights of the Child.

[25] Article 7, Convention on the Rights of the Child.

[26] Article 9, Convention on the Rights of the Child.

[27] Article 35, Convention on the Rights of the *Child* and Article 2 lit. a. Optional Protocol of the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

[28] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, New York, 15 November 2000.

[29] "The recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation."

[30] Article 4, Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption and Article 5 the Council of Europe Convention on the Adoption of Children.

[31] The Council of Europe Convention on Action against Trafficking in Human Beings; to the Council of Europe Convention on Human Rights and Biomedicine (Article 21); and to the Charter of Fundamental Rights of the European Union.

or her own origin (knowing the mother) and the possibility for the child's custody should be respected.[32]

3.1.2. The Office of the High Commissioner for Refugees[33]

United Nations High Commissioner for Refugees (UNHCR) has a mandate to provide international protection and assistance to refugees and, together with governments, find solutions to their plight. UNHCR also protects stateless persons and works to prevent and reduce statelessness.[34]

The Overview of Statelessness: International and Japanese Context[35] report draws our attention to the problem of statelessness of children from surrogacy.[36] It gave an example of a man who used the services of a surrogate mother in India, and then brought the child to Japan. A Japanese court issued a visa to the child on humanitarian grounds and, on that basis, allowed the child to enter Japan. As suggested by the Ministry of Justice, it was necessary to submit either an application for adoption or a declaration of paternity before applying for Japanese citizenship. This situation raises the question will the children from surrogacy be able to avoid statelessness, and if so – on what grounds and relations with their intended parents.

The United Nations High Commissioner for Refugees, in one of his interventions to the Committee on Legal Affairs and Human Right, drew attention to the risk of statelessness of children born to surrogate mothers. This risk stems from the lack of procedures to guarantee citizenship to the child in a situation where the legal regime of the surrogate mother does not allow granting citizenship to the child, and the country of origin of intended parents does not allow to grant the child citizenship on the side of its contracting parents. In this context, United Nations High

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[32] Resulting from Article 7 of the Convention on the Rights of the Child.

[33] Parliamentary Assembly of the Council of Europe, UNHCR intervention at the Committee on Legal Affairs and Human Rights, Paris, 12 November 2012.

[34] Source: https://www.un.org/ruleoflaw/un-and-the-rule-of-law/united-nations-high-commissioner-for-refugees/.

[35] A. Kohki, *Overview of Statelessness: International and Japanese Context*, April 2010, the study was commissioned by the UNHCR Representation [branch] in Japan.

[36] Also considered in: V. R. Guzman, "A Comparison of Surrogacy Laws of the U.S. to Other Countries: Should There Be a Uniform Federal Law Permitting Commercial Surrogacy", *Houston Journal of International Law*, Vol. 38, 2016, p. 643; C. Fenton-Glynn, "International surrogacy before the European Court of Human Rights", *Journal of Private International Law*, Vol. 13, 2017, p. 548; K. Smith Rotabi and N. F. Bromfield, From Intercountry adoptions to global surrogacy. Human Rights History and New Fertility Frontiers, New York 2017, p. 127.

Commissioner for Refugees quoted a rule included in the Committee of Ministers[37], which is attempting to make up for the loophole and: "apply to children their provisions on acquisition of nationality by right of blood if, because of a birth conceived through medically assisted reproductive techniques, a child-parent family relationship is established or recognized by law." However, if it is impossible to establish a link between intended parents and the child as a result of the failure to regulate the issue of surrogacy in their legal system, this recommendation will not apply. UNHCR suggests adopting regulations determined by the best interests of the child. UNHCR has also expressed its commitment to the best interests of the child in its "Dakar Conclusions."[38] This document stresses that the Convention and Preventing Statelessness must be interpreted in the light of subsequent human rights treaties, including the CRC, which provides for the right to acquire nationality. National legal mechanisms must consequently act so as to ensure that their nationality is automatically acquired at birth by a stateless child born on their territory. If, on the other hand, a child applies for citizenship, States should limit the formal requirements to enable children to acquire citizenship as soon as possible after childbirth.

3.1.3. United Nations Office on Drugs and Crime

United Nations Office on Drugs and Crime (UNODC) – global leader in the fight against illicit drugs and international crime. Established in 1997 through a merger between the United Nations Drug Control Program and the Centre for International Crime Prevention.

In the paper presented[39], it has been pointed out that in some countries the term "sexual exploitation" is often understood as inclusive with commercial surrogacy. However, national surveys do not include questions about such practices. It has been indicated that the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children[40] does not provide for separate regulations on trafficking in pregnant women, but several legal instruments contain regulations

[37] Recommendation CM/Rec (2009)13 of the Committee of Ministers to member states on the nationality of children, adopted by the Committee of Ministers on 9 December 2009 at the 1073rd meeting of the Ministers' Deputies.

[38] Interpreting the 1961 Statelessness Convention and Preventing Statelessness among Children, ("Dakar Conclusions") September 2011, available at: http://www.refworld.org/docid/4e8423a72.html [last accessed: 4 July 2018].

[39] The Concept of "Exploitation" in the Trafficking in Persons Protocol, Vienna, 2015.

[40] Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted and

designed to counteract such practices. These documents include the optional protocol to the Convention on the Rights of the Child, which defines "the sale of children" as follows: "any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration."[41] Form the research conducted it has been concluded that Thailand is the country which has experience in commercial surrogacy. In one of the cases[42] the three elements of the definition were indicated, which were found to satisfy: victims were brought/sent/detained/confined through use of force and deception for the purposes of being exploited through commercial surrogacy. However, the need to penalize commercial surrogacy as a separate behavior was not recognized, and it was classified as a form of "sexual exploitation"[43], since this term is quite broad in application. It also highlights the novelty of commercial surrogacy and the lack of adequate legal solutions to counter it. According to UNODC, international commercial surrogacy also falls within the international legal definition of "sale of children", but there is still no clear definition of the forms and scope of these activities.

3.2. Support of the UN's system bodies for national bodies and/or national initiatives

3.2.1. United Nations Population Fund, Danish Institute for Human Rights, Office of The High Commissioner for Human Rights

United Nations Population Fund (UNFPA) – United Nations leading agency for delivering a world where every pregnancy is wanted, every childbirth is safe and every young person's potential is fulfilled. The UNFPA work involves the improvement of reproductive health; including creation of national strategies and protocols, and birth control by providing supplies and services. **The Danish Institute for Human Rights** (DIHR) is a national human rights institution (NHRI) operating in accordance with the UN Paris Principles. **The Office of the United Nations High**

opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000.

[41] Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted and opened for signature, ratification and accession by General Assembly Resolution A/RES/54/263 of 25 May 2000 entered into force on 18 January 2002.

[42] Provincial Court of the Minburi District, Bangkok, Choen Pai Wan and Others, UNODC No. THA012.

[43] In the file, the cases of "forced labor" and "others."

Commissioner for Human Rights is a United Nations agency that works to promote and protect the human rights that are guaranteed under international law.

The position of the UNFPA regarding surrogacy has been presented in the study on reproductive rights.[44] The text of the document draws attention to the opposing positions of states and entities with regard to the assessment of surrogacy. On the one hand, it stresses the need to review the prohibition of such practices in order to protect women living in poverty, and on the other, it points to the need to guarantee the right to use one's own body. According to the UNFPA, the need to balance the rights of potential parents with the rights of others and the rights of the unborn child should remain the most important guideline. UNFPA continued its work on the phenomenon of surrogacy by supporting the development of NGOs.

3.2.2. Sama Resource Group for Women and Health supported by United Nations Population Fund[45]

Sama Resource Group for Women and Health (Sama) is a group based in Delhi, working on issues related to women and health. The initiative comes from 1999, It was the initiative of group of feminist activists who were involved in the autonomy of women and improving her health condition.

The material presented by the organization in cooperation with UNPFA refers to the issue of surrogacy in India, in particular to issues related to surrogacy arrangement process, health risks and children's rights. This report begins with the genesis of the term "surrogacy"[46] as well as the indication of its origin and brief characteristics. The remarks made do not differ from the general terms indicated in this paper. The report refers to the actual situation for 2013, however, due to the fact that the ban on commercial substitution has only started being processed in India, many comments are of an up-to-date nature. Much more important are the remarks about the woman – surrogate herself. As shown by previous research work of this organization[47] financial issues are the main determinant of the decision to be a surrogate. The main motive was the lack of resources to meet basic needs,

[44] *Reproductive Rights Are Human Rights: A Handbook*, United Nations Population Fund, The Danish Institute for Human Rights, United Nations High Commissioner for Human Rights, 2014.

[45] *Surrogacy Information Brief*, Sama Resource Group for Women and Health supported by United Nations Population Fund, 2014, and *Birthing A Market A Study on Commercial Surrogacy*, Sama–Resource Group for Women and Health.

[46] The word "surrogate" is derived from the Latin word "subrogare", which means "appointed to act in the place of."

[47] *Birthing A Market: A study on Commercial Surrogacy*, Sama (2012).

pay off debts, educate children or improve housing conditions. Attention was also drawn to the qualification issues for surrogate motherhood, particularly the caste, class and physiological traits that need to be given to enable surrogate seekers to choose. From the perspective of the Indian population, the key criterion may be class affiliation, from the perspective of foreigners – physiological characteristics. Marital status is also an important aspect, as in most cases the women who decide to become surrogates are married. This determines the need to obtain consent for the process of surrogacy and in many cases is also connected with the obligation of the woman surrogate and her husband to refrain from sexual intercourses, which is particularly important in the case of *in-vitro* fertilization.[48] Women who decide to become surrogates are in most cases women who already have children, as this is usually an element that contributes to the positive assessment of a surrogate. The health situation of a candidate for a surrogate is examined very carefully, age is important[49], the number of deliveries, abortions – if any, issues connected with menstruation, the use of contraceptives, as well as the medical history of the woman herself[50] and her family, plus information on potential addictions. All this information constitutes a very deep intrusion into women's privacy and data, including data commonly referred to as "sensitive."

The analysis undertaken by "Sama" also refers to intended parents. In frequent cases the people who want to have a baby born are well-off or middle class people who are not able to conceive in the traditional way or women who are not able to maintain pregnancy. Surrogacy option is also used by single persons who cannot maintain pregnancy and who are looking for a semen or egg donor at the same time. It is also possible to apply this procedure to same-sex relationships, where the use of genetic material of one of the partners is allowed.

According to the "Sama" analysis, other entities are also involved in the surrogacy process. First, we should list numerous clinics involved in supporting fertilization, because surrogacy in most cases requires *in-vitro* fertilization. Apart from clinics, other organizations involved in the process are entities offering comprehensive assistance in the process of surrogacy: law firms, travel agencies, tourism departments,

[48] As indicated by American cases (Stiver v. Parker, 975 F.2d 261, 268 (6th Cir. 1992)), it happened that, despite the *in-vitro* procedure, the child's genetic father was the mother's husband due to the non-abstention from sexual relations.

[49] No woman aged under 21 yrs. and over 35 yrs.

[50] Diagnostics includes: blood group test, blood sugar level test, blood urea test, urine test, hepatitis C status, HIV status, hemoglobin status.

surrogate contract intermediaries, surrogate recruiters, NGOs to name but a few. ART is a separate entity. Banks were introduced by the Indian Act on Assisted Reproduction in 2013 and deal with supplying sperm/semen, oocytes/oocyte donors and surrogate mothers to assisted reproductive technology clinics or their patients. The organization notes that, while there exist records of clinics themselves, no one keeps records of the number of children born by Indian surrogates, which, in the organization's opinion, is crucial, not least because of the information on potential gender control.

The study also draws attention to the formal requirements for persons applying for a surrogate: being in a heterosexual relationship for at least two years and (now historically) foreigners were required to certify that their country of origin admits surrogate practices and that there will be no problem with immigration and granting of citizenship to the child.

As far as admissibility of surrogacy is concerned, in 2013 it was stated as possible.[51] However, an additional condition for the admissibility of this procedure is the presentation of a certificate that the intended parents' country of origin considers the surrogate procedures to be legal and that children born under this procedure will be able to legally enter the country of origin of intended parents. As stated in the study, the Indian legislation also takes care of the further fate of the child derived from surrogacy, in particular through the intended parents' submission of a written obligation, through which they secure the upbringing or maintenance of a child until the child reaches the age of 21.

The surrogacy agreement is the only document that links the intended parents, the maternity support clinic, the surrogate and her husband. As "Sama" indicates in the case of a married surrogate, it is important that her husband or a person authorized by him (albeit reluctantly) is also a signatory to the agreement. The obligation to hand over the child at the time of childbirth is considered the most important element of the contract. Language issues are considered an important problem – contracts are usually written in English – not understood by surrogates and their husbands. As practice shows, there are situations in which certain essential elements of the agreement are communicated orally[52] but this is not a rule. The

[51] The ban on surrogacy by foreigners has been in force since 2017, however, it is still practiced with the difference that the travelers are not intended parents but possible surrogates (which de facto constitutes an even greater threat for them).

[52] *Birthing A Market: A Study on Commercial Surrogacy*, Sama–Resource Group for Women and Health, p. 93.

"essential elements" are usually limited to the obligation to relinquish the child and the amount to be paid. Many other duties are omitted, thus only the interests of intended parents are better safeguarded. The "Sama" also draws attention to the dangers that may affect women in connection with the performance of the tasks of a surrogate. The dangers, already indicated in the previous study include threats to physical and emotional health, and risks resulting from the *in-vitro* procedure pregnancies. The following are considered to have the greatest impact on the further health of surrogates: hormonal interventions, multiple pregnancies and caesarean sections. The importance of psychological support has also been highlighted, and if any there is, it is usually provided by intermediaries or the clinics themselves, hence it does not fully cater for the welfare of surrogates. There are also no standards or even minima set in the scope of counselling.

In terms of remuneration, it was pointed out that remuneration usually takes place after the birth and transfer of the child. During pregnancy, the surrogate receives certain amounts of money to secure her medical and nutritional needs. There are situations in which the payment also includes procedures to implement embryos. A large part of the fees is paid to intermediaries. In financial terms, insurance is also extremely important, and surrogates and children should be covered, yet there is no standard for determining its amount and scope. It is also postulated that surrogates should have access to free legal assistance resulting from unawareness of infringements, e.g., insurance law. Another financial issue is the possible compensation resulting from complications related to pregnancy or childbirth. They should include health impairment, compensation for inability to work or obtain a specific job, as well as their family should be paid in the event of the death of a surrogate.

Attention was also drawn to the problem of data and birth certificates, indicating that care should be taken to include the parental status of the surrogate mother. It is only after birth that the transfer of parenthood takes place through adoption or otherwise. Postulates also included the need to increase control over entities dealing with surrogate births.[53]

[53] These were included in the project of The Surrogacy (Regulation) Bill, 2016, Bill No. 257 of 2016.

3.3. Opinions of non-UN bodies

3.3.1. The International Commission on Civil Status

The International Commission on Civil Status (ICCS) is an international intergovernmental organization created by the Protocol signed at Bern on 25 September 1950.

In the "Surrogacy and the civil status of the child in ICCS member states"[54] paper, three core issues have been brought up:

a) The prohibition of surrogacy arrangements and its effects on the child's civil status;
b) The legality and legal framework of surrogacy arrangements and the child's civil status;
c) The international recognition of foreign civil-status records or judgments concerning a child born of a surrogate mother and its effects on the child's situation.

As regards the first aspect, namely the prohibition of surrogacy, it should be pointed out that the States which opted for such a ban did so primarily for moral and ethical reasons.[55] The document also analyses the legal statuses of selected countries. In most cases, we are dealing with the adoption of regulations recognizing a woman-parent as a mother. However, the possibility of carrying out procedures to establish motherhood and paternity, to which the family and child are entitled, has been left open. It also points to the extensive procedures for altruistic surrogacy, which applies most frequently to relatives in the Netherlands. The importance of criminal provisions applicable in the case of attempts at commercialization is also stressed. The second part of the document examines the Greek and British legislation on the possibility of concluding surrogate contracts, the requirements of these contracts, the consent of the parties involved, and the legal grounds for their implementation. Part three deals with the effects of international recognition of foreign civil-status records or judgments in terms of surrogacy. Attention was drawn here to the initiatives of the European Consuls General, who asked the Indian government not to offer surrogate procedures to their citizens, and to the work of the ICCH. The existing facts were also analyzed. One of the facts concerned a single man in India for whom a surrogate gave birth to a child genetically derived

[54] Surrogacy and the civil status of the child in ICCS member states, synopsis prepared by Frédérique Granet, Professor at Strasbourg University, and the ICCS Secretariat General 2013.

[55] The regulations contained in German, Swiss, French, Turkish and Italian legal acts are indicated here.

from him. The Belgian court found the contract itself illegal, but showed that the parenthood of the man can be considered legal. In order to prevent statelessness (the child did not have Indian nationality), the Belgian court considered the fact that the man took care of the child, and the fact that leaving the child in India was not in his best interest (contrary to Article 8 ECHR). Identifying the phenomenon of surrogacy is a heterogeneous practice, hence dealing with children in such cases still poses significant legal problems.

3.3.2. The Hague Conference on Private International Law

The Hague Conference on Private International Law – a global inter-governmental organization that is active in the area of private international law, and as such develops several international conventions, protocols and soft law instruments.

The work undertaken by The Hague Conference on Private International Law should certainly be regarded as the most comprehensive and systemic. The Hague Conference on Private International Law started work on the subject of surrogacy in 2010, when the recommendation document stated that a new legal problem, which is international surrogacy, should be identified.[56] In the same year, it was also stated that an increasing number of such agreements could have an impact on the legal situation of children born as a result of these practices.[57] More systemic works began in 2011[58], when the Council invited the Permanent Bureau to intensify its work in this area.

The year 2012 saw the publishing of the document entitled *A Preliminary Report on the Issues Arising in Relation to International Surrogacy Arrangements*[59], in which the phenomenon first underwent analysis. One of the reasons for the cross-border nature of the issue is the fact that different legal regulations exist. Some states have decided to take a restrictive approach to surrogacy, especially in its commercial

[56] Council on General Affairs and Policy of the Conference (7–9 April 2010), Conclusions and Recommendations adopted by the Council, H:\PV91\RB_DOC\FPU\00048579.DOC, pp. 3–4.

[57] Special Commission on the practical operation of The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (17–25 June 2010), Conclusions and Recommendations Adopted by the Special Commission, p. 4.

[58] Preliminary Document No. 11 of March 2011, "Private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements", drawn up by the Permanent Bureau, was circulated to Members of the Hague Conference in March 2011.

[59] *A Preliminary Report on the Issues Arising in Relation to International Surrogacy Arrangements*, Preliminary Document No. 10 of March 2012 for the attention of the Council of April 2012 on General Affairs and Policy of the Conference, Prel. Doc. No. 10, March 2012.

dimension, while others (although these are in minority) represent a liberal approach and allow its practice. Another reason for the intensification of international traffic is the economic motive resulting from lower costs of surrogate procedure. To these factors one may add the easy access to information and the emergence of professional entities providing intermediation services, which has been achieved thanks to the Internet.

Of the main problems identified at the initial stage, attention should certainly be paid to the question of a differentiated approach by states to the legality of surrogacy. The admissibility of such practices has a significant impact on the legal status of the child. This status is different in the case of countries clearly prohibiting surrogates, and which do not have pertinent regulations, as well as those allowing surrogate practices. In the latter, control models are distinguished: initial control, where the agreement between the surrogate and intended parents is controlled[60] and final control, where the control focuses on the legal transfer of parenthood. There is also a trend towards a preference for a genetic relationship between intended parents and child, which in some jurisdictions is required to admit surrogacy.[61] The requirements are also identified for women taking up surrogacy in this way[62] as well as towards intended parents.[63] The effectiveness of contract law is not insignificant either – as a rule, in countries carrying out preliminary control of surrogate contracts, there is no way that they cannot be enforced. From the cross-border legal perspective, surrogacy generates problems in cases where intended parents wish to regulate the child's status and either report to their consul in the country where the surrogacy took place, or try to regulate the child's legal status after returning from that country. In this respect, it is important to underline the identified danger of focusing on the child's status without any deeper analysis of the legal situation itself.[64]

[60] As works in Israel. The special Committee exanimates contract and pre-approves surrogacy arrangements with "compensation payments."

[61] E.g. China, Israel.

[62] Age, satisfactory completion of medical and psychological screening, having already had a viable pregnancy and/or a living child, having completed her family, civil status and having received independent legal advice (to have awareness of the actions take).

[63] Medical reason for the intending mother not undertaking the pregnancy, civil status, sexual orientation, age.

[64] It was judged that the illicit nature of the surrogacy arrangements under internal law could not be given greater weight than the superior interests of the child; the twins H&E case (Court of First Instance, Antwerp, 19 December 2008) and the case of the twins M&M (Court of Appeal, Liege, 6 September 2010) and the child C case (Court of First Instance, Brussels, 6 April 2010).

When identifying possible problems, it was observed that unilateral attempts made by states to regulate the issue of surrogacy and the situation of the child are ineffective. Only international cooperation[65] may bring concrete results. These initiatives should, in particular, cover the countries between which the surrogate process takes place (the country of origin of intended parents and the country of origin of the surrogate). Solutions should also be sought in existing legal regulations – mainly in the 1996 Hague Child Protection Convention and the 1993 Hague Intercountry Adoption Convention.[66]

The document is accompanied by a glossary of the most important terms in the field of surrogacy in order to facilitate unification works.[67] These definitions underwent further modifications.

In 2013, a comprehensive study on the phenomenon of surrogacy was undertaken. This study encompassed: agencies, health professionals, legal practitioners and Members and non-Member interested states.[68]

Preliminary results[69] included the analysis of questionnaires received. Thematically it was possible to identify several groups of issues which were then analyzed from the perspective of domestic and international law. These issues included: birth

[65] The example of such cooperation is a collective letter written by eight (Belgium, France, Germany, Spain, Italy, the Netherlands, Poland, Czech Republic) Consul Generals to a number of IVF clinics in India to request that they cease providing surrogacy options to nationals of their countries unless the intending parties had consulted with their embassy first.

[66] Some inspiration might be found in human rights instruments such as: the UNCRC and its Optional Protocol on the sale of children, child prostitution and child pornography, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, as well as the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children.

[67] The glossary includes definition of following terms: international surrogacy arrangement, traditional surrogacy arrangement, gestational surrogacy arrangement, commercial surrogacy arrangement, altruistic surrogacy arrangement, receiving State, state of the child's birth, surrogate (mother), intending parent(s), gamete (egg) donor, gamete (sperm) donor, "legal parentage" or the legal parent(s), "genetic parentage" or the genetic parents.

[68] Responses were received from: Australia, Belgium, Brazil, Canada, Chile, Colombia, Croatia, Cyprus, Czech Republic, Denmark, Dominican Republic, El Salvador, Finland, Germany, Guatemala, Hungary, Iceland, Ireland, Israel, Japan, Korea, Republic of Latvia, Lithuania, Madagascar, Mauritius, Mexico, Monaco, Netherlands, New Zealand, Norway, Philippines, Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay.

[69] *The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project*, (Prel. Doc. No. 3 B of March 2014) and *Study of Legal Parentage and the issues arising from International Surrogacy Arrangements* (Prel. Doc. No. 3 C of March 2014).

registration, the establishment of legal parentage: the basic principles, Assisted Reproductive Technology, surrogacy arrangements, the contestation of legal parentage, the acquisition of nationality by children. A separate group included problems closely related to the agreements on surrogacy, such as: the legal status of children and intending parents, child welfare, position of the surrogate mother, gamete donors, intending parents, the competency and conduct of some intermediaries[70], the financial aspects of ISAs, criminal activity.[71]

When formulating conclusions, several groups of problems were highlighted. These problems included both issues relating to the rights of the child, women and other persons likely to be involved in the surrogate process. Some considerations were also devoted to procedural issues and their unification.

With regard to children's rights, attention has been paid to their legal status and to ensuring that international surrogacy arrangements are carried out in a manner compatible with the human rights and well-being of all those involved in the process, including in particular the child(s) to be born as a result of the process.[72]

The importance of the child's background and awareness of this background was also highlighted. In the context of a child's strong relationship with parents(s), it is important to determine the relationship that the child creates with parents and on what basis it is established. The parent who is primarily responsible for the child's situation is the first person who will be responsible for the exercise of the child's rights. However, it has been noted that the CRC uses the concept of parent(s) without specifying whether this concept refers to a genetic, social or legal parent. This issue should also be clarified[73], yet it is easier said than done as while the development of genetics has made it possible to unambiguously determine the child's origin, it has also led to a distinction between the woman from whom the child is genetically derived, and the woman who gave birth to the child.[74] However, when it comes to determining maternity (or, more broadly, parenthood), countries may have equal internal practices, and this determines the need to unify private international law.

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[70] A lot of misleading was underlined: *Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements,* (Prel. Doc. No. 3 C of March 2014), p. 86.

[71] *Study of Legal Parentage and the issues arising from International Surrogacy Arrangements* (Prel. Doc. No. 3 C of March 2014).

[72] *The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project* (Prel. Doc. No. 3 B of March 2014), p. 25.

[73] *The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project* (Prel. Doc. No. 3 B of March 2014), p. 10.

[74] The legal relation is predominantly determined by the act of giving birth.

In the case of surrogacy procedures, rules allowing for the exercise of the right to know one's own origin also need to be unified.

With regard to women who may be involved in the process of surrogacy, it is important to ensure free and informed consent to medically assisted procreation (in-vitro), care for adequate standards of medical care, freedom to make decisions concerning their own bodies, with intended parents' control reduced to absolute minimum.

Unification of procedures for cross-border legal recognition of parenthood has been identified as one of the priority challenges[75], in the knowledge that it is not possible to create a legal framework that would unify procedures on the issue of surrogacy itself. This however does not mean that minimum standards cannot be sought. It is proposed that these minimum standards addressed the following issues: free and informed consent of surrogate mothers[76] to any surrogate contract, the provision of appropriate (medical, psychological and legal) information to those involved in surrogate procedures, support for women who choose to be surrogates, the welfare of any child born to an international surrogacy agreement, mediation standards in surrogate procedures, standards relating to medically assisted procreation procedures (embryo formation, number of implementations), responsibility for children's special needs resulting from such procedures (including when they are the result of medical errors), minimum contract standards (limiting the absolute impact of intended parents) and possible financial claims of a woman-surrogate.[77]

The works were continued in the following year. The *Parentage/Surrogacy Project: An Update*[78] was published. This document gathers additional information relevant for the establishment of legal regulations.

This document gathers additional information relevant for regulatory determinations. In particular, the practices of the countries were monitored on the basis of their periodic reports to the CRC. With regard to India, it was found that: "[c]ommercial use of surrogacy, which is not properly regulated, is widespread, leading to the sale

[75] *The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project* (Prel. Doc. No. 3 B of March 2014), p. 21.

[76] Also expressed in international bioethics standards, e.g., the Universal Declaration on Bioethics and Human Rights (adopted on 19 October 2005 by the 33rd session of the General Conference of UNESCO).

[77] *The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project* (Prel. Doc. No. 3 B of March 2014), pp. 26–27.

[78] The Permanent Bureau has published *The Parentage/Surrogacy Project: An Update*, (Prel. Doc. No. 3 A of February 2015).

of children and the violation of children's rights."[79] The analysis also examines the decisions made by ECHR and the motives behind the judges in charge of specific decisions.[80] Attention was also drawn to possible and already emerging problems concerning respect for human rights in the context of surrogacy, such as the abandonment of the child(s) for which a surrogacy agreement has been concluded, the predispositions of some intended parents[81] and the risk of child trafficking, the child's right to know his or her own background (including cultural background), the informed and free consent of surrogacy mothers and issues concerning professionalism and the ethics of intermediaries.

It was also decided that the Experts' Group shall continue its work and should first consider the private international law rules regarding the legal status of children in cross-border situations.[82]

The year 2016 as started it the publication of the "Background Note for the Meeting of the Experts' Group on the Parentage/Surrogacy Project."[83] The document states that establishing the very origin of children who were born as a result of assisted procreation and surrogate birth is a complex issue. When the international element is added to it, the matter becomes even more complicated. Thus, the Experts' Group is looking for solutions in many dimensions: analyzing domestic law acts, the practice of national courts, international regional initiatives, the practice of human rights protection bodies. This analysis made it possible to establish the existing practices of determining parenthood for children (both paternity and maternity) as well as the mechanisms applicable to the procedure of determining the child's origin, recognition of foreign birth documents or recognition or determination of the child's origin. In this respect, possible issues which may arise during this process and which should be resolved by the Experts' Group have also been identified. It also reiterates the minimum standards that should be included in the surrogate procedure. These include: "due diligence obligations of States; free and informed consent of surrogate mothers; appropriate information and education for all par-

[79] "Concluding observations on the consolidated third and fourth periodic reports of India" (CRC/C/IND/CO/3–4), 13 June 2014.

[80] Especially in relation to genetic connection.

[81] It might be the person who is not eligible, i.e., unfit to become an adoptive parent, because of the criminal background.

[82] Conclusions and Recommendations of the 2015, Council on General Affairs and Policy of the Conference, 24–26 March 2015.

[83] The Permanent Bureau, "Background Note for the Meeting of the Experts' Group on the Parentage/Surrogacy Project", January 2016.

ties with regard to the legal, medical and psychological issues; suitability of the intending surrogate mother; suitability of the intending parents; a child's ability to know his or her origins (including the collection and preservation of information); standards for intermediaries, e.g., clinics; medical safeguards – standards for ART procedures; provisions in case of breakdown of the ISA, and child abandonment; the financial aspects of the arrangements, including ensuring that financial terms do not constitute sale of a child; preventing child trafficking in the guise of ISAs; ensuring that intending surrogate mothers are not trafficked for purposes of ISA; whether a pre-conception agreement on the arrangements should be required; and securing the child's legal status prior to or post conception." In conclusion, the need for binding (convention) and non-binding documents was identified.[84]

Two documents were drawn in 2017: "Report of the January/February 2017 meeting of the Experts' Group on Parentage/Surrogacy"[85] and "Conclusions and Recommendations of the 2017 Council." In the first one, the issue of the position of a child in a cross-border situation was addressed. The relationship between the legal status of the child and the recognition of documents relating to the child's status was considered important. Exclusion of certain issues (parental responsibility, intercountry adoption, child abduction and family maintenance) was decided for transparency reasons. The existence of grounds for jurisdiction to determine the child's origin was considered very important and dominant: the state of birth, the state of habitual residence of the surrogate mother, the State of nationality or habitual residence of the child, and the State of nationality or habitual residence of one or both of the intending parents. However, the need for a flexible approach was stressed and attention was drawn to the need to develop a binding multilateral instrument dealing with the recognition of foreign judicial decisions on legal parentage and how it could become operational.[86]

The most recent documents include the continuation of work already undertaken on determining the child's status and the recognition of jurisdiction. It was pointed out that further work should focus on the issue of filiation in the context of

[84] The Permanent Bureau, "Background Note for the Meeting of the Experts' Group on the Parentage/Surrogacy Project" (January 2016), pp. 18–19.

[85] Report of the January/February 2017 meeting of the Experts' Group on Parentage/Surrogacy; Conclusions and Recommendations of the 2017 Council, Council on General Affairs and Policy of the Conference, 14–16 March 2017.

[86] Conclusions and Recommendations of the 2017 Council. Council on General Affairs and Policy of the Conference, 14–16 March 2017.

documents on the origin of children and their recognition by States. Recognition should also cover the case law of national courts. The next steps highlight the need for a stronger focus on international surrogacy agreements and possible safeguards for their provisions.[87]

3.4. Non-governmental organizations statements about surrogacy

3.4.1. European Centre for Law and Justice

The **European Centre for Law and Justice** is an international, Non-Governmental Organization dedicated to the promotion and protection of human rights in Europe and worldwide. The ECLJ holds special Consultative Status before the United Nations/ECOSOC since 2007.

The report on the problem of surrogacy in the perspective of human rights violations was presented by European Centre for Law and Justice[88], which pointed out the need for its elaboration resulting from the growing commercialization of the human body. Surrogacy process is treated as commodification of the human person, and therefore it jeopardizes the dignity of both mother and child, and infringes Article 7 of the CRC concerning the child's right to know his or her origin and identity.[89] The violation of dignity also stems from racial preference for children: donors with Caucasian characteristics are more valued than those with Indian characteristics. Referring to the phenomenon of surrogacy itself, it has also been pointed out that even in countries where such practices are formally banned, women may decide to participate through emotional or financial pressure, or threats or promises concerning their jobs. For these reasons, this type of activity is growing rapidly, especially in the countries that can offer low-cost procedures. This activity also attracts organized crime groups, often those exploiting prostitution.

It highlights a whole series of difficulties that occur when dealing with surrogacy. These included: the lack of care for women's health, ignoring the importance the

[87] Report of the February 2018 Meeting of the Experts' Group on Parentage/Surrogacy and Conclusions and Recommendations of the 2018 Council, Council on General Affairs and Policy of the Conference (13–15 March 2018).

[88] Surrogate motherhood: a violation of human rights – report presented at the Council of Europe, 26 April 2012.

[89] Possible six adults claiming parent's rights: the genetic mother (egg donor), the gestational mother (surrogate), the commissioning mother; the genetic father (sperm donor), the husband of the gestational mother (presumption of paternity) and the commissioning father.

relationship between a woman and a child have during pregnancy and the effect it has on a child's development, the surrogate's decision to retain the child after giving birth, the separation of intended parents and the renunciation of raising a child to be born. A situation in which a defect is diagnosed at the prenatal stage was also considered a serious challenge. This raises the question of whether a surrogate mother can be required to have her pregnancy terminated – as the ECLJ points out, such practices are used by some of the agencies acting as intermediaries in surrogacy.

In conclusion, it has been found that surrogacy is contrary to international and European standards, particularly regarding human dignity, adoption, protection of women and children and trafficking in humans. Surrogacy is not the best interest of the child, it is merely the satisfaction of the desires of adults, and desires that are not based on law, because there can be no right to a child. The refusal to transcribe the filiation of children obtained through international surrogacy in the civil registry has been identified as one of the most effective safeguards against the use of surrogate procedures across borders.

In a similar vein, the organization intervened in a case before the European Court of Human Rights.[90] At that time, the need to prohibit those practices is also pointed out in all member states of the Council of Europe. In justifying the rejection of the complaint, the ECLJ stressed that the applicants could not claim protection because the situation to which they themselves contributed is illegal. Moreover, there is no protection of family life under Article 8 of the ECHR in this case.[91]

3.4.2. World Youth Alliance

World Youth Alliance – an international non-governmental, non-profit youth organization, promotes human dignity internationally and locally. The World Youth Alliance was founded in spring 1999 during the UN International Conference on Population and Development (ICPD + 5).

A study prepared by the World Youth Alliance[92] identifies the practice of surrogacy as one of the most controversial contemporary practices. Having considered different approaches to surrogacy, the document points to the need to analyze this

[90] Case of D. and Others v. Belgium (dec.), application No. 29176/13, 8 July 2014, pp. 46–7. There was no third part statement in cases: Case of Paradiso and Campanelli v. Italy, application No. 25358/12, Case of Mennesson v. France, application No. 65192/11, Case of Labassee v. France, application No. 65941/11.

[91] As in case of Stübing v. Germany, application No. 43547/08, 12 April 2012.

[92] World Youth Alliance, Surrogacy White Paper, November 2015.

issue from the perspective of human rights. The largest challenge identified here is the subject of the surrogacy contract – the human being. The very qualification of contracts (even if they are in force, they may cause problems – whether they are sales contracts or rather service contracts – both are not identified at the level of family law). The practice of surrogacy also affects other issues such as family relations, legal status or citizenship. Possible discussions should set standards for human dignity.

3.4.3. Associazione Comunita Papa Giovanni XXIII, Company of the Daughters of Charity of St. Vincent de Paul, Congregation of Our Lady of Charity of the Good Shepherd, International Catholic Child Bureau, World Union of Catholic Women's Organizations

Associazione Comunita Papa Giovanni XXIII (The Pope John XXIII Community Association) – an international association of the faithful of pontifical right. Ever since its foundation in 1968 by Father Oreste Benzi, it has embraced a practical and constant commitment to combatting marginalization and poverty).[93]

Company of the Daughters of Charity of St. Vincent de Paul – a Society of Apostolic Life for women within the Catholic Church. Founded in 1633 and devoted to serving Jesus Christ in persons who are poor through corporal and spiritual works of mercy.

Congregation of Our Lady of Charity of the Good Shepherd – Catholic religious order that founded in 1835 by Saint Mary Euphrasia Pelletier in Angers. The Congregation has a representative at the United Nations, and has spoken out against human trafficking.

International Catholic Child Bureau – an international catholic organization created in 1948 that aims to promote the protection of the dignity and rights of children.

World Union of Catholic Women's Organizations – founded in 1910 and now represents almost 100 Catholic women's organizations worldwide.

In a joint address to the UN[94] on commercial surrogacy, the above-mentioned organizations strongly supported the recognition of this practice as violating the

[93] The Pope John XXIII Community Association website: http://www.apg23.org/en/the_pope_john_xxiii_community.

[94] *The Commercial Maternal Surrogacy Violates Human Dignity*, a collective, written statement submitted by Associazione Comunita Papa Giovanni XXIII, Company of the Daughters of Charity of

dignity of the individual. However, it is often the case that children, who are victims, are not able to intervene since the violations and the existence of legal remedies, as well as the possibility to make effective use of them are ignored. For this reason, the above-mentioned organizations postulate a general condemnation of the phenomenon of surrogacy (as it violates the dignity of both children and mothers) and the prohibition of surrogacy at the international level. Although in compliance with the Vienna Declaration and Program of Action: "Everyone has the right to enjoy the benefits of scientific progress and its applications", The World Conference on Human Rights notes "that certain advances, notably in the biomedical and life sciences as well as in information technology, may have potentially adverse consequences for the integrity, dignity and human rights of the individual."[95] Such phenomena include surrogacy due to the fact that women and children are progressively treated as objects, and motherhood as a service. The procreation has been reduced to consumer mechanisms – intended parents conclude an agreement, select goods from a catalogue, check whether they have any defects and if these meet their expectations, they pay the agreed price. What is more, failure to meet the required expectations not only causes the rejection of the child, but even determines the decision to abort pregnancy.

Situations in which a bond between a surrogate mother and a child could be created are also avoided. This is facilitated, for example, by not allowing a surrogate to breastfeed[96], without considering the consequences of such decisions both for the mother and for the child, and at different stages in life. Not being able to get to know one's biological mother and the feeling of being abandoned by the woman who brought you into the world may be a traumatic experience for a child. Such feelings may also be experienced by other children of the woman who was a surrogate mother.

3.4.4. International Union for the Abolition of Surrogacy

The *International Union for the Abolition of Surrogacy* is dedicated to working through all legal means to implement the international prohibition of the

St. Vincent de Paul, Congregation of Our Lady of Charity of the Good Shepherd, International Catholic Child Bureau, World Union of Catholic Women's Organizations, non-governmental organizations in special consultative status A/HRC/31/NGO/147, 15 February 2016.

[95] Article 11, a Declaration and Program of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

[96] Such an approach also contradicts the recommendations of the World Health Organization (WHO), which calls for mothers to breastfeed newborn babies during the first six months of life.

commodification of the body, especially through surrogacy. The Union was founded at the initiative of national and European associations working for the respect of childhood, women, dignity and human rights, including the *European Center for Law & Justice*, *l'Appel des Professionnels de l'Enfance*, *Alliance VITA*, FAFCE, *La Manif Pour Tous*, *l'Agence Européenne des Adoptés*, *Care for Europe*, European Dignity Watch, *Fondazione Novae Terre.*[97]

Within the frame of "No maternity traffic" initiative, a study devoted to a comprehensive analysis of the issue of surrogacy from a human rights perspective was prepared.[98] The report broadly presents the seriousness and the risks of surrogacy to the mother and the child. The analysis begins with a statement that in some cases we may compare the international practice of surrogacy to adoption. This statement is however not true, as the aim of adoption is to ensure that the child obtains a family – which it is devoid of, and the child from the surrogate has at least a mother (a parent). Surrogacy, on the other hand, deprives the child of its mother. What is more, adoption is treated as acting in the interest and protection of a child deprived of its family, while surrogacy is more related to satisfying the desires of adults.[99] Thus, it is difficult to find any reasons here to believe that the best interests of the child are preserved. Moreover, neither the number of potential persons involved in the procreative process nor the lack of clarity of the situation as to one's own identity is conducive to satisfying this interest. Lack of identity should also be considered in the context of special relations between the child and the mother and the lack of continuation of these relations after birth. It is also worth noting the interest of the children of a surrogate who are siblings of a child to be born. If they are aware of pregnancy, the fact that the mother has "given up" the child may seriously affect their own sense of security and stability.

Admitting surrogacy raises the issue of treating a child like an object. Commercialization of the process of surrogacy makes intended parents approach the child like any other "product." Therefore, they want the product to be of full value (they may want to influence race, appearance, gender), or they may decide not to

[97] No Maternity Traffic website: http://www.nomaternitytraffic.eu/who-are-we/?lang=en.

[98] *Surrogate Motherhood and Human Rights Analysis of Human Legal and Ethical Issues*, report by C. de La Hougue and C. Roux, September 2015.

[99] In Baby M case Dr L. Salk testified that Mrs. Whitehead was a "surrogate uterus", [in:] A. W. Latourette, "The Surrogate Mother Contract: In the Best Interests of Society?", *University of Richmond Law Review*, Vol. 25, issue 1, p. 63.

take the child if it is not in line with expectations.[100] The decision not to take up parental responsibilities may also result from a change of opinion or separation of intended parents.[101] Another problem that also has an impacts the child is the question of abortion. The question is whether abortion can take place in the case of surrogacy, and if so, who has the right to decide about it – the intended parents or the surrogate? What's more, how will this issue be resolved in the event of a dispute. Other situations of non-performance or improper performance of the contract are also objectifying and disputable – what are the situations in the event of the child's death shortly after the birth, or what to do if the surrogate does not want to relinquish the child? In the latter case, there is also the question of the intended parents' reimbursement of the expenses incurred.

With regard to surrogate practices, attention has also been paid to issues relating to women. The very process of surrogacy is a serious violation of individual dignity, instrumental treatment of one, and focus on the goal (birth) that such a woman has to achieve, regardless of her needs. Women who decide to be surrogates must take into account possible serious consequences for their own health. Pregnancy, as always, is associated with a certain risk, and in the case of surrogacy pregnancies, this risk increases, due to hyper-stimulation practices used. Women – surrogates are also aware of the need to relinquish the child, and often do not want to be emotionally bound with it, which in consequence may lead to later problems for both the child and herself.

The risk is also visible in surrogacy contracts. These contracts are aimed at providing the best quality "product." This is achieved not only by collecting accurate data

[100] The situation like that took place in Stiver v. Parker, 975 F.2d 261 (6th Cir. 1992) case. Similar problem (and unclear circumstances) appears in Case of Baby Grammy. In this case, the Australian family Law (Family Law Act 1975 (No. 53, 1975) requires to ensure that the best interests of children are met by (a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and (b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and (d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children, more information, see: Farnell & Anor and Chanbua [2016] FCWA, 4 April 2016, File No. PTW 3718 of 2014, p. 94. Decision was to separate the twin babies and allow one to live with intended parents and a second one (with Down syndrome/trisomy 21) with surrogate mother. Both children received Australian citizenship.

[101] In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (1998), more information, see: M. Soniewicka, *Prokreacja medycznie wspomagana*, [in:] J. Stelmach, B. Brożek, M. Soniewicka, W. Załuski, *Paradoksy bioetyki prawniczej*, Warszawa 2010, p. 108.

about a woman who is to be a surrogate, but also by allowing the intended parents to select a woman who, in their opinion, will give birth to the most suitable child. This woman must then follow restrictive recommendations (not always justified) of intended parents and refrain from contact with her own family (fear of a change of decision after childbirth or interference by family members demanding respect for women's rights). The object approach is also manifested during childbirth itself – decisions on caesarean sections are often made to ensure that the baby's head is not deformed. Caesarean sections also ensure that childbirth takes place at the exact date intended by parents. Attention is also drawn the fact that surrogacy contracts are not always concluded independently, i.e., the economic pressure is often so great that it is difficult to speak of any voluntary actions.

The report also draws attention to the relationship between surrogacy and international adoption practices. In the case of the latter, the regulations are very clear. Both the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption and the European Convention on the Adoption of Children (Revised) require that the consent of the parents has been given freely. The consent need to be given without having received payment or compensation of any kind, and that the mother has agreed only after the birth of the child. Maintenance of relations has also been secured here, The Hague Convention forbids contact between adoptive and biological families until the consent has been given. Surrogacy procedure does not stand in line with the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography[102] and the Convention on the Rights of the Child.[103] The authors of the report agree with the Committee on the Elimination of Discrimination against Women that both the mother and child in the surrogate process are treated as unfree persons and should be voluntarily subject to the Slavery Convention[104] and subsequent anti-trafficking legislation.[105]

[102] Article 2(a) Optional Protocol of 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."

[103] Article 35 of the Convention on the Rights of the Child: the sale of children is prohibited "for any purpose or in any form."

[104] Slavery Convention: "[s]lavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised", 1926.

[105] Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized

In conclusion, the only effective measures that can lead to the cessation of surrogacy are those taken at international level, with a general ban on such practices and the adoption of criminal sanctions for those who thus proceed. There can also be no acceptance of any agreements that treat a human being as an object – such agreements are contrary to the principle of the dignity of the individual. What is important, attention was drawn to the fact that states should resolve individual cases related to surrogacy. The best interests of the child should be the guiding principle determining these decisions, but it should not be used in such a way as to encourage surrogacy practices. The state must therefore be particularly cautious in situations where the child is already staying with intended parents, where the child has no nationality, where the surrogate is not known, because all this information can be used to sanction the facts. Such an approach would result in such exceptions to the prohibition of surrogacy which could lead to the law becoming a dead letter. The interests of the child may also determine the entrustment of children born as a result of surrogate practices to institutional care or to adoptive parents. In the latter case, these parents should not be intended parents, because it will only stand as a change in the legal relationship, and "sanctioning" of surrogacy. It would be right to use adoption legislation, as its non-commercial character is very strong, effectively blocks unwanted activities.

Conclusion

Governmental and non-governmental organizations are keen to work together to find solutions for surrogacy. The issues herein considered could be summarized in four main groups.

The first – the rights and best interests of the child – in this respect, particular attention is paid to the "commercialization" of the child, thus making it a victim of human trafficking practices. The surrogacy process itself determines wider consequences to consider in the context of respecting children's rights[106] such as the right to know its background/provenance and the right to be raised by parents (although

Crime, of 15 December 2000 and Article 4 of the Council of Europe Convention on Action against Trafficking in Human Beings of 16 May 2005, Article 6, The Convention on the Elimination of All Forms of Discrimination against Women, adopted on 18 December 1979 and entered into force on 3 September 1981.

[106] Included in CRC.

in this respect the provisions of the CRC are vague). It is also emphasized (both in studies and in case law) that surrogacy itself constitutes an infringement of the best interests of the child.

The second group consists of issues relating to the rights and interests of the surrogate. In this respect, it firstly and foremost stresses the objectification and far-reaching control over women's lives, and the human rights violations. Attention is also drawn to the negative consequences that the surrogacy process may have for women's physical and mental health.

The third group of issues is the rights of the intended parent/s. In general, the organizations the work of which has been reviewed, fail to identify this group of problems. Intended parents are rather identified as potential infringers of the rights of others. However, there are studies[107] that focus on ensuring equal and non-discriminatory access to parenthood.[108] This issue may be particularly problematic in countries that allow surrogacy practices, but reserve them only for a specific group, e.g., married couples.[109]

Finally, the last group of problems are the issues related to the legal regulations of the countries which may be affected by the problem of surrogacy, both in terms of the countries of origin of children or surrogates, as well as the intended parents' countries of origin. In this respect, it should be stressed that the regulations concerning surrogates (prohibiting or permitting) have not yet been adopted in all countries, and the regulations adopted are not always comprehensive. It is also worth stressing that surrogacy itself is a global phenomenon, and thus requires states to cooperate in order to achieve effectiveness and compliance with the applicable international law, especially with regard to mechanisms that prevent movement from countries where surrogacy is prohibited to countries which allow it, and with regard to repressive measures against intermediaries.

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[107] *Public Policies for Lesbian, Gay, Bisexual and Trans in Argentina, Proposal from the Argentine Federation of Lesbians, Gays, Bisexuals and Trans of a Federal Public Policy for Citizenship of Lesbians, Gays, Bisexuals and Trans in Argentina*, financial support from United Nations Development Programme.

[108] It is necessary to remember that "the right to child" or "the right to be a parent" does not exist in human rights regulations.

[109] *The Right to Adoption of Lesbian, Gay, Bisexual, and Transgender People in Viet Nam, Reality and Recommendations*; the Report was made for the United Nations Development Programme in Viet Nam. The viewpoints presented in this publication are of the writers and not necessarily represent the United Nations, including UNDP or any agencies, funds and programs of the United Nations, September 2015.

To sum up, it seems crucial to note that not all problems of surrogacy have been considered by the organizations or it was decided to formulate postulates of legal regulations in relation to only some of them. In the works considered, the issue of "by choice" surrogacy was not treated separately. The studies rather indicate situations in which partners or spouses are unable to produce offspring naturally, which may result from fertility problems or other natural impediments. It seems that this type of surrogacy would be down for greater ethical condemnation, but from a legal perspective, it would generate the same type of difficulty. Another silent issue is the question of qualifying a surrogacy contract – is it a service or a sale? In this case, it seems that the lack of consideration is determined by the recognition that, in the case of the choice of legal qualification, the procedure itself will gain a legally recognizable and admissible status. The same problem arises in relation to the creation of standards for surrogate practices. Yet another highly problematic issue is how to interpret the "best interests of the child." The mechanism should not be absolute, and the interpretative principle[110] cannot always be homogenously interpreted, especially if temporal aspect or initial illegality are in question.[111] It should also be borne in mind that the problem of surrogacy may coexist with other bioethical problems such as gender selection or feature selection or even *postmortem* sperm retrieval.[112]

Works on regulating surrogacy are not very advanced. Due to the global nature of the problem, there is an identified need to create expert groups with different origins (ethnic, geographical, religious, philosophical, cultural). Their inter-disciplinarity (lawyers, social workers, representatives of governmental and non-governmental organizations) is also emphasized.[113] Lack of cooperation will result in the relocation of entities dealing with surrogacy from one country to another. It should be remembered that proven mechanisms (e.g. concerning international adoption) may not always be adequate to solve new problems.

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[110] General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Article 3, para. 1), Committee on the Rights of the Children, CRC/C/GC/14, 29 May 2013.

[111] Case of Paradiso and Campanelli v. Italy, No. 25358/12, judgement of 24 January 2017.

[112] C. Strong, J. R. Gingrich, W. H. Kutteh, "Ethics of Postmortem Sperm Retrieval: Ethics of Sperm Retrieval After Death or Persistent Vegetative State", *Human Reproduction*, Vol. 15, Issue 4, 1 April 2000, p. 740.

[113] *The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Projec*t (Prel. Doc. No. 3 B of March 2014), p. 30.

CHAPTER IV Foundations of family law *versus* surrogate motherhood

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Surrogate motherhood: current trends and the comparative perspective[1]

1. Various forms of surrogacy

The practice consisting in carrying pregnancy and handing the child over to other people in fulfillment of a previously undertaken commitment by a woman to give birth goes now beyond the situation which resembles the biological origin of a child, i.e., where a baby is handed over to a couple – woman and man. It now encompasses also the handing of the child over to single women and men, as well as homosexual couples (predominantly male). The essence of the practice, which is common for all personal arrangements, is the obligation undertaken by a woman to stay pregnant, give birth to a child and hand the child over to another person.

Surrogacy is closely connected with the problems concerning the use and regulation of the assisted reproductive technologies. In case of a surrogacy arrangement that is referred to as traditional or partial, the genetic material derives from the surrogate and the man, to whom the child will be handed over (biological father) or the semen donor.[2] Cases, in which the genetic material does not come from the surrogate, are described as gestational or full surrogacy arrangements.[3] The legal orders that

[1] The paper is an English summary of the main propositions contained in the article prepared in the Polish language: *Surrogate motherhood (tzw. urodzenie zastępcze): bieżące tendencje w ujęciu prawnoporównawczym*.

[2] That type of surrogacy does not require a procedure conducted in a clinic. See: L. Brunet, J. Carruthers K. Davaki and others, *A Comparative Study on the Regime of Surrogacy in EU Member States)*, 2013. http://www.europarl.europa.eu/RegData/etudes/STUD/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf (last accessed: 14 September 2018), pp. 9 and 12.

[3] *Ibidem*.

allow surrogacy often allow only for the second type of surrogacy, justifying such an approach by ethical considerations. In traditional surrogacy, the woman in fact gives up her own child, consents to establish the filiation of the child with other persons and grant them parental responsibility for the child. In some of the legal orders, such as English law, law of Canadian provinces,[4] the traditional surrogacy is still permitted.[5]

Due to the origin of the genetic material, up to six persons may participate in the process: surrogate and her husband (who may benefit from the presumption of fatherhood), person/couple that will receive the child and the donors of the genetic material. Some legal orders that allow for surrogacy provide for an explicit requirement that the child has genetic relationship with at least one of the intended parents (woman or man).[6]

Another criterion that clearly distinguishes the regulations in various countries is the issue of consideration. The surrogacy process involves the costs of medical procedures (including in vitro, conduct of pregnancy and childbirth) and may also include compensation for the agency (intermediary) and the surrogates.[7] The so-called altruistic surrogacy assumes that the surrogacy is not a source of income for the surrogate.[8]

The legal orders that allow for the surrogacy birth can also be distinguished with respect to the requirements that must be fulfilled by the surrogacy (age, health condition, number of previous pregnancies), requirements for the intended parents such as infertility, medical contraindications for pregnancy[9] or lack of such restrictions[10] and for the consequences of the procedure (the determination of descent

[4] In the common law provinces, Article 541 of the Quebec Civil Law Code from 1991 provides that *Any agreement whereby a woman undertakes to procreate or carry a child for another person is absolutely null*), legisquebec.gouv.qc.ca (last accessed: 14 September 2018).

[5] Data collected by the intermediating agencies indicate that the traditional surrogacy is selected much less frequently, https://surrogacy.ca/intended-parents/cost-of-surrogacy.html# (last accessed: 14 September 2018).

[6] For example, English, Portuguese and Ukrainian laws.

[7] Countries that allow for commercial surrogacy include Ukraine, Russia, Moldavia, Armenia, Georgia, Uganda, some of the US states (e.g. California and Illinois).

[8] Countries that allow for altruistic surrogacy and prohibit at the same time its commercial form include the United Kingdom, the Republic of South Africa, Greece, Portugal, Cyprus, Australia.

[9] For example, in Greece, Portugal, Russia, Ukraine and Cyprus.

[10] For example, English and California laws.

from the intended parents immediately on the birth of the child[11] or as result of the previous[12] or subsequent court procedure).[13]

Most of the national legal orders do not accept the surrogacy practices. The differences in the approach to the surrogacy resulted in the cross-border surrogacy issues and in forum shopping, which consist in execution and performance of the surrogacy agreements in a country that either allows for such procedure or provides less burdensome requirements than the home country of the intended parents. Such persons return to their home country with expectation that the legal status of the child determined under the laws of another country will be recognized.

2. Liberalization vs tightening: changes in the countries allowing surrogacy

Countries, in which the laws explicitly allow for surrogacy, include: the United Kingdom, Israel, Greece, Portugal, Cyprus, Russia, Ukraine, Georgia, Canada (except for Quebec), the Republic of South Africa, Australia[14] and Thailand. Surrogacy is also allowed in some state laws in the United States. In addition, surrogacy is also practiced in India.

In the last years one could observe two contradictory directions: liberalization of the requirements and access to the surrogacy or their tightening, including also introduction of bans on surrogacy.

The specific feature of regulation of the surrogacy motherhood in the United Kingdom, one the first countries supporting surrogacy, is the requirement (applicable both to the domestic and foreign surrogacy) to fulfill the requirements set out in the domestic law and obtain a parental order based on which the relation between the child and the surrogate mother is extinguished[15] and established for the benefit

[11] For example, in the Ukrainian, Russian, Greek and Cyprian laws.

[12] In California, on the basis of the decision issued before the birth of the child (*pre-birth order*) in the birth certificate includes as parents the persons to whom the child is handed over.

[13] For example, in the UK, where the origin of the child is determined in the procedure that results in the issuance of the parental order.

[14] With the exception of the Northern Territory that has not introduced any provisions in this matter.

[15] According to the English law, the surrogate is recognized as the mother of the child.

of intended parents.[16] The surrogacy arrangements are, however, often performed in other countries on the terms that are not compliant with the English law, e.g., cases of commercial surrogacy or surrogacy for the benefit of a single person. The English courts, acting in the best interest of the child, have started to compare the amounts paid by the intended parents with the costs typically incurred in such arrangements abroad that are significantly above the "expenses reasonably incurred" provided for in the domestic law. The requests to issue a parental order filed by single persons, that present a foreign birth certificate, influenced the proposals to amend the domestic law and broaden the scope of persons eligible to make such a request.[17]

The scope of persons that are eligible to enter into agreement with a surrogate has recently been broadened in Israel, which regulated the surrogacy arrangements in 1996 as one of the first countries.[18] Until mid-2018, surrogacy was available in Israel only for the Israeli heterosexual couples. The last amendment from July 2018 has also allowed the surrogacy arrangements to be entered by single women as ordering party, provided that such woman will provide oocyte.

The next country that broadened access to surrogacy, with further reaching consequences, as it benefits foreigners, is Greece. The provisions concerning surrogacy were introduced into the Greek Civil Code in 2002.[19] The requirement that both the surrogate and the intended parents are Greek citizens or have their permanent

[16] The legal framework in the United Kingdom is described in more detail by M. Wells-Greco, *The status of children arising from inter-country surrogacy arrangement: the past, the present, the future*, The Hague: Eleven International Publishing 2016, pp. 159–191.

[17] See report from the parliamentary works from 14 May 2018 *Children: surrogacy, and single people and parental orders (UK)*, https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8076 (access: 20.09.2018).

[18] In 1996, the statute on the carriage of the embryo was adopted. Prior to that, the surrogacy was prohibited on the basis of the 1987 ordinance of the Health Ministry. With respect to the legal solutions in Israel see: A. Westreich, *Surrogacy and egg donation in Israel: legal arrangements, difficulties, and challenges.*

[19] Statute No. 3089/2002 introduced changes to the Articles 1455–1460 of the Civil Code. In 2005, statute No. 3305/2005 concerning assisted reproduction techniques, which sets out the details of the procedure. For the description of the Greek law see A.N. Hatzis, *The Regulation of Surrogate Motherhood in Greece*, http://users.uoa.gr/~ahatzis/Surrogacy.pdf (access: 14.09.2018); K. Roskas, *Greece*, [in:] *International Surrogacy Arrangements. Legal Regulation at the International Level*, K. Trimmings, P. Beaumont (eds.), Hart Publishing 2013; Ch. Amoiridis, A. Akritidou, *Surrogacy Proceedings in Greece after the implementation of law 4272/2014*, text published on 11.07.2016, http://www.greeklawdigest.gr/topics/aspects-of-greek-civil-law/item/217-surrogacy-proceedings-in-greece-after-the-implementation-of-law-4272–2014 (last accessed: 14 September 2018).

domicile in Greece[20] was abandoned in 2014. As of today, it is sufficient that a person applying for the court's permit or the surrogate have either permanent or temporary place of residence in Greece. The wording of the provisions is also interpreted in such a way that only heterosexual couple or a woman can be allowed to participate in such a procedure. In 2008 and 2009, there were, however, court rulings that allowed also single men to take part in surrogacy proceedings.[21]

Russia and Ukraine are another examples of countries in which the premises for the surrogacy were expanded despite the lack of fulfillment of the domestic legal requirements.[22] Those two countries are "attractive" jurisdictions because of the relatively low costs of the procedure, admissibility of the commercial surrogacy and, therefore, greater chance of finding a surrogate. Surrogacy is available in Ukraine to the heterosexual married couples; in Russia, both to the heterosexual couples and to the single women.[23] The courts have, however, sanctioned the cases in which the surrogacy procedure was conducted for the benefit of single men and homosexual couples.[24] In practice, the requirement of the medical reasons for surrogacy is not verified thoroughly.[25]

In 2016, Portugal levied the prohibition of surrogacy (in force from 2006) and such practice has been legalized.[26] Legal state orders in the US present a differentiated

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[20] The purpose was to prevent reproductive tourism and immigration to Greece of impoverished women from other countries for the purpose of becoming surrogate. K. Roskas, *op. cit*., p. 152.

[21] K. Roskas, *op. cit*., pp. 145–146.

[22] Surrogacy is also available in other countries created after the collapse of the Soviet Union: in Georgia and the member states of the Community of Independent States: Armenia, Belarus, Kazakhstan, Kirgizstan. Their regulations resemble the Russian law. For discussion of differences, see: A. A. Novikov, *Surrogate motherhood in Russia and the Commonwealth of Independent States: legislation, jurisprudence, and political discussion*.

[23] The solutions provided in the Russian law are described by A. Novikov, *op. cit*.; I. Berger, *Macierzyństwo zastępcze w świetle przepisów prawa Federacji Rosyjskiej*, Instytut Wymiaru Sprawiedliwości: Warszawa 2017, https://www.iws.org.pl/analizy-i-raporty/raporty#podstawowe17 (last accessed: 14 September 2018). The Ukrainian surrogacy law is presented, *inter alia*, by A. Herts, *Surrogate motherhood in Ukraine: method of infertility treatment, judges; activism and doctrine*; M. Zeniv, *Macierzyństwo zastępcze w prawie ukraińskim*, Instytut Wymiaru Sprawiedliwości: Warszawa 2017, https://www.iws.org.pl/analizy-i-raporty/raporty#podstawowe17 (last accessed: 14 September 2018). See also: remarks by A. Novikov, *op. cit.*

[24] The decisions of the Ukrainian courts are presented by M. Zeniv, *op. cit.*, pp. 9–10. Decisions of the Russian courts are discussed by A. Novikov, *op. cit*.

[25] *Ibidem*.

[26] Law No. 25/2016. See: V.L. Raposo, *The new Portuguese law on surrogacy. The story of how a promising law does not really regulate surrogacy arrangements*, "JBRA Assisted Reproduction" 2017, Vol. 21, No. 3, pp. 230–239.

approach (ranging from prohibition to the liberal treatment) to the surrogacy.[27] Illinois and California seem to be the two states with the most favorable approach to the surrogacy.[28] With respect to the change of approach, the plans to legalize the surrogacy in the New York state deserve attention.[29]

In Australia, in the course of the last several years, the individual territories introduced provisions allowing for altruistic surrogacy.[30] In March 2017, the South Australia adopted a statute that allowed surrogacy by homosexual couples.[31]

In the last years, one could also witness the impact of the practice on introduction via "back door" of surrogacy in the countries, where the legal provisions are not explicit about it. Examples constitute the Netherlands, Belgium and the Czech Republic.

According to the information published by the Dutch government, allowed are following types of surrogacy: altruistic,[32] traditional and gestational, where the embryo is created from the genetic material of the ordering couple.[33]

The Belgian law does not contain any provisions on surrogacy, and the legal doctrine is predominately negative as regards it admissibility.[34] Despite that the

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[27] Solutions adopted in individual states are presented by M. Wałachowska, *Surrogate motherhood under different laws and federal issues – the case of the USA*.

[28] In California, single persons and hetero- and homosexual couples have access to surrogacy. It is not required that the recipient and the child have a genetic connection.

[29] The draft statute from 2017 *Child-Parent Security Act of 2017* provides for legalization of the following forms of surrogacy: gestate, commercial, for the benefit of single persons and for the benefit of hetero- and homosexual persons and couples. Child-parent security act, Assemb.B.A-6959A, Reg. Sess. 2017–18 §§581 (N.Y. 2017), available at http://legislation.nysenate.gov/pdf/bills/2017/A6959A (last accessed: 14 September 2018).

[30] Except for the Northern Territory that provides for no regulation of such practice. See M. Keyes, *Australia*, [in:], *International Surrogacy Arrangements*, pp. 25–48.

[31] Statutes Amendment (Surrogacy Eligibility) Act 2017 https://legislation.sa.gov.au/LZ/V/A/2017/STATUTES%20AMENDMENT%20(SURROGACY%20ELIGIBILITY)%20ACT%202017_6/2017.6.UN.PDF (last accessed: 14 September 2018).

[32] The Criminal Code penalized certain actions connected with the surrogacy. It is forbidden to advertise commercial surrogacy, create Internet websites or post ads relating to or by persons looking for a surrogate or by prospective surrogates.

[33] See https://www.government.nl/topics/surrogate-mothers/surrogacy-legal-aspects (last accessed: 14 September 2018).

[34] It is derived from the principle of inalienability of the human body and civil law status. Article 6 of the Belgian Civil Code stipulates that a contract cannot concern the rights that are in the scope of the public law and the good morals, and Article 1128 of the Code provides that only *res in commercio* can be subject of a contract. Such things do not include gametes and embryos or the reproductive capabilities of women. See Belgium's response to Question No. 24, [in:] *Questionnaire on the Private International Law issues surrounding the status of children, including issues arising from international*

procedure of the altruistic surrogacy is officially conducted in couple of clinics in that country. The determination of the origin of the child follows the general rules, e.g. by recognition of fatherhood by the biological father and adoption by the second intended parent.

The surrogacy is officially practiced in the Czech Republic, despite the lack of the clear legal provisions in this respect. The Czech Civil Code stipulates that the mother of a child is the woman who gave birth to it. This rule is, however, not construed as prohibition of the surrogate motherhood.[35]

The tendencies presented above can be confronted with the changes that have taken place in the countries in which the scale of the surrogacy practices resulted in the creation of the "surrogacy industry." An important destination of such tourism were not long ago India, Thailand, Nepal and Cambodia. Those jurisdictions were popular due to the low costs of the procedure. The Asian countries were also chosen as destination by European singles or homosexual couples either due to the prohibition of surrogacy in their home countries, or when their home country (e.g. Israel) did not allow them to access this procedure.[36]

In the last couple of years, the Asian countries have decided to introduce either far-reaching restrictions in the access requirements and conditions for the surrogacy procedure or to complete change their position and prohibit this procedure. Since 2015, Thailand has prohibited commercial surrogacy and the operations of the intermediary agencies. Access to the altruistic surrogacy has been limited to the Thai married couples, women and men.[37] The ban on the commercial surrogacy is also to be introduced in India (along with the prohibition to trade in embryos and gametes). According to the draft law, altruistic surrogacy should be accessible only to the Indian married couples (women and men) for the medical reasons. The

surrogacy arrangements, https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy/responses-Q1/ (last accessed: 14 September 2018).

[35] Following O. Frinta and D. Frintová, *Surrogacy from the Czech perspective: "past the point of no return"*, where the legal status in the Czech Republic is discussed in detail.

[36] *Help wanted. As demand for surrogacy soars, more countries are trying to ban it*, "The Economist" from 27 May 2017, https://www.economist.com/international/2017/05/13/as-demand-for-surrogacy-soars-more-countries-are-trying-to-ban-it (last accessed: 14 September 2018).

[37] At least one of the spouses should have Thai citizenship; if this is not the case, non-Thai spouses should be married for at least three years. Provisions of the 2015 statute are discussed by S. Hongladarom, *Surrogacy law in Thailand*, 2018, https://www.researchgate.net/publication/322286708_SURROGACY_LAW_IN_THAILAND (last accessed: 8 October 2018).

surrogate will have to be a next-of-kin of one of the spouses.[38] In practice, access of the foreigners to the Indian clinics has been restricted already few years ago.[39]

In 2015, Nepal decided to introduce a complete ban on the surrogacy,[40] which was followed in 2016 by Cambodia.[41] Following that the interested foreigners focused their attention on the countries which allow for surrogacy: Ukraine, Greece, Laos, certain African countries (e.g. Kenya).[42]

3. Cross-border situations: erosion of the prohibition in the countries opposing surrogacy?

Legal orders that oppose surrogacy include Austria, Estonia, Finland, France, Spain, Lithuania, Germany, Poland, Switzerland, Italy. If the prohibition is not expressed explicitly,[43] the inadmissibility of the surrogacy is derived from the rules concerning the origin of the child, including the main principle that the mother of a child is a woman who gave birth to it,[44] rules concerning access to assisted reproduction techniques,[45] provisions of penal law[46] and the basic rules of the legal order, which

[38] The Surrogacy (Regulation) Bill, 2016, http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/257_LS_2016_Eng.pdf (last accessed: 8 October 2018).

[39] In 2012, single persons and homosexual couples were excluded from the scope of eligible ordering persons. In 2015, the Indian Supreme Court issued a ruling in which it prohibited foreigners to access the surrogacy procedure. The same recommendations were also formulated by the Indian Council of Medical Research and the government. See I. Jargilo, *Regulating the Trade of Commercial Surrogacy in India*, "Journal of International Business and Law" 2016, Vol. 15, No. 2, pp. 340–341, http://scholarlycommons.law.hofstra.edu/jibl/vol15/iss2/12 (last accessed: 14 September 18); M. Wells-Greco, *op. cit*., pp. 191–206.

[40] On 24 August 2015, the Supreme Court of Nepal issued an order to cease the surrogacy practices.

[41] On 24 October 2016, the Cambodian Ministry of Health issued a statement in which it declared that the surrogacy birth as a method to have a child by means of assisted reproductive techniques is completely prohibited.

[42] *Help wanted. As demand for surrogacy soars…*

[43] The Swiss law expressly prohibits the surrogacy arrangements (Article 4 of the law of 1988 on assisted reproductive techniques and Article 119(2)(d) of the Swiss Constitution from 1999) (the current texts of the legal acts are available at: www.admin.ch). The invalidity of the surrogacy agreements is provided for in the Spanish (Article 10 of the law on the assisted reproductive techniques from 2006) and French laws (Article 16–7 of the French Civil Code introduced by law No. 940653 from 29 July 1994 concerning the respect of the human body).

[44] For example, § 143 of the Austrian Civil Code (ABGB); § 1591 o the German Civil Code (BGB); Article 61(9) of the Polish Family and Guardianship Code.

[45] For example, in the Austrian, German and Polish laws.

[46] Actions related to the surrogacy motherhood are penalized, e.g., in the Italian law.

include the protection of the human dignity,[47] inalienability of the human body and the civil status.

In the recent years, the countries that oppose surrogacy are faced with the issue of "transplanting" the legal status created by its citizens abroad as a result of the conducted surrogacy procedure. The approach to such cross-border surrogacy is being developed in the jurisprudence, including the rulings of the European Court of Human Rights in the light of the overruling principle of child's good and the rights protected in the European Convention on Protection of Human Rights[48] and the UN Convention on the Rights of the Child.[49] The issues underlying the court decisions involve the issuance of a permit for the child to enter the country, transcription of the foreign civil status records that indicate as a parent one or both intended parents, confirmation that a child is a citizen of the home country based on the filiation with the intended parent established abroad and the issuance of a passport. Such a process takes place in particular in Austria, Germany, Switzerland, France and Spain.

Recognition of the legal consequences takes one of the classical forms of the private international law, such as recognition of a foreign court decision that is the basis for the entry in the foreign birth certificate (such a method is used, e.g., by the German courts in cases involving recognition of the American decisions), as well as, *de facto*, by transcription of the civil records, if under the law of a given country the civil law records are only an evidence in determination of the civil status (e.g. in the French law).[50]

The Austrian Constitutional Court assigned specific consequences to the surrogacy procedures conducted abroad by the Austrian citizens. In a ruling from 2011, it decided that American decision granting status of the mother of a child born in the US state Georgia to an Austrian woman (who was a donor of the egg cell) is not contrary to the Austrian rules of the public order and is valid in the light of

[47] Article 1 of the German Constitution.

[48] Convention on the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, subsequently amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2.

[49] Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20 November 1989.

[50] In theory, filiation resulting from a foreign civil record can in such cases be challenged despite recognition; however, according to the doctrine, this is not very likely. See H. Fulchiron, C. Bidaud-Garon, *Reconnaissance ou reconstruction ? A propos de la filiation des enfants nés par GPA, au lendemain ds arrêts Labassé, Mennesson et Campanelli-Paradiso de la Cour européenne des droits de l'homme*, Revue critique DIP, 2015, No. 1, pp. 13–16.

the provisions of the private international law.[51] In a ruling from 2012, it decided that refusal to confirm Austrian citizenship (the intended parents were genetically related to the child) and issue a passport to the twins born by a surrogate in Ukraine infringes the right to private and family life protected by Article 8 of the European Convention of Human Rights.[52]

In Germany, beginning with the decision of the Supreme Court from 10 December 2014,[53] the courts allow for the recognition of a foreign ruling establishing the filiation of a child from the intended parents. Such recognition does not violate the public order in the case of gestational surrogacy and the genetic link with one of the intended parents. Such court decisions have been issued in favor of hetero- and homosexual couples.[54] It is, however, worth noting that this line of jurisprudence is being challenged and an opposite view was expressed by Oberlandesgericht Braunschweig in its decision from 12 April 2017 refusing to recognize the decision of a Colorado court which determined the origin of the child from the ordering couple. The Braunschweig court decided that such recognition would violate the fundamental rules of the German legal order, including the rule of motherhood of the woman, who gave birth to the child, as well as the prohibition concerning the surrogacy procedures.[55]

The Swiss Federal Tribunal in several decisions presented its opinion on the legal status under the Swiss law of children born abroad by a surrogate and handed over to the Swiss citizens. In its decision from 21 May 2015, the Tribunal decided that it is legitimate to enter into Swiss civil law records as a father only that man with whom the child is genetically related (the case involved the registration as parents of a child born in California by a surrogate of two men, Swiss citizens, remaining in a civil partnership).[56] In its decision from 14 September 2015, the Tribunal, referring to the contradiction with the Swiss public order, refused to recognize the birth

[51] Decision from 14 December 2011, B13/11–10. Referred to on the basis of its description by M. Wells-Greco, *op. cit.*, pp. 114–115.

[52] This jurisprudence has also influenced the amendments to the rules concerning the acquisition of citizenship by a child born abroad by a surrogate that was not awarded foreign citizenship.

[53] BGH, judgment from 10.12.2014, XII ZB 463/13.

[54] See E. Przyśliwska-Urbanek, *Macierzyństwo zastępcze z perspektywy Niemiec*, Instytut Wymiaru Sprawiedliwości: Warszawa 2017, (https://www.iws.org.pl/analizy-i-raporty/raporty#podstawowe17), p. 11 and the decisions referred to.

[55] OLG Braunschweig, judgment of 12.04.2017, 1 UF 83/13.

[56] Judgment of the Federal Tribunal of 21 May 2015, ATF 141 III 312 discussed, *inter alia*, by E. Spahni, *Surrogacy Abroad, Recognition (or Non-Recognition?) in Switzerland: a Painful Dilemma*, "Yearbook of Private International Law" 2016/2017, Vol. 18, pp. 442–443.

certificate of twins born in California indicating that there is no genetic connection between the sociological parents and the child.[57]

In Italy, there are court decisions recognizing the foreign civil law records that indicate as parents two men (including the biological father of the child).[58]

In Spain, in the cross-border matters, there is a discrepancy between the jurisprudence and position of the civil registry offices.[59] The Spanish Supreme Court in its ruling from 6 February 2014 invoked the rules of public order and confirmed the rulings of the courts of lower instances that refused to register in the birth certificate of children (born in California by a surrogate) of two married Spaniards living in Spain.[60] The decisions of the Supreme Court do not indicate that under the Spanish law it is not possible to determine the origin of a child from the intended parents (by acknowledgment of fatherhood by biological father and adoption by another person). The doctrine underlines that such position does not put the child "outside of law."[61] The civil law records follow, however, the instruction issued by the Directorate General for the Registers and Notaries Public from 5 October 2010 that allows for registration of children born abroad by a surrogate provided that certain conditions are met.[62]

Following the decisions of the European Court of Human Rights in the Mennesson and Labassee cases against France,[63] the French courts currently recognize the

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[57] Judgment of the Federal Tribunal from 14 September 2015, ATF 141 III 328 discussed inter alia by E. Spahni, *op. cit.*, p. 443. The Tribunal confirmed its positions as regards the genetic nexus in the decision from 2016. TF 5A_317/2016.

[58] See: decision of the Court of Appeals in Trento from 23 February 2017 discussed by L. Lai, *Macierzyństwo zastępcze w prawie włoskim*, Instytut Wymiaru Sprawiedliwości: Warszawa 2017, (https://www.iws.org.pl/analizy-i-raporty/raporty#podstawowe17), p. 9.

[59] For more detailed description of the Spanish legal status and the jurisprudence in the cross-border matters, see C. Martínez de Aguirre, *Surrogate motherhood in Spanish and Latin American laws: the law and the loophole.*

[60] This position has been confirmed in the ruling of the Supreme Court from 2 February 2015, which underlined that the decision is being made irrespective of the gender and sexual orientation of the ordering couple. The ruling from 6 February 2014 was discussed in detail by H. Fulchiron, C. Guilarte Martín-Calero, *op. cit.*, pp. 531–550. Both rulings are also discussed by C. Martínez de Aguirre, *op. cit.*

[61] H. Fulchiron, C. Guilarte Martín-Calero, *op. cit.*, p. 537. In July 2015, the Ministry of Justice issued an instruction in which it ordered embassies and consulates to register the children born by a surrogate and delivered to the Spanish citizens.

[62] *Ibidem*, p. 535.

[63] The case Mennesson v. France (claim No. 65192/11) and Labassee v. France (claim No. 65941/11). For more, consult the Polish analysis by M.A. Nowicki available at: http://www.hfhr.pl/wp-content/uploads/2015/11/Omowienie_orzeczenia_Mennesson_przeciwko_Francji.pdf (last accessed: 12 September 2018).

relationship between the biological father and the child born by a surrogate, and in this extent the foreign birth certificates are being transcribed.[64] This practice was preceded by changes in the argumentation against the transcription of any part of foreign birth certificates. The French administration and courts initially refused to recognize the foreign civil law records invoking first the principle of inalienability of civil law status and the violation of the public order,[65] and then evasion of the law.[66] The change of the approach was caused by the decisions of the European Court of Human Rights involving the protection of the child's right to establish his/her identity. The data of the second person registered in the birth certificate as the parent (woman, who did not give birth to the child, or man who was not the donor of the semen) are not being recognized. In the decision from 5 July 2017, Cour de Cassation ruled in favor of the possibility of adopting the child by the spouse of the biological father, who had acknowledged the child born by the surrogate.[67]

4. Conclusions

The overview of the current trends in jurisprudence of the high courts in the countries that oppose surrogacy leads to the conclusion that there is a double standard in assessment of this practice and establishment of filiation of a child born by a surrogate. Decisions "recognizing" surrogacy are issued despite the fact that the domestic law would in certain circumstances allow to regulate the status of the child (e.g. by acknowledgment of child by the biological father and adoption by the other intended parent). The limitation of the cross-border surrogacy issues could be achieved by limiting access only to the residents of the country that allows for surrogacy. The question is whether the direction adopted by the Asian countries will also be followed by other countries. From the Polish perspective of particular

[64] A thorough analysis of the French law and jurisprudence in the cross-border matters was performed by N. Baillon-Wirtz, *Surrogacy in France: ethical and legal issues.*

[65] See: e.g. the decision of the Cassation Court No. 371 of 6 April 2011, claim No. 09–17.130, https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/371_6_19627.html (last accessed: 12 September 2018).

[66] See, for instance, the decision of the Cassation Court No. 281 of 19 March 2014, claim No. 13–50.005, https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/281_19_28731.html (last accessed: 12 September 2018).

[67] Decision of the Cassation Court No. 826 of 5 July 2017, claim No. 16–16.645, https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/826_05_37265.html (last accessed: 12 September 2018).

relevance are developments in the neighboring countries and in countries with which Poland has huge human traffic, such as Ukraine. The works conducted under the auspices of the Hague Conference of Private International Law aim to align the conflict of laws regulations. Due to the extreme positions, it is, however, difficult to imagine a consensus that would be adopted by the greater number of states.

Without doubt, an open issue remains the question of acknowledgment of the motherhood of the woman, to whom the child is handed over.[68] This issue should soon be decided by the European Court of Human Rights.[69] The recognition of the genetic relationship as decisive would mean overruling of the principle *mater semper certa est* and would introduce discrepancy with the assisted reproduction techniques (a woman who makes use of such a technique and becomes pregnant with a donor egg is considered to be a mother).[70]

The court decisions are made in circumstances where the child had already been handed over to the intended parents and remains under their custody. Such a perspective and the assessment of the case from the principle of wellbeing of the child in individual cases may result in a general rule of implementation of the legal consequences of the practice conducted abroad and forbidden in the domestic law.

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[68] In the case of Paradiso and Campanelli v. Italy decided by the ECHR (the Grand Chamber judgment of 24 January 2017), the lack of the genetic relationship between the commissioning couple and the child was a decisive factor behind the decision.

[69] The new initiative came from the French Cour de Cassation. In the decision from 5 October 2018, the Court requested the ECHR with the following questions: 1. Does the refusal to transcribe the data of a woman who has received the child exceed the margin of appreciation vested with the state in light of Article 8 of the European Convention of Human Rights and is it relevant whether the child was conceived from the egg of such a woman; 2. Does the possibility of adopting by such a woman of a child that is biological child of her husband comply with the requirements of Article 8 of the European Convention on Human Rights? Decision No. 638 https://www.courdecassation.fr/jurisprudence_2/communiques_presse_8004/etranger_transcription_8981/lire_arret_n_638_40370.html (last accessed: 10 October 2018).

[70] This issue was pointed out by a judge of the Irish Supreme Court in a case decided in November 2014. The court rules that a woman who donated the egg cells cannot be registered in the birth certificate as a mother of the children (such an entry was allowed by a lower court – High Court). The children were born by a surrogate who was that woman's sister. The semen originated from the husband of the donor of egg cells. The children were handed over to the couple that raised them. The husband was entered into the birth certificate as the father of the children. The Supreme Court found that the mother is the woman who gave birth to the children. Description of facts after V.R. Guzman, *A comparison of surrogacy laws of the U.S. to other countries: should there be a uniform federal law permitting commercial surrogacy?*, "Houston Journal of International Law" 2016, Vol. 38, No. 2, p. 619, 634; https://www.irishtimes.com/news/crime-and-law/supreme-court-rules-genetic-mother-of-twins-is-not-their-legal-mother-1.1992112 (last accessed: 14 September 2018).

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Surrogacy from the Czech perspective: "past the point of no return"

1. The fundamental rules of filiation

1.1. General information

In general, parenthood refers to the relationship between a parent and a child. The principles of human reproduction mean that a parental relationship involves two elements: maternity and paternity. Drawing on the general definition of parenthood, it is possible to define maternity as the relationship between the mother and the child, and paternity as the relationship between the father and the child.

However, it should be remembered that this relationship has three dimensions: biological, social, and legal. The *biological dimension* addresses the question of who the parents are (i.e., the mother and the father) according to the biological principles of human reproduction. These biological principles stipulate that the child's mother is the woman who gave birth to the child; and the father is the man who conceives the child with the mother. Yet if the child was conceived using modern methods of assisted reproduction, even such a basic determination of the biological parents can cause some difficulties (see below). In *social parenthood,* parents are understood as the persons who bring a child up as if he/she was biologically their own (based on consanguinity), although this need not be the case. *Legal parenthood* (i.e., parenthood in the legal sense) seeks to answer the question of which man and woman are considered the mother and the father of a child under the legal regulations. Based on these legal regulations, a legal family relationship arises between a woman and a child and a man and a child, giving rise to mutual rights and duties which are, by law, inherently linked to the existence of such maternal or paternal

family relationship. In other words, only the woman determined by a legal rule as the mother, and only the man determined by a legal rule as the father have the legal status of a parent, and only such persons have the rights and duties associated with parenthood by the law. In some cases, other legal facts are required for a family legal relationship to arise. Such facts include either juridical acts (voluntary recognition of paternity) or a judicial decision (in the case of paternity determination by the court, or adoption).[1]

As indicated above, in certain cases biological parents and social parents need not be the same persons, i.e., biological parenthood and social parenthood need not coincide. It is no wonder then that since ancient times the law has sought, for the sake of legal certainty, to establish clear rules on parenthood in the legal sense.[2]

These legal rules are known as rules on the determination of parenthood, or filiation rules. By virtue of these rules, a child acquires a mother and a father in the legal sense, and accordingly a (legal) family relationship with other family members is established. When drawing up legal rules on the determination of parenthood, it is necessary to follow the ground rule that biological parenthood is a fundamental legal fact that should be respected and that underlies the establishment of legal parenthood. In other words, in agreement with the principles of nature, the rules on the determination of parenthood are largely based on the greatest possible (insofar as achievable) harmony between biological and legal parenthood. However, because in specific cases filiation rules can affect a person who is not a biological parent (in particular, the father), the legislators provide for an option to disavow such legal parenthood. A biological relationship between certain persons is an objective fact (independent of the law) which is essentially respected in the legal regulation; yet the legislators are not in a position to disavow this natural (biological) bond.[3] Exceptionally, the legislators conceive a legal family relationship differently,

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[1] See: Frinta Ondřej; Frintová Dita. Rodičovství a jeho vznik. [Parenthood and How It Arises], [in]: Zuklínová, Michaela; Dvořák, Jan; Švestka, Jiří et al.: *Občanské právo hmotné.* [*Substantive Civil Law*] *Vol. 2 Family Law.* Praha: Wolters Kluwer ČR, 2016, pp. 69–70.

[2] See: Paulus' well-known sentence about the "always certain" mother and uncertain father: "*Quia semper certa est, etiam si volgo conceperit: pater vero is est, quem nuptiae demonstrant.*" [i.e., "*The mother is always certain, even if she gave birth out of wedlock; by contrast, the father is the person identified through marriage*", D 2, 4, 5, Paulus 4 ad ed.; quoted according to Behrends, Okko et al.: *Corpus Iuris Civilis. Text und Übersetzung. Band II. Digesten 1–10.* Heidelberg: C. F. Müller Juristischer Verlag, 1995, p. 182].

[3] See: the well-known Roman law maxim: "*Iura sanguinis nullo iure civili dirimi possunt.*" [i.e., "*Consanguinity rights cannot be abolished by any civil right*", D 50, 17, 8, Pomponius 4 ad sab.; quoted according to http://www.thelatinlibrary.com/justinian/digest50.shtml (last accessed: 17 March 2018)].

namely artificially, based on parenthood in the social sense, rather than based on the existence of a natural (biological) bond. Accepting someone else's child as one's own was regulated by the law long ago, in ancient times, taking the form of adoption in imitation of nature.[4] This legal concept sought to establish legal paternity (or paternal authority over a child) in a purely legal way.[5]

1.2. Overview of the development of private law in the Czech Republic

In our country, the origins of modern private law based on the concept of the natural rights of a person are rooted in the Austrian[6] General Civil Code from 1811 (*Allgemeines bürgerliches Gesetzbuch für die gesammten Deutschen Erbländer der Österreichischen Monarchie*) (ABGB).[7] In Austria, the code was in force without significant changes during the whole of the 19th century; it was amended at the beginning of the 20th century.

World War I brought about the disintegration to the Austro-Hungarian Empire. The newly established states in its former territory included the Czechoslovak Republic. Upon its foundation on 28 October 1918, efforts were made to maintain continuity with the existing legal system. The so-called Reception Act (*recepční zákon*, No. 11/1918 Sb.) provided that all the laws and regulations applicable within the "land" and the empire remained in force for the time being ("to avoid chaos and to ensure a smooth transition to a new state arrangement"). In this way, a historically curious situation occurred from the perspective of private law, as two distinct legal systems applied to a single state. Czechoslovakia was made up of the so-called historical territory of the Czech lands, Moravia and Silesia (which originally belonged to the Austrian part of the monarchy where the ABGB applied), but also Slovakia

[4] See: Institutes of Justinian: "*Minorem natu non posse maiorem adoptare placet: adoptio enim naturam imitatur; et pro monstro est, ut maior sit filius, quam pater.*" [i.e., "A junior cannot spot a senior; for adoption imitates nature; and it seems unnatural that a son should be older than his father". Institutiones Justiniani lib. I, tit. XI; quoted according to http://www.thelatinlibrary.com/justinian/institutes1.shtml#i:xi (last accessed: 17 March 2018)].

[5] See: Frinta, Ondřej; Frintová Dita. Rodičovství a jeho vznik. [*Parenthood and How It Arises*], [in]: Zuklínová, Michaela; Dvořák, Jan; Švestka, Jiří et al.: *Občanské právo hmotné. [Substantive Civil Law] Vol. 2. Family Law.* Praha: Wolters Kluwer ČR, 2016, p. 71.

[6] It should be noted that the historical territory of the so-called Czech lands was part of the Austrian (and later Austro-Hungarian) Empire.

[7] Emperor's edict No. 946/1811 Sb. z. s.

(and Carpathian Ruthenia) which originally belonged to the Hungarian part of the monarchy where the ABGB did not apply and private law was primarily derived from legal customs.[8] This situation was obviously regarded as utterly unsatisfactory and was meant to be rectified in the future. For this purpose, efforts were made to revise the ABGB in Czechoslovakia. In 1937, the government prepared a proposal of the new law and submitted it to the Chamber of Deputies of the National Assembly, but the government bill was never adopted owing to the outbreak of World War II.

After the end of World War II, the existence of Czechoslovakia was restored, essentially within the original borders (but without Carpathian Ruthenia), and the country found itself under the influence of the Soviet Union. The post-war development escalated in February 1948 with the seizure of power by the Communists who immediately embarked on the implementation of a new social and economic regime. Under the new regime, the period from 1949 to 1950 saw the codification of all the main legal branches (the so-called "two-year legislative plan"). Following the example of the Soviet Union, family law was severed from private law and enacted as a separate piece of legislation: (Act No. 265/1949 Sb., on Family Law).[9] Despite the ideological background surrounding its enactment, this act can be regarded as the basis of modern family law. It introduced gender equality in marriage and the raising of children, and removed any inequalities between the rights of legitimate and illegitimate children.[10] The civil code was adopted in 1950 (Act No. 141/1950 Sb.).

In 1960, a new constitution was adopted in Czechoslovakia, proclaiming in its introductory declaration the victory of socialism (as the final stage prior to achieving communism). Following this ideological change, it was necessary to recodify all the basic legal branches. Family law remained embodied in a separate act (Act No. 94/1963 Sb., on the Family, (ZOR)), and in comparison with the previous family law it introduced merely minor and formal changes. The civil code was adopted shortly afterwards, in 1964 (Act No. 40/1964 Sb., the Civil Code).

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[8] A significant part of these customs was presented in the work of Štěpán z Vrbovce (*István Werböczi*), entitled *Tripartitum opus iuris consuetudinarii inlycti Regni Hungariae partiumque adnexarium*.

[9] It is noteworthy that this act was an outcome of the cooperation between Polish and Czechoslovak lawyers. See: Piątowski, J. S., [in:] Piątowski, J. S. (eds.): *System prawa rodzinnego i opiekuńczego. Część 1*. Wrocław: Zakład Narodowy im. Ossolińskich – Wydawnictwo, 1985, pp. 9–10.

[10] The relevant provisions of the ABGB were removed. The concept of family law under the ABGB was based on the traditional concept of the family under ancient Roman law, which highlighted the leading role of the father (*pater familias*) who had (virtually) unlimited power (*patria potestas*) over the children and the wife. Such a concept was no longer sustainable under the new social regime, and it is significant that the family code was adopted as a priority, even before the civil code.

The events of November 1989[11] led to the fall of the communist regime in Czechoslovakia. There was a gradual return to the traditional values of a pluralistic democratic state respecting fundamental human and civil rights. Against the backdrop of these changes[12] (and as the centrally planned economy broke down and transitioned to a market economy) it became clear that all legal branches needed recodification, including private law. While the work on the recodification of private law commenced already in the 1990s, only the third proposal for the new civil code was successful.

The present Civil Code (Act No. 89/2012 Sb., the Civil Code, (CC)) [13] has been effective since 1 January 2014. The recodification was primarily aimed at creating a private law code comparable to the standard codes of the European legal cultures. The main sources of inspiration included the domestic tradition before 1950 (in particular, the ABGB and the proposal for a new civil code from 1937), standard European civil codes and, to a certain extent, the development of the legal system after 1950. Thus, the idea of the departure from the previous legal system prevailed, albeit not absolutely. The departure was not understood as the ultimate objective, but rather as a way in which the individual parts of private law were to meet the standards of the Western European private law codes. Some continuity with the previous law remained in family law which, when deprived of the ideological wording, displayed the features of standard, modern legal regulation. However, family law was incorporated in the Civil Code, which ended its independent existence as a separate piece of legislation.

1.3. Maternity

Neither the general civil code, nor the Family Law Act of 1949, nor the Family Act in its original version from 1963 contained an express provision determining which woman is the mother from the legal perspective. At that time, there was no

[11] The events were triggered by the violent intervention of the police against a peaceful student demonstration on 17 November 1989.

[12] It should be also noted that on 31 December 1992 the Czech and Slovak Federative Republic ceased to exist. As of 1 January 1993, both states, which used to be united in a federation, became independent entities under international law. Since then, both legal systems have been developing independently of each other, although their legislative efforts have been often mutually inspired.

[13] Its number in the Collection of Laws ("89") is not arbitrary; it is meant to commemorate and symbolise the departure from the socialist private law.

pressing need to include such a provision. The private law doctrine fully relied on the above-mentioned Paulus' sentence about the mother being always certain because no other option was available than the mother being the woman who gave birth to the child.[14] In order to establish filiation, it is required in certain jurisdictions (e.g., France, Luxembourg, Italy) – in addition to the birth itself – that the mother recognize maternity.[15] This model, requiring in addition to the birth an expression of the will of a parent, was not followed in the ABGB or later regulations in our territory. In the Czech Republic, maternal affiliation is established by the very (objectively ascertainable) fact of the birth.

This principle was somewhat diluted (albeit merely ostensibly) after the modern methods of assisted reproduction were developed.[16] With the rapid development of such methods and for the sake of legal certainty, it was expressly provided that: "The mother is the woman who gave birth to the child." A new provision (s. 50a) to that effect was inserted in the Family Act through amendment by Act No. 91/1998 Sb., to amend and supplement Act No. 94/1963 Sb., on the Family, as amended, and to amend and supplement other laws. During the recodification of private law, this rule was incorporated in the current Civil Code (s. 775).[17] It is a peremptory rule permitting no derogation through agreement between parties or a unilateral expression of will.[18]

[14] This principle was indirectly reflected in s. 137 of the ABGB under which a new (family, legal) relationship arose upon the birth of children (within marriage). For details, see: Rouček, František; Sedláček, Jaromír et al.: *Komentář k Československému obecnému zákoníku občanskému a občanské právo platné na Slovensku a v Podkarpatské Rusi.* [*Commentary on the Czechoslovak General Civil Code and Civil Law Applicable in Slovakia and Carpathian Ruthenia*]. Vol 1. Praha: V. Linhart, 1935, p. 719 et seq.

[15] Králíčková, Zdeňka; Hrušáková, Milana. *Anonymní a utajené mateřství V České republice – utopie nebo realita*. [*Anonymous and Secret Motherhood in the Czech Republic – Utopia or Reality*.], [in:] Právní rozhledy, 2005, No. 2, p. 53 et seq.

[16] For details, see below.

[17] It should be noted that the wording originally proposed within recodification was more extensive: "The mother is the woman who gave birth to the child; the source of the genetic material that enabled the conception is not decisive. In a legal dispute, the court cannot find for the woman who donated the genetic material against the woman who gave birth to the child." The part of the first sentence after the semi-colon, as well as the second sentence were, however, deleted as redundant during the legislative work on the proposal, and the final wording of s. 775 of the CC was reduced to the first part of the first sentence. The resulting legal regulation is thus no different than the original provision of s. 50a of the ZOR.

[18] For details on the peremptory character *see* below.

This rule is quite consistent with the European Convention on the Legal Status of Children Born out of Wedlock, which was adopted in Strasbourg on 15 October 1975. This Convention was signed by the Czech Republic on 26 April 2000 and published under No. 47/2001 Sb. m. s. (effect from 8 June 2001). Article 2 of the Convention expressly provides that "Maternal affiliation of every child born out of wedlock shall be based solely on the fact of the birth of the child."

The current Czech Civil Code – quite in line with the previous developments – follows the rule that maternity is based on the objective fact of the birth, which is in compliance with the international obligations of the Czech Republic. Hence under Czech law, maternity cannot be 'transferred' to another person, not even on the basis of a (bilateral) contract or a unilateral expression of will. Consequently, if surrogacy is to be undertaken *via facti*, it is necessary that the intended parents (i.e., those for whom the surrogate mother carries and bears the child) subsequently adopt the child. Nevertheless, the Civil Code does contain a mention of surrogate motherhood (see below).

1.4. Paternity

The biological bond between mother and child has been established on the basis of an objective fact – the birth. This, however, was not the case for paternity. The biological bond between father and child – which arises through conception, i.e., fertilization of a mother's egg – has for a long time (from the historical perspective, during a predominant part of history) been determined based only on indirect facts. For example, a child was probably conceived by a wife's husband; an unmarried mother's child was probably conceived by the man who recognized the child born out of wedlock. The fact that with respect to paternity all the cases turned around probability (rather than certainty) was expressed by the ancient Roman law maxim "*pater semper incertus*."[19] Because there was a need to quickly, cost-effectively, and efficiently stabilize the relationship between a child and the (legal) father, a system of presumptions of paternity started to be used.[20] The system of presumptions

[19] In translation, "the identity of the father is always uncertain."

[20] Thanks to developments in genetics it is now possible to identify a biological bond between a man and a child on the basis of genetic evidence. This could suggest that the whole system of presumptions for paternity determination is outdated and obsolete. Yet such an idea is too simplified. The system of presumptions was developed to ensure that legal paternity applied, as far as possible, to the men

of paternity was included already in the ABGB, as well as in both acts governing family law in the second half of the 20th century, and hence it is not surprising that the system was incorporated in the current Civil Code.

Compared to the previous legal regulation, the current rules in the CC on the presumptions of paternity are more elaborate, and take into consideration developments in medicine, including reproductive medicine. The Civil Code first deals with the presumption of paternity with respect to the mother's husband. If a child is born within three hundred days of the termination or annulment of marriage, or the date on which the mother's husband was declared missing[21], it is presumed[22] that the mother's husband is the father (s. 776 of the CC).[23] Furthermore, this presumption applies to the situation where a child was born in wedlock through assisted reproduction (regardless of whether the husband's or a donor's material was used to fertilize the wife's egg). The situation where a child is born to an unmarried woman through assisted reproduction is governed by s. 778 of the CC. Under this provision, it is presumed that the child's father is the man who gave consent to the assisted reproduction.[24] If paternity was not determined in any of these ways (i.e., under ss. 776, 777 or 778), it can be determined through voluntary recognition by both

who were the biological fathers. In other words, the system of presumptions has sought to ensure, as far as possible and in line with long-term general human experience, a correspondence between the biological and legal paternity. Naturally, in specific cases it can happen that the presumption applies to a man who is not the biological father of the child. For this reason, parenthood determination is coupled with a provision for the disavowal of parenthood – in contentious cases, modern methods are used to determine filiation (in particular, DNA analysis).

[21] If a court declares a person missing, this fact does not affect the person's status, i.e., his marriage continues. Since it is an official declaration, it follows that a person who has been missing for a long time cannot be subject to the presumption that the mother's husband is the father.

[22] The current Civil Code uses the wording 'is presumed' for a rebuttable presumption, i.e., evidence to the contrary can be produced.

[23] Specific rules apply to a situation where a child is born in the period between the start of divorce proceedings and three hundred days after the divorce. In such a case the husband (or the mother's ex-husband) can claim that he is not the child's father, and another man can claim to be the father. If the mother supports the statements made, it is presumed that the father is the man who claims to be the father (by which the ex-husband's paternity is disavowed). It is not possible to determine paternity in this way before the divorce decree has become legally effective. An application to determine paternity in this way must be submitted within one year of the child's birth (s. 777 of the CC).

[24] In the Czech Republic, assisted reproduction is available to both married couples, and a man and a woman who are an unmarried, infertile couple (see s. 6 of Act No. 373/2011 Sb., on Special Health Services). Rather than based on the probable act of conceiving a child (as in the case of spouses), in this situation legal paternity is derived from the consent given to an assisted reproduction procedure. It is thus irrelevant whether the biological material originated from the mother's partner or a donor.

the mother and the man who claims to be the father of the child (s. 779 of the CC). Then the man who made a claim to that effect will be presumed to be the father.[25] This manner of paternity determination thus applies to a child born to an unmarried woman, with no assisted reproduction involved. In addition, paternity can be determined in this way if a child was born to a married woman, but her husband successfully disavowed his paternity (presumed to have arisen under s. 776 of the CC), which gives rise to the paternity of another man (not the mother's husband). If none of the above-mentioned ways (presumptions) applies, paternity can be determined only through paternity proceedings before the court. The proceedings can be initiated by the mother, the child (typically represented by the curator), or the man who claims to be the father (s. 783 (1) of the CC). Even here the legislators offer a presumption on the basis of which the court should determine the father if the necessary elements are met. Under s. 783 (2) of the CC, it is presumed that the father is the man who had sexual intercourse with the child's mother from 300 to 160 days before the birth. However, the court will not determine that such a man is the father if there are serious reasons excluding the paternity of this man (e.g., infertility). Thus, the presumption is set out in a traditional manner (establishing a link between sexual intercourse and the conception of the child), but the actual paternity proceedings do not always require that the sexual intercourse between the man concerned and the child's mother be proven. The DNA analysis[26] of the persons involved makes it possible to determine retroactively whether or not the man concerned had sexual intercourse with the child's mother.[27]

[25] The voluntary recognition is made either before the registry of births and deaths or the court (a person who is not fully legally competent can make the voluntary recognition only before the court). In addition, the voluntary recognition can be made in respect of a child who has been conceived, but is not yet born.

[26] For details, see the judgment of the Czech Constitutional Court file No. I. ÚS 978/07. As regards the current practices applied during the proceedings for paternity determination, attention should be drawn to the judgment of the Czech Supreme Court file No. 21 Cdo 693/2010. According to this decision, if the DNA results excluded the paternity of a man who is shown to have had sexual intercourse with the child's mother during the period of time in question, the court will always order a review of the expert's report by another expert, a research institute, or another institution (the so-called superior review).

[27] In addition, a situation arose in the Czech Republic when it was necessary to determine paternity with respect to a child who was not subject to any presumption of paternity. The child was born out of assisted reproduction after the death of the mother's husband. The man had his biological material preserved due to chemotherapy he underwent. Eventually he died of the illness. Only after his death did the widow ask for assisted reproduction with this preserved biological material. Although this situation is not covered by any presumption of paternity, according to the theory of private law it was

Legal rules on paternity determination are followed by the provisions on the disavowal of paternity. Paternity can be disavowed by the father or mother, but not by the child. It is possible to disavow paternity based on any of the presumptions except where the paternity was established through a court's decision (res judicata; any circumstances excluding paternity were to be raised during the proceedings for paternity determination). However, paternity cannot be disavowed with respect to a child who was born between 160 days and 300 days after the assisted reproduction procedure carried out with the consent of a mother's husband or with the consent of another man if the mother is unmarried, irrespective of the genetic material used. But this rule does not apply (in other words, paternity can be disavowed with respect to a child born in this way as well) if the mother became pregnant otherwise (i.e., not through assisted reproduction).[28]

1.5. Adoption and surrogacy rules

As indicated above, in certain cases legal parenthood is based on social parenthood rather than a biological (blood) bond. This occurs through adoption (s. 794 et seq. of the CC). Under s. 794 of the CC, adoption is defined as taking another person to be one's own, and there is a pre-requisite that such relationship exists between an adoptive parent and an adopted child as that which exists between a parent and a child (i.e., in the social sense), or at least the basis for such relationship. The Czech Civil Code makes a distinction between the adoption of a minor (ss. 794–845 of the CC) which is understood as full adoption[29], and the adoption of an adult (ss. 846–854 of the CC) which is understood as partial adoption.[30]

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not a reason for the court not to determine paternity because a family relationship could be proven otherwise than through sexual intercourse. For details, see: Winterová, Alena. *Určení otcovství nad rámec zákonných domněnek*. [*Determination of Paternity Beyond Legal Presumptions*.], [in:] *Správní právo*, 2003, No. 5–6, p. 314 et seq.

[28] For details *see* s. 785 et seq. of the CC.

[29] Through adoption, the family relationship between the adopted child and the original family ceases to exist, as well as the rights and duties arising therefrom. A child who has been jointly adopted by spouses or a spouse of his parent has the status of a common child of the spouses; otherwise, he has the status of an adoptive parent's child. Adoptive parents have parental responsibility. If a child who is a parent has been adopted, the effects of adoption shall also apply to his child. For details, see: ss. 832–834 of the CC.

[30] See in particular: s. 853 (2) of the CC under which, with respect to this type of adoption, an adopted child inherits from his adoptive parent in the first statutory class of heirs, but is not involved

In connection with the rules on the adoption of a minor, the Civil Code also contains a provision which expressly addresses surrogate motherhood. The provision of s. 804 of the CC first stipulates that adoption is excluded among persons related in direct line and between siblings. The second sentence of this provision specifies that "This does not apply in the case of surrogate motherhood." It follows that adoption is generally excluded in cases where there is, between the persons involved, a close family relationship that should not be replaced by adoption (establishing an artificial legal relationship between a parent and a child). However, this rule does not apply if the adoption took place after a surrogate mother gave birth to the child. This provision covers such cases where, for example, a woman carries and gives birth to a child who genetically originated from her daughter. In this case and from the legal point of view, the woman gives birth to her daughter's sibling. However, the elder (first-born) daughter wishes to become mother of this child (i.e., her sibling, from the legal point of view) because the child originated from her genetically. In order to do that, she needs to adopt the child, but that would be impossible because adoption between siblings is generally excluded. Nevertheless, by virtue of the second sentence of s. 804 of the CC it is possible, in this specific case, to defeat the general prohibition.

This provision is currently the only one within the entire Czech legal system that regulates, in any way, surrogate motherhood. The reasons for inserting this provision in the Civil Code during the recodification of private law have been evolving for a long time, and will be explained in detail below.

1.6. Family relationship and a close person

A child becomes involved in other family relationships through his or her mother and father. The Civil Code contains express provisions defining relatives in direct line (one person is a descendant of the other, s. 772 (1) of the CC) and relatives in collateral line (they have a common ancestor, but one is not a descendant of the other; s. 772 (2) of the CC). The degrees of relationship are determined by the number of births (s. 773 of the CC), in accordance with the principle *tot sunt gradus, quod sunt*

in the adoptive parent's succession rights towards other persons; or s. 851 (1) of the CC under which adoption of an adult does not affect his surname. For details *see* s. 850 et seq. of the CC.

generationes.[31] It should be kept in mind that the Czech Civil Code defines the in-law relationship as a relationship between one spouse and the other spouse's relatives. The line and degree of the relationship of a person to one spouse determines the line and degree of his in-law relationship to the other spouse (s. 774 of the CC). With respect to in-law relatives there is a rebuttable presumption that such persons are close persons (s. 22 of the CC).

A close person is defined in s. 22 of the CC. A close person is a relative in direct line, a sibling and a spouse or registered partner.[32] Close persons are presumed (a rebuttable presumption) to include in-law relatives or persons who live together permanently.[33] Other persons in a familial or similar relationship are, with regard to each other, considered to be close persons if the harm suffered by one of them is reasonably perceived as his own harm by the other.[34] The position of two close persons must be distinguished from a family relationship. Unlike a family relationship, being a close person does not change the legal status of a person. The fact that certain persons are close persons is relevant, for example, for post-mortem protection, by the close person, of personality rights (s. 82 of the CC), or for the transfer of the lease of a flat or house after the lessee has died (s. 2272 of the CC), etc.

1.7. Summary

In the light of the foregoing it can be concluded that the current Civil Code contains rather traditional legal regulation governing maternity and paternity determination. A child's mother is the woman who gave birth to the child, and the paternity of a particular man must be determined on the basis of one of the statutory paternity presumptions, or on the basis of a judicial decision. The filiation rules do not consider

[31] "The number of degrees corresponds to the number of births." For example, a grandmother and her grandson are related in the second degree in direct line; an uncle and his niece are related in the third degree in collateral line, etc.

[32] A registered partnership is a permanent union of two persons of the same sex formed in a manner provided by law. It affects the legal status of persons and excludes the formation of marriage. Details are set out in Act No. 115/2006 Sb., on Registered Partnership.

[33] For example, cohabitants (living as spouses although they are not married) or two persons of the same sex who live together although they have not entered into registered partnership.

[34] For example, cousins are generally not close persons to each other. However, if there is a closer bond between them, for example, a cousin takes care of the other cousin who is ill, they frequently visit each other, they are used to each other, etc., then the harm suffered by one of them would be reasonably perceived as his own harm, and consequently such persons would be close persons.

the possibility that a child may have been born from surrogacy, but there is a mention of surrogate motherhood in the Civil Code with respect to the adoption of a child.

2. A doctrinal and political debate concerning surrogacy

2.1. General information

> And when Rachel saw that she bare Jacob no children, Rachel envied her sister; (…). And she said, Behold, my maid Bilhah, go in unto her; **and she shall bear upon my knees, that I may also have children by her.**[35] And she gave him Bilhah her handmaid to wife: and Jacob went in unto her. And Bilhah conceived, and bare Jacob a son. And Rachel said, God hath judged me, and hath also heard my voice, and hath given me a son (…).[36]

The quotation from the Old Testament shows that the idea to replace a woman who cannot carry or give birth to a child with another woman is not new; on the contrary, this idea can be traced back to the beginning of our current culture.[37] Similar practices were, likewise, known in the Middle Ages in Europe, in particular, in places where Christianity and Islam were in close contact. As late as in the 20th century, there was a custom in Montenegro where an infertile wife brought another woman to her husband to bear his children.[38] However, these practices never gained much ground in Europe and the infertility of a married couple came to be addressed primarily through adoption, which was already embodied in ancient Roman law.[39] Obviously, no sophisticated techniques of assisted reproduction are needed for such practices, the conception occurred naturally (*per viam naturalem*) and there were no doubts as to which woman was blood-related to the child: the woman who carried

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[35] Emphasis added by the authors of the paper.

[36] Genesis, 30: 1–6. p. 70. *The Holy Bible*. Containing the Old and New Testaments. Translated out of the Original Tongues and with the Former Translations Diligently Compared & Revised Set forth in 1611 and commonly known as the King James Version; available at: http://www.gasl.org/refbib/Bible_King_James_Version.pdf (last accessed: 20 March 2018).

[37] Bilhah was not the only woman involved: Zilpah gave two sons to Jacob in lieu of his wife Leah (Genesis, 30: 10, 12); Hagar gave birth to two sons for Abram, in lieu of his wife Sarai (Genesis 16: 2–4, 15).

[38] See: Haderka, Jiří. *Surogační mateřství*. [*Surrogate Motherhood*], [in:] *Právní obzor*, 1986, No. 10, p. 925.

[39] See: Mitlöhner, Miroslav. *Surrogate Motherhood as a Way of Overcoming Childlessness*, [in:] *Social Problems of the Contemporary Families*. Wroclaw: Wydawnictwo APIS, 2014 p. 21.

and gave birth to the child. As the territory of our state has historically been a part of the Christian culture, with limited influences from other cultures, there are no historical records on our territory of the practices mentioned above.

More attention started to be paid to surrogate motherhood in this country only in connection with the development of reproductive medicine. The first "test-tube baby" [40] in the Czech Republic was born in 1982 (only four years after the birth of Lousie Brown, the first "test-tube baby" worldwide). Until 1987, another 10 children were born in this way. After that, assisted reproduction began to develop dynamically in the Czechoslovak Socialist Republic (as the first children conceived in this manner grew up, distrust in such methods gradually disappeared, as well as any concerns about potential health problems that children thus conceived could face), and 500 children were born with the use of assisted reproduction in the Czech Republic in 1995. Since 2010, approximately 5,000 children conceived in this way have been born each year in the Czech Republic.[41]

The first cases of assisted reproduction occurred in an unregulated environment, and assisted procreation was a grey area.[42] Neither administrative law (medical law) nor private law (in particular, family law and civil law) provided the necessary legal rules.[43] The first specific legal regulation in this area was provided in the Measure of the Ministry of Health of the Czech Socialist Republic: Conditions for Assisted reproduction (OP-066.8–18.11.1982; the "Measure"). This Measure was issued by the Ministry of Health of the Czech Socialist Republic in accordance with s. 70 (1) (c) of (no longer applicable) Act No. 20/1966 Sb., on the Healthcare of the People, which empowered the Ministry to issue general acts with a view to ensuring uniform management of the healthcare system.[44] While the Measure was formally repealed only by Regulation No. 268/2010 Sb., it was actually no longer used as of 1 June 2006

[40] The expression "test-tube baby" refers to a child conceived outside the mother's body through the IVF method (*in vitro fertilisation*), with a subsequent embryo transfer.

[41] For details, see: http://www.ceskatelevize.cz/ct24/domaci/1136905-prvni-ceske-dite-ze-zkumavky-slavi-tricetiny (last accessed: 20 March 2018).

[42] The healthcare facility that was about to carry out a specific fertilisation procedure obtained special permission to conduct an experiment from the Ministry of Health.

[43] See: Radvanová, Senta; Zuklínová, Michaela: *Kurs občanského práva – Instituty rodinného práva.* [*Course in Civil Law – Institutes of Family Law*], 1st ed. Praha: C. H. Beck, 1999, p. 89.

[44] The issuance of this Measure was notified (registered) in Chapter 6 of the Collection of Laws 1983, p. 205, as "*the issuance of directives on the conditions for assisted reproduction*." It was also noted that the directives were published in the Journal of the Ministry of Health of the CSR in Chapters 11–12, under No. 18. By virtue of registration in the Collection of Laws, the Measure had the character of a ministry regulation, i.e., a general statutory instrument.

when an amendment to the Act on the Healthcare of the People came into effect by virtue of Act No. 227/2006 Sb., on Research into Human Embryonic Stem Cells and Associated Activities, which provided legal regulation of assisted reproduction in a statute rather than a mere statutory instrument.[45] However, this legislation has already been repealed as well, and as of 1 April 2012 it was replaced with ss. 3–11 of Act No. 373/2011 Sb., on Specific Healthcare Services. None of these provisions contain express provisions on surrogate motherhood.

2.2. Origins of the debate on surrogate motherhood

The origins of the debate on surrogate motherhood are inherently associated with Professor JUDr. Jiří Haderka, CSc., who devoted a substantial part of his professional career to family law. It was arguably this man who drew the attention of Czech legal and medical professionals to surrogate motherhood, through an article published in the journal Právní obzor.[46] The article briefly clarified the concept of surrogate motherhood, summarized the contemporary approach to this issue in certain Western European countries, and analysed the contemporary Czechoslovak legal regulation governing surrogate motherhood. Haderka concluded that while the legal regulation of assisted reproduction[47] did not provide for surrogate motherhood at all, and while all the contemporary healthcare was controlled by the state (and consequently, assisted reproduction procedures were carried out only in state hospitals), it was not possible to completely rule out the possibility "that a backstreet procedure[48] or auto-insemination could be carried out. Likewise, no statutes expressly provided for criminal sanctions for such conduct."[49] He further noted that "it cannot be recommended to change the legal regulation so as to legalize surrogate motherhood."[50] In his opinion, "within the Czechoslovak jurisdiction, it is not

[45] The amendment inserted ss. 27d–27h into the Act on the Healthcare of the People, governing assisted reproduction.

[46] Haderka, Jiří. *Surogační mateřství*. [*Surrogate Motherhood*], [in:] *Právní obzor*, 1986, No. 10, p. 917 et seq.

[47] As contained in the "Measure."

[48] Authors' note: i.e., a procedure to accomplish surrogate motherhood.

[49] Haderka, Jiří. *Surogační mateřství*. [*Surrogate Motherhood*], [in:] *Právní obzor*, 1986, No. 10, p. 926.

[50] Haderka, Jiří. *Surogační mateřství*. [*Surrogate Motherhood*], [in:] *Právní obzor*, 1986, No. 10, p. 933.

possible to recognize as valid any foreign statutes or a contract concluded abroad allowing such a procedure, because it would be necessary to apply the reservation of the Czechoslovak public order (*clausus ordinis publici* under Act No. 97/1963 Sb., on Private International Law and Procedural Law[51])."[52] Elsewhere, Haderka posed the key question of whether it was possible to defeat the principle of "*mater semper certa est*", or whether it was necessary to maintain the construction of maternity in the legal sense as resting solely on the fact of the birth. According to the authors of this paper, Haderka raised in this respect arguments which are still valid today, despite further developments (*see* below). He expressly argued:

> In both blood transfusion and transplants, which range from using another person's tissue (e.g., skin grafting) to using his/her organ (e.g., the heart), the cells, tissues, organs, etc., that are transferred become a part of the recipient's body. If it was possible to transplant a whole ovary so that it would be able to produce live ova capable of fertilisation53, then such ova would perforce be considered part of the recipient's body. An argument a maiori ad minus: if merely a fertilised ovum is implanted in the recipient's body (i.e., an embryo in the initial stages of development), it also becomes a part of her body although it is an embryo of a new independent living being.[54]

By citing the principle "*Quae rerum natura prohibentur, nulla lege confirmata sunt*,"[55], Haderka concluded by saying that the fact of the birth gives rise to legal maternity even if a child did not originate from the birth mother, and a child could

[51] Authors' note: this law has been replaced with Act No. 91/2012 Sb., Governing Private International Law.

[52] Haderka, Jiří. *Surogační mateřství*. [*Surrogate Motherhood*], [in:] *Právní obzor*, 1986, No. 10, p. 933.

[53] The hypothetical case considered by Professor Haderka at the time when he was drafting his paper became a reality in the U.S. in 2008. [see for example: http://www.infertile.com/woman-gives-birth-first-ovary-transplant-operation/ (last accessed: 20 March 2018)]. In the Czech Republic, the first successful ovary transplant where the ovary started functioning normally in the recipient's body was publicly announced in 2016 (the transplant was performed in 2015, but according to the media reports, the recipient had no intention of becoming pregnant immediately after the operation, *see* for example https://www.denik.cz/zdravi/lekari-provedli-prvni-uspesnou-transplantaci-vajecnikove-tkane-v-cesku-20160322.html (last accessed: 20 March 2018)].

[54] Haderka, Jiří, "Partus – non ovum – facit maternitatem", [in:] *Československá gynekologie*, 1986, No. 2, p. 207.

[55] "Whatever is prohibited by the nature of things cannot be confirmed by any law" (Celsus 17 Dig., D 50, 17, 188, 1).

have only one mother in the eyes of the law, just as a child could have only one father.[56] Finally, in another paper Haderka maintained that he was firmly convinced, from the ethical point of view, that:

It is specifically forbidden:

- to make a human body the object of a civil contract under which a contracting party undertakes to create a living being in her body or to accept a fertilized embryo only to carry the foetus until birth;
- to include, in a civil contract, a woman's undertaking that she will hand her future child over to another person after the birth;
- for a citizen to accept an undertaking that he will voluntarily recognize paternity with respect to a child who has not yet been conceived at that time, or an undertaking that he will adopt a child who has not yet been conceived or is merely a *nasciturus* (unborn);
- to enter into a civil contract inconsistent with the principles and objectives of public international law in the area of human rights and freedoms.[57]

In the light of the foregoing it is clear that shortly after reproductive medicine started to develop in Czechoslovakia, the expert debate began to focus on the related issue of surrogate motherhood, and the arguments raised by Professor Haderka influenced the direction of this debate.

2.3. Developments in the 1990s

The fall of the communist regime in Czechoslovakia and the transition to pluralistic democracy, the rule of law, and a respect of fundamental human rights and freedoms, as well as a transition to a market economy (see above), have had an impact on virtually all areas of life. This applied equally to medicine, including reproductive medicine. The newly acquired freedom (more specifically, the sudden absence of the totalitarian power which had controlled all areas of life) gave a new impetus for reconsidering (and sometimes challenging) the borders within which reproductive medicine operated.

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[56] See: Haderka, Jiří, "Partus – non ovum – facit maternitatem", [in:] *Československá gynekologie*, 1986, No. 2, pp. 207–208.

[57] Haderka, Jiří. "Lze přijmout praxi tzv. 'náhradních rodiček' k odstraňování bezdětnosti manželství?" [*Is it Possible to Permit 'Surrogacy' in order to Address Childlessness in a Marriage?*], [in:] *Československé zdravotnictví*, 1986, No. 10, p. 424 et seq.

It should be also noted that soon after 1989, the state monopoly on all healthcare services was abolished in the Czech Republic, by virtue of Act No. 160/1992 Sb., on Healthcare in Private Healthcare Facilities. This act introduced the notion of "private healthcare facilities" (i.e., any healthcare facility other than a state facility, s. 1 (1) of the act) which could provide the following services: advisory, nursing, diagnostic, and preventive services, physiotherapy, spa therapy, and curative and pharmaceutical services. In such facilities, it was permitted to provide both inpatient and outpatient care, including services provided through medical technology and ambulance services for patient transport (s. 3 (1) of the act). In this way, the first private healthcare facilities focusing on reproductive medicine were established. These facilities were obviously interested in making a profit and, consequently, in the relaxation of the rules on assisted reproduction and in the possibility of offering a wide range of methods and procedures for assisted reproduction. During that time (1990s), the relaxation of the rules allowed the healthcare facilities dealing with reproductive medicine (in particular, the private ones) to go, in individual cases, beyond the legal framework contained in the Measure, and to also accept unmarried couples or single women for assisted reproduction. Because the participants felt they were in a "grey area" and the whole situation was perceived as rather "delicate" and giving rise to concerns, there was little willingness to communicate openly and the professional legal community knew little of such cases; if information was ultimately disclosed, then only with the promise to respect the anonymity of the participants. Sometimes, healthcare facilities contacted certain lawyers (including the authors of this paper) with requests for consultation about specific situations which centered not only on the permissibility of assisted reproduction for example for a single woman, but also on surrogate motherhood. This indicates that in the 1990s there was, among the public, a demand in the Czech Republic for surrogate motherhood and for surrogate mothers.

From the legal perspective, assisted reproduction was, at that time, still regulated by the Measure, and societal trends were clearly reflected in the interpretation thereof. In its s. 1 (1), the Measure provided that "An assisted reproduction procedure can be carried out only if both spouses so request". In the 1980s, when assisted reproduction was fully controlled by the state, the interpretation of this provision was quite unequivocal: an assisted reproduction procedure could be carried out only with respect to spouses, not an unmarried couple (cohabitees) or a single woman. In 1996, an opinion appeared which fundamentally changed the interpretation of the provision as regards the range of persons who may undergo assisted reproduction:

> We can assume that the wording of this provision does not unequivocally imply that assisted reproduction is available to married persons only. Rather, the wording suggests an emphasis on the word "both", implying merely that if the woman is married, the assisted reproduction procedure can be undertaken only at the request of both spouses. However, it is not possible to deny assisted reproduction to a single woman (unmarried, divorced, or widowed) by arguing that a child needs, for his healthy development, both parents (the so-called "complete family"). While the involvement of both parents in the child's upbringing is certainly significant, it must be acknowledged that parenthood has an enormous significance for a single woman's life satisfaction. Likewise, the legal order should be consistent. If the applicable legal rules allow a single woman to adopt another person's child and bring such a child up as her own (s. 74 (2) of the Family Act[58]), then a single woman should not be denied the option of assisted reproduction by arguing that it is contrary to a child's healthy development if a single woman brings up such a child alone.[59]

Another argument can be raised against the restrictive interpretation of s. 1 (1) of the Measure. Family life and protection thereof are an integral part of fundamental human rights (see: Article 10 (2) of the Charter of Fundamental Rights and Freedoms (the "Charter") [60], and Article 8 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms[61]). The notion of "family life" certainly covers the freedom of the parties concerned to decide whether they want to conceive a child together. However, this decision is totally independent of whether or not the man and the woman have entered into marriage.[62] It follows that any limitations placed on access to assisted reproduction restrict fundamental human rights; consequently,

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[58] Authors' note: Act No. 94/1963 Sb., on the Family ('ZOR').

[59] Knap, Karel; Švestka, Jiří; Jehlička, Oldřich et al. *Ochrana osobnosti podle občanského práva.* [*Protection of Personal Rights under Civil Law*], 3rd ed. Praha: Linde Praha a. s., 1996, p. 227.

[60] The Charter of Fundamental Rights and Freedoms is a part of the constitutional order of the Czech Republic. It was promulgated under No. 2/1993 Sb.

[61] Promulgated under No. 209/1992 Sb., effective from 18 March 1992.

[62] *See* the judgment of the ECHR in the case *Kroon and Others v. the Netherlands*: "In any case, the Court recalls that the notion of "family life" in Article 8 (art. 8) is not confined solely to marriage-based relationships and may encompass other de facto "family ties" where parties are living together outside marriage (*see* as the most recent authority, the *Keegan v. Ireland* judgment of 26 May 1994, Series A No. 290, pp. 17–18, para. 44)."

the limitations must perforce take the form of statutes[63] (Article 4 (2) of the Charter), while complying with the requirements imposed by the Charter (Article 4 (3) and (4)). Such limitations cannot arise from implementing regulations which merely have the force of a statutory instrument.[64] It is clear that the change to the interpretation of the Measure was not motivated purely by an effort to arbitrarily "bend" legal rules according to current needs (primarily the needs of private healthcare facilities), but had a rational basis in that it was necessary to take into account the fundamental human rights aspects which had been overlooked until then.

Considering these opinions in the professional community, it comes as no surprise that the 1990s saw a more liberal approach to the potential legal regulation of surrogate motherhood. In 1996, a proposal for a new civil code was published, which, in its Principle No. 68, provided that "in the case of the implantation of embryos, the donors are not considered to be the parents if an agreement on the medical procedure was in place and unless this agreement provided otherwise."[65] This proposal for the civil code[66] thus implicitly offered an option to *provide otherwise* in an agreement, i.e., to assign legal parenthood to the embryo donors. However, despite the otherwise liberal environment of that time, the legal community took a rather negative stance on the proposal: "It should be noted that such an exception gives rise to major concerns about the ethical and legal consequences. As a result, it is opposed, also in this country, by the majority of professionals."[67]

In the light of the foregoing, namely that in the 1990s there was a demand in the Czech Republic for surrogate motherhood, a debate took place, notably within the professional medical community, about the ethical aspects of such practices. In

[63] See also: the judgment of the Czech Constitutional Court, file No. Pl. ÚS 46/97, in which, with respect to the citizen's right to free healthcare, and the scope, extent, and manner in which healthcare is provided, the Court expressly stated "limitations on fundamental rights and freedoms of citizens can be imposed only by statutes."

[64] For details, see: Frinta, Ondřej, "Asistovaná reprodukce – právo a současná praxe" [*Assisted Reproduction – the Law and Current Practice*], [in:] *Právní fórum*, 2005, No. 4, p. 133 et seq.

[65] Quoted according to Knap, Karel; Švestka, Jiří; Jehlička, Oldřich et al. *Ochrana osobnosti podle občanského práva.* [*Protection of Personal Rights under Civil Law*], 3rd ed. Praha: Linde Praha a. s., 1996, p. 225.

[66] It should be emphasised that it was the second proposal for the civil code after 1989. It is, therefore, not a proposal that served as the basis for the adoption of the current Czech Civil Code No. 89/2012 Sb. (that proposal was the third one).

[67] Quoted according to Knap, Karel; Švestka, Jiří; Jehlička, Oldřich et al. *Ochrana osobnosti podle občanského práva.* [*Protection of Personal Rights under Civil Law*], 3rd ed. Praha: Linde Praha a. s., 1996, p. 225.

general, both the arguments and counter-arguments reflected similar debates in other European states. For example, the moral status of a human embryo was raised, the influence of the prenatal period on the future development of the child and the bond with the mother who carried the child, the unethical motivation associated with surrogate motherhood (where a surrogate mother is hired to ensure that the "commissioning" woman does not lose her career or a toned body), commercialization, potential complications if a handicapped child is born, the potential for mutual blackmail, etc. The other side of the argument centred primarily on the possibility of helping another person have his or her own genetic child and the fact that the motivation of the stakeholders is not always unethical or commercial (e.g., a woman may, for purely altruistic reasons, wish to carry and give birth to a child which genetically originated from her daughter or sister who cannot bear a child, etc.).[68] The debate prompted – within the medical community – the Ethics Commission of the Section of Assisted Reproduction[69] to issue an opinion on the individual methods of assisted reproduction which expressly stated that "surrogacy is an ethical method in medically indicated cases. At present, the Commission does not recommend using this method in the Czech Republic."[70] The reason for not recommending the method in the Czech Republic lay in legal aspects, because there was no legal regulation thereof under Czech law and the theory of private law (specifically, family law) which was influenced in particular by Professor Haderka's arguments (*see* above) clearly supported the view that the mother of the child is the woman who gave birth to the child. Adoption remained the only way to arrange for the "legal transfer" of the child from the surrogate mother to the intended parents, but under the law there is no legal right to adoption: the court grants adoption only if specific requirements are satisfied, notably if adoption is in the interests of the adoptive child).

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[68] See for example: Haderka, Jiří, "Fertilizace in vitro s následným přenosem embrya – 'inventura' právního řádu České republiky" [*In-Vitro Fertilisation and a Subsequent Transfer of the Embryo – 'Stock-taking' of the Legal Order in the Czech Republic*], [in:] *Lékařské listy, příloha Zdravotnických novin*, 1996, No. 4, p. 6 or Radvanova, Senta; Zuklinova, Michaela: *Kurs občanského práva – Instituty rodinného práva.* [*Course in Civil Law – Institutes of Family Law*], 1st ed. Praha: C. H. Beck, 1999, p. 77.

[69] It is a section within the Czech Gynecological and Obstetrical Society of the Czech Medical Society of J. E. Purkyně which has existed independently since 1936.

[70] The opinion was published in the official journal of the Czech Gynecological and Obstetrical Society, i.e., *Česká gynekologie*, 1996, No. 3, p. 198.

2.4. Preparation of the amendment to the family act

The developments described above related to reproductive medicine were obviously noted by the legislators. As indicated earlier, it was stated expressly, for the sake of legal certainty, that "the mother is the woman who gave birth to the child." The provision of s. 50a of the ZOR, which was inserted in the Family Act by amendment by Act No. 91/1998 Sb., to amend and supplement Act No. 94/1963 Sb., on the Family, thus left no doubts about legal maternity. The explanatory memorandum to the amendment explained that "The newly proposed provision should address the so-called "assisted reproduction." The proposed provision unequivocally clarifies maternity determination in a situation when an egg was donated to a woman who gave birth to the child. In this respect, a number of lengthy, complex lawsuits are known from other countries, as well as controversial decisions." A relatively brief justification of this provision emphasizes an important issue. Surrogate motherhood from the perspective of assisted reproduction represents only one side of the same coin: the women who have their own ova, but cannot carry or give birth to a child. The other side of the coin is represented by the women who can carry and give birth to a child, but they do not have their own ova or cannot make use of their own ova due to genetic diseases. The previously raised arguments about the impermissibility of surrogate motherhood under the Czech law thus remained valid:

> Motherhood cannot be transferred to other women: neither unilaterally nor through contract. No woman can assume the place of the rightful mother of a child (who need not be necessarily identical to the woman from which the child genetically originated) otherwise than through adoption. In this country, adoption is exclusively established through judicial decision (a contractual arrangement is not permissible), and only with respect to minors; irrevocable adoption is possible only with children who are older than 1 year on the day on which the judicial decision was issued.
>
> In this context, the notion of a "surrogate mother" makes no sense in our legal system. In this country, a contract to undergo pregnancy, give birth, and hand over the child to other persons is void and its terms are unenforceable.[71]

[71] Haderka, Jiří, "Právní ochrana statusu dítěte narozeného z lékařsky navozeného oplodňování: co je a co není právně přípustné v České republice" [*Legal Protection of the Status of a Child Born Through Assisted Reproduction: What Is and Is Not Legally Permissible in the Czech Republic*], [in:] *Správní právo,* 1998, No. 4, p. 222.

The uniform position of private law theorists on maternity determination is quite aptly summarized in the brief comment on s. 50a of the ZOR: "with respect to the still valid Roman principle that '*mater semper certa est*' this provision appears, at first sight, redundant. Yet by including this provision, legal certainty has increased around maternity in assisted reproduction situations when disputes could arise over maternity (the woman who gave birth versus the donor of the egg)."[72]

2.5. Development in the 2000s and 2010s

We should go back to the simile about the two sides of the same coin. One side represents a clear legal and theoretical position (*see* above), while the other side reflects the everyday realities of life which are rather more complicated. As Professor Haderka pointed out:

> While our legal regulation is certainly not perfect in this respect,[73] it is here and it must be respected. However, certain anti-legal nihilism seems to have set in and there are doctors specialising in reproductive medicine who pride themselves in the media[74] on flouting the legal rules. (…) it seems to be rooted in the perception that from the legal point of view, reproductive medicine is a grey area (vakuum juris) and in this legal vacuum it is solely up to the doctor (and his conscience) to decide whether or not he will carry out an assisted reproduction procedure, with the only guidance (if any) of the FIGO directive[75].[76]

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[72] Poláková, Martina, "Určení rodičovství z pohledu práva dítěte znát své rodiče deklarovaného Úmluvou o právech dítěte" [*Parenthood Determination from the Perspective of the Child's Right to Know His Parents as Declared in the Convention on the Rights of the Child*], [in:] *Právní rozhledy*, 2000, No. 2, p. 56.

[73] Authors' note: the legal regulation of assisted reproduction as provided in the Measure.

[74] Haderka is referring to certain newspaper articles: "Děti z montážní linky" [*Children from the Assembly Line*], [in:] *Lidové noviny*, 8 July 1995; "Mateřství po čtyřicítce" [*Motherhood after Fourty*], [in:] *Květy*, 1997, No. 33.

[75] Fédération internationale de gynécologie et ďobstétrique.

[76] Haderka, Jiří, "Právní ochrana statusu dítěte narozeného z lékařsky navozeného oplodňování: co je a co není právně přípustné v České republice" [*Legal Protection of the Status of a Child Born Through Assisted Reproduction: What Is and Is Not Legally Permissible in the Czech Republic*], [in:] *Správní parvo*, 1998, No. 4, p. 217.

Such an open and explicit statement reflects the previously discussed "relaxation of the rules" in assisted reproduction. As mentioned earlier, while the reports of such procedures were rather rare at first, we can now see that what used to be merely whispered in the corridors at conferences[77] is nowadays publicly presented in the media. This has led to a greater awareness among the broad public of surrogate motherhood, as well as greater demand for surrogacy which has come to be quite openly advertised in public media. A very graphic and open illustration of the current development can be found in the article "A Chance for One's Own Baby: While in Czechia Surrogacy is a Reality, the Slovaks Can Only Hope" [*Šanca na vlastné: V Česku má náhradné materstvo reálnu podobu, Slováci musia dúfať*]:

> A private hospital in Zlín offers hope to women who, for whatever reason, cannot have their own child. The child can be carried by a surrogate mother. (…) In a newly refurbished modern building in the former Baťa institute, we were welcomed by the owner, gynaecologist MUDr. David Rumpík. "I used to have some reservations whenever the topic of surrogacy was raised, notably as regards the surrogate mothers in India where it is a normal business," he surprised us at the beginning. (…) These practices have existed for a long time: the assisted reproduction procedure was undertaken, the mother acted as the mother, before the birth she relinquished[78] the child and the father took the child from the hospital. The father and his wife then arranged for adoption. However, these practices were conducted very carefully and in secret. In 2004, such practices were officialised by Professor Pilka who "fathered" the first Czechoslovak test-tube baby in 1982 in Brno. (…) It was in 2004 that we decided, following a thorough legal analysis, to use the first surrogate mother for a woman whose uterus had been removed, and her

[77] For example, the authors of this paper were told of the following surrogacy situation: the surrogate mother gave birth in hospital, she proved her identity by showing the ID card of the woman who had provided the eggs and arranged for the surrogate mother. The doctor simply turned a blind eye to the fact that the patient clearly did not resemble the photo in the ID card, and recorded in the documents the details of the woman who was not present in hospital. These practices, not at all rare, are indirectly confirmed in the currently used family law textbook from 2015 which expressly states: "The only way a woman from the commissioning couple can acquire the child (if we exclude the substitution of identification documents) is through adoption…" Hrušáková, Milana; Králíčková, Zdeňka; Westphalová, Lenka et al. *Rodinné právo.* [*Family Law*] 1st ed. Praha: C. H. Beck, 2015, p. 131. Authors' note: emphasis added.

[78] Authors' note: since maternity arises through birth, it cannot be relinquished (*see* above). *Relinquishment* here refers to consenting to the adoption of the child.

> baby was carried by her own sister. The situation remains the same today: nobody can force a surrogate mother to relinquish her child if she bonded with the child during her pregnancy. This is right. So, the first baby was born through surrogacy in our clinic, and the biological mother subsequently and after a lot of difficulties adopted the child. It took the court about two years to regularise the adoption. (…) Since 2004, thirty-one children have been born in this hospital through surrogacy.[79]

For the sake of completeness it should be added that the hospital referred to in the article (Clinic of Reproductive Medicine and Gynecology in Zlín) itself sets the prerequisites for starting a surrogacy cycle in its premises.[80] To illustrate the current open approach to surrogacy, we can mention several websites which publicly present surrogate motherhood[81] or even contain explicit advertisements both from couples seeking to hire a surrogate mother, or from surrogate mothers.[82] The sites quite openly discuss the reimbursement of the costs incurred by the surrogate mother during the process. This openness is further illustrated by various newspaper articles

[79] "Šanca na vlastné: V Česku má náhradné materstvo reálnu podobu, Slováci musia dúfať" [*A Chance for One's Own Baby: While in Czechia Surrogacy is a Reality, the Slovaks Can Only Hope*], [in:] *Život*, 2015, No. 3, available at: http://zivot.cas.sk/clanok/19260/sanca-na-vlastne-v-cesku-ma-nahradne-materstvo-realnu-podobu-slovaci-musia-dufat (last accessed: 20 March 2018).

[80] (1) There must be a clear reason for the treatment through surrogacy (medical indication). Most frequently, these are women whose uterus has been removed or women whose uterus has not developed. (2) Solely a doctor who specialises in this area can decide that surrogacy is necessary. (3) We carry out only the actual treatment, we do not arrange for surrogate mothers, nor intervene in the relationship between the genetic parents and the surrogate mother. (4) In order to be accepted for treatment, it is necessary to undertake a prior legal analysis of the relationships between the genetic parents and the surrogate mother. As a rule, legal counselling is provided in a specialised law office, the output being a written legal assessment of the situation of a specific couple and a specific surrogate mother. (5) We prefer the transfer of one embryo only; in other words, we try to avoid multiple pregnancy to minimise the risk for the surrogate mother. Quoted from http://www.ivf-zlin.cz/24903-surogatni-materstvi (last accessed: 20 March 2018).

[81] See: https://nahradni-materstvi.webnode.cz/ (last accessed: 20 March 2018).

[82] For example: https://www.emimino.cz/diskuse/nahradni-materstvi-zkusenosti-88048/ (accessed 20 March 2018).

which at present mention hundreds[83] of surrogacy cases each year.[84] Considerable media attention was paid to a problematic case when a couple hired as a surrogate mother a woman with minor psychomotor retardation. She gave birth to a handicapped boy who required constant care, and neither the couple nor the surrogate mother were interested in him, so the boy was handed over to institutional care.[85]

It is no wonder that surrogate motherhood has become a widely and repeatedly discussed topic for professionals: "A discussion on the legal regulation of surrogacy was held, for example, at a conference on surrogate motherhood organized by the Ministry of Justice of the Czech Republic in 2009, at a meeting of the Committee on Human Rights and Bioethics in February 2010, and at a meeting of the Ethics Commission of the Ministry of Health in March 2016."[86] To date, however, no

[83] See for example: "The pioneer in surrogacy was the Clinic of Reproductive Medicine and Gynecology Zlin. It was here that the first child carried by a surrogate mother was born. Nowadays it is estimated that about a hundred of them are born in Czechia each year – nobody knows exactly how many. Neither the Ministry of Health, nor any other office collects this data, and the approximately 40 reproduction clinics in the Czech Republic are reluctant to divulge any information. The information that the newspaper Pátek LN managed to obtain indicates that one hundred is probably a very sober estimate." Zídková, Lucie, "Matky z půjčovny: stovky českých dětí odnosí náhradní rodičky" [*Mothers for Rent: Hundreds of Czech Children Have Been Carried by Surrogate Mothers*], *Lidové noviny* [online], 18 November 2016; available at: https://www.lidovky.cz/matky-z-pujcovny-stovky-ceskych-deti-odnosi-nahradni-rodicky-pu6-/zpravy-domov.aspx?c=A161118_112903_ln_domov_ELE (last accessed: 24 March 2018).

[84] The figure 'hundreds' is mentioned in an article from 2014: "The first Czech child that was carried by a surrogate mother for another woman is today 21 years old. Since then, hundreds of children have been born through surrogacy in this country, and so-called surrogate motherhood is gradually ceasing to be taboo. … Today most lawyers have no doubts that surrogate motherhood is legal. "Although the new Civil Code refers to it in one sentence only, it is nonetheless clear evidence that surrogacy is foreseen in the legislation. Furthermore, the judges, as far as I know, have not yet punished anyone for surrogate motherhood in this country," claims a lawyer from Brno, Leona Musilová, who specialises in surrogate motherhood. In her opinion, it is a criminal offence only if a third party arranges an agreement between the two parties, or if a surrogate mother takes remuneration above the costs and lost earnings." Jánská, Lucie, "Konec tabu. Stovky dětí v Česku porodily náhradní matky. Prvnímu je už 21" [*End of Taboo. Hundreds of Children in Czechia Were Born by Surrogate Mothers. The First One Is 21 Years Old Now*], *Lidové noviny* [online], 22 July 2014; available at: https://relax.lidovky.cz/ja-nahradni-matka-oe2-/zdravi.aspx?c=A140721_204119_ln-zdravi_jzl (last accessed: 24 March 2018).

[85] See: Pektorová, Markéta; Ventruba, Pavel, "Surogace, ano či ne?" [*Surrogacy, Yes or No?*], [in:] *Česká gynekologie*, 2015, No. 4, p. 299 et seq.

[86] Hobzová, Hana, "Surogátní mateřství: Mohou psychologické výzkumy svědčit pro přijetí v praxi?" [*Surrogate Motherhood: Can Psychological Research Be Used as an Argument in Favour of Acceptance in Practice?*], [in:] *Psychosom*, 2016, No. 3, p. 152 et seq. [online], available at: https://www.psychosom.cz/54-archiv/615-hobzova-h-surogatni-materstvi-mohou-psychologicke-vyzkumy-svedcit-pro-prijeti-v-praxi (last accessed: 20 March 2018).

comprehensive legislative proposal has been drawn up based on these (or other) discussions to regulate surrogate motherhood.

2.6. Development in connection with the recodification of private law

The recodification of private law has always provoked considerable professional discussions. This was certainly true in the Czech Republic where, following two unsuccessful attempts, work began in 2000 on a proposal for the new civil code which was, after twelve years of intensive work, adopted as the current Civil Code.[87]

It should be noted that within the so-called Recodification Commission at the Ministry of Justice of the Czech Republic[88], the phenomenon of surrogate motherhood was also widely discussed. From 2005, when the first draft of the code was presented, until 2010, the provision on the exclusion of adoption between immediate family members (in direct line and between siblings) was proposed without any mention of surrogate motherhood. The members of the Recodification Commission – notably those who professionally dealt with family law – were obviously fully aware of the realities surrounding surrogate motherhood. In addition, shortly before that (in 2009), a conference on surrogacy had been organized for professionals by the Ministry of Justice of the Czech Republic. The conference clearly indicated an effort to change the legal *status quo* of no legal regulation of surrogate motherhood whatsoever.[89] The Recodification Commission thus decided to somehow reflect surrogate motherhood in the proposal for the civil code. It was obvious that the proposed regulation could not provide comprehensive legal rules

[87] For details on the process of recodification (notably the first phases thereof), see: Eliáš, Karel; Zuklínová, Michaela, *Principy a východiska nového kodexu soukromého práva*. [*Principles and Points of Reference for the New Private Law Code*], 1st ed. Praha: Linde Praha, a. s., 2001 p. 37 et seq.

[88] The co-author of this paper, Associate Professor Frinta, was a member thereof.

[89] "Daniela Kovářová, the Minister of Justice, wants to help women who cannot have children. At the conference on surrogate motherhood, she and Dana Jurásková, the Minister of Health, and other professionals, initiated a discussion about possible legal regulation for a situation when a childless couple arranges for another woman to give birth to their child. In the Czech Republic, cases when another woman carries and gives birth to a child of a married couple are still in legal limbo. Kovářová would like to concentrate primarily on the legal and health aspects of surrogate motherhood"; quoted after ČT24: "Kovářová s Juráskovou otevírají cestu náhradnímu mateřství" [*Kovářová and Jurásková Open the Door to Surrogate Motherhood*], 2 September 2009; available at: http://www.ceskatelevize.cz/ct24/domaci/1387477-kovarova-s-juraskovou-oteviraji-cestu-nahradnimu-materstvi (last accessed: 20 March 2018).

on surrogate motherhood as such rules fell under the proposal for Act No. 373/2011 Sb., on Specific Healthcare Services, which was being prepared at that time and which provided for assisted reproduction (see above). Likewise, it was clear that the Civil Code could not simply defeat the rule that the mother is the woman who gave birth to the child (on the basis of Haderka's above-mentioned arguments on the essence of motherhood, as well as in accordance with Article 2 of the European Convention on the Legal Status of Children Born out of Wedlock under which motherhood should be based solely on the fact of the birth of the child, and last but not least for the sake of maintaining legal certainty with respect to a woman who decides to become pregnant by way of a donated ovum or embryo if she cannot use her own genetic material). Thus, the prevailing opinion recognized that surrogate motherhood should be foreseen in the Civil Code as reflecting the current *status quo*, i.e., as a reality of life that occurs now and then and that is legally completed through adoption by the commissioning parties who hired the surrogate mother. This made the Recodification Commission focus on the adoption provision. Paradoxically, the provision of s. 804 of the CC, excluding adoption because of a family relationship (see above), "complicated" adoption in situations when the reasons for surrogate motherhood were, due to a close family relationship, for the most part purely altruistic and ethically acceptable (e.g., a mother carries, for her daughter, an embryo which originated genetically from her daughter, *see* above). Removing the exclusion of adoption in this case appears acceptable even given that surrogacy completed through adoption can occur between women who are not related and where the motivation of the surrogate mother can be purely driven by profit. Against the backdrop of these considerations, it was decided to insert subsequently (i.e., in the draft proposal of 30 December 2010), in s. 804 of the CC, a surrogacy exception to the exclusion preventing adoption due to family relationship.

This approach to surrogate motherhood can be, to the best of the authors' knowledge, considered as quite exceptional and original in the European context. It can be compared to the solution reached in the fairy tale entitled "The Peasant's Wise Daughter".[90] Like in the fairy tale, we can simply conclude that surrogate motherhood is *neither regulated nor ignored* in the current Civil Code. While on the one hand it

[90] The daughter had to prove her wisdom by coming to her fiancé's house "neither during the day, nor at night; neither dressed nor naked; neither by walking nor by riding". She resolved the riddle by putting on a coarse and very thin sack, a stocking on one leg, and a shoe on the other bare foot. Just before dawn she sat on a goat and she half-walked and half-rode to the town. Her fiancé acknowledged that she was a witty girl and he proposed to her. Quoted after: Němcová, Božena, "Chytrá horákyně"

is stipulated that surrogate motherhood produces a certain legal effect in a certain situation (allowing an exception to adoption between relatives), on the other hand, the Civil Code does not clarify the essence of this concept, and specifically the (un)lawfulness of its essence, i.e., of the surrogacy agreement between the parties. Whatever the evaluation of this solution (see below), it should be remembered that the Recodification Commission has opted for this reflection of surrogate motherhood in the code because the members believed that sooner or later there would be comprehensive legal regulation of surrogate motherhood in the Czech Republic (*see* above), and the Civil Code would then be ready, with no need for amendment to this crucial piece of legislation. However, such comprehensive legal regulation has not yet been adopted, nor is it in the pipeline.

2.7. Current debate on surrogate motherhood

As noted above, the first two decades of the 21st century saw surrogate motherhood become a perfectly normal part of the social reality in the Czech Republic, and this should be taken into account when evaluating the current legal situation. In order to survey current opinion, one should preferably start by consulting commentaries, which are perceived in the Czech Republic as a faithful representation of the current theory and practice of private law.

In the Czech Republic, there are currently three commentaries on the current Civil Code. In her commentary on s. 775, Frintová notes the peremptory nature of the provision on maternity determination and the consequences arising therefrom for surrogate motherhood when "due to the peremptory nature of this provision (…) any surrogacy contracts are not legally enforceable. In this situation, the only way to integrate a child in a new family is through adoption."[91] In the same source, Nová in her commentary on s. 804 of the CC argues for the introduction of comprehensive legal regulation of surrogate motherhood when she contends that "in the current state of our society it is undoubtedly necessary to regulate this area, and

[The Peasant's Wise Daughter]; available at: http://www.cist.cz/Pohadky/horakyne.htm (last accessed: 20 March 2018).

[91] Frintová, Dita. Komentář k § 775 OZ. [Commentary on Section 775 of the Civil Code], [in:] Švestka, Jiří; Dvořák, Jan; Fiala, Josef et al. *Občanský zákoník. Komentář.* [*Civil Code. Commentary*] *Vol. II.* Praha: Wolters Kluwer, a. s., 2014, p. 282.

the Civil Code anticipates this development."[92] In another commentary, Králíčková emphasizes:

> If a surrogacy contract was foreseen in the new Civil Code, this would give rise to significant uncertainty around the status of a child born to a surrogate mother. If the child was "actually rejected" by both the surrogate mother who "merely" gave birth to the child, and the mother who "merely" made the necessary arrangements and, as a rule, also supplied her genetic material, the child would find itself in a position of "unwanted performance" under a nominate "contract" with dubious legal enforceability. The human and human-rights aspects in such a case are completely disregarded.[93]

In the same commentary, Sedlák interprets rather positively the exception under s. 804 of the CC which defeats, in the case of surrogate motherhood, the prohibition of adoption between close relatives, stating that "by defeating this principle in favor of surrogate motherhood, foundations have been laid for remedying the situation when the parents whose genetic material was used to conceive a child are not parents in the legal sense due to the principle *mater semper certa est* embodied under s. 775"[94] Likewise, in the third commentary, Šínová notes that "the Czech legal regulation of motherhood is clearly unsatisfactory, failing to meet the current needs of society. As a result, certain practices appear which exacerbate the whole situation, because they can lead to a legal impasse."[95] Such situations include home births to avoid immediate records in the registers of births and deaths (a surrogate mother gives birth to a child at home, and subsequently a commissioning parent comes to

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[92] Nová, Hana. Komentář k § 804 OZ. [Commentary on Section 804 of the Civil Code], [in:] Švestka, Jiří; Dvořák, Jan; Fiala, Josef et al. *Občanský zákoník. Komentář.* [*Civil Code. Commentary*] *Vol. II.* Praha: Wolters Kluwer, a. s., 2014, p. 353.

[93] Králíčková, Zdeňka. Komentář k § 775 OZ. [Commentary on Section 775 of the Civil Code], [in:] Hrušáková, Milana; Králíčková, Zdeňka; Westphalová, Lenka et al. *Občanský zákoník II. Rodinné právo (§655–975). Komentář.* [*Civil Code II. Family Law (ss. 655-975). Commentary*], 1st ed. Praha: C. H. Beck, 2014, p. 515.

[94] Sedlák, Petr. Komentář k § 804 OZ [Commentary on Section 804 of the Civil Code], [in:] Hrušáková, Milana; Králíčková, Zdeňka; Westphalová, Lenka et al. *Občanský zákoník II. Rodinné právo (§655–975). Komentář* [*Civil Code II. Family Law (ss. 655-975). Commentary*], 1st ed. Praha: C. H. Beck, 2014, p. 645.

[95] Šínová, Renáta. Komentář k § 775 OZ [Commentary on Section 775 of the Civil Code], [in:] Melzer, Filip; Tégl, Petr. *Občanský zákoník – velký komentář* [*Civil Code – Large Commentary*] Vol. IV. ss. 655–975. Praha: Leges, 2016, p. 865.

the registry of births and deaths to record the child as their own, if necessary with a falsified medical report), and the births described above when in the hospital the surrogate mother uses the identification documents of the commissioning mother.[96]In the same commentary, Zemandlová puts forward a case for more detailed regulation of this procedure, "or, as appropriate, for the integration thereof within existing legal concepts (assisted reproduction procedures, parenthood determination). It would be primarily useful to clearly stipulate the conditions for surrogacy practices, both in healthcare regulations and in family legislation."[97] In the light of the foregoing it is clear that the prevailing opinions in the commentaries consider the current situation as rather unsatisfactory, calling for more detailed legal rules.

Similarly, some other contemporary academic literature[98] presents opinions which *de lege ferenda* make a case for adopting detailed legal provisions. For example, a work surveying current problems in family law regulation devoted three chapters to surrogate motherhood. The author, Marek, aptly identifies the negative issues associated with surrogate motherhood (which are in no way affected by the fact that surrogacy is no longer taboo in society): "Along these lines, a major threat can be seen in the extreme emotions experienced by both contracting parties: either party has a fairly good opportunity to blackmail because all the stakeholders are greatly involved both mentally and physically."[99] He further calls for simple legal regulation to ensure that the whole process is, from the very beginning, supervised by the court.[100]Likewise, Smolíková argues for more (albeit minimalistic) regulation: "We believe that it is rather unfortunate to provide for surrogate motherhood in the Czech Republic solely through a mention in s. 804. (…) In our opinion, surrogate

[96] For details, see: Šínová, Renáta. Komentář k § 775 OZ [Commentary on Section 775 of the Civil Code], [in:] Melzer, Filip; Tégl, Petr. *Občanský zákoník – velký komentář* [*Civil Code – Large Commentary*] Vol. IV. ss. 655–975. Praha: Leges, 2016, p. 865.

[97] Zemandlová, Anna. Komentář k § 804 OZ [Commentary on Section 804 of the Civil Code], [in:] Melzer, Filip; Tégl, Petr [*Civil Code – Large Commentary*] Vol. IV. ss. 655–975. Praha: Leges, 2016, p. 1093.

[98] Literature published after the adoption of the current Civil Code.

[99] Marek, Tomáš, "K některým otázkám surogátního mateřství" [On Some Issues Surrounding Surrogate Motherhood], [in:] Šínová, Renáta, Šmíd, Ondřej, Juráš, Marek. *Aktuální problémy rodinněprávní regulace: rodičovství, výchova a výživa nezletilého* [*Current Problems in Family Law Regulation: Parenthood, Upbringing and Maintenance of a Minor*], Praha: Leges, 2013, p. 116.

[100] Marek, Tomáš, "K některým otázkám surogátního mateřství" [On Some Issues Surrounding Surrogate Motherhood], [in:] Šínová, Renáta, Šmíd, Ondřej, Juráš, Marek, *Aktuální problémy rodinněprávní regulace: rodičovství, výchova a výživa nezletilého* [*Current Problems in Family Law Regulation: Parenthood, Upbringing and Maintenance of a Minor*], Praha: Leges, 2013, p. 118.

motherhood should be formally regulated at least in broad lines, notably by defining the underlying relations covered by this concept, and by identifying the health-related requirements to be fulfilled."[101] Zemandlová summarises the significance of s. 804 of the CC as reflecting the current practices when the whole process of surrogate motherhood is completed through adoption. She emphasizes that while the mention in the Civil Code is small, it is significant in its content because "if we posit that where a statute foresees particular conduct (which is clearly the case under s. 804 of the new CC), we inevitably conclude that surrogate motherhood under the new CC is permitted conduct (a claim to the contrary would defeat the principle that legal rules must be free of contradictions). (…) Yet adoption in surrogacy cases has certain specific aspects."[102] Her thoughts from the perspective of *de lege ferenda* lead to the conclusion that the legal concept of adoption should address the specific situation when the adoption is undertaken to complete the surrogacy process:

> In this respect, we could draw inspiration from the requirements stipulated under English law, in particular the simplified procedure for the acquisition of legal parenthood (parental order or "fast-track" adoption). It should be remembered, though, that by adjusting adoption to the specificities of surrogate motherhood we are not surrendering compliance with basic principles (notably genuine consent of all parties, non-commercialisation, best interests of the child, etc.). The aim is to streamline the adoption process so that the legal status of all stakeholders is resolved as soon as possible, and the amalgamation of biological, social, and legal parenthood is not unnecessarily impeded.[103]

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[101] Smolíková, Kateřina, "Úprava náhradního mateřství v návaznosti na § 804 nového občanského zákoníku" [Regulation of Surrogate Motherhood with Regard to s. 804 of the New Civil Code], [in:] Šínová, Renáta, Šmíd, Ondřej, Juráš, Marek, *Aktuální problémy rodinněprávní regulace: rodičovství, výchova a výživa nezletilého* [*Current Problems in Family Law Regulation: Parenthood, Upbringing and Maintenance of a Minor*], Praha: Leges, 2013, p. 118.

[102] Zemandlová, Anna, "Perspektiva surogátního mateřství u nás: inspirace z anglického práva" [Perspective of Surrogate Motherhood in Our Country: Inspiration from English Law], [in:] Šínová, Renáta, Šmíd, Ondřej, Juráš, Marek, *Aktuální problémy rodinněprávní regulace: rodičovství, výchova a výživa nezletilého* [*Current Problems in Family Law Regulation: Parenthood, Upbringing and Maintenance of a Minor*], Praha: Leges, 2013, pp. 135–136.

[103] Zemandlová, Anna, "Perspektiva surogátního mateřství u nás: inspirace z anglického práva" [Perspective of Surrogate Motherhood in Our Country: Inspiration from English Law], [in:] Šínová, Renáta, Šmíd, Ondřej, Juráš, Marek, *Aktuální problémy rodinněprávní regulace: rodičovství, výchova*

In her paper for a law journal, Králíčková notes that:

> We are left with no choice but to maintain that the silence of the legislators on this matter, apart from a single mention with respect to adoption included in the final draft of the Civil Code (see the second sentence of s. 804 of the CC), does not imply that that surrogate motherhood is 'permitted' and that surrogacy contracts (whatever designation is used by the parties, lawyers, or doctors) can be freely entered into.[104]

The above quotation might suggest that Králíčková infers a ban on surrogate motherhood as such (based on s. 775 of the CC and the whole concept of maternity determination). However, this is not the case because later in her paper she indicates that the ban only relates to the question of whether surrogacy contracts should be considered binding:

> If a surrogacy contract was foreseen in the new Civil Code, the status of a child born to a surrogate mother would be, from the very start, quite uncertain. The human and human-rights aspects in such a case are completely disregarded. (…) In the light of the above- mentioned understanding of status rights and the fact that a surrogacy contract is void, a question arises as to how the commissioning couple become parents de jure. The only way the commissioning couple can acquire the child (if we exclude the substitution of identification documents) (…) is through adoption (…)[105]

She eventually criticizes the current state as well when she contends:

> Rather than trying to align our legislation with European standards, notably with the legislation of the neighboring countries, the Czech Republic has allowed the notion of surrogate motherhood to enter the legal system through

a výživa nezletilého [*Current Problems in Family Law Regulation: Parenthood, Upbringing and Maintenance of a Minor*], Praha: Leges, 2013, p. 140.

[104] Králíčková, Zdeňka, "Mater semper certa est! O náhradním a kulhajícím mateřství" [*Mater semper certa est! About Surrogate and Limping Motherhood*], [in:] *Právní rozhledy*, 2015, No. 21, p. 730.

[105] Králíčková, Zdeňka, "Mater semper certa est! O náhradním a kulhajícím mateřství" [*Mater semper certa est! About Surrogate and Limping Motherhood*], [in:] *Právní rozhledy*, 2015, No. 21, pp. 729–730.

> a totally marginal matter, namely an exemption from the prohibition of adoption between close relatives (see the second sentence of s. 804 of the CC). This has opened the door to the questioning of traditional values, status rights, and notably the rights of the child. Such a situation is certainly not satisfactory.

Likewise, Císařová and Sovová posit that "surrogate motherhood, both between persons living permanently in the Czech Republic and with a cross-border element, has become a reality of life."[106] In their view, it is untenable in the long term "for the legislators to ignore this serious reality occurring in human life and in actual legal practice." As regards the relation between the surrogate mother and the intended parents, the authors quite pragmatically claim that "written form should be prescribed for any arrangement between the surrogate mother and the intended parents, to provide a breakdown of costs related to pregnancy and birth, as well as possible personal assistance for the mother. Last but not least, it is necessary to address the recovery of the surrogate mother after birth, i.e., during the puerperium"[107]; and these terms are the only provisions that can be legally enforced (unlike, for example, a provision on the required consent to the adoption of the child). In her paper, Burešová focused on several real surrogacy cases, drawing attention to a unique area:

> An area which tends to be disregarded by authors and which centres on a narrow segment of surrogate motherhood, namely non-traditional families composed of two same-sex parents and a child or children. (…) Surrogate motherhood is in fact the only legal avenue that a number of same-sex male couples pursue if they wish to raise a child in their partnership, without the mother's involvement. Surrogate motherhood tends to be associated with an infertile heterosexual couple which, in its role of the commissioning couple, acts as intended parents. Yet for various reasons, most authors disregard the fact that there are situations when the role of the commissioning couple is taken on by a same-sex couple.[108]

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[106] Císařová, Dagmar; Sovová, Olga, "Náhradní mateřství v právní praxi" [*Surrogate Motherhood in Legal Practice*], [in:] *Journal of Medical Law and Bioethics*, 2015, No. 2, p. 24.

[107] Císařová, Dagmar; Sovová, Olga, "Náhradní mateřství v právní praxi" [*Surrogate Motherhood in Legal Practice*], [in:] *Journal of Medical Law and Bioethics*, 2015, No. 2, p. 22.

[108] Burešová, Kateřina, "Surogátní mateřství a jeho (nejen) právní aspekty?" [*Surrogacy and Its (Not Only) Legal Aspects?*], [in:] *Právní rozhledy*, Praha: C. H. Beck, 2016, No. 6, p. 199.

From the perspective of *de lege ferenda* she concludes that:

> It is quite obvious that completely liberal legislation allowing economic surrogate motherhood is certainly not desirable. With respect to the anticipated legislative proposals, this is clearly illustrated by Russia or India: the countries which have become a destination for surrogacy tourism, but which are also accused of abusing the poverty or economic hardship of women, contrary to the human rights policy, as such women are forced to undergo surrogacy, sometimes even repeatedly. Such women have become victims of the legal system, taking major health risks. Another issue is modern-day slavery.[109]

Finally, Telec in his timely essay develops the understanding of surrogate motherhood as a non-legal personal favor which is not based on a contract in the legal sense; personal favurs remain deliberately unregulated.[110]

This survey[111]of current academic discussion on surrogate motherhood points to several facts. Despite the limited extent of the survey, it quite convincingly indicates that considerable attention is devoted to surrogate motherhood in the Czech Republic, both among professionals (in the legal and medical branches) and the broad public.[112] Although individual participants in this discourse focus on various aspects of this issue, a recurrent theme is discernible across the board: surrogate motherhood has become a reality of life, and the law (due to its inertia) has failed to adequately take it into account (with the exception of s. 804 of the CC). The authors

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[109] Burešová, Kateřina, "Surogátní mateřství a jeho (nejen) právní aspekty?" [*Surrogacy and Its (Not Only) Legal Aspects?*], [in:] *Právní rozhledy*, Praha: C. H. Beck, 2016, No. 6, p. 201.

[110] See: Telec, Ivo, *Náhradní mateřství: osobní úsluha mimo právo* [*Surrogate Motherhood: Non-Legal Personal Favour*]; available at: https://zdravotnickepravo.info/nahradni-materstvi-osobni-usluha-mimo-pravo/ (last accessed: 29 March 2018).

[111] Due to space limitations, the present survey cannot be exhaustive.

[112] For illustration, in 2014 a survey was undertaken at the Institute of Social Work at the University of Hradec Králové to analyse and describe the level of public awareness of surrogate motherhood. The survey showed that the public is "quite familiar with the notion of surrogate motherhood, and regarding the permissibility of surrogate motherhood, most respondents agreed that it should be permitted in cases of infertility. (…) It was widely agreed that a surrogate mother should be entitled to reasonable and sufficient financial compensation (on a case by case basis)." Quoted according to Mitlöhner, Miroslav; Sovová, Olga. *Právní problematika umělé lidské reprodukce* [*Legal Aspects of Artificial Human Reproduction*], 1st ed. Hradec Králové: Gaudeamus, 2015, p. 56 et seq. For details, including compiled statistical data, see ibid.

widely agree that legal provisions[113] should be adopted to regulate this issue in future, bearing in mind the problems associated with surrogate motherhood.

Finally, it is interesting to confront this line of thought with the opinion of the Ministry of Health of the Czech Republic (notably its Ethics Commission).[114] In its opinion of 24 January 2017, the commission made the following observations with respect to surrogate motherhood:

> The greatest moral problem of surrogate motherhood is possible commercial abuse, which already occurs quite often. In such cases, a child becomes an object of business, contrary to parental ethics, declarations of human rights and the rights of the child, and applicable legislation. However, business is often transacted in a grey area which is difficult to properly supervise, and the stakeholders themselves may not be fully aware that their actions are inconsistent with fundamental moral and legal rules. (…) In a situation when a substantial proportion of the population considers this method appropriate for certain types of infertility, a ban on surrogate motherhood would not be respected. This concern is validated by the women engaging in 'abortion tourism' if they live in a country where abortions are illegal. (…) However, any legislative solution protecting the interests of biological parents (in particular, the rules on the hand-over of the child into their care after the surrogate mother has given birth to the child) opens the door to commercialisation of the process, and morally and legally reprehensible child-trafficking. In the light of the foregoing arguments, the members of the Ethics Commission of the Ministry of Health of the CR consider the current legal regulation in the Czech Republic, which does not address surrogate motherhood and insists on the old parenthood concepts, as the lesser evil among all other options. The members strongly oppose any amendments that would aim to provide greater protection to the biological parents' interests than the existing legislation does.[115]

[113] The authors mostly present merely rough ideas about the legislation to be adopted rather than specific proposals, though.

[114] The Ethics Commission of the Ministry of Health of the Czech Republic was established following the adoption of Act No. 123/2000 Sb., on Medical Equipment, and resumed the activities of the former Central Ethics Commission of the Ministry of Health of the Czech Republic.

[115] Opinion of the Ethics Commission of the Ministry of Health of the Czech Republic on some issues of assisted reproduction, 24 January 2017; available at: https://www.mzcr.cz/dokumenty/

It was indicated above that despite intensive discussions on this topic, further legal provisions in this area have not yet been adopted, and given the foregoing it is clear that no change in this respect can be expected in the near future. This is even more probable after a handicapped child born from a surrogate mother and subsequently placed in institutional care sensitized the public to this issue, but nevertheless has not (despite public proclamations made at that time)[116] led to any progress or activity to yield some tangible results.

2.8. Summary

It follows from this part that a debate on surrogate motherhood has been underway in the Czech Republic since the very beginnings of reproductive medicine in this country. The nature and outcomes of the debate have always been affected by the contemporary social and political realities. In the first stage, when surrogate motherhood was a new phenomenon, a negative approach prevailed: the underlying (ethical and legal) risks and problems associated with the procedure had already been identified. During the first stage, the healthcare system was centrally managed and controlled; thus, there were no discrepancies between the opinions of the experts and the social reality. This negative approach continued after 1989 when the state monopoly on the healthcare system ceased to exist. The newly acquired freedom and the fall of totalitarian power brought about a 'relaxation of the rules' in numerous areas, including in assisted reproduction. A greater awareness of surrogate motherhood generated increasing demand therefor. At first there were just scattered cases, with hardly any information on them publicly available, but gradually, as the cases became more numerous, more information began to appear.

stanovisko-eticke-komise-ministerstva-zdravotnictvi-k-nekterym-otazkam-asistovan_13839_3359_1.html (last accessed: 24 March 2018).

[116] See, for example: "A shocking case of a one year old boy who was born handicapped to a surrogate mother and ended up in an orphanage, rejected both by the surrogate mother and the biological parents, could change Czech laws. (…) Josef Vymazal, the Deputy Minister of Health, told the newspaper *Právo* on Thursday that he would convene a working group in September, composed of Ministry civil servants, gynaecologists, medical ethics experts, and health insurance representatives to deal with this issue", quoted after Kovářová, Radka, "Otřesný případ odloženého dítěte rozhoupal úředníky. Náhradní mateřství půjde na přezkum" [*A Shocking Case of a Rejected Child Sets the Ball Rolling. Surrogate Motherhood to Be Reviewed*],14 August 2015; available at: https://www.novinky.cz/domaci/377691-otresny-pripad-odlozeneho-ditete-rozhoupal-uredniky-nahradni-materstvi-pujde-na-prezkum.html (last accessed: 24 March 2018).

Progressively (and notably after 2004, see above), surrogate motherhood became a reality of life, and an integral part of assisted reproduction. Given the prevalence of this phenomenon, it was at least minimally foreseen in the recodification of private law. This could be regarded as the removal of the last taboo surrounding this issue in society. Following this development, Czech private law theorists started to call for more detailed legal rules, in spite of the rather cautious approach of the state (Ministry of Health, *see* above). Despite the opinions mentioned above, it cannot be expected that any (even piecemeal) legal provisions on surrogate motherhood will be adopted in the foreseeable future.

3. Basic criminal issues of child trafficking

3.1. General information

Under Czech criminal law, child trafficking falls under the crimes against freedom which are set out in Title II, Section 1 of Act No. 40/2009 Sb., the Criminal Code (the "Criminal Code"). Specifically, such crimes are covered by ss. 168–179, of which the crimes associated with surrogate motherhood are human trafficking (s. 168 of the Criminal Code) and entrusting another person with a child (s. 169 of the Criminal Code). In addition, it should be noted that the Czech criminal law provides for the criminal liability of legal entities by virtue of Act No. 418/2011 Sb., on Criminal Liability of Legal Entities and Proceedings Against Them. The nature of a legal entity, as an artificial legal construct[117], implies that a legal entity cannot commit certain crimes (e.g., infanticide under s. 142 of the Criminal Code or bigamy under s. 194 of the Criminal Code, etc.). The legislator has reflected this in s. 7 of the act, by providing an exhaustive list of all crimes that a legal entity is incapable of committing. With respect to surrogate motherhood it is significant that the above-mentioned crimes of human trafficking or entrusting a child to another person are not included in the list; consequently, a legal entity may be punished for such crimes.

[117] The current Civil Code is based on the theory of fiction of legal entities, see: s. 20 of the CC.

3.2. Crimes of human trafficking and entrusting a child to another person

The name of the crime under s. 168 of the Criminal Code suggests that it could apply to the commercial form of surrogate motherhood. However, that is not the case, because the crime is committed by whoever forces, procures, hires, incites, entices, transports, conceals, detains, or consigns a child to be used by another for: a) sexual intercourse or other forms of sexual abuse or harassment, or for the production of pornographic works; b) the extraction of tissue, cell, or organs from his/her body; c) service in the armed forces; d) slavery or servitude; or e) forced labour or other forms of exploitation, or who profits on such conduct (s. 168 (1) of the Criminal Code – child trafficking).[118] Section 168 of the Criminal Code protects the personal freedom of a person in the broadest sense, i.e., freedom to move and take decisions in all areas of one's life. Yet this provision cannot apply to surrogate motherhood, not even in its commercial form, because a child is entrusted to another person for the purpose of adoption (see above), and not for the purposes expressly stipulated.

By contrast, adoption is expressly mentioned in s. 169 of the Criminal Code – the crime of entrusting a child to another person. The crime is defined as follows: whoever entrusts for remuneration a child to another person for the purpose of adoption or for another similar purpose shall be sentenced to imprisonment for up to three years or to prohibition of activity (s. 169 (1) of the Criminal Code).[119] Thus this provision is a special provision with respect to s. 168 of the Criminal Code, and the commission of both crimes arising from a single act is impossible.[120] It is clear that surrogate motherhood as such (i.e., carrying out an assisted reproduction procedure on a surrogate mother so that she can carry a child that she will hand over, after birth, to the commissioners) is not a criminal offence. But it would be

[118] It should be added that s. 168 (2) of the Criminal Code applies to trafficking in persons over 18 years of age. While child trafficking is always prosecuted, adult trafficking must be accompanied by the use of or threat of violence or other serious harm, etc.

[119] This is linked to s. 798 of the CC, under which no person may obtain unfair profit from the activities associated with the arrangement of adoption. However, under s. 169 of the Criminal Code, anyone who is guilty of conduct stipulated therein is criminally liable, irrespective of whether or not such a person arranged for adoption.

[120] See: Šámal, Pavel et al. *Trestní právo hmotné.* [*Substantive Criminal Law*], 8th ed. Praha: Wolters Kluwer ČR, 2016, p. 598.

a crime to hand over the child for adoption for remuneration. Both the surrogate mother and the commissioners (as abettors) would be criminally liable.[121]

The authors of this work are not aware of a single case in which a surrogate mother or commissioners were prosecuted in connection with adoption of a surrogacy child, although surrogacy offers are often openly advertised on online discussion sites. The authors believe that if such prosecution was initiated, the case would likely be widely publicized due to the generally positive approach of the public to surrogacy and openness of the debate thereon, and thus would be certainly noticed by professionals. For a similar opinion, see other authors as well.[122] It is the potential risk of criminal sanctions (even if not enforced in reality) that prompted some authors to call for detailed legal provisions on surrogate motherhood: "It is most appropriate that the fundamental surrogacy issues be regulated, due to criminal implications and the decriminalization of ordinary life situations.'[123]

3.3. Summary

In terms of criminal law, surrogate motherhood as such is not a crime. It cannot be a crime because after the recodification of private law it is foreseen in s. 804 of the CC as a concept which is consistent with the law. However, criminal consequences could arise in the case of commercial surrogacy, as regards the final stage thereof: adoption of the child by the commissioning parents for remuneration given to the surrogate mother. But this has, in all probability, not happened yet. It can be down to the fact that both parties before the adoption court are deliberately silent on any remuneration, or that the current approach to surrogate motherhood is very liberal

[121] For details see: Mitlöhner, Miroslav; Sovová, Olga, *Právní problematika umělé lidské reprodukce.* [*Legal Aspects of Artificial Human Reproduction*], 1st ed. Hradec Králové: Gaudeamus, 2015, pp. 30–31.

[122] In particular, Mitlöhner, Miroslav; Sovová, Olga, *Právní problematika umělé lidské reprodukce.* [*Legal Aspects of Artificial Human Reproduction*], 1st ed. Hradec Králové: Gaudeamus, 2015, p. 31.. In this respect, it is interesting to refer to the findings set out in the Master's Thesis by Barbora Bílková. Based on the Free Access to Information Act (Act No. 106/199 Sb.) she was provided with seventeen adoption judgments in which it was indicated that the child was born to a surrogate mother. None of the judgments addressed the issue of compensation for the surrogate mother. For details, see: Bílková, Barbora, *Náhradní mateřství.* [*Surrogate Motherhood*] Praha, 2017. Master's Thesis. Charles University, Faculty of Law. Thesis advisor: Ondřej Frinta, p. 23.

[123] Císařová, Dagmar; Sovová, Olga, "Náhradní mateřství v právní praxi" [*Surrogate Motherhood in Legal Practice*], [in:] *Journal of Medical Law and Bioethics*, 2015, No. 2, p. 22.

and open in the Czech Republic, including the feeling that a surrogate mother naturally deserves adequate compensation for her assistance to the childless couple.

4. Cross-border surrogacy

4.1. General information

Various jurisdictions have various approaches to surrogate motherhood. While it is expressly permitted in some of them, albeit only in an altruistic, non-commercial, and gratuitous form (e.g., the UK, Portugal, Hungary, the Netherlands, Israel), or even in a commercial form (e.g., Russia, Ukraine, Belarus, India, some US states, South Africa), elsewhere it is expressly prohibited (Spain, France, Germany, Austria, Turkey, some US states), or unregulated or partially regulated (e.g., the Czech Republic).[124] Since there is a global demand for surrogate motherhood (except in the so-called "developing countries") and each country has its own approach, it is not surprising that there is "reproductive tourism" and specifically "surrogacy tourism". Historically, the so-called "abortion tourism" was well known, when pregnant women from countries with anti-abortion laws travelled to countries where abortion could be performed safely and without any risk of sanctions. The same applies to surrogate motherhood and the countries with restrictive laws. Interested persons from such countries (and to a lesser extent from countries with unclear rules) travel to look for a surrogate mother in countries which permit such practices.

Based on the approach to surrogate motherhood in the Czech Republic described above, it can be estimated[125] to what extent there is a need in the Czech Republic to look for a surrogate mother abroad, and to what extent the Czech Republic can be an attractive destination for foreign nationals looking for a surrogate mother.

As regards the former situation, it can be assumed that the number of Czech citizens seeking to hire a surrogate mother abroad is currently rather limited, but it does happen occasionally. Such cases are sometimes publicly discussed on online discussion sites. These are primarily older cases from the time when this issue was

[124] See, for example: https://en.wikipedia.org/wiki/Surrogacy_laws_by_country#/media/File:Maternidad_subrogada_situaci%C3%B3n_legal.PNG (last accessed: 24 March 2018).

[125] In this case, only a rough estimate can be made because there are no statistics in the Czech Republic suggesting the prevalence of this phenomenon.

still taboo.[126] In one case, the Czech citizens travelled all the way to Georgia to hire a surrogate mother. They argued that they had greater legal certainty in this way than they would have with a Czech surrogate mother, and the total costs also played a role.[127] Nevertheless, the authors believe that these cases account for just a fraction of all surrogacy pregnancies in the Czech Republic. According to the authors, this view is supported by the liberal approach to this issue in the Czech Republic during the last two decades, as shown above.

As regards the latter situation, it can be assumed that it would be extremely rare (if it occurred at all) for foreign nationals to seek to do the surrogacy process in the Czech Republic. The reason is that in order to finalize the process, it would be necessary to carry out adoption because it is the woman who gave birth to the child who is identified, upon birth, as the mother under Czech law. Undoubtedly, any interested foreign nationals would be discouraged by the thought of having to apply to the Czech court for adoption of this child[128], or that the child would need to be adopted in the home country of the intended parents. This is supported by the argument that such foreign nationals can use surrogate mothers from the countries where surrogate motherhood is perfectly legal and the whole process is, given the local regulation, predictable in all its phases. As a result, the following discussion will concentrate solely on the situations when Czech nationals acquire a child that was carried by a surrogate mother abroad, and then return with the child to the Czech Republic.

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[126] "Lukáš, 15 September 2009: Personally I know about three couples who brought children, born in this way, from America, and everything was OK. The price they paid is enormous if you convert the amount to CZK, it can be millions. The key thing is that it is all perfectly LEGAL, transparent, and no-one makes any fuss about it there"; quoted verbatim from: https://hobby.idnes.cz/odpovedi.aspx?t=166&akce=otazky (last accessed: 24 March 2018).

[127] "Anonymous, 30 May 2012: Hi, my baby is being carried by a surrogate mother. But we had the procedure done in Georgia, they have better laws. A surrogate mother is there merely a 'carrier'. I am the mother, the father is the father, so she does not relinquish the child after birth and I do not need to adopt it. Unfortunately, you cannot involve the insurance provider, so you have to bear all the costs. Still, in Georgia surrogate motherhood is one of the cheapest, and like I said, they have the best laws (…) Because our surrogate mother is in Georgia and she cannot speak English, there is no communication between us. All the news comes from the doctor only. It is terribly difficult for me to know that my baby is growing somewhere there and I know absolutely nothing about her. I can't wait to have her here!"; quoted verbatim from: https://www.emimino.cz/diskuse/je-tu-nekdo-komu-porodi-dite-nahradni-matka-111193/ (last accessed: 24 March 2018).

[128] International adoption which is even more complicated than standard adoption without any international element. Generally, only such children can be adopted internationally for whom no family can be found in the Czech Republic.

4.2. Recognition of other states' decisions on parenthood determination in surrogacy cases

As indicated above, there are situations when Czech citizens decide to arrange for surrogacy abroad. Consequently, the assisted reproduction procedure for the surrogate mother and the birth will take place outside the Czech Republic. The parents will subsequently receive the child's birth certificate in accordance with the national legislation; the certificate can be usually issued only after the national court decided that the persons concerned are to be registered as the child's parents.[129] The Czech citizens then return with the child and the birth certificate to the Czech Republic where they first apply for a certificate of Czech citizenship[130], and subsequently they apply to have the child's birth recorded in the Czech register of births and deaths (i.e., a special register of births managed by the municipality office Brno-střed which contains, inter alia, records of births abroad[131]). In order to do so, the parents present the child's birth certificate documenting the birth abroad and indicating who the child's parents are according to the issuing state. If the Czech registry of births and deaths is to recognize the certificate as a public instrument, i.e., so that a public instrument issued abroad can have the same evidentiary authority in the Czech Republic, the certificate usually must, under s. 12 of Act No. 91/2012 Sb., Governing Private International Law, include the prescribed authentication.[132]

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[129] See, for example: the issuance of the so-called "parental order" in accordance with s. 54 of the Human Fertilisation and Embryology Act in the UK.

[130] See notably: s. 41 et seq. of Act No. 186/2013 Sb., on the Citizenship of the Czech Republic and Amendments to Some Other Acts (the Czech Citizenship Act). The municipality office of Prague 1 is competent to issue the certificates in these cases, see: s. 44 of the Act. However, citizenship is outside the remit of this work.

[131] For details, see notably: s. 3 (5) and s. 42 et seq. of Act No. 301/2000 Sb., on Registers of Births and Deaths, Name and Surname, and on Amendments to Some Other Acts (Act on Births and Deaths Register).

[132] Recognition of foreign instruments is outside the remit of this work; we presume that it is an instrument which is treated by the Czech registry of births and deaths as a public instrument. We merely indicate that it must be a legalised instrument or an instrument with an apostille (i.e., while still subject to the legalisation requirement, the instrument was issued in a state which is a contracting party to the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents – in the Czech Republic under No. 45/1999 Sb.), or an automatically recognised instrument without further legalisation if the issuing state is a party to a bilateral (or multilateral) treaty which provides for a release from the legalisation requirement. The instrument must be accompanied by a certified translation into Czech.

Two possible options should be noted here. In the vast majority of cases, the foreign birth certificate indicates as parents a woman and a man (whether or not they are married, they are the ones who commissioned the "services" of a surrogate mother). After all, the reason for resorting to surrogacy abroad is to obtain, in accordance with the national laws, a birth certificate in which they are directly (with no further requirements) recorded as parents (unlike the Czech law which requires adoption, *see* above). In this case, the Czech registry of births and deaths is not able to discover that the child was actually born to a woman other than the one recorded in the birth certificate (namely, a surrogate mother). The applicants who have paid a considerable amount of money abroad for surrogacy will certainly not divulge that information; nor will they present the foreign court decision on the basis of which the foreign birth certificate identified as mother the woman who actually did not give birth to the child. In this way, the intended parents succeed in becoming registered as parents in the Czech Republic, in accordance with the Czech laws on registers of births and deaths. Thus, there is little Czech Supreme Court case law to consult concerning the recognition of foreign decisions[133] on surrogacy children, except for a few very recent cases (see below).

The second option which may occur – and indeed has already occurred in the Czech Republic (see below) – involves a couple consisting of two men hiring a surrogate mother to give birth to a child for them. It should be remembered that in some countries two same-sex persons, who used a surrogate mother to carry the child for them, might be identified as parents in a birth certificate. The Czech doctrine was aware of this option:

> The Czech Republic is often faced with the dilemma of whether or not two same-sex parents should be recorded in the special registry of births and deaths, based on a foreign public instrument, if the child was born to

[133] The Supreme Court rules solely on the recognition of final and conclusive foreign decisions in cases of divorce, legal separation, marriage invalidity, whether or not a marriage exists, and parenthood determination and disavowal, provided that either party to the proceedings was a citizen of the Czech Republic. See: s. 51 and s. 55 of Act No. 91/2012 Sb., Governing Private International Law. However, this regime excludes any decisions covered by Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 (the so-called Brussels II bis which, however, does not deal with the topic explored in this paper), as well as the decisions which are recognised automatically (i.e., without the Czech Supreme Court's decision) on the basis of multilateral or bilateral treaties on legal assistance.

> a surrogate mother abroad. We take the view that if at least one legal parent is also a genetic parent, and the second parent adopted the child, and if social parenthood is involved as well, then there is no other choice but to enter a record to this effect – in the interests of the child – although it is inconsistent with the peremptory rule according to which adoptive parents must be only spouses or one of the spouses (see s. 800).[134]

The quotation suggests that not only does the Czech family law doctrine acknowledge that such a situation might occur, but it also favors recognition of such a decision if all the conditions indicated in the quote are satisfied.

This idea did not remain a merely theoretical thought: it was tested on a case involving two men who entered into marriage under Californian laws and are, therefore, regarded as spouses according to the law of California. In 2012, these men entered into a surrogacy contract with a surrogate mother.[135] The link to the Czech Republic stems from the fact that one of the men is a Czech national, who has relatives in the Czech Republic whom he visits occasionally. By virtue of a judgment of 10 May 2013, file No. BF 047383, the Californian High Court for Los Angeles ruled that based on the surrogacy contract concluded between these men and the surrogate mother, the surrogate mother is not a legal parent of the (then) unborn child, and the parents are those men. Accordingly, the men were registered, upon birth, as parents in the birth certificate.

This birth certificate was then presented to the municipality office of Prague 1 in the Czech Republic, attached to an application for the citizenship certificate. Since two same-sex persons were registered as parents on the birth certificate, which is a situation unknown to Czech law, the persons concerned were asked to initiate proceedings before the Czech Supreme Court for the recognition of the Californian judgment on the basis of which the (Californian) birth certificate was issued. In its

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[134] Králíčková, Zdeňka. Komentář k § 775 OZ, [Commentary on Section 775 of the Civil Code], [in:] Hrušáková, Milana; Králíčková, Zdeňka; Westphalová, Lenka et al. *Občanský zákoník II. Rodinné právo (§655–975). Komentář* [*Civil Code II. Family Law (ss. 655-975). Commentary*], 1st ed. Praha: C. H. Beck, 2014, p. 516. See also: Králíčková, Zdeňka, "Mater semper certa est! O náhradním a kulhajícím mateřství" [*Mater semper certa est! About Surrogate and Limping Motherhood*], [in:] *Právní rozhledy*, 2015, No. 21, pp. 731–732; and regarding two mothers, see also: Králíčková, Zdeňka; Nový, Zdeněk, "Dvě matky, jedno dítě, nejlepší zájem dítěte a veřejný pořádek" [*Two Mothers, One Child, the Best Interest of the Child, and Public Order*], [in:] *Právní rozhledy*, 2017, No. 15–16, pp. 524–530.

[135] The facts were extracted from the Czech Constitutional Court's judgment file No. I. ÚS 3226/16 from 29 June 2017; available at: http://kraken.slv.cz/I.US3226/16 (last accessed: 29 March 2018).

judgment, the Czech Supreme Court recognized the Californian judgment only so far as it applied to one of the men, while it made no ruling on the other man. Furthermore, the Court indicated that the fact that the child was born from surrogacy was not contrary to public order. In the subsequently issued (Czech) birth certificate, only the box "father" was filled in, while the box "mother" remained blank.

For that reason, a new application was filed with the Czech Supreme Court for the recognition of the Californian judgment, but this time only with respect to the other man. By judgment Ref. No. 28 Ncu 187/2015–6 of 18 July 2016, the application for recognition was dismissed because in the Court's opinion granting the application would be inconsistent with s. 15 (1) (e) of Act No. 91/2012 Sb., Governing Private International Law:

> Pursuant to the Supreme Court, allowing the application would effectively result in a situation corresponding to the joint adoption of the child by two persons of the same sex, which is not accepted by the Czech law, as it categorically excludes the joint adoption of a minor child by persons who are not spouses. The Supreme Court emphasised that the issue of delimiting the borders in which, according to the Czech law, it is conceivable to establish a parental relationship between a minor and a couple of cohabiting persons of the same sex was perceived as a legislative issue the solution to which cannot rely on the leading role of courts but the democratically elected legislature.[136]

A constitutional complaint was subsequently lodged against this decision, bringing the case before the Czech Constitutional Court. The Constitutional Court set aside the Supreme Court's decision by the above cited judgment (file No. I. ÚS 3226/16). The long reasoning stated inter alia the following:

> The Constitutional Court thus concludes that failure to recognise a foreign decision determining parenthood to a child of two persons of the same sex in a situation in which family life was de facto and legally constituted between them in the form of surrogacy on the grounds that the Czech law does not allow the parenthood of two persons of the same sex is contrary to the best interest of the child protected by Article 3, para. 1 of the Convention on the Rights of the Child. If a family life has already been established between

[136] See: para. 8 of the above cited judgment of the Czech Constitutional Court.

> individuals on a legal basis, it is the duty of all public authorities to act in such a manner that this relationship may develop and it is necessary to respect the legal guarantees protecting the relationship between the child and its parents. The Supreme Court therefore erred when dismissing the application seeking the recognition of the decision on determining the parenthood of the second complainant towards the third complainant. (…) It should also be noted that the need to prioritise the best interest of the child, and the conclusion that it does not manifestly violate the public order for the recognition of the social parenthood of a same-sex couple acquired through surrogacy, has also been emphasised by doctrinal opinions, even though they are generally critical towards the institute of surrogacy (see: KRÁLÍČKOVÁ, Z., Mater semper certa est! O náhradním a kulhajícím mateřství [Mater semper certa est! On Surrogate and Limping Motherhood]. Právní rozhledy No. 21/2015, p. 731).[137]

Based on this, the Czech Supreme Court recognized the Californian judgment with respect to this man as well.

The judgment received substantial media coverage[138], prompting both negative and positive comments.[139] From the professional debate, primarily the critical paper written by Professor Ivo Telec can be mentioned, criticizing the Constitutional Court for having insufficiently analyzed the conflicting values, and for the lack of methodological approach which cannot be mechanically replaced with references to European or other decisions:

> Even if we wanted to construct formalistic, legal, and unnatural "parenthood of a man and a man" (or a woman and a woman) by employing legal fabrication, social engineering, biomedicine, ideology, and politics, we will never obliterate the naturalness of maternity and paternity. The legal order, as a social phenomenon expressing prevailing political consensus, can do almost anything. For example, the legal order can stipulate that every second

[137] Paras. 55 and 58 of the cited Czech Constitutional Court's judgment.

[138] See, for example: https://zpravy.idnes.cz/gayove-cechoamerican-dan-rodice-rodicovska-prava-ustavni-soud-nahradni-matka-1wt-/domaci.aspx?c=A170724_101930_domaci_hm1 (last accessed: 29 March 2018).

[139] See, for example: https://www.lidovky.cz/uznani-gayu-rodici-i-v-cesku-treba-prijde-i-legalizace-mnohozenstvi-kloni-se-ke-klausovi-pravnic-ikt-/zpravy-domov.aspx?c=A170822_153457_ln_domov_sk (last accessed: 29 March 2018).

> Saturday in a month shall be a Tuesday. The question is, however, how reasonable that would be and notably, in particular, in our case, how objectively fair that would be with respect to small children (a weaker party). It is not possible to buy children in a shopping basket like toys. Even if biomedicine and engineering made this possible and affordable. If something is potentially technically or scientifically possible, it does not imply that it is objectively fair or, as in our case, considerate towards a weaker party who is still mentally and physically immature or has only just been conceived.[140]

It can be expected that this issue will spark further debate among experts. With respect to this decision of the Czech Constitutional Court, it should be added that the present case did not concern general permission enabling same-sex couples to become parents, nor to adopt jointly a child. The Constitutional Court merely decided whether the factual and legal reality would be recognized in the Czech Republic, i.e., that the second complainant had the right to protection of his family life already de facto and legally established with the third complainant and that the failure to recognize the family bond amounted to a violation of the third complainant's right to have the best interest of the child as the primary perspective when making decisions concerning him.[141]

Finally, it should be added that the authors are aware of another judgment of the Czech Supreme Court which found in favor of the applicant and which also concerned the recognition of a judgment on paternity determination regarding a child born to a surrogate mother (in Illinois, US). Because no information is provided in the judgment about the second parent, it is impossible to find out whether the second parent was male or female. What is interesting about this judgment is the fact the Czech Supreme Court expressly stated that surrogate motherhood is mentioned in s. 804 of the CC, and therefore it cannot be argued that recognition is prevented because of manifest inconsistency with the Czech public order.[142]

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[140] See: Telec, Ivo, "Kritický pohled na nález Ústavního soudu: uznání kalifornského rodičovského statusu stejnopohlavního manžela" [*A Critical Review of the Judgment of the Constitutional Court: Recognition of the Californian Parenthood Status of a Same-Sex Spouse*], [in:] *Právní rozhledy*, 2017, No. 19, p. 674.

[141] See: para. 60 of the cited judgment.

[142] File No. 28 Ncu 101/2017.

4.3. Summary

Several important conclusions can be drawn. First, as regards cross-border surrogate motherhood, only a few judicial decisions are available. These decisions imply that the Czech Supreme Court does not consider it inconsistent with public order (and thus it is not an obstacle to the recognition of such a foreign decision in the Czech Republic) if a child was born to a surrogate mother. The Czech Constitutional Court went a step further when it concluded that in the case at hand the right to family life was violated because the Czech Supreme Court refused to recognize the decision on the basis of which two same-sex persons were to be registered as parents. While the decision of the Czech Constitutional Court is rather controversial and likely to generate further debate among professionals, these conclusions seem to reflect and validate the overall liberal approach to surrogate motherhood in Czech society.

5. Conclusion

Surrogate motherhood is a topical issue in the Czech Republic. For a long time, it has continuously attracted the attention of both professionals and the broad public. This paper has shown that opinions on surrogacy have been gradually changing. Professionals largely emphasize the need for more detailed rules (see above), because the social reality and prevalence should not be overlooked. However, the authors of this work believe (and the presented literature review implies) that in the foreseeable future this debate will not reach a broad consensus regarding the precise form of such legal rules. Since the Czech courts have already had to decide on the recognition of foreign decisions, including those where the parents were two same-sex persons, it can only be expected that the debate on this issue will intensify. According to the authors, the society-wide debate is likely to result in a largely positive outcome (however long the journey will be), because already at present surrogate motherhood is no longer taboo in the Czech Republic. On the contrary, generally accepted by (Czech) society, surrogacy is perceived as a reality of life not provoking substantial controversies (at least if the commissioners are male and female, respectively).

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Principles of adoption system versus surrogate motherhood

1. Introduction

Problems of primary forms of surrogate motherhood were discussed in the Polish legal literature.[1] However, it is still a controversial topic that provokes disputes, also regarding international regulations.[2] Doubts in the doctrine were primarily raised by the question of admissibility of the surrogate motherhood agreement.[3] However, one should accept the view that such agreements cannot be concluded pursuant to

[1] *Inter alia* K. Bagan-Kurluta, "Macierzyństwo zastępcze a adopcje – symbioza czy konkurencja", *Miscellanea Historico-Iuridica*, 2014,Vol. XIII, Journal 2, pp. 281–294; *Idem*, "Czyje dziecko, czyje? Kilka uwag o pochodzeniu dziecka na tle umów macierzyństwa zastępczego", *Miscellanea Historico-Iuridica*, 2016,Vol. XV, Journal 1, pp. 259–270; M. Działyńska, "Macierzyństwo zastępcze", *Studia Prawnicze*, 1993, Journal 1, pp. 87–98; M. Safjan, *Prawo wobec ingerencji w naturę ludzkiej prokreacji*, Warszawa 1990, pp. 135–155; P. Singer, D. Wells, *Dzieci z probówki. Etyka i praktyka sztucznej prokreacji,* Warszawa 1988, pp. 119–142; J. Ostojska, "Problem macierzyństwa zastępczego a prawo dziecka do poznania własnej tożsamości", *Rodzina i Prawo*, 2012, No.22, pp. 7–19.

[2] *Inter alia,* Judgement of the ECHR dated 26 June 2014 in the case of *Mannesson v. France*, Application No. 65192/11; Decision of the ECHR dated 8 July 2014 in the case of *D and others v. Belgium,* Application No. 29176/13; Judgement of the ECHR dated 24 January 2017 in the case of *Paradiso and Campanella v. Italy,* Application No. 25358/12.

[3] *Inter alia,* Z. Czarnik, M. Majcher, "Macierzyństwo zastępcze w prawie polskim", *Przegląd Powszechny*, 1993, No. 2, pp. 191–201; M. Fras, D. Abłażewicz, "Umowa o macierzyństwo zastępcze i jej dopuszczalność na tle prawa polskiego", *Rodzina i Prawo*, 2008, No. 9–10, pp. 94–119; J. Holocher, M. Soniewicka, "Analiza prawna umowy o zastępcze macierzyństwo", *Prawo i medycyna*, 2009, No. 3, pp. 43–60; A. Makowiec, "Macierzyństwo zastępcze w świetle ochrony praw człowieka", [in:] *Uniwersalny i regionalny wymiar ochrony praw człowieka. Nowe wyzwania – nowe rozwiązania. Vol. 3,* ed. J. Jaskiernia, Warszawa 2014, pp. 204–212; M. Safjan, *Prawo wobec ingerencji…*, *op. cit.,* pp. 429–490.

Art. 353[1] of the k.c. [*Kodeks cywilny – Civil Code*]. The doctrine indicates that the possibility of concluding agreements regarding family and legal relationships of a personal nature is excluded.[4] Undoubtedly, the surrogate motherhood agreement does not concern property issues, as its effect is to transfer, in various ways, parental authority and other rights and obligations arising from the family relationship to persons intending to be parents of a born child. In addition, the surrogate motherhood agreement appears to be unacceptable because of the conflict with the principles of social coexistence (Art. 5 and 58 of the k.c.).

The analysis of surrogate motherhood from the viewpoint of the Polish adoption law prompts to ask whether in the current legal situation such cases are possible. It should be noted that although the legislator did not exclude *expressis verbis* the possibility of concluding such agreements, it has introduced a number of solutions that aim, at least, to limit such cases. Considerations that are the main topic of this report should be preceded by an analysis of the possibility to use surrogate motherhood *de legelata* based on the provisions of filiation law and the provisions of the Infertility Treatment Act of 25 June 2015.[5] At the same time, one cannot forget the fact that surrogate motherhood agreements are still in an informal form, and their integral part in most cases is the mother's consent to adoption of the child born by her. Therefore, the main part of the study presents the basic principles on the basis of which the Polish legislator has regulated the institution of adoption and confronts them with potential threats regarding surrogate motherhood.

It should also be noted that the issue of admissibility of surrogate motherhood agreements has been variously regulated in individual countries.[6] In some countries this problem has not been regulated at all (e.g., in Poland), while in others it was explicitly banned (e.g., in Germany or in Italy). In some countries, the admissibility of surrogate motherhood agreements was dependent on their character. In some,

[4] M. Goettel, "Umowy w prawie rodzinnym – zarys koncepcji", [in:] *Europeizacja prawa prywatnego. Vol. I,* ed. M. Pazdan [*et al.*], Warszawa 2008, pp. 301–303.

[5] The Infertility Treatment Act of 25 June 2015 (the consolidated text Journal of Laws of 2017 item 865), hereinafter: u.l.n. [*Ustawa o leczeniu niepłodności*].

[6] *Cf.* M. Fraus, D. Abłażewicz, "Reżim prawny macierzyństwa zastępczego na tle porównawczym", *Problemy Współczesnego Prawa Międzynarodowego Europejskiego i Porównawczego*, 2008 No. VI, pp. 31–67; M. Mikluszka, *Zagraniczne procedury tzw. macierzyństwa zastępczego (surrogacy motherhood) w świetle zasady handlu ludźmi – zagadnienia węzłowe,* Warszawa 2017; I. Berger, *Macierzyństwo zastępcze w świetle przepisów prawa Federacji Rosyjskiej,* Warszawa 2017; O. Bobrzyńska, *Macierzyństwo zastępcze w prawie francuskim,* Warszawa 2017; *Idem*, *Macierzyństwo zastępcze w prawie Zjednoczonego Królestwa,* Warszawa 2017; L. Lai, *Macierzyństwo zastępcze w prawie włoskim,* Warszawa 2017; M. Zeniv, *Macierzyństwo zastępcze w prawie ukraińskim,* Warszawa 2017.

only non-commercial agreements were allowed (e.g., in England), in others, commercial agreements were also allowed (e.g., in the Russian Federation). The variety of normative solutions in the field of surrogate motherhood, of course, opens a way to "procreative tourism."

2. Surrogate motherhood and Polish filiation law

The progress of medical knowledge in human procreation has made the Roman principle *mater semper certaest* cease to be the absolute principle. Above all, it is difficult to continue to speak about the uniform character of the term *mother*. Therefore, it is no longer so obvious as earlier that this concept describes only a woman who gave birth to a child. Today, it is reasonable to extract three concepts:

1. a biological mother – a woman that gave birth to a child after pregnancy;
2. a genetic mother – a woman who is a donor of reproductive cells;
3. a sociological (social) mother – a woman who wishes to be the mother of a child and to raise it.

There is no doubt that in typical cases these three types of motherhood occur together. Of course, this is especially the case with the so-called natural parenthood, when a child comes from, for example, both spouses and was conceived by a natural act of sexual intercourse without the use of medically assisted procreation. Then, the biological mother is at the same time the genetic and sociological mother if she raises her own child. Of course, derogations from the above rule do not only concern surrogate motherhood. In the event of an adoption of a child there is a situation in which there is no identity of genetic and biological parents and adoptive (sociological) parents.

In accordance with Article 61^9 of the k.r.o. [*Kodeks rodzinny I opiekuńczy– Family and Guardianship Code*] the mother of a child is the woman who gave birth to it. Her data are entered into its birth certificate on the basis of a birth card provided by the entity performing the medical activity and the birth declaration protocol (Art. 53.1 of the p.a.s.c. [*Prawo o aktach stanu cywilnego– Law on Civil Status Records*]). The card submitted to the Head of the Registry Office includes also the data on the child's mother (Art. 54.2 of the p.a.s.c.). In addition to the above comments, it should be stated that according to Art. 3 of the p.a.s.c. the birth certificate is the sole proof of the event identified in it and its non-conformity with the truth can only be proven in court proceedings. In a situation where a surrogate motherhood agreement was

used, in the light of the law, the mother would not be the woman being the other party, next to the surrogate mother, to such an agreement, even if the child were conceived with the use of her egg cell. The Polish legal order does not provide for a possibility for the persons who have concluded a surrogate motherhood agreement with a surrogate mother to be entered into a birth certificate as parents. Such solutions are in some legal systems such as in the United Kingdom or in Ukraine.[7]

It can therefore be concluded that the Polish filiation law does not give the possibility to shape the legal situation of a child in such a way that its parents, in the light of the applicable regulations, would be the sociological parents (including genetic ones) and not the surrogate mother. For this reason, an instrument used to transfer custody of a child between a surrogate mother and sociological parents, and for them to obtain parental authority, can only be the institution of adoption under Polish law. At the same time, one cannot forget about situations where there is the so-called "foreign element." In particular, it refers to the facts where the surrogate motherhood agreement was concluded in another country with participation of Polish citizens, and the sociological parents and not the surrogate mother were entered as the parents into the birth certificate. Then, the birth certificate prepared in this way was transcribed in the Polish Registry Office (Art. 104 of the Law on Civil Status Records of 28 November 2014).[8]

2.1. Surrogate motherhood and Infertility Treatment Act

Because the provision implementation of the surrogate motherhood agreement will require the use of medically assisted procreation in the vast majority of cases, the presentation of surrogate motherhood in the context of the Polish normative solutions concerning the adoption institution cannot take place without presenting the possibilities created by these procedures. Depending on the model adopted by the legislator, the possible option of applying adoption regulations may be wider

[7] O. Bobrzyńska, *Macierzyństwo zastępcze w prawie Zjednoczonego Królestwa,* Warszawa 2017, pp. 2–3, 8–11;M. Zeniv, *Macierzyństwo zastępcze w prawie ukraińskim,* Warszawa 2017, p. 8.

[8] J. Gajda, "Rejestracja stanu cywilnego dziecka urodzonego przez matkę zastępczą", [in:] *Studia z prawa administracyjnego i nauk o administracji, Księga jubileuszowa dedykowana Prof. zw. dr hab. Janowi Szreniawskiemu,* ed. Z. Czarnik, Z. Niewiadomski, J. Posłuszny, J. Stelmasiak, Przemyśl – Rzeszów 2011, pp. 217–218. Act of 28 November 2014, Law on Civil Status Records (the consolidated text Journal of Laws of 2016, item 2064, hereinafter: p.a.s.c. [*Prawo o aktach stanu cywilnego*].

or narrower. The following analysis will include the legal status prior to the entry of the Infertility Treatment Act and afterwards.

The Infertility Treatment Act has standardized two types of donation – partner donation and non-partner donation. According to Art. 2.1.8 of the u.l.n. [*ustawa o leczeniu niepłodności* – Infertility Treatment Act], partner donation means the donation of reproductive cells by a donor – a man to be used in the procedure of medically assisted procreation in a female recipient who remains in a marriage relationship with the donor or in a cohabitation confirmed by a consistent statement by the donor and the recipient; in the partner donation, the female reproductive cells are used. In the Infertility Treatment Act there is no legal definition of the concept of non-partner donation. However, according to the justification for the Act, it covers situations where at least one of the reproductive cells comes from an anonymous donor.[9]

In the current legal status, the legislator has limited the possibility of donating reproductive cells only to anonymous donation in the context of non-partner donation (Art. 30 and Art. 36 of the u.l.n.). At the same time, it should be noted that donation of reproductive cells from a person or persons known to the recipient, thus the so-called donor-specified donation could occur in the period before the Infertility Treatment Act came into force.[10]The use of this type of donation could lead to financial benefits in exchange for the transfer of reproductive cells (for-profit surrogacy arrangement) as evidenced by the popularity of the Internet forums where such advertisements are placed.[11] Donor-specified donation could be part of a complex procedure that can be termed surrogate motherhood.

The consideration of surrogate motherhood in relation to the regulations on adoption requires the indication in which cases adoption may be part of an informal surrogate motherhood agreement. The current regulations of the Infertility

[9] Justification for the Bill of the Infertility Treatment Act, Parliamentary Document No. 3245. https://legislacja.rcl.gov.pl/docs//2/230033/230073/230074/dokument146213.pdf (last accessed: 6 April 2018).

[10] A. Krawczak, A. Damska, *Bocian sprawdza kliniki. Pierwszy Pacjencki Monitoring Polskich Ośrodków Leczenia Niepłodności,* p. 64. Source: http://www.nasz-bocian.pl/pliki/monitoring_pacjencki_NB_2015.pdf (last accessed: 20 March 2018); A. Krawczak, "Ustawa a potrzeba poznania własnego dziedzictwa generycznego przez dzieci urodzone dzięki dawstwu niepartnerskiemu", *Medycyna i Prawo*, 2017, No. 4, p. 66.

[11] For example, https://robimydzieci.com (last accessed: 20 January 2018). On the trade in human egg cells in the previous legal status, *inter alia,* K. Nowosielska, "Handel komórkami rozrodczymi kwitnie – będzie karany", *http://www.rp.pl/Prawo-karne/310159887-Handel-komorkami-jajowymi-kwitnie---bedzie-karany.html* (last accessed: 20 January 2018).

Treatment Act fundamentally limit the technical possibilities of implementing the provisions of such agreements. This is primarily due to the lack of donor-specified donation and anonymity of donors and recipients. The following are the types of surrogate motherhood with a commentary concerning the possibility of implementing this type of agreements, considering the provisions of the Infertility Treatment Act. It is worth noting that these remarks are universal in the sense that they allow to define the way in which the infertility treatment model can enable or restrict the implementation of surrogate motherhood agreements.

First of all, one should point to gestational surrogate motherhood[12], which consists in using a method of medically assisted procreation, but not using the reproductive cells of the surrogate mother. Then, the genetic parents may be:

1. The intending parents – in the current legal status it is excluded. Before the Infertility Treatment Act came into force, the embryo donation with a specification for a surrogate mother could take place. She then consented to the adoption by the donors of this embryo, hence the sociological and genetic parents (see: Diagram 1). Theoretically, there could also be a situation where a surrogate mother obtained an egg cell from the sociological mother (donor-specified donation), and the semen used in the surrogate procedure came from the sociological father. He also participated, together with the surrogate mother, in the procedure of medically assisted procreation. He recognized his fatherhood and then, together with the surrogate mother, he expressed consent to adoption by the genetic mother who after the medically assisted procreation became his wife (see: Diagram 2).

[12] *A Preliminary Report on The Issues Arising from International Surrogacy Arrangements, Hague Conference on Private International Law, Glossary*, source: https://assets.hcch.net/docs/d4ff8ecd-f747–46da-86c3–61074e9b17fe.pdf (last accessed: 29 March 2018).

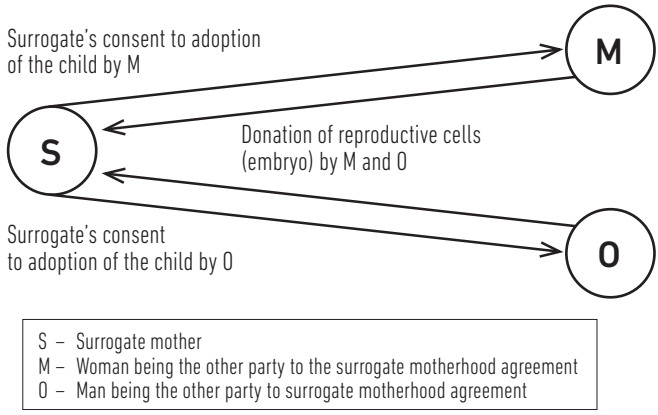

Diagram 1

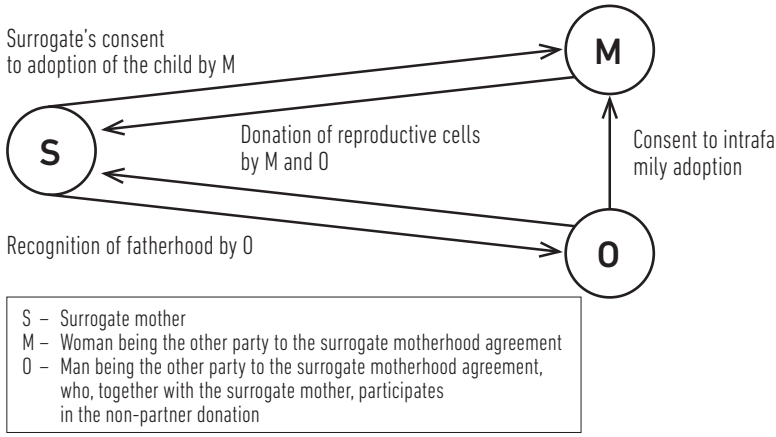

Diagram 2

2. The intending mother and an anonymous donor – in the current legal status it is excluded. Before the Infertility Treatment Act came into force, the egg cell donation with a specification for a surrogate mother could take place. She then consented to the adoption by the sociological parents, including the genetic mother (see: Diagram 3). Theoretically, there was also a possibility that the surrogate mother and the sociological father went together through the infertility treatment procedure. Then, the sociological father could recognize the fatherhood of the child and next, together with the surrogate mother, he could express the consent to adoption by the donor of

the egg cell, that is his partner, with whom he concluded marriage after the birth of the child (see: Diagram 4).

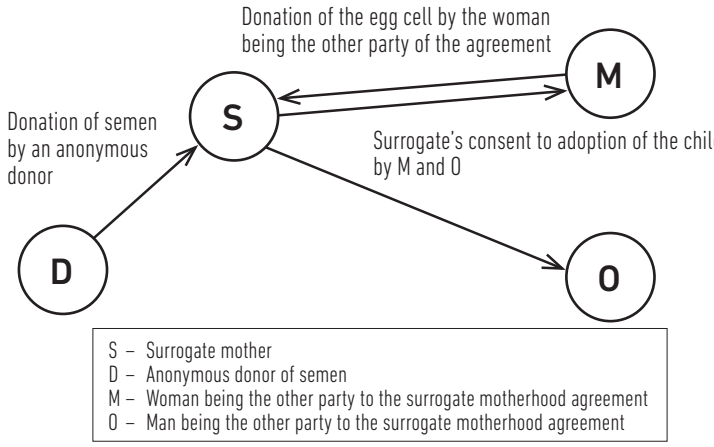

Diagram 3

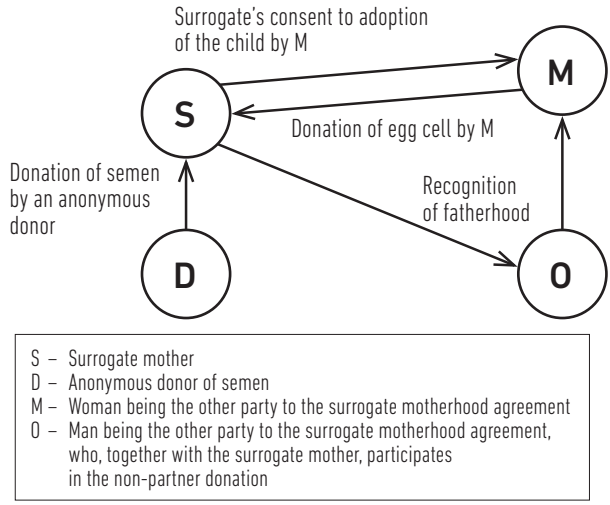

Diagram 4

3. Anonymous donors of semen and an egg cell – prior to the entry into force of the Infertility Treatment Act, a surrogate mother, who was single, could be donated an egg cell by an anonymous donor, and then she expressed her consent to adoption by the other party to the surrogate motherhood

agreement. In the current legal status, there is no possibility of medically assisted procreation in relation to a female recipient who is single (Art. 2.1.3 of the u.l.n.). Therefore, the above case is possible, but the surrogate mother's husband or, more likely, the person declaring to remain with her in cohabitation would have to be involved in the whole procedure. Then, the surrogate mother and her husband or a person remaining with her in cohabitation would have to consent to adoption by the sociological parents (See: Diagram 5). This case is more like giving consent to adoption in exchange for financial gain than surrogate motherhood, because the difference between other adoption cases comes down to the fact that the consent to adoption is expressed by the persons who are the child's legal but not genetic parents. In the case of reproductive cells from anonymous donors, another action scheme could be used. The sociological father, together with the surrogate mother, would participate in a non-partner donation procedure. The man would recognize the fatherhood of the child on the basis of Art. 75^1 of the k.r.o. Then, together with the surrogate mother, he would express consent to adoption by the woman, who would become his wife after the child's birth. (see: Diagram 6).[13] This case is far from typical situations of surrogate motherhood, because neither the surrogate mother nor the sociological parents are the genetic parents of the child.

[13] One should also consider whether such a procedure could be carried out effectively if the man declared (contrary to the truth) that he was cohabitating with the surrogate mother, being at the same time married to the sociological mother. One could raise doubts whether infertility treatment centers have proper instruments to verify lack of being a married couple by the persons participating in the partner donation procedure and declaring cohabitation.

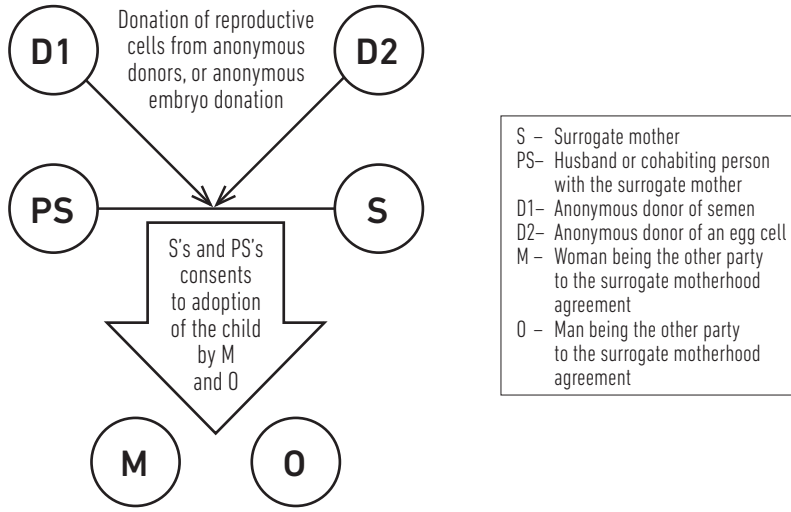

Diagram 5

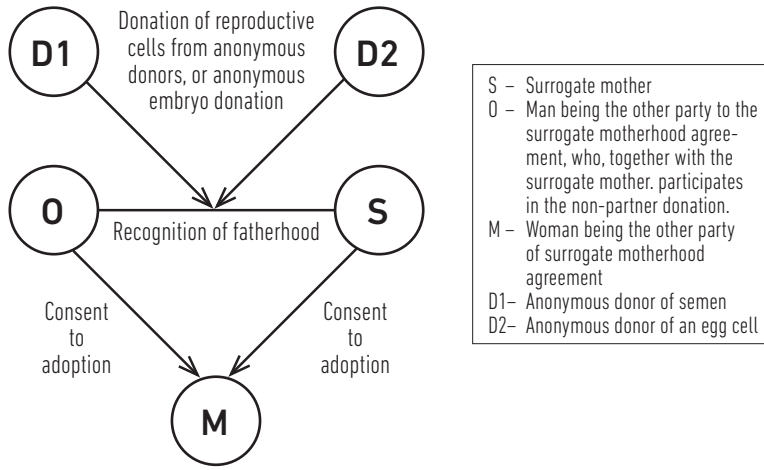

Diagram 6

Secondly, one should point to traditional surrogate motherhood[14] where the surrogate mother's egg cell is used. The genetic father may be:

[14] *A Preliminary Report…*, *op. cit.*

1. The intending father – in the current legal status it is possible in two cases – either through the use of medically assisted procreation, i.e. the Infertility Treatment Act, or by "home" insemination or sexual intercourse. In the first case, the man being the other party to the surrogate motherhood agreement participates in the partner donation, together with the surrogate mother. Such involvement is essential in the absence of donor-specified donation after the entry into force of the Infertility Treatment Act. Therefore, the man will have to declare (falsely) that he remains in cohabitation with the surrogate mother and to recognize the fatherhood of the child conceived as a result of the application of the relevant medical procedures. As already indicated, there is also a possibility of fertilization beyond this procedure – whether due to a sexual intercourse or a home insemination. In all these above-mentioned cases, the born child could be adopted by the man's wife within the so-called intra-family adoption. In such a case, according to the regulations included in the Family and Guardianship Code, the man would remain with the child in a family relationship, and his wife in a relationship of adoption. Therefore, if the fertilization were to be carried out according to the provisions of the Infertility Treatment Act, first, the man would have to declare (falsely) that he was in cohabitation with the surrogate mother, and then, after the child's birth, to get married with a woman who would adopt the child.[15] In other cases, such as sexual intercourse, "home" insemination, he would recognize fatherhood and then the surrogate mother would express her consent to adoption by his wife (see: Diagram 7).

[15] See: footnote 13 of the present paper.

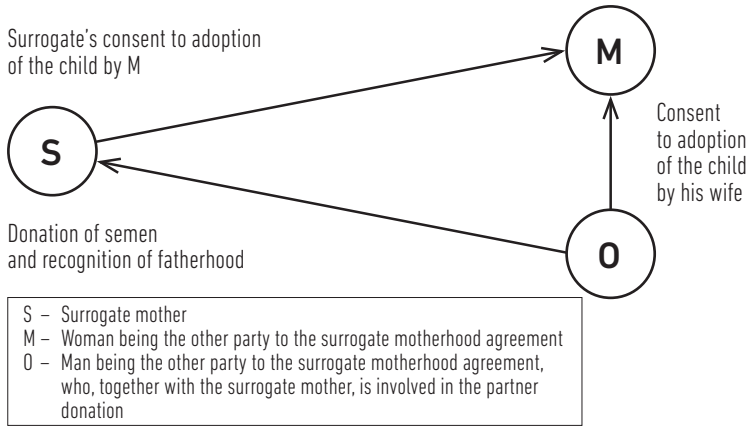

Diagram 7

2. An anonymous donor – the child born in this way may be adopted according to the general provisions set out in the Family and Guardianship Code. The mother of the child is the surrogate mother and the father is an anonymous donor. The other party to the agreement has no genetic relationship with the child.

The above analysis shows that the Infertility Treatment Act has largely restricted the possibility of implementing an informal surrogate motherhood agreement. It excluded gestational surrogate motherhood, where the reproductive cells come from the sociological parents or from the sociological mother. What has remained is the possibility of gestational surrogate motherhood, where the reproductive cells or the embryo from anonymous donors were used in the surrogate mother, although in this procedure not only the surrogate mother would have to participate, but also a man who would participate in the non-partner donation. The Infertility Treatment Act did not, however, eliminate partial surrogate motherhood, where the sociological father is the donor of semen, except that he must undergo the procedure of partner donation together with the surrogate mother, whose egg cell will be used.

The above-analyzed configurations assumed that the rights to the child would be granted to spouses wanting to be the sociological parents due to the implementation of surrogate motherhood. In the case when the person interested in the childbirth would be single or living in an informal same-sex relationship, the question arises about the possibility of conducting the procedures of medically assisted procreation. It should be noted that the Infertility Treatment Act excludes the participation of

a single woman who would benefit from the donation of semen in such procedures (Art. 2.1.3 of the u.l.n.). The donation of reproductive cells or embryos may be, according to Polish law, used only in relation to spouses or people of the different sex remaining in cohabitation. This means that in theory it is possible for a man who is in a same-sex relationship to find a woman who would agree to declare falsely to be remaining in cohabitation with him and to go through the medically assisted procreation procedure. In this way, the man would recognize fatherhood and obtain the parental authority over the child. However, it would be impossible to adopt the child by the partner of the man recognizing fatherhood in such a way that they both would have parental authority over the child. This option applies only to marriages (adoption of stepchildren), which under Polish law are relationships of different sex persons. In the presented facts, only one of the partners from the same-sex relationship would have parental authority over the child, and the other one could only participate in fact in its upbringing. Moreover, the surrogate mother would remain all the time in legal and family relationships with the child born in this way.

3. Adoption in Polish law – general remarks

Remarks on the subject of adoption can be started with a statement that basically "*przysposobienie*" [*the word with fully Polish roots meaning* "*adoption*"] is a legal term under Polish law.[16] It should not give rise to doubt whether it is also correct to use the term "*adopcja*" ["*adoption*"]. Its etymology is derived from the Latin term for this institution (*adoptio*). Such duality of naming is not unusual, not only in Poland, but also in other European countries where in the professional literature individual authors use the concept of adoption, although the legislator of a given State uses a different term in a given legal act. Just by the way of exemplification one can refer to Germany, where the statutory concept contained in the BGB is: *Annahmeals*

[16] It should be noted that the Polish legislator sometimes uses the term "*adopcja*" instead of "*przysposobienie*", e.g., in Art. 211a of the Criminal Code. In addition many laws use terms containing the concept of *adopcja* and not *przysposobienie,* e.g., *interwencyjne ośrodki preadopcyjne* [*pre-adoption intervention centers*] (e.g. Art. 112^1 § 1.1 of the k.r.o., Art. 582^1 § 2.3 of the k.r.o., Art. 2.3 of the u.w.r.), *ośrodki adopcyjne* [*adoption centers*] (e.g., Art. 114^1 § 1 of the k.r.o. Art. 578 § 2 of the k.p.c, Art. 156 of the u.w.r.), *procedury adopcyjne* [*adoption procedures*] (e.g., Art. 129 of the u.w.r.), *postępowanie adopcyjne* [*adoption proceedings*] (the title of chapter V of the u.w.r.), or *wywiad adopcyjny* [*adoption interview*] (Art. 156.1.7 of the u.w.r.).

Kind[17], or Austria, where the legislator in the ABGB used the term: *Annahme an Kindesstatt*.[18] However, it is different in Switzerland, where the statutory term is *die Adoption*[19], or in the French Civil Code, where the legislator uses the term *l'adoption*.[20] It is also known the concept of accepting as a son (*усановление*), which appears, for example, in the Family Code of the Russian Federation.[21]

In Polish law, there is no statutory definition of adoption.[22] As it appears then, adoption can be defined by referring to the wording of Art. 121 § 1 of the k.r.o., according to which the effects of adoption consist in creation of a relationship, which exists between parents and children, between the adoptive parent and the adopted child. Adoption is, therefore, a parental relationship, within which all rights and obligations are created between the adoptive parent and the adopted child, characteristic of the natural parental relationship.[23]

In foreign studies on adoption, it is noticed in a more intensified manner than in the Polish professional literature that adoption involves not only the adoptive parents and the adopted child, but also the child's parents. According to the concept of the *adoption triad* (*adoption triangle*), when regulating the institution of adoption, one should consider the relationships that exist between the three parties involved in adoption – the adopted child, the adoptive parents and the child's parents.[24] It is not difficult to notice that in the case of the surrogate motherhood agreement, the relationship between the so-called adoption triad is particularly complicated.

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[17] The German Act of 18 August 1886, the Civil Code, as amended, source: http://www.gesetze-im-internet.de/bgb/index.html (last accessed: 6 April 2018).

[18] The Austrian Act of 1 June 1811, the Civil Code as amended, source: https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622 (last accessed: 6 April 2018).

[19] The Swiss Act of 10 December 1907, the *Civil Code* as amended, source: https://www.admin.ch/opc/en/classified-compilation/19070042/index.html (last accessed: 6 April 2018).

[20] The French Act of 21 March 1804, the Civil Code as amended, source: https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721 (last accessed: 6 April 2018).

[21] The Act of 29 December 1995, the Family Code of the Russian Federation as amended, source: http://pravo.gov.ru/proxy/ips/?docbody=&nd=102038925 (last accessed: 10 April 2018).

[22] Similarly, as, e.g., in the ABGB or the BGB. It is different than, e.g., in the Family Codes of the Russian Federation (Art. 124.1) and of Ukraine (Art. 207.1).

[23] J. Ignatowicz (prepared by J. Gajda), [in:] *Kodeks rodzinny i opiekuńczy. Komentarz,* ed. K. Pietrzykowski, Warszawa 2018, p. 887.

[24] The originators of the concepts are A. Baran, R. Pannor and A. D. Sorosky (*The Adoption Triangle: The Effects of the Sealed Record on Adoptees, Birth Parents, and Adoptive Parents*, New York, 1989); E. W. Carp, *Family matters. Secrecy and disclosure in the history of adoption*, Cambridge – London 1998, pp. 149–150. http://definitions.uslegal.com/a/adoption-triangle/ (last accessed: 27 May 2015).

It will be like that in particular when there is full surrogate motherhood where the adoptive parents are in fact the child's genetic parents.

The essence of adoption is reflected in the Roman principle of *adoption natur amimitatur*.[25] Nowadays, this principle should be understood in such a way that as a result of adoption a new family emerges, as close as possible to the natural family. If adoption is to imitate nature and to result in the creation of a family as close as possible to the natural one, it should also be considered that in accordance with the before mentioned principle, the child should have two parents (not more) and different-sex parents. Assuming the dominant axiology in Poland, it would be difficult to agree with the statement that it is in harmony with nature that more than two persons are referred to as parents or even two people, but of the same sex. One can also have doubts whether creation of the possibility of adoption by same-sex couples really carries out the fundamental premise of the child's welfare, or, it rather leads to its undermining.[26] At the same time, it should be noted that in some countries such adoption is allowed, but the ECHR's case law is not uniform in this respect.[27] Enabling adoption by same-sex couples in some countries is also associated with a different definition of the very concept of "family."[28]

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[25] In Roman law, the understanding of this principle was not as clear as today. In the positive sense, adoption was to be used in cases where for various reasons it was impossible for the adoptive parent to have his own offspring. In the negative sense, adoption could only be allowed in cases where natural conception could also take place, and unacceptable when it would be inherently impossible. M. Kuryłowicz, "Zasada 'adoptio naturam imitatur' w prawie rzymskim", [in:] *Plenitudo legis dilectio. Księga pamiątkowa dedykowana prof. dr hab. Bronisławowi W. Zubertowi OFM z okazji 65. rocznicy urodzin*, eds. A. Dębiński and E. Szczot, Lublin 2000, p. 150.

[26] *Cf.* more *inter alia*: M. Kosek, "Pojęcie rodziny w Kodeksie rodzinnym i opiekuńczym i negatywne skutki jej redefinicji w wybranych aktach prawnych", [in:] *W trosce o rodzinę. Księga pamiątkowa ku czci Profesor Wandy Stojanowskiej*, eds. M. Kosek, J. Słyk, Warszawa 2008, pp. 229–240; E. Holewińska-Łapińska *Przysposobienie* [in:] *System…, op. cit.*, ed. T Smyczyński, pp. 528–531; A.N. Schulz *Now aKonwencja…, op. cit.,* pp. 108–110; A. Śledzińska-Simon, *Adopcjadzieci…, op. cit.*, pp. 141–156; T. Sokołowski, "Dobro dziecka wobec rzekomego prawa do adopcji", [in:] *Związki partnerskie, debata na temat projektowanych zmian prawnych*, ed. M. Andrzejewski, Toruń 2013, pp. 103–115; J. Gajda, "'Adopcja'przez pary homoseksualne", [in:] *Związki partnerskie, debata na temat projektowanych zmian prawnych*, ed. M. Andrzejewski, Toruń 2013, pp. 117–126.

[27] Judgement of the ECHR dated 26 February 2002 in the case of *Frette v. France*, 36515/97; Judgement of the ECHR dated 22 January 2008 in the case of *E. B v. France*, No. 43536/02; Judgement of the ECHR dated 15 March 2012 in the case of *Gas and Dubois v. France*, No 259551/07; T. Sokołowski, *Ochrona praw dziecka…, op. cit.*, pp. 209–220. Regarding adoption by same-sex couples in selected countries: L.P. Itaborahy, J. Zhu, *State-Sponsored Homophobia: A world survey of laws: Criminalisation, protection and recognition of same-sex love,* Geneva 2014, p. 29.

[28] P. Mostowik, *Władza rodzicielska…, op. cit.*, p. 26.

Nowadays, the basic purpose of the adoption institution is to create a legal framework for the functioning of a family-type relationship. It is to enable a child's right to be brought up in the family environment, in a situation where it has been deprived of parental custody. Adoption is to carry out a child's right to grow up in a family. It should serve to protect a child's welfare, disregarding property interests of the adopted child and the adoptive parent and their relatives.[29] Undoubtedly, one can agree with the view that the non-property concerns existing on the child's side are of prime importance. However, one can defend a view that it would be too extreme to think that financial matters are irrelevant, e.g., the financial situation of the candidates for adoption in relation to the health condition of the child who requires special care.[30]

As noted in the professional literature, apart from the basic, above-mentioned functions of adoption, one can also indicate additional assumptions that have an auxiliary character. Such assumptions include the principles of: state control, the judicial procedure for establishing the adoption relationship, limited dissolvability of adoption, the secrecy of adoption, and the absolute power of adoption regulations.[31]

The adoption decision should follow the principle of a child's welfare, which is dominant in family law.[32] A child's welfare has not been defined *expressis verbis* by the Polish legal regulations.[33] They are widely considered to be the principle of law

[29] Like this: E. Holewińska–Łapińska, [in:] *System Prawa Prywatnego. Volume 12 Prawo rodzinne i opiekuńcze*, ed. T. Smyczyński, Warszawa 2011, p. 498.

[30] Judgement of the Supreme Court of 5 July 2006, IV CSK127/06, LEX No. 232819.

[31] Like this: J. Ignatowicz, [in:] *System prawa rodzinnego i opiekuńczego*, ed. J. St. Piątowski, Wrocław –Warszawa – Kraków – Gdańsk – Łódź 1985, p. 924.

[32] The premise of the child's welfare in the case of adoption is commonly accepted both in national laws (e.g., Art. 1741.1 of the BGB), and in international conventions (e.g., Art. 21 of the Convention on the Rights of the Child of 20 November 1989, Polish Journal of Laws of 2013 No. 3 item 4, Art. 1 of the Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption, Polish Journal of Laws of 1999, No. 99, item 1159).

[33] The term *a child's welfare* appears mainly in the Family and Guardianship Code. Is also used in many other laws, e.g., in Art. 1.2, Art. 5 and Art. 9 of the Act of 6 January 2000, on the Ombudsman for Children's Rights (Journal of Laws of 2000 No. 6 item 69 with subsequent amendments), in Art. 4.1, Art. 155 of the u.w.r., or in Art. 260.1, Art. 397.2, Art. 401.4. of the Act of 12 December 2013 on the Aliens (the consolidated text Journal of Laws of 2016, item 1990) The legislator, in a manner contrary to the principles of proper legislation uses also other terms which may be regarded as the child's welfare, e.g.: *the interest of the child* (Art. 158.2.3 and Article 167.1 of the Act on the Aliens), *the best interest of the child* (Art. 139a.1.3 and 139a.2, Art. 166.1.6 of the u.w.r.) or *the overriding interest of the child* (Art, 164.20.1 of the u.w.r.). Concerning the concept of the welfare of the child in the Family and Guardianship Code, *cf.*: W. Stojanowska, *Rozwód a dobro dziecko*, Warszawa 1979, p. 17.

and the general clause.[34] The welfare of the child is a value protected constitutionally and the obligation to protect it lies not only on the parents, but also on the public authorities.[35] In relation to family law the welfare of the child should always be considered, regardless of the fact whether this term is in the regulation on which the legal norm has been construed.[36] In the absence of the statutory definition of the concept in the doctrine of family law, welfare of the child is defined differently, although one can indicate a number of common elements.[37] Firstly, the welfare of the child is realized by both protecting its person and property. Secondly, intangible values outweigh tangible values.[38] Thirdly, in many definitions the need for the preparation of the child to life and work in the society is indicated.

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[34] S. Wronkowska, M. Zieliński, Z. Ziembiński, *Zasady prawa. Zagadnienia podstawowe*, Warszawa 1974, pp. 24, 25, 59; J. Winiarz, *Rodzina…, op. cit.*, pp. 448–449; M. Kordela, *Zasady prawa. Studium teoretyczne*, Poznań 2012, p. 30; Z. Radwański, Z Radwański, *Pojęcie i funkcja „dobra dziecka" w polskim prawie rodzinnym i opiekuńczym*, SC 1981 Volume XXXI, pp.4–6; *Ibid.*, "Dobro dziecka", [in:] Konwencja o prawach dziecka a prawo polskie. Ed. and introduction by Adam Łopatka. An overview of the discussion Tadeusz Fuks, ed. T. Fuks, A. Łopatka, Warszawa 1991, pp. 62–63.

[35] W. Borysiak, [in:] *Konstytucja. Komentarz,* ed. M. Safjan, L. Bosek, Warszawa 2016, p. 1503; L. Garlicki, M. Detlatka, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Volume II,* ed. L. Garlicki, Warszawa 2016, pp. 779–780. Judgement of the Constitutional Court [*Trybunał Konstytucyjny – TK*] of 28 April 2003, K 12/02, OTK-A 2003/4/32 item; Judgement of the TK of 17 April 2007, SK 20/05, OTK-A 2007/4/38; Judgement of the TK of 21 January 2014, SK 5/12, OTK-A 2014/1/2/; Judgement of the TK of 27 September 2017, SK 36/15, OTK-A 2017/60.

[36] J. Kosik, *Problem przywrócenia władzy rodzicielskiej w świetle kodeksu rodzinnego i opiekuńczego*, NP 1973, No. 10, p. 1468; Judgment of the TK of 28 April 2003, K 12/02, OTK-A 2003, No 4, item 32; Resolution of the Supreme Court [*Sąd Najwyższy* – SN] of 20 November 1953, C 1964/52, OSNCK 1956, No 2, item 32; Resolution of the SN of 9 June 1976, III CZP46/75, LEX No. 1966.

[37] S. Kołodziejski, *Dobro wspólnych nieletnich dzieci – jako przesłanka odmowy orzeczenia rozwodu*, Palestra 1965 No. 9 p. 30. Approvingly: A. Łapiński, *Ograniczenia władzy rodzicielskiej w polskim prawie rodzinnym*, Warszawa 1975, p. 131; B. Walaszek*, Dobro dziecka jako przesłanka niektórych uregulowań kodeksu rodzinnego i opiekuńczego PRL*, SP 1970, No. 26–27, p. 281; Z. Wiszniewski, S. Gross, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. B. Dobrzański, J. Ignatowicz, Warszawa 1975 p. 281; J. Marciniak, *Treść i sprawowanie opieki nad małoletnim*, Warszawa 1975, p. 19; A. Olejniczak, *Materialnoprawne przesłanki udzielenia rozwodu*, Poznań 1980, p. 52; A. Strzembosz, *System sądowych środków ochrony dzieci i młodzieży przed niedostosowaniem społecznym*, Lublin 1985, p. 109; S. Łakoma, *Pojęcie, priorytet i treść dobra dziecka*, SPE 2004 vol. LXIX, pp. 90–91; M. Andrzejewski, *Prawo rodzinne i opiekuńcze*, Warszawa 2014, p. 24; J. Gajda, *Kodeks rodzinny i opiekuńczy. Akty stanu cywilnego. Komentarz*, Warszawa 2002, p. 236; W. Stojanowska, *Rozwód…*, *op.cit.*, p. 27; *Idem*, "Dobro dziecka jako instrument wykładni norm konwencji o prawach dziecka oraz prawa polskiego i jako dyrektywa jego stosowania", [in:] *Konwencja o prawach dziecka – analiza i wykładnia*, ed. T. Smyczyński, Poznań 1999, pp. 97–99; Z. Radwański, *Pojęcie i funkcja…, op. cit.*, p. 19.

[38] Judgment of the SN of 15 September 1951, C 717/51, OSNCK 1953, No. 1 item 37.

The need for the implementation of the basic family law rule for the welfare of the child has required, in relation to adoption, an introduction of additional conditions that enable the achievement of this institution objectives. The conditions for adoption have differentiated features. Some are to lead to the creation of the relations possibly best imitating the relations of the natural relationship; others are to be the guarantee that the relationship of adoption will proceed correctly; next ones are to consider the will of the entities affected by the adoption.

By analyzing the issue of adoption premises, one can conclude that in the individual countries they are similar to a greater or lesser extent. The Family and Guardianship Code provides the following premises of adoption: minority of the adopted child (Art. 114 of the k.r.o), full legal capacity of the adoptive parent, having appropriate qualifications by the candidate to the adoption of a child[39], essentially, completion by the candidate of a course and obtaining a positive qualification opinion from the adoption center[40] (Art. 114^1 § 1 of the k.r.o.), the an appropriate age difference between the parties to the adoption (Art. 114^1 § 2 of the k.r.o.)[41], essentially, remaining alive

[39] *Inter alia,* H. Dolecki, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, eds. H. Dolecki, T. Sokołowski, Warszawa 2013, p. 825; A. Stelmachowski, [in:] *Kodeks..., op. cit.*, ed. B. Dobrzański, J. Ignatowicz, p. 700; J. Trepka-Starosta, "Motywacja do podjęcia decyzji o adopcji", [in:] *Adopcja. Teoria i praktyka*, ed. K. Ostrowska, E. Milewska, Warszawa 1999, pp. 67–73; T. Postrzednik, "Wykorzystanie systemowej diagnozy rodziny w pracy z kandydatami na rodziców adopcyjnych", [in:] *Ibid.*, pp. 116–119; M. Rozborska, A. Jankowska, "Psychologiczne przygotowanie kandydatów na rodziców adopcyjnych", [in:] *Ibid.*, pp. 120–123; G. Gralak, "Kwalifikacja kandydatów na rodziców adopcyjnych w aspekcie psychologicznym", [in:] *Ibid.*, p. 131; Z Ziembiński, *Zadania i technika wywiadu środowiskowego*, NP 1955, Journal 5, p. 107; *Idem,Podłoże społeczne przysposobienia dziecka w Polsce Ludowej*, Warszawa 1956, p 129; Judgement of the SN of 9 June 1976., III CZP 46/75, OSNCP 1976, No. 9, item 184.

[40] Concerning the possibility of appeal against the decision of the adoption center*cf.*: K. Tryniszewska, *Ustawa o wspieraniu rodziny i systemie pieczy zastępczej,* Warszawa 2015, pp. 409–410; R. Zegadło, [in:] *Kodeks rodzinny i opiekuńczy,* ed. J. Wierciński, Warszawa 2014, p. 793; Judgment of the Provincial Administrative Court in Olsztyn of 2 July 2013, II SA/OI 393/13, LEX No. 1343092.

[41] The term "*relevant difference in age*" is understood in the Polish literature variously. According to one view this should be approximately 18 years (Decision of the SN of 29 November 1972, III CRN 284/72, LEX No. 7190; Decision of the SN of 18 November 2003, II CK 199/02, LEX No 602360; E. Holewińska-Łapińska, [in:] *System…, op. cit.*, ed. T. Smyczyński, p. 527; T. Smyczyński, *Prawo rodzinne i opiekuńcze*, Warszawa 2016, p. 277; J. Ignatowicz, M. Nazar, *Prawo rodzinne*, Warszawa 2016, p. 471). According to the second view the difference should be a minimum of 15 years (J. Winiarz, J. Gajda, *Prawo rodzinne*, Warszawa 2001, p. 226). While according to the third view one cannot determine a fixed limit, but one should consider the circumstances of the case (Judgment of the SN of 22 June 1972, III CRN 133/72; OSP 1973 No. 6 item 123; M. Wawiłowa, Gloss to the Decision of the SN of 22 June 1972, III CRN 133/72. OSP 1973/6/12). *Cf.* also: E. Holewińska-Łapińska, [in:] *System…*, *op. cit.*, ed. T Smyczyński, pp. 477–448; Z Miczek, *Odpowiednia różnica wieku jako przesłanka przysposobienia*, PS 2007 No. 10, p. 77.

by the parties to adoption (Art. 117 § 2 of the k.r.o.)[42], the undisturbed completion of the pre-adoption period (mandatory or optional, Art. 120^1 of the k.r.o.)[43], the lapse of the six weeks period of time after the birth of the child (Art. 119^2 of the k.r.o.) and essentially, the consent of many entities – the biological parents (Art. 119 of the k.r.o., Art. 119^1 of the k.r.o., Art. 119^{1a} of the k.r.o.), the adoptive parents (Art. 117 of the k.r.o.), the adopted child (Art. 118 of the k.r.o.), the spouse of the adoptive parent (Art. 118 of the k.r.o.), or the guardian (Art. 120 of the k.r.o.).[44] These conditions are generally divided into the ones concerning the adopted child, concerning the adoptive parents and concerning third persons. An analysis of the adoption conditions will be made in the later part of the report, devoted to the adoption procedure. Because of the subject matter of this paper we will discuss only those adoption premises, which are of crucial importance for the possible use of surrogate motherhood.

3.1. Types of adoption in the context of issues relating to surrogate motherhood

In the modern legal systems, the institution of adoption is applicable to a wide range of situations. Also, in Polish law, there are many types of adoption grouped according to different criteria: 1) anonymous, full and incomplete adoption; 2) joint and singular adoption 3) domestic and foreign adoption; 4) adopter-specify adoption in

[42] Judgement of the SN of 30 September 1952, C 1513/52, PiP 1953, Journal 5–6.

[43] J. Ciszewski, *O warunku wspólnego zamieszkiwania przysposabiającego z przysposabianym przed orzeczeniem przysposobienia*, PWS 1979, No. 1, pp. 22–28; J. Mazurkiewicz, *Zanim pomysły nasze sczezną wraz z nami. Wrocławskie projekty ochrony prawnej dzieci i kobiet,* Wrocław 2016, pp. 177–181.

[44] E. Budna, *W sprawie charakteru prawnego zgody rodziców na przysposobienie anonimowe dziecka*, PS 1996 No. 3, pp. 37–61; H. Dolecki, Gloss to the Decision of the SN of 25 October 1983, III CRN 234/83, OSP 1986/1/2; M. Goettel, *W sprawiecharakteru prawnego zgody rodziców na przysposobienie*, NP 1990, No. 1–3, pp. 54–59; *Idem*, Gloss to the Resolution of the SN Civil and Administrative Chamber of 26 September 1983, III CZP 46/83, OSPiKA 1985, item 28, p. 67; E. Holewińska-Łapińska, *Zrzeczenie się dziecka*, Jurysta 1993 No. 3, pp. 14–15; J. Panowicz-Lipska, *Zgoda na przysposobienie*, RPEiS 1985, No. 1, pp. 51–67; U. Maziarzewska-Leszczyna, *Charakter prawny zgody rodziców na przysposobienie dziecka*, Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji 1991, No.27, pp. 141–150; M. Pazdan, *Zdolność przysposabiającego do żądania przysposobienia*, ZNUJ 1962, No. 9, p. 101; T. Smyczyński, Gloss to the Decision of the SN of 25 October 1983, III CRN 234/83, OSPiKA 1985, item 134, p. 364; B. Walaszek, *Przysposobienie w polskim prawie rodzinnym oraz polskim prawie międzynarodowym prywatnym i procesowym*, Warszawa 1966., p. 208; Decision of the SN of 8 February 1974, III CRN 346/73, OSNC 1975 No. 6 item 92.

the construction before and after the amendment of the Family and Guardianship Code. In the context of research on the issue of surrogate motherhood, it is justified to focus attention on those types of adoption which in the case of normalization of the so-called surrogate motherhood agreements in Polish law or the use of informal agreements could be applicable. This will allow stressing possible threats that might arise in the case of surrogate motherhood agreements at the stage of adopting.

It seems that the most basic is the division due to the effects in relation to the relatives of the adoption parties. On the basis of this criterion, one can distinguish anonymous adoption, full adoption and incomplete adoption. The adjudication consequence of each of the above-mentioned adoptions is the creation of legal effects between the adoptive parent and the adopted child as between parents and children (Art. 121 § 1 and Art. 124 § 1 of the k.r.o.).

Incomplete adoption consists in the fact that the effects of the adoption extend only to the relationships between the adoptive parent and the adopted child, and the descendants of the adopted child (Art. 124 of the k.r.o.). At the same time, the child does not lose fully the legal bonds concerning inheritance (succession) or alimony, even with its biological parents, except that the adoptive parents step into their place (Art. 131 of the k.r.o., Art. 937 of the k.c.).[45] The adopted child does not remain in the legal and family relationships with the adoptive parent's relatives, and the relatives do not remain in such relationships with the adopted child. Incomplete adoption is not possible when parents expressed the so-called anonymous consent (Art. 119^1 of the k.r.o). In principle, in the child's birth certificate only an additional note is entered (Art. 75 of the p.a.s.c.), and the adopted child essentially acquires the surname of the adoptive parent (Art. 122 of the k.r.o.). Incomplete adoption can be converted into full adoption during the minority of the adopted child (Art. 124 § 3 of the k.r.o.). Incomplete adoption can be dissolved if there are valid reasons and this is not contrary to the welfare of the child (Art. 125 of the k.r.o.).

The basic type of adoption, not only under Polish law but also in other legislations, is full adoption.[46] The most important effects of full adoption are acquisition by the adopted child of the rights and obligations arising from the relationship to the relatives of the adoptive parent and termination of such rights and obligations of the adopted child to the previous relatives (subject to. the exemption referred to in

[45] Act of 23 April 1964, the Civil Code, the consolidated text Journal of Laws 2017, item 459.

[46] In certain national legislations, it is the only type of adoption. *Cf. inter alia,* the Family Code of the Russian Federation of 1995, and the Family Code of Ukraine of 2002.

Art. 121[1] of the k.r.o.). The adopted child acquires a new civil status without losing the previous one, which is connected with the possibility of establishing the natural civil status by determining or denying motherhood or fatherhood.[47] In general, the adopted child receives the surname of the adoptive parents (Art. 122 of the k.r.o.).[48] For important reasons, full adoption can be dissolved, if this is not contrary to the welfare of the child (Art.125 of the k.r.o.).

Anonymous adoption consists in including the adopted child into the family of the adoptive parents in a way as far reaching as possible in comparison with the other types of adoption. It may be ruled in cases strictly defined by the legislator, where the parents of the child and the adoptive parents do not know each other.[49] It concerns the situations where the child's parents expressed the so-called blank consent to adoption, they are unknown or deceased, as well as when one of the parents gave his/her anonymous consent and the other is unknown, deceased or deprived of parental authority (Art. 119[1] of the k.r.o.). Anonymous adoption has in fact similar effects to full adoption. The main differences are that complete adoption makes the adopted child lose his/her previous civil status, and the adoption cannot be dissolved. A new birth certificate is always created for the child (Art. 71 of the p.a.s.c.). These differences make anonymous adoption be treated as distinct from full adoption and incomplete adoption.[50]

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[47] Resolution of the SN of 20 March 1976, III CZP 77/75, OSNCP 1976, No. 9, item 185; Judgement of the SN of 21 February 1973, III CRN 332/72, OSNCP 1973, No. 12, item 224; Judgement of 20 April 1962, I CR 1069/60, OSN 1963, item 132.

[48] Judgement of the SN of 4 July 1952, C 1134/52, OSN 1953, No. IV, item 103.

[49] This construction resembles anonymous childbirths (anonymous birth, confidential pregnancies) present in some legislations.Act of 28 August 2013 on the Extension of Assistance for Pregnant Women and the Regulation of Confidential Births (Gesetz zum Ausbau der Hilfen für Schwangere und zur Regelung der vertraulichen Geburt), the German Federal Journal of Laws 2013 part 1 No 53; source: http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&start=//*%5b@attr_id=%2527bgbl113s3458.pdf%2527%5d#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl113s3458.pdf%27%5D__1433495016078 (last accessed: 6 April 2018). More information: The booklet prepared by Bundesministerium für Familie, Senioren, Frauen und Jugend, *Die vertrauliche Geburt. Informationen über das Gesetz zum Ausbau der Hilfen für Schwangere und zur Regelung der vertraulichen Geburt*, p. 22; http://www.bmfsfj.de/blaetterkatalog/206322/blaetterkatalog/blaetterkatalog/pdf/complete.pdf (last accessed: 6 April 2018). Decree dated 24 January 1956, the Code of Social Welfare and Family as amended, source: https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006074069&dateTexte=20150531 (last accessed: 31 May 2015). More information: D. Łukasz, R. Puchta, R. Tymiński, E. Wojnarska-Krajewska, *Ustawodawstwo związane z pozostawieniem noworodka…*, *op. cit.*, pp. 150–152.

[50] S. Grzybowski, "'Adoptio plenissima' (przysposobienie całkowite)", *Państwo i Prawo*, 1979, No. 2, pp. 38–48;E. Płonka, *Przysposobienie całkowite w prawie polskim,* Wrocław 1986, p. 117.

It must be assumed that if it were allowed under Polish law to conclude surrogate motherhood agreements, then the adoption type which would serve realization of such an agreement provisions would be, first of all, full adoption. Anonymous adoption is applicable in those situations where the parents of the child and the adoptive parent do not know each other. Incomplete adoption, due to maintaining ties with the rest of the child's family could be used, for example, in the case of intra-family surrogacy.

Until the entry into force of the amendments to the Family and Guardianship Code of 24 July 2015 a kind of adoption, which was unregulated legally, but encountered in practice, was the so-called adopter-specify adoption.[51] Before the entry into force of said amendments, the so-called adopter-specify adoption had been construed as the situations where the parties to the adoption were selected outside the adoption center and the consent to the adoption was given by the biological parents in the guardianship court to a specific adoptive parent, known to them.[52] In the legal status of that time it was stressed that this type of adoption might lead to giving consent to adoption in return for obtaining financial benefits.[53] The so-called adopter-specify adoption in the sense prior to the amendments could also be part of the

[51] After this date adoption with indication received another meaning, which will be the subject of further analysis.

[52] An opinion of the Supreme Court Research and Analyses Office [*Biuro Studiów i Analiz Sądu Najwyższego – BSiA SN*] according to which "a typical situation in the light of the statutory model is to give consent to adoption by the persons precisely specified (and in this sense indicated by the fact of the notification in the form of a requirement for adoption and therefore by the applicants." (Opinion of BSiA SN of 14 May, Ref. No. BSA I-021–113/14, p. 6). While the Minister of Justice in one of his letters indicated that "the concept of adopter-specify adoption is not a legal term. This term is sometimes referred to the essential form of adoption of the child, requiring the consent of the parents expressed in proceedings for the adoption of their child. Since in the proceedings the candidates for adoptive parents take part, the consent to adoption includes substantially the consent to adoption of the child and the acceptance of the specific applicants." (Letter of the Minister of Justice of 10 Feb. 2012, Ref. No. DprC-I-023–32/12, p. 1). H. Ciepła, [in:] *Komentarz do spraw rodzinnych…*, *op. cit.*, ed. J. Ignaczewski, p. 395; R. Łukasiewicz, [in:] *Instytucje prawa rodzinnego*, ed. J.M. Łukasiewicz, Warszawa 2014, p. 255; R. Łukasiewicz, *Przysposobienie ze wskazaniem – kilka uwag o projektowanych zmianach k.r.o.*, SP KUL 2014, No 4, pp. 177–179; R. Zegadło, [in:] *Kodeks…, op. cit.*, p. 834; Budna, *W sprawie…, op. cit.*, p. 37; R. Łukasiewicz [in:] *Instytucje prawa rodzinnego*, ed. J.M. Łukasiewicz, Warszawa 2014, p. 255; R. Łukasiewicz, *Przysposobienie ze wskazaniem – kilka uwag o projektowanych zmianach k.r.o.*, SP KUL 2014, No 4, s. 177–179; R. Zegadło, [in:] *Kodeks…, op. cit.*, p. 834.

[53] *Inter alia*. L. Gardocki, "Organizowanie adopcji a handel dziećmi", *Palestra*, 1994, No. 11, pp. 44–46; M. Pomarańska-Bielecka, "Komercyjny obrót dziećmi w celach adopcyjnych", *EP*, 2009 No. 3, p. 3 *et seq.*; M. Pomarańska-Bielecka, "Adopcja ze wskazaniem i zagrożenia z nią związane. O granicy między handlem dziećmi a stosowną korzyścią majątkową należną rodzinie biologicznej oddającej dziecko do adopcji", *Dziecko krzywdzone. Teoria, badania, praktyka*, 2015, Vol. 14, No. 2, p. 97.

informal procedure of surrogate motherhood. Bearing in mind that before the entry into force of the Infertility Treatment Act donor-specified donation in conjunction with adoption with indication had been admissible, and all the configurations, indicated in the first part of the report (see: Diagrams 1 to 7), could have been used.

Although the concept of adopter-specify adoption is appropriate for Polish law, one can trace some similarities of such an adoption type to the solutions in force in other countries, especially the so-called *open adoption* and *independent adoption*. In some countries, there is a division into *open adoption* (*offene adoption*) and *close adoption* (*inkognito adoption*) and intermediate constructions (*halboffene adoption*). The essence of open adoptions is an exchange of information and a contact between the biological parents and the adoptive parents before or after the adoption of the child.[54] In the foreign doctrine, the attention is turned to both the positive and negative effects of such adoptions.[55] In turn, in case of *independent* and *agency adoption* the demarcation criterion is commitment of the adoption center (adoption agency) in selecting future parties to adoption.[56] In the case of *agency adoption,* the biological parents resign from their parental rights and instead of them the adoption agency gives the consent to specific adoptive parents. Whereas, in the case of *independent adoption* the consent to adoption by specified persons is expressed directly by the biological parents.[57]

In 2015, there were changes in Polish law which were to limit significantly the cases of surrogate motherhood. The first of these was the introduction of the Infertility Treatment Act, which in fact eliminated the possibility of gestational surrogate motherhood. The second of these was the revision of the Family and Guardianship Code, of the Code of Civil Procedure and of the Act of 9 June 2011 on Supporting Family and Foster Care System.[58] It was to limit significantly the cases of adopter-specify adoption and thus to eliminate child trafficking in the form of

[54] M. Berry, "Risks and benefits of Open Adoption", *The Future of Children: Adoption*, 1993, Vol. 3, No. 1, p. 126; B. Z Sokoloff, "Antecedents of American Adoption", *The Future of Children: Adoption*, 1993, Vol. 3, No. 1, p. 24.

[55] M. Berry, *Risks and benefits…*, *op. cit.*, p. 125 *et seq.*; J. H. Hollinger, "Adoption Law", *The Future of Children. Adoption*, 1993, Vol. 3, No. 1, pp. 50–51; A. Baran, Pannor, "Perspectives on Open Adoption", *The Future of Children: Adoption*, 1993, Vol. 3, No. 1, p. 122.

[56] R. Hicks, *Adoption. The Essential Guide to Adopting Quickly and Safely*, New York 2007, pp. 49–93.

[57] M. T. McDermott, "Agency Versus Independent Adoption: The Case for Independent Adoption", *The Future of Children: Adoption*, 1993, Vol.3, No. 1, p. 146.

[58] Act of 9 June 2011 on Supporting Family and Foster Care System, the consolidated text Journal of Laws of 2017, item 697.

consent to adoption in return for financial benefits. In the scope of such facts there was also giving consent to adoption by surrogate mothers who had given birth to a child and undertook informally to give away the child to the adoption by the other party to surrogate motherhood agreement.

In accordance with the new Art. 119^{1a} of the k.r.o., parents may indicate before the guardianship court the person of the adoptive parent who may be exclusively a relative of the parents with the consent of that person made before that court. The person indicated may also be the spouse of one of the parents. The literal construction of the above regulation could suggest that the cases known so far as adopter-specify adoption has been limited only to relatives of the child and its step-parents.[59] But with the elapse of time, based on the functional and systemic interpretation, a view worked its way that Art. 119^{1a} of the k.r.o. introduced only a new, additional mode of adoption that does not affect the possibility for the child's parents to express their consent to adoption by a person of their choice that does not belong to the circle of the entities referred to in Art. 119^{1a} of the k.r.o.[60] This position has the primary meaning for discussions on surrogate motherhood. Lack of possibility to give consent to adoption of a child by a person from outside the family and unselected by the adoption center would limit the possibility of surrogate motherhood only to the intra-family one. It should therefore be concluded that whereas the Infertility Treatment Act reduced significantly the admissibility of the actual use of surrogate motherhood agreements, the revision of the Family and Guardianship Code concerning the so-called adopter-specify adoption did not introduce any substantial changes.[61]

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[59] J. Ignatowicz, M. Nazar, *Prawo rodzinne,* Warszawa 2016, pp. 59, 473; J. Mazurkiewicz, *Zanim pomysły nasze sczezną wraz z nami. Wrocławskie projekty…, op. cit.*, p. 170. K. Mularski, "W sprawie problemów intertemporalnych związanych z wejściem w życie art. 119^{1a} Kodeksu rodzinnego i opiekuńczego", *Zeszyty Prawnicze BAS*, 2016, No. 2, p. 36. Not quite unambiguously in this matter, but rather in accordance with the position by M. Nazar: J. Gudowski, [in:] *Kodeks postępowania cywilnego. Komentarz, T. IV*, ed. T. Ereciński, Warszawa 2016, p. 314.

[60] J. Gajda, *„Adopcja ze wskazaniem", op.cit.,* pp. 52, 57; *Idem*, [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. K. Pietrzykowski, Warszawa 2018, pp. 930, 934; T. Smyczyński, *Prawo rodzinne i opiekuńcze,* Warszawa 2016, p. 280; A. Wilk, *Co nowego w przysposobieniu? Nowelizacja prawa o przysposobieniu*, Metryka 2015 No. 2, p. 189; R. Łukasiewicz, *Prawna regulacja…*, *op. cit.*, p. 126; J. Strzebinczyk, *Prawo rodzinne*, Warszawa 2016, pp. 339, 341.

[61] Assuming the interpretation of Article 119^{1a} of the k.r.o., according to which this provision does not exclude the consent to adoption of a child by a person outside the range of the entities referred to in that provision.

In Polish law one can talk about intra-family adoption as a sort of adoption. Also, in other legislations, e.g., in German law, there are different regulations for adoption by aliens (*Fremdadoption*) and adoption of a stepchild (*Stiefkindadoption*).[62] The cases where the adoptive parent is a relative or a relative-in-law are in Polish law given a preferential treatment. Above all, such persons are not affected by the obligation to hold a certificate of training completion in the adoption center (Art. 172.2.1 of the u.w.r.). In addition, the adoption center does not initiate proceedings in the search for candidates to adoption of a child and the initiated are suspended if the readiness for the adoption of a child is declared by its relatives or relatives-in-law (Art. 170.1 of the u.w.r.). In the context of the surrogate motherhood issues, it should be noted that intra-family adoption could be applicable in the case where the surrogate mother would be related to the social mother or father, and where the donor of the reproductive cell would be the sociological father (see: Diagrams 2 and 4).

In the literature, it is common to distinguish national and foreign adoption. At this point it should be mentioned that the concept of foreign adoption or international adoption may raise some doubts about its nature. Foreign adoption in terms of the Family and Guardianship Code means a situation where there is a change from the existing residence of the adopted child in the Republic of Poland to the residence in another country (Art. 114^2 of the k.r.o.). While in terms of international private law[63], foreign (international) adoption means adoption with the so-called foreign element (57–58 of the p.p.m.).[64] With regard to the so-called surrogate motherhood agreements one should consider whether there is a possibility of a foreign adoption ruling in a situation where the parties to the adoption have been matched outside the activity of state institutions. Only in such cases the issue of surrogate motherhood may take place. This is due to the fact that the surrogate mother and intending parents must to get to know each other before its conception and therefore when the adoption centers do not collect any data about the adopted child. It is also worth noting that in situations where the persons interested in surrogate motherhood want to carry it out abroad, they will probably choose a country where

[62] *Inter alia,* H. Oberloskamp, *Wir werden Adoptiv – oder Pflegeeltern,* München 2000, pp. 100 *et seq.*

[63] The Act of 4 February 2011 – Private International Law, (the consolidated text Journal of Laws of 2015, item 1792, hereinafter: p.p.m. (*Prawo Prywatne Międzynarodowe*).

[64] K. Bagan-Kurluta, *Przysposobienie międzynarodowe dzieci*, Bialystok 2009, pp. 271–272; *Ibid*., "Celowość powojennych zmian w polskim prawie w kontekście realizacji dobra dziecka przy przysposobieniu zagranicznym", [in:] *Prawo blisko człowieka. Z dziejów prawa rodzinnego i spadkowego. Materiały konferencyjne (Kraków 7–8.03.2007)*, ed. M. Andrzejewski, Toruń 2008, pp. 99–114.

it is possible to enter them as the parents in the birth certificate. Then the certificate will be subjected to transcription in the Polish registry office. In such cases, it would be far more complicated to carry out the adoption procedures.

Another division that is relevant in the context of the surrogate motherhood issues is joint and singular adoption. It is important in the sense that it indicates who may be the other party, next to the surrogate mother, to the informal surrogate motherhood agreement. The Infertility Treatment Act reduces significantly the possibility of surrogate motherhood and prevents taking part in the infertility treatment procedures by single women (Art. 2.1.3 of the u.l.n.). But if in Polish law there were the possibility of donor-specified donation, which in the absence of appropriate legal regulations had taken place in the previously existing legal status, it would be necessary to answer the question who can be the adoptive parent. In accordance with Art. 115 § 1 of the k.r.o. only spouses, thus persons of a different sex, may adopt jointly. Therefore cohabitants, regardless of their gender, may not adopt jointly.[65] On the other hand, a lonely person may adopt singularly a minor child. This opens the possibility of actual custody of the child by the person with whom the adoptive parent remains in an informal relationship, including a same-sex person. It should be noted that the provisions of the Infertility Treatment Act and of the Family and Guardianship Code do not make it possible for same-sex couples to obtain parental authority over a child conceived thanks to infertility treatment procedures by one of such partners and the person declaring cohabitation with him/her. In this case, the parental authority over the child will be given only to that partner of the same-sex relationship who participated in the infertility treatment procedure or made the adoption.

3.2. Surrogate motherhood and adoption procedure in Polish law

When considering the issue of the institutions involved in the adoption procedure one should distinguish certain stages of the child adoption procedure. In Polish law one can talk about three stages of adoption. The first of them involves participation of the adoption center, and according to the circumstances, it may be intense.

[65] Decision of the SN of 25 October 1983, III CRN 234/83, LEX No. 2972, with the glosses: T. Smyczyński, Gloss to the Decision of the SN of 25 October 1983, III CRN 234/83, OSP 1985 No. 7–8, item 134; H. Dolecki, Gloss to the decision of the SN of 25 October 1983, III CRN 234/83, OSP 1986 No. 1, item 2.

The activity of adoption centers focuses on collecting information about children whose legal situation allows adoption, on selection of the future parties to adoption, on conducting training and issuance of the respective opinions (Art. 156 of the u.w.r.). The second stage is a decision by a court which is of crucial importance for the emergence of the adoption relationship (Art. 585–589 of the Civil Procedure Code).[66] The guardianship court, based on the obtained data decides whether the adoption will be in accordance with the welfare of the minor child. The last stage is to make changes in the civil status of the minor by placing in the existing or new birth certificate the data of the adoptive parents, as the child's parents (Art. 71–73 and 75 of the p.a.s.c.).

It may not be surprising that considering the objectives of adoption, the State wishes to exercise control over the process. Today it is common to regulate the procedure of adoption in a way which ensures that the appropriate judicial or administrative body oversees it. Due to the need for the implementation of the protective function of the State it is interested in the appropriate functioning of the family created after the adoption. This is not only in the interest of those families, but it also has the social meaning. In this sense one can talk about the public interest in the sphere of adoption.[67] It should therefore be considered as accurate and still valid the statement that the auxiliary adoption rule, aiming to achieve better the underlying assumptions of this institution should be, *inter alia*, the principle of the State control. Currently, adoption has ceased to be only a private matter of the parties to it and their families. Today, the role of the State bodies boils down to ensuring that the adoption should be ruled only where it is in the welfare of the child. This value is considered not only on the stage of adoption relationship creation but also during its duration and possible dissolution.

As already mentioned in the Polish legal system, on the first stage of the procedure leading to the establishment of adoption, competent authorities for carrying it out are the adoption centers acting on the basis of the Act on Supporting Family and Foster Care System. The procedure was referred to in the literature as pre-adoption

[66] Act of 17 November 1964 the Civil Procedure Code, the consolidated text Journal of Laws of 2018, item 155.

[67] On the relation between the welfare of the child and the public interest: M. Balcerek, *Prawa dziecka*, Warszawa 1986, p. 250; H. Haak, *Kodeks rodzinny i opiekuńczy. Przysposobienie. Komentarz*, Toruń 1996, p. 16; A. Łapiński, *Ograniczenia władzy rodzicielskiej w polskim prawie rodzinnym*, Warszawa 1975, pp. 136–137; Z Radwański, "Dobro dziecka", [in:] *Konwencja o prawach dziecka a prawo polskie*, ed. A. Łopatka, Warszawa 1991, p. 61; W. Stojanowska, *Rozwód a dobro dziecko*, Warszawa 1979, p. 20.

procedure, as it precedes the subsequent judicial proceedings.[68] In accordance with Art. 154.1 of said Act, it includes "conducting adoption procedures" and preparation of the candidates for the child adoption.[69]

As indicated earlier, one of the basic tasks of the adoption centers is the choice of future parties to adoption. This means that persons showing the readiness for a minor child's adoption may come to the adoption center. Then the adoption center verifies whether these persons are qualified to adoption of a child. Then the adoption center verifies whether in the data banks of children waiting for adoption there is information of the child for whom those candidates would be the proper parents.

It should be noted that this procedure will not apply to the cases of the so-called surrogate motherhood. The nature of this type of agreements is the fact that the surrogate mother and the future sociological parents are acquainted with each other even before the child's conception. Thus, the question is whether in Polish law it is possible to conduct adoption in a situation where the adoption center has not matched the future parties to this relationship. The answer to this question is positive. Doubts may, however, appear in relation to the scope of such situations.

The introduction in 2015 by the Polish legislator of Art. 119^{1a} of the k.r.o. raised doubts as to whether the parents of the child may consent to adoption of their child by the specific persons other than the relatives or spouse of one of the parents. It was also underlined that in the doctrine there appeared a view of such a possibility, but on the basis of Art. 119 of the k.r.o. and not Art. 119^{1a} of the k.r.o. When considering the issue in relation to surrogate motherhood, it should be noted that if in Polish law the provisions of the Infertility Treatment Act were different, i.e., they provided for donor-specified donation and thus they opened the possibility of informal agreements on gestational surrogate motherhood, then the persons wishing to benefit from surrogate motherhood would have to use the following procedure. The parties to the surrogate motherhood agreement would get acquainted with each other without the State control, e.g., they would be friends, relatives, or they would find each other via an Internet forum. Then thanks to the infertility treatment procedure the woman would give birth to a child. The next step would be filing by the sociological parents of an application for the child's adoption to the

[68] Like this: M. Nazar, [in:] Prawo rodzinne, Warszawa 2016, p. 476. For more about this procedure *cf.*, e.g., A. Wilk, [in:] *Ustawa o wspieraniu rodziny i systemie pieczy zastępczej. Komentarz*, Warszawa 2016, pp. 688 *et seq.*

[69] Tasks of the adoption center have been listed as examples in Art. 156.1 of the Act on Supporting Family and Foster Care System.

guardianship court (Art. 585 of the k.p.c. [*Kodeks postępowania cywilnego – the Code of Civil Procedure*]). It is worth emphasizing again that the adoption center would not be involved in their selection of the child. The involvement of the center would boil down only to issuance of an opinion on the adoptive parents and conducting of the corresponding training (Art. 114^1 of the k.r.o.). Then to make the adoption the consent of the persons who in the light of law are the parents of the child would be needed (Art. 119 § 1 of the k.r.o.). If Polish law allowed application of medically assisted procreation towards single people, then the surrogate mother would give her consent to the adoption of the child. In the current state of law, in addition to her, the consent to the adoption would have to be expressed also by the man who took part in the infertility treatment procedure. In this way, all the rights arising from the relationship would be transferred to intending parents.

There is no doubt that the adoption of a child by the persons selected by the parents themselves may cause doubt as to their intentions. Some concerns are justified that this type of adoption may be the result of an informal agreement of the parents (especially the mother) and the future adoptive parents agreeing payment of money in return for the consent to the adoption. The consent to the adoption in such cases could be also part of the gestational surrogate motherhood agreement. In the period preceding the entry into force of the Infertility Treatment Act, undoubtedly, there had been a real danger of child trafficking. To its implementation one could use donor-specified donation and adoption with indication in the sense prior to the entry into force of the amendments in 2015.

Because of the previously indicated reasons, selection of future parties to adoption outside the adoption center is treated in Poland with some suspicion. Differently are assessed such situations in certain other legal systems. For example, in most states in the USA it is even required that the parents of the child and the adoptive parents should initiate their first meeting by themselves, which might take place, e.g., thanks to a newspaper advertisement.[70] In Polish law, however, there is a stronger conviction that it is the adoption center that should ensure the selection of future parties to adoption.

The second stage of adoption is the proceedings before the guardianship court (Art. 117 of the k.r.o.). By analyzing the contemporary applicable legal systems, it should be noted that the construction that the adoption takes place due to a court decision is dominant. Such conduct is outside Poland also in Germany or France.

[70] M. T McDermott, *Agency Versus Independent…, op. cit.*, p. 148.

Sometimes the decisive authority to establish adoption is not a court but an administrative authority, e.g., in Slovenia.[71] Exceptionally, adoption is made by the way of an agreement to be concluded between the adoptive parent and the adopted child with a permission of the court. This is the case, e.g., in Austria.

The court proceedings in the case of adoption are crucial for the issues of surrogate motherhood. As it was already noted, the involvement of the adoption center is inherently restricted in such cases. In the previously existing legal status, the persons, who due to the application of the medically assisted procreation, implemented the informal surrogate motherhood agreement, made adoption directly by submitting a petition for adoption to the guardianship court. Then the guardianship court examined their qualifications and determined whether they were meeting the criteria for adoption of the minor. The involvement of the adoption center was limited only to the issuance of the completion certificate of the training and of an opinion about the adoptive parents. Similarly, the situation would look if now Polish law were amended by such solutions related to infertility treatment, which would allow the implementation of informal surrogate motherhood agreements (donor-specified donation of reproductive cells).

Specificity of surrogate motherhood agreements entails that an analysis is required only for some premises of adoption. In relation to the adoption made in the framework of surrogate motherhood it is not necessary to make any detailed comments on such considerations as: the requirement of the adopted child's minority, full legal capacity of the adoptive parents, appropriate age difference between the parties to adoption, and staying alive by the adopted child and in principle of the adoptive parents. As regards the grounds for considering the wills of the entities in question, most space should be given to the consent of the child's parent, which has already been made in the earlier part of the report.

The premise of the appropriate qualifications for adoption of a child in respect of the issue of surrogate motherhood should be considered by focusing on the issue of adoption by a genetic parent of the child. In the event of surrogate motherhood there could be different configurations depending on the fact whose reproductive cells were used in the procedure of medically assisted procreation.

At the outset, it should be noted that determination of motherhood may be considered if in the birth certificate of the child, a woman that had not given birth

[71] The Slovenian Act of 4 June 1976 on Marriage and Family Relations with amendments, source: http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO40 (last accessed: 10 April 2018).

to it were entered, and the motherhood were denied. In the event of surrogate motherhood, a child is born by the surrogate mother and it is she, on the basis of Art. 61[9] of the k.r.o., who is entered into the child's birth certificate as its mother. This means that even if the sociological mother were the genetic mother of the child she could not demand motherhood denial of the surrogate mother and then determination of her own motherhood, as there are no normative grounds in this respect. The only way to obtain the parental rights and obligations would be adoption of the child.[72]

In the case of a sociological father there could be two situations – he would be either the genetic father of the child (if his reproductive cells were used), or he would not be (if anonymous semen donation were used). In the context of issues relating to adoption by the genetic parent and thus the first of the above options, two facts should be considered:

1. In the current state of law, it is not possible that there should occur an event where in addition to the reproductive cell of the sociological father the reproductive cell of his wife would be used (gestational surrogate motherhood). But if the provisions of the Infertility Treatment Act allowed such a possibility, then it would be required to consider the issue of collisions between fatherhood recognition and adoption, described in the doctrine. It appears that in such cases it would be more reasonable to use the institution of fatherhood recognition (see: Diagram 2).[73] Possibly, however, that in face of the negative attitude to surrogate motherhood, the institution of adoption would be used (see: Diagram 1).
2. On the basis of the Infertility Treatment Act it is possible to have a situation where the reproductive cells of the intending father and a surrogate mother are used (traditional surrogate motherhood) and they both would have to follow the infertility treatment procedure within partner donation (see: Diagram 7). Then there is no issue of collisions between fatherhood recognition and adoption, described in the doctrine, because the man as the genetic father would recognize the fatherhood under Art. 73 of the k.r.o.

Adoptive parents are generally required to obtain a completion certificate of the training conducted by the adoption center. This requirement does not apply, however, to the relatives and the relatives-in-law of the child (Art. 172.2.1 of the

[72] E. Holewińska-Łapińska, [in:] *System…*, *op. cit.*, ed. T Smyczyński, p. 532.

[73] S. Szer, *Prawo rodzinne,* Warszawa 1957, p. 226; E. Holewińska-Łapińska, [in:] *System…, op. cit.*, ed. T. Smyczyński, p. 531; *Cf.* B. Walaszek, *Przysposobienie…, op. cit.*, pp. 116–117.

u.w.r.), which could be of relevance in intra-family surrogacy. At the same time the issue of the necessity to obtain an opinion prepared by the adoption center is worth noting. In the current state of law, one can talk about two opinions issued by the adoption centers – a qualification opinion (Art. 114^1 § 1 of the k.r.o., Art. 585 § 2^2.2 of the k.p.c.) and an opinion as per Art. 586 § 4 and 5 of the k.p.c.

In the event of a petition for adoption by intending parents under the surrogate motherhood it seems that it would be necessary for them to obtain the both opinions. The qualification opinion would be issued with regard to the qualifications of the adoptive parents but without a reference to a specific child to whom the petition for adoption will apply. The opinion as per Art. 586 § 4 of the k.p.c. should refer to the assessment of the adoptive parents in relation to a particular child to be adopted. Doubts can be raised by the data indicated in Art. 586 § 5.3 and 4 of the k.p.c. that are to be included in this opinion. In accordance with these provisions the adoption center should include in the opinion the information on the relationship between the adopted child and the adoptive parents. This opinion will be issued particularly in the event where the adoptive parents have not been matched with the child via the adoption center. One should note that in such cases the center does not collect in its databases the information on the child, hence it will be difficult for it to determine how such relationships look like. This is of vital importance in the context of the surrogate motherhood issues. If the Polish provisions concerning treatment of infertility enabled, e.g., gestational surrogate motherhood, then the adoption center would be burdened, to some extent, with responsibility for examining the relationship between the parents, the adoptive parents and the child, to which, in fact, they do not have appropriate instruments.

The legislator has also introduced a premise of the so-called pre-adoption period, which consists in possibility that prior to adoption the guardianship court may specify the manner and period of personal contacts between the adoptive parents and the adopted child (Art. 120^1 § 1 of the k.r.o.). In relation to national adoption it is optional, but in relation to foreign adoption it is mandatory (Art. 120^1 § 3 of the k.r.o.). The situations where the mother of the child and the future adoptive parents come to an agreement in question of consent to the adoption and payment for it of a certain amount of money can be legalized by the method of "*faitsaccomplis*." This could take place in the event of surrogate motherhood. Just after the birth of a child its mother would pass the new-born to the custody of the adoptive parents. Then, after the expiry of the six-week period of grace, before which the consent to adoption cannot be expressed effectively (Art. 119^2 of the k.r.o.), a petition for adoption of

the minor would be submitted, together with a petition for granting the adoptive parents the pre-adoption custody. Due to the fact that the child would already stay with the adoptive parents it would be likely that the court would grant them the custody of the child in the form of a pre-adoption family and then it would issue a judgment of adoption.

If the change to the Polish legislation led to the possibility of the actual use of surrogate motherhood, especially gestational, then the importance could have Art. 585^2 of the k.p.c., entered by amendments of 2015. In accordance with this provision on the ongoing proceedings in the cases where the petition for adoption concerns the child unreported to the adoption center, the guardianship court notifies a public prosecutor. This requirement refers to the cases where the matching of the child to the adoptive parents did not take place via the adoption center. Implementation of the informal agreements on surrogate motherhood with the accomplished adoption would, therefore, be controlled by the prosecutor. Art. 585^2 of the k.p.c. increases the role of the prosecutor in the adoption case, which may be regarded as contrary to the postulated changes aimed at limiting the position of the prosecutor in civil proceedings.[74] However, one cannot lose sight of the functions of this regulation. It has not only a civil law dimension, but it can protect the child from the viewpoint of protection under criminal law. In view of the characteristics of surrogate motherhood agreements the intervention of the prosecutor in adoption cases may be justifiable.

The final stage of adoption is entering into the old or new birth certificate of the data of the adoptive parents as the child's parents. As it has already been indicated, the surrogate motherhood agreements could be implemented mainly on the basis of the adjudication of full adoption. Adjudication of anonymous adoption is impossible in such situations, whereas incomplete adoption is marginal in Polish law. Adjudication of full adoption may result in various changes in the acts of civil status. There is a possibility of drawing up a new birth certificate of the child or entering into

[74] *Inter alia,* T Ereciński, "O potrzebie nowego kodeksu postępowania cywilnego", *PiP*, 2004, Journal 4, p. 8; A. Góra-Błaszczykowska, "Wszczęcie postępowania cywilnego przez prokuratora w świetle zasady równości stron (kilka uwag na tle aktualnego stanu prawnego)",*Opolskie Studia Administracyjno-Prawne*, 2008,Vol. V, p. 64; A. G. Harla, *Uprawnienia prokuratora*, Palestra 2006 No 3/4, p. 41; A. Jaworski, "Uprawnienia prokuratora w postępowaniu cywilnym w przyszłym Kodeksie postępowania cywilnego – propozycja podstawowych założeń", [in:] *Postępowanie rozpoznawcze w przyszłym Kodeksie postępowania cywilnego*, eds. K. Markiewicz, A. Torbus, Warszawa 2014, pp. 483–527; M. Piórkowska, "Kilka refleksji w związku z udziałem prokuratora w postępowaniu cywilnym", *Przegląd Ustawodawstwa Gospodarczego*, 1994, No. 5, pp. 23–25; K. Weitz, "Czy nowa kodyfikacja postępowania cywilnego?", *PiP*, 2007, Journal 3, p. 26.

the existing birth certificate of an additional note containing information on the adoption (Art. 72 of the p.a.s.c.). It is important to remember that in the event of the drawing up of a new birth certificate the adopted child does not lose its existing civil status and as an adult it is able to get to know its biological origin.

The birth certificate of the child born by the surrogate mother may have different content. There is no doubt that the woman who gave the birth to the child is entered as the mother. At this point one should disregard the cases where a transcription of a birth certificate issued in another country has been made, and a woman who is the genetic mother of the child was entered into it, although she had not given birth to it. However, the question of the content of a birth certificate in relation to fatherhood remains. In this respect, there are two possibilities.

Firstly, in the event of surrogate motherhood the key meaning may have fatherhood recognition by the man who wishes to be the father of the child. At the same time, one should still remember that *de legelata* the Infertility Treatment Act excludes the possibility to realize gestational surrogate motherhood, where the genetic mother of the child will be the sociological mother and not the biological (surrogate) mother. At the same time, it is possible to participate in the infertility treatment procedure by a man who wants to be in the future the father of a child. Together with a surrogate mother, he may participate in the procedure of partner donation and be the genetic and legal father of the child, or in non-partner donation and be the legal but non-genetic father of the child. In the first case, the fatherhood recognition will be made on the basis of Art. 75 of the k.r.o. (see: Diagram 7), while in the second case on the basis of Article 75^1 of the k.r.o. (see: Diagrams 4, 6, 7). In the event where such recognition occurred, in law the father would be the genetic father, the mother would be the woman being the surrogate mother. The next step to finalize the surrogate motherhood agreement would be the adoption of the child by the wife of the man who has recognized his fatherhood. The question remains whether the procedure of infertility treatment would have to have taken place before the conclusion by the man of marriage with the adoptive mother, or in the absence of marital status verification by infertility treatment centers it would be possible to go through the procedure by persons declaring cohabitation, out of whom at least one is married.

Secondly, if in the birth certificate of the child it is the surrogate mother who has been entered as the mother, and as the father another man than the genetic father, then the persons who are the other party to the surrogate motherhood agreement are in no way connected by the legal ties with the child. This will be the case when the father of the child is not known and in the birth certificate under the heading

"father" the so-called covering data have been written (Art. 61.2 of the p.a.s.c.), and when fatherhood of another man than the genetic father has been determined, e.g. by the presumption of the child's origin from the husband of the surrogate mother or recognition of fatherhood. It should be stressed once again that in the absence in the Infertility Treatment Act of donor-specified donation, even informal gestational surrogate motherhood may not take place in fact. But if there were such a possibility, then in the event of refusal by the surrogate mother to give over the child, the chances of the genetic parents would be none to become the parents of the child in the light of law. Above all, they would not be able to challenge the motherhood of the surrogate mother. It is undisputed that she is the woman who gave birth to this child. Thus, there are no grounds for the annulment of the child's birth certificate. It would be also pointless for the genetic parents to refer to the fact of the conclusion of the surrogate motherhood agreement and its content, requiring from the surrogate mother to give over the child born by her to the genetic parents. First of all, as previously mentioned, the admissibility of such an agreement is questionable. Its nullity is usually raised in the light of Art. 353^1 of the k.c. in conjunction with Art. 58 § 1 and 2 of the k.c. Secondly, even if this agreement were valid, it would not lead to undermining of the birth certificate content. According to Art. 3 of the p.a.s.c. it is the exclusive proof of the fact of the child's birth by the surrogate mother, and its inconsistency with the truth can be found only in court proceedings, which, as mentioned previously, is not an option either. The situation is not clear even if the surrogate mother gave over the child to the genetic parents. Such parents, wishing to adopt their own genetic child, in the light of Polish law, would be treated as other candidates to adoption of the child. Additionally, one cannot exclude the situation where the genetic parents applying for adoption would not get a favorable qualification opinion from the adoption center. Although the provision of Art. 114^1 § 1 of the k.r.o. does not require a favorable opinion (it refers to having a qualification opinion), which does not, however, alter the fact that the lack of such an opinion will minimize the chances of the genetic parents for the adoption and in practice precludes their candidacy.

3.3. Foreign adoption and surrogate motherhood

Passing to the issues of surrogate motherhood related to foreign adoption, it should be indicated that the following comments will be only of a general nature. A detailed

analysis of the issues related to the aspect of international surrogate motherhood will be made in a separate report.

First, it should be noted that the term "adopcja zagraniczna" [*foreign adoption*] (Art. 114^2 of the k.r.o.) is not fully strict, although it is widely accepted both in the science and practice of justice administration. In the doctrine, it has been indicated that for certain situations a more appropriate wording would be the concepts of adoptions "between countries", "to another country", or "international adoption."[75] As indicated, the concept of foreign adoption can be examined from two perspectives. From the viewpoint of the Family and Guardianship Code, this is the adoption, whose result is a change of the residence place of the adopted child from the residence place in Poland, to the residence place in another country (Art. 114^2 of the k.r.o.). On the ground of the statute on Private International Law, foreign (international) adoption means the adoption where the so-called foreign element is present (Art. 57–58 of the p.p.m.).[76]

A consideration of the foreign adoption issues in the context of surrogate motherhood requires that the further analysis should be preceded by two introductory notes. Firstly, in situations where the sociological parents decide to carry out the procedure of medically assisted procreation with participation of the surrogate mother in a country other than Poland, they will probably choose a country where it will be possible to enter them in the birth certificate as the parents, e.g., Ukraine. Then the institution of adoption will not be the implementation of such an agreement. Secondly, a minor importance will have here adoption abroad in terms of the Family and Guardianship Code (Art. 114^2 of the k.r.o.), since the change in the residence place of the child will be rather a change of the residence place from abroad to the residence place in Poland. This does not change the fact, however, that in the State where the child will be born there may be the analogous solutions to Art. 114^2 of the k.r.o. that will have to be considered.

Essential in this area is the Convention of 29 May 1993, on Protection of Children and Cooperation in Respect of Intercountry Adoption.[77] Poland as well as the other States which have ratified it has adapted its own regulations to the convention standards. In accordance with Art. 2.1 of the k.p.z. the Convention shall apply

[75] K. Bagan-Kurluta, *Przysposobienie…*, *op. cit.*, p. 272.

[76] K. Bagan-Kurluta, *Przysposobienie…*, *op. cit.*, pp. 271–272; *Ibid.*, *Celowość powojennych zmian…*, *op. cit.*, pp. 99–114; E. Holewińska-Łapińska, "Nowelizacja norm o przysposobieniu – adopcje zagraniczne", *Monitor Prawniczy*, 1995, No. 11, p. 324.

[77] *Journal of Law*, 2000, No. 39, item 448 with corrections, hereinafter: k.p.z. [*Konwencja o przysposobieniu zagranicznym*].

where a child habitually resident in one Contracting State ("the State of origin") has been, is being, or is to be moved to another Contracting State ("the receiving State") either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin.

In the light of the Convention, foreign adoption is *ultima ratio* – as it is in relation to the national adoption of the subsidiary character. First, it should be ascertained that adoption (and not, e.g., foster care) is a way to ensure the child the care adequate to its situation, and in the second order that there are no adequate candidates for the child's adoption in its country of origin.[78]

In accordance with the provisions of the Hague Convention of 1993, the Contracting State designates a central authority to carry out the obligations imposed by the Convention. In Poland, this function is currently fulfilled by the Ministry of Family, Labour and Social Policy. Its duty is, *inter alia,* cooperation with the central authorities of other States or with organizations or adoption centers, licensed by the governments of those countries, in the scope of foreign adoption. Acting on the basis of the delegation contained in Art. 168.3 of the Act on Supporting Family and Foster Care System the Minister of Family, Labour and Social Policy in the notice of 17 January 2017 on the list of the adoption centers authorized to cooperation with the central authorities of the other countries or with organizations or adoption centers, licensed by the governments of other countries[79], authorized to this cooperation two centers: 1) Diecezjalny Ośrodek Adopcyjno-Opiekuńczy Centrum Służby Rodzinie I Życiu w Sosnowcu [The Diocesan Adoption and Guardianship Center, Center for Services for Family and Life in Sosnowiec], and 2) Katolicki Ośrodek Adopcyjny w Warszawie [The Catholic Adoption Center in Warsaw].

Foreign adoption within the meaning of the statute on Private International Law may be applied in relation to surrogate motherhood. In accordance with Art. 57.1 of the p.p.m. adoption is governed by the national law of the adoptive parent. The issue of law governance in the event of joint adoption is regulated by Art. 57.2 of the p.p.m., as a rule indicating the joint national law of both spouses. In accordance

[78] *Inter alia* C. Bojorge, "Intercountry Adoptions: In the Best Interests of the Child", *QUT Law Review*, 2002, Vol. 2, No. 2, p. 271; P. H. Pfund, "Intercountry Adoption, The 1993 Hague Convention, Its Purpose, Implementation and Promise", *Family Law Quarterly*, 1994, Vol. 28, No. 1, p. 57; *Cf.*L. M. Katz, "A modest proposal? The Convention Protection of Children and Cooperation in Respect of Intercountry Adoption", *Emory International Law Review*, 1995, Vol. 9, No. 1, pp. 303–304.

[79] Journal of Laws of 2017, item 35.

with Art. 58 of the p.p.m. adoption may not proceed without compliance with the national law of the person to be adopted, concerning the consent of that person, the consent of his/her legal representative, and the authorization of the competent State authority, and additionally concerning the adoption restrictions due to the change to the existing place of residence in another country.[80]

In the doctrine, a number of doubts is caused by the relation of Art. 57 and 58 of the p.p.m.[81] As indicated in the literature, concerning the premises listed in Art. 58 of the p.p.m. one should consider both the regulations defined on the basis of Article 57 of the p.p.m. and the rights defined on the basis of Art. 58 of the p.p.m. These systems are used in parallel, but separately, which means that there is here no synthesis of standards from different legal systems.[82] According to another view, Art. 58 of the p.p.m has a corrective meaning, which means that it is applied only if the applicable law indicated in Art. 57 of the p.p.m. does not provide for the requirements referred to in Art. 58 of the p.p.m.[83] According to the next view in relation to the premises referred to in Art. 58 of the p.p.m., the applicable law is the law of the adoptive parent, if it provides more protection for the adopted person.[84] It is worth mentioning the view that Art. 58 of the p.p.m. excludes to the extent of the premises listed there the application of Art. 57 of the p.p.m.[85]

The arrangements for the adoption binding in different legal systems are often different. This may lead to the question of reasonableness of the use in a given case of the public policy clause (*ordre public, porządek publiczny, Klausel der öffentlichen Ordnung*).[86] This clause is known not only to the Polish system of law. Only as an

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[80] Extensively on the subject of the law collision issues concerning adoption, *cf. inter alia:* B. Gnela, [in:] *System Prawa Prywatnego. Prawo prywatne międzynarodowe. Vol. 20c*, ed. M. Pazdan, Warszawa 2015, pp. 362–492.

[81] The views presented below will also include the positions adopted with regard to the relation of Art. 22 § 1 and Art. 22 § 1 of the Act of 12 November 1965 on Private International Law (*Journal of Laws*, 1965, No. 46, item 290 with amendments).

[82] [82] M. Pazdan, *Prawo prywatne międzynarodowe*, Warszawa 2017, p. 326; *Cf.* K. Bagan-Kurluta, *Przysposobienie międzynarodowe…*, op. cit., p. 150.

[83] B. Walaszek, *Przysposobienie…*, p. 294; *Cf.* B. Gnela, "Przysposobienie obywateli polskich przez cudzoziemców w świetle orzecznictwa Sądu Najwyższego", *Palestra*, 1988, No. 10, p. 12.

[84] A. Maczyński, *Rozprawy i studia z prawa prywatnego międzynarodowego*, Warszawa 2017, p. 629.

[85] Like that in respect to the previous legal status: Decision of the SN of 9 February 1972, III CRN 115/71, OSNCP 1972, No. 7–8, item 147.

[86] Decision of the SN of 2 June 1980 I CR 124/80 OSN CP 1981, No. 1, item 13; Judgment of the SN of 12 December 1986, I CR 268/86, Palestra 1989, No. 3; Decision of the SN of 21 June 1985 III CRN 58/85, *Nowe Prawo*, 1988, No. 10–12.

example, one can indicate the collision law regulations of Germany, Austria, Switzerland, or Belgium.[87] It is also present in the EU regulations.[88] In accordance with Art. 7 of the p.p.m., foreign law is not applied if its use would have effects contrary to the fundamental principles of the legal order of the Republic of Poland.[89] The public policy clause is also referred to directly by Art. 1146 § 1.7 of the k.p.c. concerning recognition of a foreign judgment. The relevant provisions are also included in the Law on Civil Status Records. In accordance with Art. 103 of the p.a.s.c., the Head of the Registry Office refuses registration of an event, if it were contrary to the fundamental principles of the legal order of the Republic of Poland. For the same reasons the Head of the Registry Office refuses to make the transcription (Art. 107.3 of the p.a.s.c.), and also to make acts on the basis of a ruling of a foreign state authority (Art. 108.4 of the p.a.s.c.).

One may also try to give examples of the clause application with regard to matters of adoption. As it might be presumed, this clause should be applied in the case of a joint foreign adoption by a homosexual couple (a "married" couple or cohabiting in the registered partnership). In the event of a recognition of such a foreign judgment there would be an infringement of the fundamental principles of the Polish legal system under the Constitution (Art. 18) and the k.r.o. (Art. 1 § 1, Art. 115 § 1). Referring to this clause, the Head of the Registry Office should also refuse the transcription of a foreign birth certificate of a child where two people of the same sex would be entered as the parents, including one as the biological mother and the other person would be a woman being the partner of the mother and making "adoption" of her child. As this has been reasonably assumed in the judicial

[87] *Cf.* respectively: Einführungsgesetz zum Bürgerlichen Gesetzbuche vom 21 September 1994 (BGBl. I S.2494) – Art. 6; Bundesgesetz vom 15. Juni 1978 über das international Privatrecht (BGBl. No. 304/1978) – § 6; Bundesgesetz über das Internationale Privatrecht vom 18 Dezember 1987 (AS 1988 1776) – Art. 17; Law of 16 July 2004 containing the Code on Private International Law – Art. 21. Quoted after: S. van den Bogaert, P. Tereszkiewicz, "Belgijskie prawo prywatne międzynarodowe", *Kwartalnik Prawa Prywatnego*, 2005, Journal 3, p. 867.

[88] *Inter alia,* Art. 22a of the Regulation (EC) No. 2201/2003 of the European Parliament and of the Council of 21 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, OJ of the EU L 338 of 23 Dec. 2003; Art. 45.1a of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ of the EU L 351 of 20 Dec. 2012.

[89] For more, *inter alia,* M. Zachariasiewicz, [in:] *System Prawa Prywatnego. Prawo prywatne międzynarodowe. Vol. 20A*, ed. M. Pazdan, Warszawa 2014, pp. 469–507; M. Sośniak, *Klauzula porządku publicznego w prawie międzynarodowym prywatnym*, Warszawa 1961.

decisions the basic principle of the Polish legal system is the difference of the parents' sex.[90] Inadmissible would be also the transcription of the birth certificate of a child, where more than two people would be entered as the parents (e.g., biological parents and adoptive parents).

In relation to the issue of surrogate motherhood the public policy clause can be essential. As it has already been indicated, the surrogate motherhood agreement may be realized with the aid of two legal constructions – an entry to the birth certificate of the genetic parents of the child or making adoption. In view of the fact that in Polish law there is a principle according to which the mother of a child is the woman who gave birth to it, some doubts may be raised by entering the genetic parents to the birth certificate when the procedure involving the surrogate mother has occurred in a State where it is possible. Although the Head of the Registry Office could consider such a situation to be contrary to the fundamental principles of the legal order of the Republic of Poland and refuse the transcription of the birth certificate, it is doubtful, however, whether he/she will be able to distinguish such facts from standard cases where a child was born abroad, but without the participation of the surrogate mother.

Many doubts may also be raised as to the compliance with the fundamental principles of the Polish legal order of a child adoption by its genetic parents as the implementation of surrogate motherhood agreement. It should be noted at the same time that the proceedings for adoption may in such cases be both before the Polish court and a foreign court or another body (Art. 1106^4 of the k.p.c.). In the event where the case is pending before the Polish guardianship court it may use the public order clause deciding on the basis of the applicable law, which may be a foreign law. In the event where the case is pending before a foreign court, the public policy clause will be applicable at the stage of the judgment recognition by the Polish court (Art. 1146 § 1.7 of the k.p.c.). Adoption of the own genetic child could be considered as contrary to the fundamental principles of the Polish law to the extent that establishing of legal and family relationships between the parents and the children is under Polish law regulated by filial law. There may also be a different position which allows adoption of the own child in those cases where it is the only way to determine the legal and family relationship between the parent and the genetic child. Doubts can be raised by the fact that in the case analyzed

[90] *Cf.* in this respect, Judgment of the Supreme Administrative Court of 17 December 2014, II OSK 1298/13, www.orzeczenia.nsa.gov.pl; Judgment of the Provincial Administrative Court from Łódź of 14 February 2013, III SA/Łd 1100/12, www.orzeczenia.nsa.gov.pl. *Cf.* also the reasons for the Decision of the SN of 6 December 2013, I CSK 146/13, www.mojepanstwo.pl (last accessed: 4 March 2018).

above, adoption is a component of the surrogate motherhood procedure that has not been legalized in the Polish legal order. It should also be noted that the situation is not precluded, where the court will not have the information of the conclusion of a surrogate motherhood agreement and that the adoptive parents are the genetic parents of the child, and it will consider this adoption as a typical adoption with indication (within the meaning prior to the amendments), or an open adoption.

4. Final conclusions

The analysis of the Polish legal solutions for adoption in the context of the issues of surrogate motherhood leads to the following conclusions:

1. The validity of the Polish legal rule *mater semper certaest* expressed in Art. 61^9 of the k.r.o. causes that the genetic ties of the sociological parents with the child born as a result of a surrogate motherhood agreement are not, from the point of view of the Polish law, decisive for determining the parent-child relationship. To the extent that the mother of the child is a woman that gave birth to it, the only way for both sociological parents to take custody over the child and to obtain the parental authority would be adoption of the child even by one of them. Depending on the situation, the sociological father could in such cases either recognize the fatherhood of the child born by the surrogate mother or adopt it. These options are, however, far reduced by the Infertility Treatment Act.
2. The Infertility Treatment Act significantly reduced the possibility of surrogate motherhood in Poland. Due to the exclusion of the admissibility of using donor-specified donation, implementation even of informal agreements on gestational surrogate motherhood is in fact impossible. But there is still a possibility of traditional surrogate motherhood. In addition, the exclusion of medically assisted procreation for single people and the impossibility of joint adoption by persons in same-sex relationships has led to the situation that surrogate motherhood under Polish law may not be the way to obtain parental authority over the child by both partners (both male or female) from a homosexual relationship.
3. In the event of the admission in Polish law to conclude surrogate motherhood agreements, adoption as a method of legalization of legal ties between the sociological parents and the child would have the following characteristics:

a. Usually, it would be a full adoption. Possibly in relation to intra-family adoption, an incomplete adoption could be applied;
b. It would be an adopter-specific adoption – within the narrower meaning (Art. 119^{1a} of thek.r.o.) if it were an intra-family adoption, e.g., the surrogate mother would be the sociological mother's sister. In other cases, it would be an adoption with indication in the wider sense (prior to the amendments);
c. It would be an adoption, whose parties had not been matched via the adoption center. It should be noted that the sociological parents and the surrogate mother must get to know each other before the child's conception, and therefore before the adopted child is born; an informal selection of its sociological parents takes place as subsequent candidates for the adoption. The submission of the petitions would bypass the center-based procedures in the selection of the candidates for the child's adoption;
d. It would be a joint adoption made by the spouses. Single adoption could only be applied in those cases where they would be considered in terms of their effects as joint adoption. We mean the situations where the sociological father would recognize fatherhood of the child born by the surrogate mother in the procedure of medically assisted procreation, where they would take part together and then his wife would adopt the child.

4. In various countries, legal arrangements concerning surrogate motherhood are extremely diverse. This may lead to carrying out the procedures of assisted procreation with participation of the surrogate mother in other countries. It should be noted that adoption as a part of the surrogate motherhood agreement will be rarely the case as the sociological parents interested in the birth of a child will generally choose the country where it is possible to enter them in the birth certificate as the child's parents, e.g., in Ukraine. Then they will seek to have such a birth certificate transcribed in Poland.
5. In the cases where adoption is a part of the surrogate motherhood procedure made abroad, crucial are the provisions of the statute on Private International Law. An important role can be played in this respect by the public policy clause. It may be used by the Polish court either at the stage of the application of the law applicable to the adoption, or of recognition of a foreign judgment.

6. In the context of the implementation of the principle of the welfare of the child the regulations of the Polish filial law, adoption law, and the law on medically assisted procreation can be considered as controversial. The legislator protects the rights of the woman who bore the child at the expense of the sociological parents' interests (including genetic ones). It should be noted that in the event of gestational surrogate motherhood the surrogate mother will not be the genetic mother of the child and in the case of traditional surrogate motherhood some ties of genetic relationship will occur between her and the child. The collision of these interests is undoubtedly difficult to resolve. On the one hand, one should counteract the cases of trading in reproductive cells, or paid surrogacy, as conflicting with the principles of social coexistence, on the other hand, it is impossible to ignore the fact that surrogate motherhood functions in practice, thanks to the capabilities offered by the legislations of other countries.
7. In relation to the subject-matter of this report it should be noted that adoption as an element of surrogate motherhood procedure may raise many legal problems. At this point one should omit the relevance of the surrogate motherhood procedures themselves, which are particularly controversial. If Polish law provided for a possibility to conclude surrogate motherhood agreements where the surrogate mother would oblige herself to agree to adoption by the sociological parents (including genetic ones), one would have to answer the question whether such agreements would be consistent with the Polish legal system. Firstly, some doubts may be raised by the question whether adoption should be an instrument for legalization of genetic ties in the surrogate motherhood agreements. Maybe it would be more appropriate to use the regulations from the scope of determining the child's origin, adapted of course to this type of facts. In the doctrine, there is a view that adoption should not constitute a means to establish legal and family relationships between the parents and their genetic children. Secondly, the regulations for adoption in a strict manner relate to the issues of adoption secrecy, which in accordance with the Polish law are regulated in a way different from the issue of access to the data relating to donors of reproductive cells. If the provisions of the Infertility Treatment Act "proclaim" the secret of origin in the case of the application of the procedures of medically assisted procreation, the provisions of the Law on Civil Status Records permit, in an uncritical way, to disclose the secrets of adoption.

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Surrogacy motherhood in the Slovak Republic – an illegal immigrant?

1. Introduction

Surrogate motherhood is not an unknown term in the Slovak Republic. The first legal analysis of this phenomenon was published in the Slovak professional literature at the end of the 1980s.[1] A new wave of interest in this institution has been observed since 2009, and it is possible that is has been so under the influence of the recent developments in the Czech Republic, where the first clinic of reproductive medicine admitted performing surrogacy in 2004. The precedent in the Czech Republic, as part of the former common state of Czechs and Slovaks, has a strong influence on the Slovak legal environment. However, the proximity of other countries in which surrogate motherhood is carried out, such as Ukraine and Russia, together with the increasing media coverage and international interest in this phenomenon, certainly have played a due part as well.

[1] J. Haderka, "Surogační mateřství", [in:] *Právny obzor*, 1986, Vol. 69, No. 10, pp. 917–934.

Since 2009, several papers have been published on the topic in professional journals and specialized monographs[2], as well as articles in general interest magazines[3], and on the Internet.[4] In Slovak terminology, the term "*náhradné materstvo*" is used as the literal translation of the English term "surrogacy motherhood." However, the Slovak version of the English name "surrogacy motherhood", i.e., "surogačné materstvo" is also widely used.

Surrogate motherhood is defined as "a specific area of assisted reproduction where a third person enters the reproduction process of a couple, a woman willing to undergo the process of fertilization and subsequent pregnancy while after giving birth to the child the surrogate voluntarily surrenders care of the baby to the intended parents and in consequence she surrenders all of her parental rights"[5], and as "the process that starts with a pregnancy, which is followed by the childbirth by a woman who does so for the benefit of another woman who cannot conceive or carry the child because of various health indications", while "the completion of this surrogacy is the 'hand over' of the child (...)"[6], or also as "a situation in which either for a remuneration or, possibly, free of charge, a woman is 'hired' to be artificially inseminated (usually by the sperm of a man from the interested couple) or to have an embryo – provided by the intending parents – Implanted, and to carry such a child and after delivery, to hand it over to the intending parents."[7]

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[2] I. Humeník, *Ochrana osobnosti a medicínske parvo*, Bratislava 2011; A. Erdősová, *Aktuálne otázky o človeku a jeho právach v bioetike*, Bratislava 2016; K. Račková, "Surogačné materstvo a jeho aktuálne legislatívne limity", [in:] N. Ostró, L. Jánošíková (eds), *Human Rights Forum 2012 – medicínske právo interdisciplinárne*, Bratislava 2012, pp. 177–207; K. Račková, "Surogačné materstvo", [in:] *Právo a manažment v zdravotníctve*, Bratislava 2011, pp. 14–17; A. Erdösová, "Náhradné materstvo právne a eticky, alebo nakoľko platí: mater semper certa est, pater incertus", [in:] *Justičná revue*, 2014, Vol. 66, No. 12, pp. 1474–1493.

[3] "Šanca na vlastné: V Česku má náhradné materstvo reálnu podobu, Slováci musia dúfať", *Život*, 2015, No. 3; "Europoslankyňa Záborská chce zakázať náhradné materstvo: Čo jej na ňom prekáža?", *Život*, 2015, No. 2.

[4] Articles posted on the Pravo-Medicina blog (www.pravo-medicina.sk): I. Humeník, "*Surogačné (náhradné) materstvo*", 26 August 2009; Z. Zoláková, "Surogačné materstvo, platnosť dohôd o surogačnom materstve a najlepší záujem dieťaťa", 12 December 2011; other sources include: https://najmama.aktuality.sk, and the blog of the independent web newspaper *DenníkN*: https://dennikn.sk/blog.

[5] K. Račková, "Surogačné materstvo a jeho aktuálne legislatívne limity", [in:] N. Ostró, L. Jánošíková (eds.), *Human Rights Forum 2012 – medicínske právo interdisciplinárne*, Bratislava 2012, p. 180.

[6] A. Erdősová, *Aktuálne otázky o človeku a jeho právach v bioetike*, Bratislava 2016, p. 50.

[7] I. Humeník, op. cit., p. 179.

Most of the abovementioned papers recognize *traditional surrogacy*, where the surrogate mother is the biological mother of the child and *gestational surrogacy* that uses either a female egg from the intending mother or a donor egg.

In the Slovak legislation, the surrogate motherhood is not regulated. The only provision which reflect this form of assisted reproduction is Article 82 (2) of the Family Act, which makes any surrogacy agreements null and void. However, as we will point out in the following text, if such a treatment were to be carried out in the Slovak Republic, the legislation on filiation would, under certain conditions, make it possible to legalize the relationship of the intending parents to the child born from surrogacy. However, the performance of such a procedure would be on the brink of the law, and it is questionable whether any clinic or a doctor would perform the procedure.

Another question is children who have been carried by foreign surrogate mother abroad and "imported" to the Slovak Republic by intended parents living in the Slovak Republic. Official data on such cases does not exist. As we will point out in the following text, when recognizing the civil status documents of such children issued abroad, there is no a big space to investigate whether it is a child born from surrogacy. Unofficially, there is a talk that there are such cases.[8]

2. Principle of the protection of the family life as a one of the basic principles of the Slovak legal order

Marriage and parenthood enjoy enhanced protection in the Slovak legal order. Both legal concepts are protected in the Slovak Constitution, the basic law of the Slovak Republic. Article 41 (1) of the Constitution of the Slovak Republic No. 460/1992 Coll. of Laws, as amended by Constitutional Act No. 161/2014 Coll. states: "Marriage is a unique union between man and woman. The Slovak Republic broadly protects marriage and enhances its good. Marriage, parenthood and family are protected by law. Special protection of children and adolescents is guaranteed." Marriages and parenthood are protected here as legal concepts. This protection cannot be confused with the right to protection against unjustified interference in his or her

[8] In the interview for the *Život* magazine, one of the most popular weeklies in the Slovak Republic, already in 2009 a doctor specializing in assisted reproduction admitted to recommending an infertile couple to use the services of a surrogate mother in India: http://zivot.pluska.sk/clanok/120/asistovana-reprodukcia-je-vazny-zasah-do-intimity-dvoch-ludi (last accessed: 15 August 2018).

private and family life as a basic human right which is protected in Article 19 of the Constitution of the Slovak Republic.[9]

Paragraph 41 of Article 41 further specifically protects the right of children to parental care and provides a condition for the judicial decision on measures that result in the separation of children from parents: "Childcare and upbringing is the right of parents; children have the right to parental upbringing and care. Parents' rights may be restricted and minor children may be separated from their parents against the will of their parents only by a court decision, by law." Paragraph 3 of Article 41 provides for the equality of children regardless of whether they were born in or out of wedlock.

Protection of marriage and parenthood are also fundamental principles of Slovak family law. These basic principles are enshrined in the introductory articles of Act No. 36/2005 Coll. on Family. In Article 1, the protection of marriage, as the union of man and woman – "the society broadly protects this unique union and enhances its good"; in Article 2, family protection – all forms of family – are protected, but it is particularly emphasized that a family based on marriage is the basic cell of society; and in Article 3, separately, the protection of parenthood. Pursuant to Article 3, "Parenthood is a mission of a woman and a man exceptionally recognized by a society. The society provides to the parenthood not only protection but also necessary care, in particular by material support for parents and assistance in exercising parental rights and duties."

The role of the principles is to establish common interpretative rules for the decision-making of Slovak courts in the area of family law. In interpreting family law standards, courts are always required to abide by the above principles.[10]

As can be seen from the above, family and parenthood are of prime importance in the Slovak legal order. The professional literature highlights the educational impact of the family and its impact on the healthy development of the child and thus the elimination of serious social problems.

The Slovak legal order thus also protects the rights of the child and fulfills the obligations which the Slovak Republic derives from the international treaties to which it is bound, in particular, from the 1989 Convention on the Rights of the Child. The Convention on the Rights of the Child, by which the Slovak Republic has been bound since its inception, on the basis of a succession after the Czech and

[9] See: J. Drgonec, *Ústava Slovenskej republiky. Teória a prax*, Bratislava 2015, p. 819.

[10] B. Pavelková, *Zákon o rodine. Komentár*, Bratislava 2013, p. 2.

Slovak Federative Republic[11], constitutes the basic reference framework for Slovak legislation in the area of family law and in the field of social-legal guardianship and other areas regarding protection and provision of the rights of the child.

The Slovak Republic is also a signatory state to other conventions which have an impact on decision-making in matters concerning the child, such as the Convention for the Protection of Human Rights and Fundamental Freedoms (1950)[12], International Covenant on Economic, Social and Cultural Rights (1966)[13], the Convention on Protection of Children and Cooperation in respect of intercountry Adoptions (1993)[14], the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children (1980)[15], Convention on the Civil Aspects of International Child Abduction (1980)[16] and others.

3. Rules of filiation in the Slovak Republic

3.1. Establishment of maternity

Czechoslovak family law, as well as Slovak family law – as the law of the successor state of the Czechoslovak Federative Republic, was based on the Roman principle *mater semper certa est, pater incertus*. The previous Family Act. No. 94/1963 Coll. from 4 December 1963 (the previous Family Act), didn't contained regulation of the establishment of maternity, only the establishment of paternity. It was due to the assumption that "in practice, there will normally be no doubt about who is the mother of the child (the woman who gives birth to the child)."[17]

The change come in the new Family Law Act. No. 36/2005 Coll. of the Laws of 11 February 2005 (the Family Act). This Act, already modified the question of who is the mother of a child. Section 82 paragraph 1 of the Family Act clearly states that "the mother of the child is the woman who gives birth to the child."

[11] Statement of the Federal Ministry of Foreign Affaires No. 104/1991 Coll.
[12] Statement of the Federal Ministry of Foreign Affaires No. 209/1992 Coll.
[13] Statement of the Ministry of Foreign Affaires No. 120/1976 Coll.
[14] Statement of the Ministry of Foreign Affaires No. 380/2001 Coll. of Laws
[15] Statement of the Ministry of Foreign Affaires No. 366/2001 Coll. of Laws
[16] Statement of the Ministry of Foreign Affaires No. 119/2001 Coll. of Laws
[17] Z. Češka et col., *Československé rodinné parvo*, Bratislava 1986, p. 145.

The explanatory report to that provision points out the progress in current medical science in the field of assisted reproduction, that has caused the increase of maternity establishment disputes in foreign legal practice. Therefore, in the interests of legal certainty, the Act clearly defines the mother as the woman who gives birth to the child. Hence, the legislator, as if he wanted to act preventively, adjusts the issue before it becomes a problem in the practice of the Slovak Republic.

For the sake of completeness, it should be added that the phenomenon of surrogate motherhood was not the sole motive for the adoption of this legal regulation. In the past, cases of abandoned children were reported, when the mother of the found child had to be determined. Currently, in the context of assisted reproduction, the commentaries point out to the possibility of donation of the female gametes, where, even if it is not a case of surrogate motherhood, the woman who carries and gives birth to the child does not have to be child's biological mother.[18] In the case of uncertainty where there is a doubt as to who is the mother of a child, maternity will be determined by the court (Section 83 of the Family Act) upon the request of a woman who claims herself to be the mother of the child or at the request of the father of the child who demonstrates that he has a legitimate interest in this determination. The court focuses solely on the circumstances of the child's birth (Section 83 paragraph 1 of the Family Act).

Section 82 paragraph 2 of the Family Act reacts directly on the phenomenon of surrogate motherhood. According to this provision, any agreements which are contrary to paragraph 1 (those which would declare other person than the woman who gives birth to the child, to be "a mother of the child") are void! However, the doctrine is of the opinion that such agreements would have been invalid even before the adoption of this provision, as they would contradict the provisions of Section 3 of the Slovak Civil Code: "Exercise of rights and obligations arising out of civil law relationships must not (...) be in contradiction with good morals" and Section 39 of the Slovak Civil Code: "A legal act which, in its content or purpose, is contrary to, or circumventing the law, or is in contradiction with good morals, is invalid." Surrogacy motherhood agreements are clearly considered to be *contra bonos mores* in the Slovak legal environment. Such contracts would therefore not have legal protection in the Slovak Republic.

[18] R. Bános, *Zákon o rodine. Veľký komentár*, Bratislava 2015, p. 262, or R. Šínová, "Konania vo veciach určenia rodičovstva", [in:] R. Smyčková, M. Števček, A. Kotrecová, et al., *Civilný mimosporový poriadok. Veľký komentár*, Praha 2017, p. 374.

3.2. Establishment of paternity

The establishment of paternity is linked to the fact who is the mother of the child. In other words, the establishment of paternity is always dependent on the establishment of maternity. According to the Family Act (Sections 84–96 of the Family Act), the father of a child is considered a man who: 1) is a husband of the child's mother; 2) a man who, together with the mother of the child, declared before the court or civil registry office that he is the father of the child; 3) a man who had sexual intercourse with the child's mother no less than 180 and no more than 300 days before the birth of the child – in this case, it is a court that decides on the determination of paternity. In all three cases, these are presumptions which are rebuttable (unlike the establishment of maternity, where it is a mandatory, irrefutable legal rule). The Act regulates who and within what time period can deny paternity based on one of the first two above mentioned presumptions.

3.2.1. Paternity of the husband of the child's mother (Sections 85–89 of the Family Act)

A mother's husband is considered the father of a child if the child was born during the marriage or until the expiration of the 300th day following the termination of marriage or its annulment (Section 85 of the Family Act). In case that the mother marries again within 300 days after the termination of her previous marriage, her new husband will be considered the father.

The paternity that was established this way may be denied by the husband of the mother, by the mother, and subsidiarily, also by the child. The mother's husband can deny paternity within three years since the day he learned of the facts that question his paternity to the child. Mother can deny paternity within three years since the birth of a child.

The conditions for disavowal of paternity are more strictly formulated in the Act if the child is born 180 days after the conclusion of marriage, when it is at least theoretically possible to assume that the procreation happened during the marriage. In such a case, it is necessary to prove that it is impossible that the husband of the mother was the father of the child and the burden of proof bears the husband of the mother who deny the paternity. If a child was born within 180 days since the conclusion of marriage, it would be sufficient for a successful disavowal of the paternity if the husband of the mother denied the paternity before a court, unless it is proved that he had sexual intercourse with the mother of the child at the relevant

time prior to the birth of the child[19] or he knew that the mother is pregnant at the time of conclusion of marriage. Scholarship / legal literature, however, points out that the court should, in any event, try to establish paternity by objectively expert evidence, as required by Article 7 of the Convention on the Rights of the Child.[20]

However, paternity cannot be successfully denied if the child was born between the 180th and the 300th day after performing the assisted reproduction treatment, if the procedure was performed with the consent of the mother's husband. For the successful denial of paternity, it would be necessary in this case to prove (irrefutably) that the mother got pregnant in other way.

The denial of paternity by the child (Section 96 of the Family Act) is possible only on a second place, only if the parents' time period for the denial of paternity has already expired. This option is not available for the child automatically. The court decides whether the denial of paternity by the child may be admissible. The court decides on a child's proposal and it only allows the denial of paternity if it is in the best interest of the child.

3.2.2. Paternity established by a consensual declaration of the parents (Sections 90–93 of the Family Act)

If the paternity of a child is not established in accordance with the first presumption (a mother's husband), then paternity may be established by a common voluntary declaration of the parents. The declaration must be done personally, before the civil registry office or before the court. A minor parent can file a declaration of paternity only before the court. This way can also be established the paternity for a child still unborn, but already conceived. The court does not approve the parents' declaration, nor does it investigate its veracity. The joint consensual declaration shall be accepted and recorded in the court minutes.

Even paternity established by the consensual declaration of the parents can be denied. Paternity may be denied by the mother, as well as the father, whose paternity had been previously established by the consensual declaration of the parents. The time limit for both of them is three years since the date of establishment of paternity.

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[19] Defined by law as 180 days to 300 days before the birth of the child (Section 87 paragraph 3 of the Family Act). This time limit is repeatedly used by law in connection to the determination of patrenity.

[20] R. Šínová, "Komentár k § 105", [in:] R. Smyčková, M. Števček, A. Kotrecová, et al., *Civilný mimosporový poriadok. Veľký komentár*, Praha 2017, p. 375.

Upon expiry of that period, again, the denial of paternity is possible only on the request of the child, in accordance with Section 96 of Family Act.

3.2.3. Establishment of paternity by the judicial decision

A motion for paternity determination by the judicial decision may be filled when the husband of the mother is not considered as a father of child (either because the mother is not married, or the child was born 300 days after the termination of marriage or paternity of the mother's husband was successfully denied), or paternity has not been established by the consensual declaration of the parents. The order of the three paternity presumption is strictly hierarchical. A child, mother, or man who claims to be the father of a child may submit a proposal to establish paternity.

We talk about the third presumption of paternity because the Family Act in provision of Section 94 paragraph 2 states that as a father of the child is considered a man who had sexual intercourse with the mother of the child no fewer than 180 days and no more than 300 days before the child's birth and his paternity is not excluded due to serious circumstances. In the paternity proceedings, the court should therefore investigate who had sexual intercourse with the mother of the child in the relevant period. As noted in the literature, such detection is in practice replaced by a DNA test that can conclusively confirm or exclude the paternity of a particular man to 99%.[21]

But even the confirmation of paternity by DNA testing has its limits, especially in the case of artificial insemination. For example, the Slovak legislation allows artificial insemination to be performed on the single mother. In this case, the biological father of the child will be the donor of the sperm, the man who did not really had sexual intercourse with the mother of the child. Without the consent of the man who is the sperm donor, his paternity can not be established, not even on the basis of a judicial decision.[22]

[21] B. Paveleková, op. cit., p. 554.

[22] R. Šínová, "Komentár k § 105", [in:] R. Smyčková, M. Števček, A. Kotrecová, A. et al., *Civilný mimosporový poriadok. Veľký komentár*, Praha 2017, p. 375.

3.3. Criticism of establishment of paternity according to the Slovak legislation

The concept of establishment of paternity in the Family Act from 2005, based on three hierarchically arranged paternity presumptions, fully follows the previous legal regulation from 1963.

The paternity of the husband of the mother is preferred. This reflects one of the fundamental principles of family law in Slovakia, based on Articles 2 and 3 of the Basic Principles of the Family Act as well as on Article 41 paragraph 1 of the Constitution of the Slovak Republic and that is the protection of a family *formed* through *marriage*. Preference is also given to the so-called "social paternity", i.e., paternity based on the will of parents, who are interested in bringing up a child (paternity of the mother's husband has not been denied), regardless of biological reality. However, as it has been pointed out by a part of the professional literature this approach suppresses the right of the child to become fully acquainted with its biological origin, based on Article 7 of the Convention on the Rights of the Child.[23]

As has been stated above, the presumptions are strictly hierarchical, and for example, paternity cannot be established by a consensual declaration of the parents if the mother of the child is married, as long as the paternity of the mother's husband has not been successfully denied before a court. The biological father of a child of the married woman can not in any way affect the determination of paternity, even if he would be interested in doing so. A similar situation occurs also in the case of the second presumption, the one when paternity has been established by a consensual declaration of the parents. In this case, it is not possible to file a motion for paternity determination until one of the "social" parents does not change their attitude and does not deny her/his parenthood before a court.[24]

A certain correction of this system is the possibility for the child, even before reaching the full-age, to achieve the denial of paternity, whether it had been established by the first or second presumption, and then to address the court for the

[23] B. Pavelková, *op. cit*., p. 522

[24] The rights of the biological father are protected very little. In accordance with the Article 8 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, the right to protection of family life belongs to everyone, i.e., including also the man who is a biological father of the child; see: J. Muránska, "Aktuálne otázky určenia a zapretia otcovstva", [in:] *Notitiae Novae Facultatis Iuridicae Universitatis Matthiae Belii Neosolii*, vol. XXI, Banská Bystrica 2016–2017, p. 243 et seq.

determination of true paternity (third presumption, linked with the judicial decision on paternity).

3.4. Adoption

The basic purpose of adoption under Slovak family law is to provide the child with a functioning and stable family environment. The Family Act expresses this in Section 99 paragraph 2: "Only a minor may be adopted if the adoption is in his / her interests." The best interests of the child should be examined in a comprehensive way, taking into consideration not only the material security of the child, but especially his family and social ties. Biological kinship has a clear advantage over adoption.[25] The law prefers that a child acquires a full family by adopting, but exceptionally the child can also be adopted by a sole person if the assumption is that the adoption will be in the interest of the child.

The adopters (or adopter) do not have the right to choose a child, the first contact with the child is provided to them by a welfare authority – Office of Labor, Social Affairs and Family.[26] Persons interested in adopting a child must be enrolled in the list of applicants for adoption, which is kept by the welfare authority. Enrollment in the list shall be carried out by the welfare authority after examining the applicant's assumptions to become an adopter. The assumptions to be fulfilled by the adopter are laid down in the Family Act: the adopter must be a natural person who has full legal capacity for legal acts, which, by his / her health, personality and moral assumptions and the way of life and life of the persons living with him / her, secures that the adoption will be in the interest of the minor (Section 98). An additional condition added by Section 99 is that between the adopter and the adoptee must be a reasonable age difference.

Details of the procedure for examining these assumptions and deciding on the entry into the list of applicants are set forth by Act No. 305/2005 Coll. on social-legal protection of children and on social guardianship. Inclusion in the process of mediating the contact of the child with future adopters shall take into account the order

[25] B. Pavelková, *op. cit*., p. 584.

[26] Cf. also: *Slovakian Country Profile for Intercountry Adoption, State of Origin* (point 5.6, s. 13), https://assets.hcch.net/docs/eeea1195-f250–4889-b3f4–3883ac5d29co.pdf (last accessed: 15 August 2018).

in which the candidates for adoption are enrolled in the applicants list (Section 42, paragraph 1 of Act No. 305/2005 Coll.).

However, the spouse of the parent does not have to be enrolled in the list of applicants. Thus, the spouse of the parent has a simpler status – there is no need to be enrolled in the list of applicants for adoption, the time since the application for adoption to the adoption decision is shortened, as there is no need to go through a survey before the social welfare authority (however, the compliance with the legal requirements shall be evaluated by the court in the adoption proceedings) and asks for the adoption of a specific child that he / she already knows in advance.

However, other close relatives may not adopt the child. In particular, it involves the adoption of a sibling by siblings or grandchildren by grandparents. There is talk of the so-called "superfluous family relationship."[27] A more distant relationship does not present an obstacle: for example, it is possible to adopt a nephew or niece. From the point of view of surrogate motherhood, it would not be possible to adopt, for example, the child that would be born by the mother for her daughter, but it would be possible to adopt a child that would, for example, be born by a sister for a sister.

Adoption requires parental consent of the adopted child. Consent can be given during the adoption process, in relation to specific adopters. Or they can give the so-called "blank approval" – before the court or before a welfare authority, in which, in advance, without relation to any particular adoptive parents, they consent to the adoption of the child. This consent can be given already in the medical facility, after childbirth, but may also be withdrawn until the child is placed in the care of prospective adoptive parents.

The consent of the child's parents is not necessary only if they have not shown a genuine interest in the child for six months or have shown no interest during the two months following the birth of the child, unless they had a serious obstacle to do it. For this purpose, the law set forth the special proceedings, so-called proceedings on the adoption ability (Sections 137–142 of Act No. 161/2015 Coll. Civil Non-Contentious Procedure Code) in which the court may decide that the child is adoptable, after which the child's parents are not party to the adoption proceedings itself. The consent of a minor child with adoption is required if the minor is able to assess the extent of the adoption.

Another condition for adoption is that the adopted child must be at least 9 months in pre-foster care of prospective adoptive parents (adopter). The cost of this care is

[27] This obstacle and its limits have been formulated by judicial practice.

borne by future adopters. The goal of pre-foster care is to examine practically the ability of adopters to look after the child and the functionality of the relationship between adoptive parents and the child. This condition can only be forgiven if a foster parent or the person whose child was entrusted to a substitute personal care ask the adoption of the child and the child was actually in their care for that period before the adoption.

If the court decides lawfully on adoption, the legal relationship between the child and his / her original family will disappear in its entirety. The child becomes a member of his new family, the relationships are created not only with the adopters, but also with the adoptive family. The adopted child receives the surname, nationality, and the same inheritance rights as biological descendants.[28] Therefore, adoption can also be metaphorically considered as a way of determining parenthood.[29]

3.5. Conclusions

Considering the above-mentioned, one can imagine the following procedure in case that the child would be carried and born by a surrogate mother in the Slovak Republic:

A surrogate mother would become a child's mother by giving birth to a child, in accordance with the law. Paternity could be determined by the consensual declaration of the parents, i.e., surrogate mother and the intending father. Biological paternity would not even have to be examined. If a surrogate mother was married, as a father would be considered her husband, in accordance with the law. In this case, it would be necessary to deny the paternity of the mother's husband before the court, and only then paternity could be determined by a consensual declaration of the parents.

A surrogate mother would have to give up her parental rights so the intended mother could become a mother of the child in the legal sense. An intending mother as a wife of one of the child's parents would then be able to adopt the child relatively easily.

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[28] K. Ševcová, "Výzvy adopcie detí v rámci Európskej Únie = Challenges of child adoption with in EU", [in:] *"Stop! Deti nie sú tovarom! Adopcie nie sú obchodom!": zborník príspevkov z medzinárodnej vedeckej konferencie, Banská Bystrica 17. marca 2015*, Banská Bystrica 2015, p. 165.

[29] J. Cirák, B. Paveleková, M. Števček, *Rodinné právo*, Šamorín 2008, p. 135.

But this process brings many risks. If a surrogate mother (and her husband, if she was married) decides to keep the child, nothing prevents her from doing so. If a surrogate mother would not give up her parental rights and her husband would not deny paternity to the child, then the intended parents do not have any legal means to claim the access to the child. Not even if the intended parents were the biological parents of a child. As mentioned above, the woman who has given birth to the child is always considered to be the child's mother regardless of her genetic connection to it and the husband of the child's mother is considered a father of the child. Until his paternity has not been denied before a court, no other paternity proceedings can be taken. A biological father of a child, whether the child has been conceived naturally or by artificial fertilization, is not a person entitled to contest the paternity of the mother's husband.

But, is the performance of surrogate motherhood in the Slovak Republic admissible? There seems to be no simple answer to this question. The basic regulation governing the performance of artificial insemination in SR is the legal act (1983) – the Ministry of Health legal Measure No. 24/1983 of the Ministry of Health Bulletin, on conditions for artificial fertilization. This legal regulation lays down the basic conditions for performing artificial insemination: only a married couple may apply for artificial fertilization, the application of both spouses is required (this condition is not fulfilled in practice, artificial insemination is also available for unmarried couples); artificial insemination is permissible only if indicated for health reasons – of a woman or a man (the measure in Section 2 demonstratively lists their examples); artificial insemination can only be performed on an adult woman under the age of 35 years.

However, this legislation does not correspond to the level of medical development as it is nowadays. For example, it refers to only one method of artificial insemination. In addition, the Measure is an implementing rule for the act that is no longer valid, so its legal force is questionable. Because of the absence of any other legal regulation, the Measure is generally accepted as the basic legal framework for artificial insemination in the Slovak Republic.[30] This legislation can be applied by analogy to other forms of artificial insemination. However, with regard to the permissible forms of artificial insemination, the measure does not provide the answer.

[30] K. Račková, "Právna úprava asistovanej reprodukcie v Slovenskej republike", [in:] *Právo a manažment v zdravotníctve*, Vol. 3, 2012, No. 2, pp. 2–4.

Thus, in the professional literature, we often find the opinion that the legal acts governing the performance of assisted reproduction do not prohibit the medical use of surrogacy method,[31] or that "the Slovak law does not, in principle, exclude surrogate motherhood."[32] Pavlak points out that the law does not allow the provider of the assisted reproduction to take away gametes primarily for the purpose of surrogate motherhood, since the surrogate mother as a recipient does not gain the therapeutic benefit from this procedure, but the legal regulation does not explicitly prohibit it. However, there is no legal obstacle to use the gametes that have been already removed, for the surrogate motherhood. The author also points out that the performance of the surrogacy is not punishable in the Slovak Republic.

What, then, does prevent the exercise of surrogate motherhood in the conditions of the Slovak Republic? We are of the opinion that this is especially a social atmosphere in the Slovak Republic. In the Czech Republic, surrogate motherhood has been realized in practice since 1993 but was not publicly admitted until the year 2004. In the Slovak Republic, where society is considerably more conservative, it is possible to assume that no clinic would have done so, because of the public's negative reaction. It cannot be ruled out, however, that surrogate motherhood does not take place in the Slovak Republic, in secrecy.

4. View of the Slovak doctrine on surrogate motherhood

Jiří Haderka is acknowledged as the first person who dealt with the issue of surrogate motherhood in what constituted then the Czechoslovak Socialist Republic. In his article "Surrogate Motherhood" (1986) published in *Právny obzor*[33], he considers whether or not it is possible under the applicable legislation to provide surrogate motherhood domestically. He concludes that the law does not allow such a procedure (referring to the afore-mentioned legislative Measure of the Ministry of Health of the Slovak Socialist Republic of 1983). However, according to the author, it may not be totally ruled out that such an operation will be performed even if it is contrary to the law.[34] As stated below, the performance of such a procedure is not punishable.

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[31] I. Humeník. *Ochrana osobnosti a medicínske právo*, Bratislava 2011, p. 181.

[32] B. Pavelková, *op. cit*., p. 517 et seq.

[33] J. Haderka, "Surogační mateřství", [in:] *Právny obzor*, Vol. 69, 1986, No. 10, pp. 917–934.

[34] Ibidem, p. 926.

Regarding legislation for the future, he is clearly opposed to legitimizing surrogate motherhood in Czechoslovak law. He argues in particular with the unethicality and degrading nature of such a procedure, which places the mother into the position of the goods and the intending parents into the position of the buyer. It also points to other, especially psychological, risks associated with this: both for the surrogate mother and the intending parents, as well as for the healthy development of the fetus.[35]

Haderka's abovementioned article on surrogate motherhood has so far been considered the beginning of the national debate on the legal regulation of this legal concept and has so far been cited by works dealing with surrogate motherhood in Slovak professional literature.

Among the current authors, the topic of surrogate motherhood is mainly dealt with by Katarína Račková, Ivan Humeník, and Andrea Erdösová.

Račková points out the diminishing ability to reproduce in a modern society that can be solved either by adoption or by a surrogate motherhood. The surrogate motherhood may be a more attractive option for infertile couples, providing under certain circumstances the possibility of having a child who will carry the genetic information of both or at least one of the couple. On the other hand, however, this is a much more controversial method, coupled with a whole range of ethical, moral and legal issues.[36]

In her work Račková systematically analysis the legal regulations of individual countries that allow for surrogate motherhood, the ways of legalizing parenthood of the intending parents to the child, as well as the issues of content and enforceability of agreements between the intending parents and the surrogate mother.[37] Given that she does not avoid controversial issues associated with surrogate motherhood, which she illustrates practically on specific cases taken by courts abroad, her articles could serve as a basis for debate on the suitability and form of surrogate motherhood regulation in our conditions.

In the same spirit, her conclusions are also formulated. She does not think about the form of surrogate motherhood regulation in the Slovak Republic conditions, but rather points to the plus and minus of this way of dealing with the problem of infertile couples. She points to the fact that the existing differences in the legal regulation

[35] Ibidem, pp. 931–932.

[36] K. Račková, "Surogačné materstvo", [in:] *Právo a manažment v zdravotníctve*, 2011, Vol. 2, No. 5, pp. 14–15.

[37] K. Račková, "Surogačné materstvo a jeho aktuálne legislatívne limity", [in:] N. Ostró, L. Jánošíková (eds), *Human Rights Forum 2012 – medicínske právo interdisciplinárne*, Bratislava 2012, pp. 177–207.

of surrogate motherhood in individual countries creates favorable conditions for the so-called "reproductive tourism." Therefore, she calls for the adoption of rules at an international level that would harmonize national conditions and modify the issue in a uniform manner.

The authors of the present study would like to add that the harmonization of the performance of the surrogacy is, given the irreconcilable attitudes of the countries on the admissibility / inadmissibility of surrogate motherhood, unlikely, on which Račková points out too. What is possible to achieve and what would considerably reduce at least the rate of commercial surrogacy supported by the reproductive tourism, is the adoption of an obligation at international level, obligation of the countries in which the surrogacy is allowed to make it available only to their resident citizens.[38]

Humeník deals with the issue of surrogate motherhood in the context of the legislation on assisted reproduction as such.[39] He criticizes the Slovak legal regulation of assisted reproduction, which he describes as "inadequate, or even catastrophic." He points to the fact that the basic regulation for performing assisted reproduction is, as mentioned above, the legislative Measure of the Ministry of Health No. 24/1983, a 28-year-old rule. The legal regulation of human gametes he also considers to be inadequate.[40] He comes to the view that assisted reproduction should be comprehensively regulated by a special law. On the basis of the analysis of individual aspects of assisted reproduction, he formulates specific recommendations for a new legal regulation, which, in his opinion, should explicitly address also the question of the admissibility of surrogate motherhood.[41]

In relation to surrogate motherhood, he states that "in assessing surrogate motherhood in terms of Slovak legislation, it is clear that the rules governing assisted reproduction and health care provision do not directly exclude the medical use of surrogate motherhood techniques. However, if we take into account all the

[38] See: Report of the Parliamentary Assembly of the Council of Europe, 23 September 2016, "Children's rights related to surrogacy", http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=23015&lang=en (last accessed: 15 August 2018).

[39] I. Humeník, *Právne aspekty asistovanej reprodukcie*, [in:] I. Humeník, *Ochrana osobnosti a medicínske parvo*, Bratislava 2011, pp. 159–188.

[40] Ibidem, p. 169. Due to insufficient Slovak legislation, as well as the number of uncertainties surrounding the given issue, there was a need to modify at least the conditions of the dealing with the gametes in practice. This was done partly in the Government Regulation No. 20/2007 Coll. of laws on detais of procurement, donation of tissues and cells – see: K. Ševcová, *Kapitoly z medicínskeho práva*, Banská Bystrica 2016, p. 131.

[41] Ibidem, pp. 186–188.

connections regarding the realization of the surrogate motherhood, we find that the application of surrogate motherhood is in our circumstances difficult, if not impossible."[42] He points out that the surrogacy agreements are in our law unenforceable and in essence absolutely invalid, not only in view of the above-mentioned Section 82 of the Family Act, but also for the contradiction with the fundamental principles of civil law.

He draws attention to the fact that the liberal legislation of surrogate motherhood, especially if it allows the exercise of such form of assisted reproduction without being conditioned by the existence of health problems on the part of the intending parents, creates room for the use of surrogate motherhood also in situations that will have nothing to do with the inability to conceive and bear a child. Even though Humeník does not express a clear "no" to surrogate motherhood, from his repeated view that surrogate maternity carries a great ethical risk that cannot be balanced even by the desire of infertile couple to have a child,[43] it is possible to sense the rather negative attitude to allow for surrogate motherhood in conditions of the Slovak Republic.

Erdösová addresses the validity of surrogacy agreements from a wider perspective. She concludes that surrogacy agreements show in principle three shortcomings: a lack of common objective, a lack of public interest and a lack of legitimacy of the contract.[44]

The lack of common goal – it is questionable whether the surrogacy agreement is a synallagmatic contract, whether there is a mutual benefit. In addition, the question arises here, of namely the "performance of the contract." If a child is not a thing, and a negotiable thing (which is clearly not and cannot be), it is questionable whether such a contract has a legally enforceable subject of the contract.

The lack of public interest – Erdösová asks the question whether such a contract is not in contradiction with the public interest or good morals. Or whether the values to be protected by the state are not, so to speak, at stake. She also points to the weakening of the values of predictability and legal certainty, which in the case of surrogate motherhood are lacked both by the surrogate mother as well as the ordering couple until the last moment (the risk of rejection of the child being surrendered by the surrogate mother, the risk of refusing to take the child by the ordering couple, etc.).

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[42] Ibidem, p. 181.

[43] Ibidem, p. 187.

[44] A. Erdösová, "Náhradné materstvo právne a eticky, alebo nakoľko platí: mater semper certa est, pater incertus", [in:] *Justičná revue*, Vol. 66, 2014, No. 12, pp. 1474–1493.

The lack of legitimacy of the contract – here Erdösová points to the fact that in some forms of surrogate motherhood, a woman from the couple interested in surrogacy or even one of the partners – the intending parents, may not be the child's biological parent, and the resulting effect is essentially the same as that of adoption, but achieved by a more complicated and painful way.[45]

From the point of view of the healthy development of a child born with the help of surrogate motherhood, Erdösová points to the fact that the mother-child bond develops already during pregnancy. The negative impact on the psychosomatic development of a child may have the situation when the mother tries not to create the emotional bond to the child that develops in her, as well as the situation when the mother creates the emotional relationship, but this is subsequently broken after birth. Finally, there is a risk of a post-traumatic reaction, after the transfer of the child, also with the surrogate mother.[46]

Regarding the *de lege ferenda* conclusions, Erdösová in her work formulates certain limits in which the future, potential Slovak regulation of surrogate motherhood should be moving. At the same time, however, she notes that in the Slovak Republic does not seem the society is interested in surrogate motherhood, after all, as she states in brackets, it is possible to take advantage of the possibilities in the Czech Republic. She formulates her suggestions with the condition that "if the legal regulation of surrogate motherhood in the Slovak Republic is considered…"

Erdösová recommends a Czech model, which, in spite of many imperfections, is an example of a liberal but essentially moderate legislation. In particular, she states that surrogate motherhood should be possible only with the use of genetic material from the intending parents, that is to say, neither from the surrogate mother nor third parties.[47] She maintains that a surrogacy agreement between the surrogate mother and the intending parents would be totally invalid, due to being contrary to good morals. Only a contract with a clinic performing the procedure could be the legal basis, which can only oblige the surrogate mother to be responsible for the conduct and adherence to prescribed instructions. Performance alone, i.e., the transfer of the child should not be enforceable.

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[45] A. Erdősová, *Aktuálne otázky o človeku a jeho právach v bioetike*, Bratislava 2016, pp. 56–57.

[46] Ibidem, pp. 66–70.

[47] The Clinic of Reproductive Medicine in Zlín, which is a pioneer in the realization of a surrogacy motherhood in the Czech Republic, requires that the women from the intending parents couples have their functional ovaries and the ova was theirs.

4.1. Conclusions

As can be seen from the opinions of the representatives of the legal doctrines analyzed, surrogate motherhood is considered rather a controversial method of infertility treatment. Several authors express the doubts whether the negatives of this method of dealing with infertility do not outweigh its positives. In essence, none of them, however, unambiguously and unconditionally rejects the possibility of enshrining surrogate motherhood in the Slovak legal order, as Haderka did. As can be seen from the work, predominantly of Erdösová, they also take into account the existence or absence of a "social ordering" that can be decisive in the alarmingly diminishing reproductive capacity of the population.

From this perspective, as concern the possibility of introducing surrogate motherhood in the Slovak Republic in the foreseeable future, a lot can be read from the opinions of representatives of political parties and churches that reflect to a great extent the mood of the population.

However, we clearly see in the works of all cited authors the rejection of commercial surrogate motherhood and reproductive tourism. These two questions are inter-linked, reproductive tourism is a breeding ground for commercial surrogate motherhood. Therefore, as Račková points out, steps must be taken not only at the level of national law but also at the level of international law, in order to eliminate this worst form of surrogate motherhood.

5. Recognition of the surrogacy performed abroad

If domestic legislation does not allow surrogate motherhood, or the conditions for its implementation are very restrictive, childless couples often go abroad in search for possibilities. Here, however, there is a need to legalize the "parental relationship" in the home country of the intended parents, which originated abroad, between the intending couple and the child born to a surrogate mother.

It is natural that countries that prohibit surrogate motherhood are opposed to accepting the effects of a surrogate motherhood carried out abroad. For this purpose, it is generally a public policy exception which allows each state to protect its fundamental values. While a public policy exception is a generally accepted concept in cross-border relations that allows a state to defend itself against the effects of the application of foreign law or against the effects of recognizing foreign decisions, its

content is not universally given. It is determined by each state itself, according to what values it considers to be the key.

This makes the public policy exception an ideal means to defend against the effects of foreign legal concepts that are lawful in their country of origin, but for a recognition country unacceptable for moral or ethical reasons, such as surrogate motherhood. On the other hand, it is also the reason why attitude of the countries to recognition of foreign surrogacy motherhood and the application of public policy exception in these matters is differentiated.[48]

The limit of discretion in the use of public policy exception against foreign surrogacy motherhood is the international obligations of the State, in particular the obligations arising from international human rights conventions. Here, in particular, the Convention on the Rights of the Child from 1989 and the European Convention for the Protection of Human Rights and Fundamental Freedoms from 1950.[49] The refusal to give effect to surrogate motherhood carried out abroad can have a negative impact on the status of a child born through a surrogate motherhood.

Well known are the judgments of the European Court of Human Rights in *Mennesson v. France*[50] and *Labassee v. France*[51] in which the ECHR stated that the failure of the French authorities to recognize the child-parent relationship established between French intending parents and children born of surrogacy abroad violated children's right to respect for their private life, in accordance with Article 8 of the European Convention on Human Rights and Fundamental Freedoms.

In the case of *Paradiso and Campanelli against Italy*[52], however, according to the Grand Chamber of the ECHR, there has been no violation of Article 8 by Italy, which refused to recognize the parent-child relationship evidenced by the Russian birth certificate of a child born to a surrogate mother in Russia. What's more, the child was removed from the complainants and given for adoption. In this case, however, unlike French cases, the child was not biologically related to either of the intending parents. The Grand Chamber pointed to the right of the Italian authorities to decide

[48] See: M. Wells-Greco, H. Dawson. "Inter-country surrogacy and public policy: lessons from the European Court of Human Rights", [in:] *Yearbook of Private International Law*, 2015, Vol. 16, No. 2014/2015, pp. 315–343.

[49] Those obligations must even be regarded as being part of the public policy of each Contracting State, and which that State is required to protect by virtue of the application of a public policy reservation. Compare judgement of the ECHR in case *Pellegrini v. Italy*, application No. 30882/96.

[50] Application No. 65192/11.

[51] Application No. 65941/11.

[52] Application No. 25358/12.

whether to recognize the relationship between parent and child based on surrogate motherhood, provided that the rights of the child are safeguarded.

The ECHR did not, therefore, even in one case declare a general order for Contracting States to give effect to family-law relationships based on surrogate motherhood carried out abroad. To decide on this matter is the sovereign right of the Contracting States. These must, however, take care to ensure the best interests of the child, which ultimately follows from the second mentioned Convention on the Rights of the Child.

Naturally, the interpretation of the ECHR is binding also for the Slovak Republic, which is also a Contracting State to the European Convention of Human Rights and Fundamental Freedoms. Analysis of the judgments at issue was also published in *Justičná revue*, the leading journal for the Slovak legal practice, issued by the Ministry of Justice of the Slovak Republic.[53]

The process of legalization of the legal relationship between the intending parents and child born from surrogacy in the Slovak Republic depends on the fact how it is proved. Depending on the law of the country in which the surrogate motherhood was carried out, the birth certificate of the child is issued to the intending parents in which they are either listed as the parents of the child, or the parental status of the couple is confirmed by a court decision.

If the intending parents are included in the child's birth certificate, the birth of such a child shall be recorded in the Special Registry kept by the Ministry of the Interior of the Slovak Republic. The Special Registry serves to record the birth of citizens of the Slovak Republic (if the parents of the child are citizens of the SR, the child acquires Slovak citizenship by birth – Section 5 paragraph 1, Act No. 40/1993 Coll., On Citizenship), which occurred in the territory of a foreign state. For registration, it is sufficient to submit a birth certificate issued abroad (Section 23, paragraph 3 of Act No. 154/1994 Coll., On Registries). The authority that enforces the record does not examine the accuracy of the data included in the foreign birth certificate

[53] N. Bitterová, "Doktrína voľnej úvahy v judikatúre Európskeho súdu pre ľudské práva vo veciach náhradného materstva", [in:] *Justičná revue*, 2017, Vol. 69, No. 12, pp. 1409–1434.

or the basis on which the data was entered.[54] It can only examine the authenticity of a foreign birth certificate as a public document.[55]

This fact was confirmed by the Ministry of the Interior of the SR – Civil Registry Department, in response to our request for information dated 7 May 2018. It has also confirmed that it knows that in some countries, surrogate motherhood is carried out and that, when enrolled in a special register, its staff are also confronted with foreign birth certificates which contain an indication of surrogate motherhood. However, the records of such birth certificates are not refused for contradiction with public policy exception, "since there is no active procedural legitimate person for filing a petition for determination of maternity pursuant to Section 83 of the Family Act."

Recognition of a foreign decision confirming a child-parent relationship based on a surrogacy motherhood in the Slovak Republic could be more complicated. According to the Slovak legislation Act No. 97/1963 Coll. of the Laws on Private International Law (PIL Act) Section 65 in conjunction with Section 68a, Foreign Decisions on the Determination of Parenthood, if at least one of the parties is a Slovakian citizen and foreign decisions in matters of adoption of a child, if the child or at least one of the adoptive parent is a Slovak citizen, are acknowledged by the special statement of the Regional Court in Bratislava. The obstacle to recognition is, among other things, the fact that recognition would be contradictory to the Slovak public order.

Section 36 of the PIL Act defines public order for the purposes of private and procedural rules of international law as "the principles of the social and state establishment of the Slovak Republic and its legal order, which must be maintained without reservation." It is therefore necessary to ask whether the recognition of a decision on parenthood determination to a child born using the surrogacy method would violate

[54] Similarly, the Supreme Court of the Slovak Republic in its judgment dated 8 October 2010, No. 3 Sžo 152/2010. See also: K. Burdová, "Náhradné materstvo a slovenské medzinárodné právo súkromné", [in:] Z. Kiselyová, et al. (eds.) *Míľniky práva v stredoeurópskom priestore 2013: zborník z medzinárodnej vedeckej konferencie doktorandov a mladých vedeckých pracovníkov*, Bratislava 2013, pp. 928–933.

[55] A foreign birth certificate must have, as a public document, required legalisations, unless the situations where the legalisation is not required, generally because international convention, multilateral or bilateral, abolish this requirement, like Convention Abolishing the Requirement of Legalisation for Foreign Public Documents from 1961 (Statement of the Ministry of Foreign Affaires No. 213/2002 Coll.), Agreement between the Czechoslovak Socialist Republic and Soviet Union on Legal Realtions in Civil, Family and Criminal Matters of 1964 (Regulation of the Ministry of Foreign Affaires No. 95/1983 Coll.).

the fundamental principles of the social establishment of the Slovak Republic or the legal order of the Slovak Republic, which must be maintained without reservation.

In the Slovak legal order, it is necessary to include among these principles primarily the basic human rights to which the Slovak Republic, as a law-abiding state, adheres, as expressed in the European Convention for the Protection of Human Rights and Fundamental Freedoms, and also enshrined in the Constitution of the Slovak Republic in the Second Chapter, but also in the Convention on the Rights of the Child. We can also add to them the basic principles of the Slovak Family Law enshrined in the introductory articles of the Family Act. The court, in recognizing such decisions, should first of all pay attention to the protection of the interests of the child, protection of the family and parenthood.

Even though it is clear that the surrogate motherhood agreement, which many representatives of the Slovak doctrine refer to as *contra bonos* mores, although perfectly legal in the country where it was concluded, would be unjustifiable in the Slovak Republic and unenforceable just for public policy exception, the child-parent relationship could be recognizable, especially if the ordering couple, or at least one of them, was the biological parent of the child.

Burdová points out in this connection that the effects of recognizing such a relationship and the degree of contradiction with the public order of the Slovak Republic may in any event be different. She points to the fact that, in principle, the Slovak legal order also allows for the extinction of the legal relationship between the child and its original family and the establishment of a family relationship between the child and the new family, in case of adoption. On the other hand, it would be inconceivable if the relationship between the parent and the child arises on the basis of a decision which, prior to the birth of the child, determines the intending couple as the child's parents.[56]

5.1. Conclusions

Legalization of the legal relationship between a parent and a child on the territory of the Slovak Republic is basically not problematic if the couple – intending parents

[56] K. Burdová, "Výhrada verejného poriadku a náhradné materstvo: Ordre public and surrogacy", [in:] M. Patakyová (ed.), *Univerzitný vedecký park a jeho právne výzvy v 21. Storočí*, Bratislava 2015, pp. 140–150.

submit the birth certificate of the child issued abroad (in the country where the surrogate motherhood was performed) in which they are mentioned as the parents of the child. In this case, the competent authority shall record the birth of a child in the Special Registry kept by the Ministry of the Interior of the Slovak Republic, in which the birth of citizens of the Slovak Republic abroad is recorded.

In the event that the ordering couple would prove their parental relationship to the child by a foreign decision, the refusal to recognize the decision in question on a basis of public policy exception would be considered. However, the use of a public policy exception will only be taken into account if there is an intense conflict with fundamental principles, such as the right to family life, the protection of the rights of the child, or the protection of family and parenthood. Such a contradiction could be, for example, if the child was taken from a surrogate mother against her will, or if a surrogate mother would be misled when waiving her rights to the child. In many cases, however, the best interests of the child will require just maintaining a stable family environment or family ties between the child and the ordering couple, as evidenced by the ECHR judgments *Mennesson v. France* and *Labassee v. France*.

6. Political and Doctrinal attitudes to the issue of surrogate partnership as a material sources of law and limits of potential legislative activity

6.1. General limits of possible changes – constitutional and political context

Legislative activity within the Slovak Republic is probably one of the most dynamic in the Europe. Nevertheless, even today there is no legislative reflection on the change of legal status as it was presented on the basis of "maternity certainty" and the nullity of any contractual act directed to the opposite. It should be remembered that within the Slovak Republic there are plenty of legal regulations, both private law and public law, which are relevant to this matter and thus, as was presented, it would not be done by a mechanical change of one act, for example the Family Act. Any change of the legal situation at its most abstract level has its natural limits.

Such limits of possible legislative activity, apparently in each country, represent lots of circumstances with various range of relevance. However, the limits are at least partially taken into consideration when it comes to the idea of change within the democratic decision-making processes in the legislature while those limits

which are integrated into the legal order should be incorporated into the explanatory memorandum to the act as a part of clear legislative process. Therefore, when considering *de lege ferenda* in the context of the institute of surrogate maternity, it is necessary to properly represent those limits to the possible legislative changes.

The legislative activity of the National Council of the Slovak Republic is limited by two real facts. The first one is the constitutional framework, which forms the formal limit of the legislative as well as of constitutional power to a certain extent. The second limit is a logical answer to the question of whether any legal change is brought by a social order. Practically it means there is a formal source or a material source of potential legislative activity. The above-mentioned corresponds to the division of the sources of the law to formal ones and material ones.[57] Both have a practical meaning for several reasons.

The formal source is an instrument linked by the theory of law with the formal source of law, especially known in the form of legal act and constitution, respectively other normative legal act. The Constitution is also the fundamental source of law. If taking into consideration only the text of the Constitution adopted and changed by the National Council of the Slovak Republic, even this source cannot have an absolute power in a modern state. An inspiration for a discussion of the limitations of constitutional power is the decision of the German Constitutional Court in case of withdrawal of the nationality of a Jewish lawyer in Nazi Germany.[58] This decision essentially provides the formulation of the fact that even the constitutional power is not without any limits. The law and justice are not available to the legislature. The idea that the Constitutionalist can organize everything according to its will would mean declaring the validity of Nazi law, which is unacceptable. This approach of real existence and the implementation of legal principles as limitations of law is as well taken by other authors.[59]

It is necessary to mention this legal tradition with respect to the fact that the Slovak Republic is part of the area that acknowledge it. Moreover, as will be pointed out later, also the Constitutional Court of the Slovak Republic refers to the essence of this tradition. It is a tradition of natural law, respectively its participation in the legal order, particularly in the point of the human-legal doctrine and the principle

[57] V. Juda, *Teória práva*, Banská Bystrica 2011, p. 66.

[58] R. Alexy, *Pojem a platnosť práva*, Bratislava 2009, p. 27.

[59] M. Večera, "Právní princípi, prirozené právo a hlediska spravodlosti", [in:] *Právny obzor*, 2003, Vol. 86, No. 2, pp. 247.

that these values are not constituted by legislative power but only accepted.[60] The very minimalist version of these principles that must be taken into consideration if the law shall be the right provides the American author Dworkin as the idea of human *dignity and equality*.[61]

Therefore, in the context of hypothetical discussions about the need to change the maternity institute, it is necessary to see the limits that these principles and rules define. An immanent assumption for such approach to this subject is the rejection of a radical positivist opinion that could deform our view on this matter contradictory to the principles of the Nuremberg tribunal and many subsequent decisions, regulations and doctrines. The topic of limits for possibilities of using different opinions on the need to change or preserve the status quo will be begun with the constitutional principles on which the Slovak legal system is built. These principles are important especially because they form (beyond logical limits) an important interpretive instrument.[62] The first one is the basic article of the Constitution of the Slovak Rrepublic Art. 1 section 1: "*The Slovak Republic is a sovereign, democratic and legal state. It does not conform to any ideology nor religion*."

This section organically consists of two principles. The first one refers to the rule of law, the logical part of which is sovereignty and democracy. The legal state, as a principle, in certain tendencies tolerates the state of the gray sphere with a pre-tolerated and presumed state of unenforceable law with potential damage. Of course, in a society with a multicolored range of relationships, it may happen that a particular right is unenforceable, and as a result it will cause a damage to someone, but there should not be a case when such result is conscious and intended by the legislature or government body. Consequently, thought about the gray option for tolerance of surrogate motherhood without a real legal basis and the enforceability of contextual rights can cause painful consequences for those people who rely on the expectation of the legality of such act in the sense of the principle that what is not prohibited is permitted.[63]

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[60] The ruling of the Constitutional Court of Slovak Republic, case Pl. ÚS 12/01 (point 6) states that "Unlike standard legal norms (rules of conduct), the state cannot form objective value, according to the conclusions of the current legal science, but can recognize and respect them, respectively to use them or highlight the meaning of certain values on the expenses or in relation to other values".

[61] Cf. R. Dworkin, *Říša práva*, Bratislava 2014, p. 365.

[62] Cf. M. Večera, "Právní princípi, prirozené právo a hlediska spravodlosti", [in:] *Právny obzor*, 2003, Vol. 86, No. 2, pp. 247.

[63] With regards to considerations indicated above, see: A. Erdősová, *Aktuálne otázky o človeku a jeho právach v bioetike*, Bratislava 2016, p. 70.

The second section talks about an important dimension to us, namely the prohibition of commitment of Slovak Republic to any form of ideology or religion. In the case of material sources and limits of potential change, this area can become a source of controversy and discussion. Therefore, when considering the material sources within the Slovak Republic conditions, it is necessary to deal with the objection of the "secular" state. The limit contained in Art. 1 of the Constitution of the Slovak Republic is not automatically an exclusion instrument for opinions and doctrines that originate in a religious environment. On the contrary, these views can be a significant positive instrument for enhancing the legal system, provided that their qualitative and quantitative dimension is not purely based on a metaphysical or theological basis. We believe that the principles and opinions arising from the religious environment are applicable and implementable in the legal system of the Slovak Republic only if they are not based exclusively on transcendental sources. Therefore, regarding the discussion, it is understandable that also religious motives of attitudes to this subject as well as the view of the Church will be taken into account.

As a part of the constitutional introduction, it is necessary to mention also some further dimensions of this subject. The protection of life which is regulated directly within the text of the main act refers also to the position of unborn life. Article 15 of the Slovak Constitution declares the general right to life, even in a certain quality to the person before its birth. The wording of section 1 of this Article reads as follows: "Everyone has the right to life. Human life is worthy of protection also before its birth."

This article was interpreted in another context by the afore-mentioned decision of the Constitutional Court of the Slovak Republic, case PL – ÚS 12/01 (2007). This was a proposal that initially deals with the constitutionality of the Interruption Act but provides an important interpretive instrument for this issue. It defines several points, namely:

a) *nasciturus* is an *ex tunc* holder of the right;
b) an unborn child at the certain stage (12 weeks) also has protection against the mother, *contra omnes*;
c) unborn life is *an objective value* that is protected and which, according to our legal tradition, constitutionalism cannot constitute but only recognizes and respects.

The implementation of above mentioned surrogacy motherhood brings several important milestones. If a child is born (and therefore becomes technically eligible for surrogacy) it is already the person and the full holder of rights. Therefore, it is not possible to adopt a law that would restrict such child from its fundamental

rights on the basis of pre-birth events. The protection that the child enjoys also against its mother since its 12th week creates also its protection against all other, it means also towards any contracts against its interest. With regard to the subject of consideration – the right to life versus the mother's decision – the interpretation of the court that the fetus's right prevails even against the mother's will, shall be more relevant also in all other cases.

This limit would also be reflected in the principle of equality as is offered by the Slovak constitution as a fundamental establishment of the whole legal system. Then it is not possible a person to have the right to make the other person only the subject of the contract. The status of a biological "surrogate" mother would be in a dominant position towards the child so it could enable to make it a subject of an exchange.

Of course, it is necessary to mention the Convention on the Rights of the Child, published in the Collection of Laws under No. 104/1991 Coll. Among other things, this defines the right of the child to know its parents or the obligation for the best interest of the child.

Another dimension to be considered when talking the constitutional limits of potential changes in surrogacy is the dignity of the person. Constitution of the Slovak Republic in Art. 19 section 1 declares, inter alia, that everyone has the right to the preservation of human dignity. The topic of dignity can vary in its interpretation. We can use philosophically the thoughts of Immanuel Kant and Karol Wojtyła, later known as Pope John Paul II, one of the important characters of personality in the last century. Both agree with the basic view that a person can not only be a subject for another person but it has a personality. Wojtyła asserts in his work *Love and Responsibility*: "This norm, in its negative aspect, states that the person is the kind of good that does not admit of use and as such the means to an end. In its positive form, the personalistic norm confirms this: the person is a good to whom the only proper and adequate attitude is love."[64]

These definitions of dignity are recognized within the framework of standard scientific opinions and constitute an interpretative mainstream. For completeness, there is also possible to find opinions that the human dignity is a political and social consequence that is not in itself but arises within society in the professional literature.[65] As I have already mentioned the decision of the Constitutional Court of

[64] K. Wojtyla, *Love and Responsibility*, San Francisco 1993, p. 41.

[65] Cf. H. Arendt, "Es gibt nur ein enziges Menshenrecht", [in:] *Die Wandlung*, 1949, Vol. 4, pp. 754–70.

the Slovak Republic, in the case of values such as human dignity, it is not something that the state creates or requires an expression of a will of a person, but it is a part of a person and the state can only respect it. If we allow the woman's autonomy so she can rent a part of her body, it means that the sovereignty over own body is absolute and a person can become a slave, a solemn by its own decision. Obviously, we try to hypothetically interpret the fact of voluntary surrogacy by a woman. Hiring a part of a person's body is constitutionally discomforted because it is not possible for someone to give up its rights in advance and not the human ones at all.

In addition, commercial rent is excluded by the international commitment of the Slovak Republic by the prohibition to use of part of the human body for commercial purposes as is contained in international documents.[66]

In conclusion to this subtext, we can say that the Slovak Constitution as well as its interpretation by the Constitutional Court of the Slovak Republic provides several limits of potential legislative changes in the field of surrogate maternity. Therefore, it is possible for discussion on the issue of constitutional conformities to accept the idea that substitute motherhood would be difficult to adopt, and apparently directly in conflict with the Constitution, such option would seem to be commercial as well as represent the creation of so called a gray zone.

In terms of material sources, the Slovak Republic is heavily influenced by the Christian values. More than 70% of its population claim to the Christian religion. The largest percentage of this influence is of the Roman Catholic Church, followed by the Evangelical Church, the Greek Catholic Church and the Orthodox Church. However, this impact also has an institutional dimension. There is an advisory body of the Slovak Government, or a discussion platform of the Solidarity Council, which includes, in addition to the Government of the Slovak Republic, employers, association of trade unions and the Catholic and Evangelical Churches.

Such position makes the attitude of Christian churches a significant material source of law. It can be said that Christian religion is one of the most relevant sources of law in Slovakia at all.

We must also mention the political form of influence. Unlike the Czech Republic, Slovak Christianity has a different dimension. There is a strong intellectual dimension in the Czech Republic, while there is present a mass and popular piety in the Slovak Republic. What seems at first sight to be negative has big importance

[66] For example, article 3 section 2 letter c) of EU Charter of Fundamental Rights or article 21 of Convention on human rights and biomedicine.

in terms of electoral influence. When it comes to election, a very high percentage of the population decides even on the basis of conservative values interpreted by one of the Christian churches. This is also reflected in the strong or neutrality of an existing political assembly. Parliamentary parties according to the value orientation:

1. *SMER – sociálna demokracia* (SMER–Social Democracy) – the largest ruling party; within it, there is a liberal fraction, but a conservative attitude or neutral attitude to ethical values prevail. During the period when SMER-SD was part of the ruling coalition, it refused to change this neutral attitude, but in two cases it initiated restrictive changes. It related to a proposal of an act on interruption and a constitutional declaration of marriage as a bond between men and women;
2. *Slovenská národná strana* (The Slovak National Party), now the second governmental party, conservative, reporting to Christian ethical values;
3. *MOST-Híd*, a liberal party, but it does not take the issues of surrogacy and bioethics as a priority in its political activity, supports gay partnerships;
4. *Sloboda a solidarita* (Freedom and solidarity) – the only parliamentary liberal party today;
5. *Hnutie obyčajných ľudí a nezávislých osobností* (The Movement of Ordinary People and Independent Personalities) – very conservative;
6. *Sme Rodina Boris Kollár* (We are the Boris Kollar Family), conservative or mostly conservative thinking.
7. *Ľudová strana Naše Slovensko Marián Kotleba* (People Party Our Slovakia – Marián Kotleba), very conservative thinking, radical right wing.

Outside the Parliament there are two parties that have the theoretical possibility to participate in legislative power: *Kresťansko-demkratické hnutie* (Christian-Democratic Movement), which is characterized by a conservative program and whose politicians include Members of the European Parliament, and *Progresívne Slovensko* (Progressive Slovakia), a party characterize by a left-wing liberal program.

However, this status quo of political views within the Slovak Republic is in the movement. Within the existence of social networks, alternative news portals, and other diverse virtual communities, it seems we can see development to even greater conservatism, but also to the activity of left-wing liberals. If the conservative movement is measurable even in the form of preference increase in polls[67],

[67] According to a poll conducted by the Focus Agency in August 2018, conservative parties and centre parties are altogether supported by 66 % of all voters; http://www.focus-research.sk/files/

left-wing movement has rather the nature of quality activity without a significant increase in its strength.

The same movement can be registered under the influence of the Catholic Church. It seems that during the last period the Greek-Catholic clergymen who are generally more conservative in ethical issues and are supporters of direct communication without excessive political correctness take the initiative.

On the ground of this short presentation, we can make two conclusions:

- The formal scope of possibilities for the legislature based on liberalization of the maternity institute towards to the partial or total legalization of surrogate motherhood may come against the constitutional protection of the fetus and the born child in accordance with the Constitution and Constitutional Court judgment which considers the life of that fetus as an objective "natural-right" value which then logically excludes the possibility of concluding contracts with the fetus or a born child as a the subject. Another potential constitutional limit may be the dignity of the woman and the resulting ban on her exploitation.
- The material scope provides particularly a Christian value view. Within the existing political map this one has a clear decisive influence while also the expected progress is aiming more towards to conservatism than to liberal attitudes. It is unlikely that a major shift in opinion could occur in the forthcoming period of two or more election periods.

6.2. Presentation of political, civil opinions and opinion of the Conference of Bishops of Slovakia

When assessing this matter, we have addressed relevant political forces, individuals and the civil sector interesting for this issue. The basic criteria for evaluating the conclusions were the real impact of the subject, the individual or the groups on this topic, and the assumed interference to this topic. The immanent accompanying feature is the fact if any subject is dealing with this topic or if there is a defined opinion on this matter. Methodically I will present single opinions with a brief characteristic of the respective respondent to this topic.

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n231_Volebne%20preferencie%20politickych%20stran_august2018.pdf (last accessed: 15 August 2018).

Anna Záborská, Member of the European Parliament for the Christian-Democratic Movement, points to the European Parliament's resolution on this issue. In her opinion, it has always been against the legalization of surrogate motherhood. Lately, it stated in its resolution of 17 December 2015 on the Annual Report on Human Rights and Democracy in the World in 2014 and the European Union's policy on the matter (2015/2229 (INI)) EP: "(it) condemns the practice of child-bearing by a surrogate mother violating human dignity, because her body and reproductive functions are used as goods; it assumes that the practice of gestational child-bearing by a surrogate mother, which includes reproductive exploitation and the use of the human body for financial or other purposes, especially in cases vulnerable women in developing countries, must be banned and considered as an urgent matter within instruments related to human rights."

Branislav Škripek, Member of the European Parliament for The Movement of Ordinary People and Independent Personalities, points in his statement to the case of "Baby Gamma" reported by the media in 2015, as an example of negative effects of surrogacy. A woman from Thailand bore twins, a boy and a girl, for a couple from Australia. They were very pleased with the little girl they chose to complete their family. But they did not care about her twin brother because of his Down syndrome. As a result, they left him behind in Thailand. This news report quickly spread across the entire world, and such discrimination on the basis of heath disability was widely condemned. In addition, it was found out later that the father of the ordering couple had been found guilty of misconduct with regard to minor girls. The court stated that the risk that he would abuse this child as well was slim, and eventually the girl stayed in the Australian couple. In addition to these empirical experiences, the case points to the violation of parental rights when the child becomes the subject of an obligation – a surrogate contract. Due to the frequent occurrence of couples without children in the economically advanced parts of the world, there is a big risk that surrogacy may evolve into a very lucrative business in the future, but the real purpose will be the exploitation of third world women and ensuing children-trafficking.

Štefan Zelník, the Chairman of the National Council of the Slovak Republic for Health (Slovak National Party) also does not see any reason to change the current legislation. According to his opinion, the child should not be the subject of business. Nor any part of the female body should be subject to any form of "rental agreement."

The Forum of Life, a civil society which participates in helping women in a state of unwanted pregnancy, has spoken through their spokeswoman, who also rejects

the legalization of surrogate maternity. This civil society is one of the most influential non-governmental organizations within the conservative spectrum.

A legal civil society as well belonging to the conservative spectrum is the Institute for Human Rights and Family Policy. Legal expert Annamaria Cerovska gave us a detailed opinion on this subject from which we choose the basic facts, mainly:

1. The fact that, in their opinion, legalization of surrogate maternity is in direct conflict with the public interest of society as it destabilizes the natural understanding of the family and threatens fundamental human rights.
2. Surrogate maternity directly threatens preservation of the best interests of the child
3. Surrogate maternity is in direct conflict with the human dignity of woman-mother and the societal meaning of this position.
4. The need for international common regulation results from the need to prevent tourism for this purpose and the subsequent possible traumatization of involved individuals by the activity of single countries in the process of (non)acceptance.[68]

It should be noted that although mentioned comments presented by members of Parliament or activists who as the basis of their political orientation impose conservative values based on Christian teaching so their reasoning is not based on metaphysical or theological grounds. The common aspect of these opinions is the best interest of the child, like is the international commitment of the Slovak Republic, as well as the rejection of the possibility of children trafficking and the exploitation of women.

Today the only liberal party, Freedom and Solidarity, has adopted a rather neutral or reluctant attitude. Within the party Freedom and Solidarity, Natalia Blahová, Member of the National Council of the Slovak Republic, dealing with the protection of human rights, says: "Such proposal would require a significant change in several acts. There is a need for an all-society discussion before expressing any opinion. In the current situation, I do not consider it real. From my long-term work with children and families I know that individual cases can be much more sensitive and complicated than they may seem at first sight. This may result in long-term legal uncertainty for the child, which may result in problems not only for the child but also for his or her biological, respectively intending parents."

[68] ECHR, GC, 24 January 2017, Application No. 25358/12, *Paradiso and Campanelli v. Italy*.

At the level of a political debate within the Slovak Republic, this subject, unlike similar ethical issues such as interruption or registered partnerships, is not associated with great interest. It can even be said that liberals' gentle refusal to express their clear view on this issue joins together the impossible, namely, Catholic conservatives, feminists, and liberals.

The prevailing present form may indicate that the current state is acceptable to the general public. It can be also said that today there is no longer a demand for change in professional, political or civil society, on the contrary the majority of the asked public are negative to the possible requirements for change in this area.

The Roman-Catholic Church is the most influential church and thus the opinion-forming entity within the Slovak Republic, either in terms of the number of its members or by its impact including the Greek-Catholic Church. As has been said, its influence is not just in pastoral or moral aspect. It is also institutionally linked through the Council of Solidarity with the Government of the Slovak Republic. The highest body in terms of power is the plenary meeting of the Conference of Bishops of Slovakia. The Conference brings together all bishops within the territory of Slovakia. In addition to its jurisdiction under the Code of Canon Law (CIC), it also has real political influence.

The Conference itself, however, only enters in the political process in terms of recommendations on specific ethical issues. Although there is a generally accepted for the Church not to form a policy as political parties and movements, and this trend is confirmed by the emeritus pope Benedict XVI[69], recommendations on ethical issues can be crucial for both election results and real political decisions. For each social or pastoral theme, the Conference has its own professional committees composed of experts from the area. One of these subcommittees is also the one for bioethics. On 8 December 2014, it issued an extensive opinion on surrogate motherhood. It is necessary to say that it is a moral-theological framework which, however, as I mentioned at the beginning within the interpretation of Art. 1 of the Constitution of the Slovak Republic, may have its meaning. The opinion itself is primarily focused on two subjects of relationship, namely the child and the mother. It contains six basic points from which we have selected the following:

1. Surrogate motherhood is a serious misuse of medicine, biomedical science and law. From a moral point of view, it presents a fraud, abuse and violation

[69] In his encyclical *Caritas in veritatis*, Benedict XVI states: "The Church does not have the opportunity to offer technical solutions and does not want *to interfere with state policy*."

against the involved persons: against the "social" or "genetic" parent of the child, the replacement mother as well as the child itself. At the same time, this procedure corrupts and profoundly morally damages doctors, healthcare professionals or other professions involved in it (e.g. nursing, pharmacy, law, management).

2. There is usually a morally unacceptable relationship between the surrogate mother of a child and objectification, i.e., trading (selling) of her body. This is not only a kind of womb rent, but a commercial abuse of the whole body of a woman who is fully involved in all processes related to pregnancy. After giving birth to the child when it is expected to hand over the "product" of her pregnancy to its "social" parents, all natural biological, emotional, social, and other accompanying ties that the woman-mother usually creates during her pregnancy are interrupted.
3. In relation to the "social" parents of the child, it is a lie, respectively a fraud in the sense that a child given to their care by way of a surrogate motherhood in fact is not their biological child: biologically it is a child of the woman who gave birth to it. Moreover, if the child was conceived from their own gametes, it is a child who takes from them partially (if there were donor's gametes) or completely (if there were gametes of both parents) only the genetic basis ("genetic" parents): its biological existence, as we understand it now more deeply, is however always significantly influenced by the life, biological and other states of the surrogate mother.
4. In relation to the baby of the so-called surrogate mother, it represents an injustice because it is conceived in unusual, sometimes bizarre conditions, with artificial, pre-planned splitting between its genetic, biological and social parents.
5. A surrogate motherhood represents an injustice as well as an irreparable crime for sacrificed children, that human beings who were artificially conceived but were not later transferred to a woman's womb, either because they were said to be defective or redundant, or even after their transfer to the womb, their development does not continue and they die: in order to the birth of a single child, many others "sacrifice."
6. To other orphan children who could be adopted it means an injustice because it reduces their real opportunity to get into adoptive care and have an appropriate family background for their development and good start to life, despite

the unfortunate situation in which they occur innocently by losing their parents or by abandonment by their living parents.

It is clear that the Conference's obvious and unequivocally disagreeable opinion on this topic results in various relationships. One of the understanding conclusions of the Conference is that it represents an unfair and internally wrong act and as such it is worthy morally rejection.

To summarize this subchapter, I would like to conclude that in the conditions of the Slovak Republic and the political public as the part of the parliamentary power, neither the civil and professional public is convinced about the admissibility or, at least, the reasonability of the change of legal status when surrogacy is de facto and also *de jure* excluded. The attitude of the Catholic Church, with a decisive influence for the society, is totally refusing. It should be said that unlike in relation to other ethical issues there is no consensus on this matter neither within wider European context. Therefore, it is highly unlikely that there could begin the discussion on change in the status quo in Slovakia. On the contrary, the latency of the fact that there are a number of cases of surrogacy outside the law regulation in the gray zone of social life, especially using third-country offerings, suggests that the discussion of the explicit sanctioning of such activity is not excluded. This is supported by the fact that in the Slovak Republic there is an increase in the influence of conservative political parties.

7. The criminal dimension of surrogate motherhood in the Slovak Republic

The Constitution of the Slovak Republic in Art. 2 section 3 defines the relationship to the state, apart from other formulations, that anyone can act which is not forbidden by law. This wording included in the Constitution is important for determining the extent of autonomy for the conduct of natural and legal persons, unless it is a performace with competence and authority of a state body. Therefore, we can see two situations in the Slovak legal environment:

1. An action which is not expected by the legal acts, regulated or prohibited at the same time; such action is sanctioned, in particular, by the impossibility of enforcement of the rights and obligations that can arise from it; it is *de facto* an activity outside the law regulation in the gray zone of social relations;

2. An action that is forbidden by the law and considered as a crime, and this crime may be either in the field of administrative law or criminal law.

The first type of action is so called gray zone. It is not clear from the wording of the legal act that it would be explicitly prohibited but at the same time it is not allowed. Optically, the surrogate contract may seem to be in this situation.

The Slovak criminal law has no specific offense of surrogate motherhood. In the case of *lege lata*, it is possible to see some of criminal offenses of the Slovak Criminal Code considering certain actions (deeds) which are connected with this surrogate maternity. In relation to surrogacy, it can be different actions:

1. The conclusion of a remunerated contract (regardless of its validity and form) about the handover of the child to the client;
2. Giving the child to other hands without the decision of a court.

The fundamental difference between these two actions is in their basic character which is the remuneration. Firstly, we discuss the fact of the crime of child custody granted to stranger. This is an act regulated in Section 180 of Act No. 300/2005 Coll., Criminal Code as amended (hereinafter referred to as the Criminal Code). According to this provision, the crime is:

1. an intentional action
2. in contrary to generally binding criminal law regulation
3. for the purpose of adoption (Section 180) or for another purpose (Section 181)
4. (when) one gets a baby
5. in the case of Section 181, remuneration.

This fact assumes the intentional action of a surrogate mother or an ordering person who, in contrary to the Family Act, respectively another generally binding legal regulation, entrusts the child to the hands of another person either for the purpose of adoption (Section 180 paragraph 1) or for another purpose (Section 181 paragraph 1). Another sign is the decisive factor in event of a hand over for the purpose of adoption, where such action is free of charge. In the case of a situation where the purpose is abstractly named as the other one, the mandatory character is a remuneration.

When assessing these facts, it is important to understand that it is the custody of a child that is someone's while the law does not speak explicitly if legally or not. However, it is possible to assume that the offender of such action is someone who took care of child upon legally presumed reason, and the subsequent action, its handover is illegal because it is in contrary to a general binding regulation. Thus,

the decisive fact is that the following movement of the child from the legal state (mother, foster, etc.) is in conflict with *the existing law*. This automatically excludes situations expected by the Family Act, for example, the limitation of parental rights by a court decision.

Another feature is the motive for the adoption. Important is if the purpose of adoption is desired, respectively presumed, not if actually the purposed is fulfilled or could have been. Therefore, it is not possible to state that the act is not a crime because adoption in such a situation was not real. In addition, it should also be mentioned that the other person in such case does not have to be the future adoptive parent, but an agent.[70] The basic subject matter in Section 180 paragraph 1 assumes also a passive form of its committing. This is the situation when someone gets a baby in this way. Thus, the end user who gets the child is criminally liable.

A particular subject matter is in Section 181 section 1 where the specialty of this matter means that for criminality of such action not violation of generally binding regulations is required but its remuneration. The legal act presumes a precisely defined purpose, either for work or for another purpose which can cover everything. This subject matter can better cover the situation we see as a surrogate maternity. To meet this subject matter, a violation of a generally binding is not required, but a remuneration for it.

Another crime which may be subsumed to be partially in the context of a surrogate maternity is the abandonment of the child. However, this is also a crime the object of which is an action by someone who leaves the child for who he/she was obliged to take care of and thus puts him in danger. Such situation is however unlikely.

Very often, child trafficking is associated with the topic of surrogacy.[71] It is a crime which is often associated with a surrogate motherhood. The subject matter of this crime is contained in Section 179 of the Criminal Code, paragraph 2 which constitutes a specific subject matter to the general crime of human trafficking.

This crime has to be interpreted also in the context of international treaties which directly concern this issue. This is particularly the UN International Convention against Transnational Organized Crime, published under No. 621/2003 Coll. and

[70] Cf. J. Madliak, Obchodovanie s deťmi ako jedna z foriem obchodovania s ľuďmi, [in:] *Stop! Deti nie sú tovarom! Adopcie nie sú obchodom! Zborník s konferencie konanej 17. marca 2015*, Banská Bystrica 2015, p. 13.

[71] Cf. J. Klatik, Príčiny nelegálnej adopcii detí, [in:] *Stop! Deti nie sú tovarom! Adopcie nie sú obchodom! Zborník s konferencie konanej 17. marca 2015*, Banská Bystrica 2015, p. 16.

the Protocol to this Convention on the Prevention, Suppression and Punishment of Trafficking with Persons, Especially Women and Children, published under number 34/2005 Coll. The purposes of this Protocol, according to article 3, human-trafficking "means the retrieval, transfer, handover, possession or taking over persons under the threat or use of violence or other forms of coercion, kidnapping, fraud, harassment, abuse of authority or vulnerability or acceptance or payment or benefit the consent of a person having control over another person for the purpose of exploitation. Exploitation involves at least exploitation for prostitution of other or other forms of sexual exploitation, forced labor or service, slavery or practices similar to slavery, insanity or organ harvesting."

In particular, it is necessary to focus on three essential features, namely the taking over of the person, the remuneration (paying) and the exploitation. All three characters are fulfilled within the surrogate agreement. This hypothesis will be explained later when criticizing those features in subject matters. Here I will introduce the wording of the Slovak Criminal Code, i.e., the above-mentioned Section 179 paragraph 2: "As is stated in section 1, a person who attracts, transfers, holds or takes over the child, even with its consent, for the purpose of child prostitution or other forms of sexual exploitation, including child pornography, forced labor or forced service, slavery or practices similar to slavery, non-commissioning, forced marriage, misuse of crime, illegal adoption, removal of organs, tissues or cells or other forms of exploitation shall be punished."

If the wording of the Protocol is wider and provides greater scope, the range of Section 179 paragraph 2 is narrower. While the international definition expects the fulfillment of all three signs of usual surrogate practice, the Slovak legislation is not so convincing. When I try to interpret the wording of Section 179 paragraph 2 of the Criminal Code, it will be only in the context of prevailing practice of surrogate maternities, therefore on the basis of contract and for remuneration. This practice recognizes, on the one hand, the taking over of the child and giving-up of all the rights to the child in advance by the surrogate mother; the remuneration regardless of its particular form and not least the exploitation.

The critical moments of the substantive definition as well as its proving in the conditions of the Slovak Republic will be introduced from its end, the concept of exploitation. A woman is a partner only when she is pregnant, after it is over, she is "forgotten." If exploitation as a term is interpreted as a ruthless, unequal and unfair

behavior that benefits from another person[72], it is possible to apply this term for using the woman and then forget her in such a way. As I have already mentioned the Slovak criminal law has jurisdiction also outside the territory of Slovakia if the crime is committed by Slovak citizens. From this point of view, the position of women-surrogate mothers in third world countries can be seen as obviously disadvantageous as far as social or existential needs are concerned. This suggests that their position can be justifiably subsumed under the concept of exploitation. Another feature of the subject matter is moreover an abuse of a vulnerable position.

Particularly, remuneration constitutes a critical matter. Several subject matters (including custody) presume the existence of financial motivation and the payment of a specific price. However, in a real relationship within the examined issue, it is possible to hide the price as:

1. Travel costs and living costs of the surrogate mother
2. Costs connected with healthcare
3. Costs connected with staying at the clinic
4. Auxiliary care for the pregnant mother.

Even the existing practice in the Czech Republic, as it has been publicized, speaks only about the necessary costs of health care and not about the price for a child, and only in case of foreigners, as the Czech citizens are under the national health care system. It is clear that in this case a state of evidential need could arise. It could be disturbed only by the answer to the question why the woman provided her womb. In the case of a family relationship, another qualitative situation would be the answer to this question, different to the case of a couple from Slovakia and a surrogate mother from India. In the second case, the possibility of suspicion of the commercial dimension of such contract would probably arise.

Proving this criminal activity if one of the elements (surrogate mother) is abroad is almost impossible. There would have to be a mother's testimony or a record of the use of IT tools that would similarly, as related to the crime of corruption, demonstrate the existence of a criminal agreement. However, the problem is if this activity is legal and even legally enforceable (in terms of agreement) in the country that should be asked for legal aid. Obviously, such legal aid could not be realized because such a contract is not a crime but a legal contract in that country. And, in the case of commercial surrogacy, we particularly talk about countries of origin of the surrogate mother where such a contract is legal. Thus, the Slovak

[72] Cf. https://en.oxforddictionaries.com/definition/exploitation (last accessed: 15 August 2018).

judicial authorities would have a very limited opportunity to prove the fundamental presumptions for the crime (such as child trafficking and custody), especially the decisive one – remuneration.

The fact that this is a very sophisticated activity is confirmed by the fact that the Slovak authorities do not have any records in this respect and it is a very latent activity.

Final conclusions

Surrogate motherhood is not regulated by the Slovak legal order, nor officially carried out. Only one legal provision which can have an effect on the surrogacy method is Section 82 of the Family Act of the Slovak Republic, which mandatory sets forth that the mother of the child is the woman who gave birth to the child. Paragraph 2 of this Section declares all agreements being contrary to this establishment of maternity, null and void.

As concern the execution of the surrogacy in the practice, the prevailing part of the authors dealing with the assisted reproduction legislation are of the opinion that it is not forbidden in the Slovak Republic. They refer to the constitutional principle "what is not prohibited is permitted". But, at the same time surrogate motherhood is not approved by law. The problem is, that the assisted reproduction legislation is insufficient and outdated, represented by the 1983 legislative measure of the Ministry of Health of the Slovak Socialist Republic.

The legislative measure allows for only one technique of the assisted reproduction. It is applied by analogy to the remaining assisted reproduction methods. That is why the surrogacy motherhood treatment remains in the "grey zone" in Slovak Republic.

In case the surrogacy would be carried out in Slovakia, in certain circumstances there would not be problem to legalize the parent-child relationship of the intending parents to the child born by surrogate mother, as we proved in Chapter 3.

As concern the perspective of the future enshrinement of the surrogate motherhood into the Slovak legal order, the doctrine largely criticizes this assisted reproduction treatment, but do not say definitive "no" to it. They admit that it deepens on social need – "social ordering". If yes, they prefer "Czech model" which means altruistic and gestational surrogacy using solely the intending parents' gametes.

In our opinion the public opinion is not very supportive to enabling the surrogacy in Slovak Republic. In Chapter 6, we present the opinions of the subjects who

represents the public and in the same time have a strong influence on public opinion – political parties as well as Churches. As we can see from their positions, the surrogacy motherhood is not in center of their interest, or they are strongly against.

In this situation, there is increasing risk that Slovak infertile couples turn abroad, to the countries in which the surrogacy is allowed. Unofficially, there is talk about money in such cases. As results from the analysis in Chapter 5 prove, it is not impossible to legalize the parent-child relationship issued from the surrogate motherhood carried out abroad. That is why there is a great risk of supporting increasing commercial surrogacy, which is the worst form of the surrogacy. We are of the opinion that it is necessary to adopt such steps on international level that would prevent reproductive tourism. But in any case, it should not be against the best interest of the child, for example the refusing recognition of the status of the child.

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Surrogate birth in light of the fundamental principles of family law

1. Introduction

Family law regulates fundamental issues concerning the conception, birth and raising of a child, which all constitute the concept of motherhood. Basically, these regulations agree with the natural (biological) state of things. Due to civilizational progress, there have appeared new reproductive possibilities which violate this state. Medically assisted reproductive technology, connected with the use of third persons in the procreative process, both with regard to donating genetic material and with pregnancy ending with birth, is connected with the issue referred to as surrogacy, or surrogate motherhood.

This term is a simplification which can be misleading. The concept of motherhood, which presupposes the existence of a special relationship between a mother and her child, is much broader than the meaning assigned to it in connection with the use of medically assisted reproductive technology. It is not limited only to fertilization, pregnancy and delivery, we can say that it just develops at that time. Motherhood is fully realized only at the stage of raising a child, and that is after its birth and it is connected with duties and obligations resulting from looking after the child. Surrogate motherhood, deprived of duties and obligations for the long-term and painstaking nurture process, which in fact comes to an end with giving birth to the child, never achieves full depth as it is deprived of personal influence, necessary for the proper shaping of the child's personality and preparation for its life in society.

Surrogate motherhood takes place when a woman, defined as a surrogate mother, agrees to the fact that in the process of procreation, normally requiring two parties,

she will play the role of a "third party." A surrogate mother uses her procreational potential to bear a child "for someone else" without the intention to accept the duties and obligations connected with raising the child. Surrogate motherhood is the result of an agreement between a woman acting as the surrogate mother and the ordering party, which involves conceiving a child, carrying it to term and giving birth to it with the intention to hand over the child to the ordering person immediately after birth. Bearing that in mind, we should assume that a surrogate mother acts as a "living incubator" for the ordered child. In this way, we create a situation which leads to the waiver of rights responsibilities connected with raising a child and transferring them to another person or persons even before the child is conceived. Therefore, the phenomenon of surrogate motherhood is also referred to as "contractual pregnancy." Because of this, referring to this type of phenomenon as motherhood raises serious doubts.

2. General evaluation

Surrogate motherhood is a multidimensional phenomenon, involved in disputes which are difficult to solve, mostly moral and legal, which cannot be explicitly assessed. Because of the subject of the study given in the title, we will consider surrogate motherhood mostly in legal analysis.

The issues of surrogate motherhood are connected with the issue of medically assisted reproductive technology, which omits the sexual act of a man and a woman. Modern medicine distinguishes two basic types of medically assisted reproductive technology. The first one is in vivo fertilization, in which a man's semen is introduced into a woman's reproductive organs, which leads to fertilization. We distinguish between *artificial insemination of husband* – AIH, when the semen comes from the target father of the child (the woman's husband or partner) and *artificial insemination of donor* – AID, when the semen comes from an anonymous donor. The other type of assisted reproductive technology is *in vitro* fertilization, when fertilization takes place in laboratory conditions outside the female body and then the embryo is introduced into the woman's reproductive organs. In vitro fertilization allows for various solutions with respect to the implantation of the ovum; what is more, there are also several possible configurations, depending on the donor of the ovum and sperm and also on who the embryo is implanted in. Therefore, the genetic parents of the child can be: 1) the couple trying to have a child; 2) the woman seeking to

have a child and an anonymous sperm donor; 3) anonymous donors of the genetic material.[1] We should add here that the above-listed techniques are types of medically assisted reproductive technology and are not, counter to the widely-promoted opinion, a method of treating infertility. Medically assisted reproductive technology has nothing to do with treating problems connected with fertility, it just makes it possible to avoid them by achieving the reproductive goal – to bring a child to life and to the world – in a purely technical way.

The woman who agrees that into her body an embryo will be transferred, one which comes from the ovum of another woman who is waiting for the child and wants to raise it and the woman who agrees to fertilization with semen from the partner of another woman who is waiting for a child and wants to raise it is called a surrogate mother due to the fact that, as the term suggests, she is a surrogate of women in pregnancy and in labor.[2] Therefore, a surrogate mother is not a woman who donates the ovum, who only agrees that her ovum should be collected and transferred into the body of another woman, who will then be pregnant and give birth to the child. The role of the woman who is the donor pf the ovum in the act of procreation is limited only to providing her genetic material whereas she is not pregnant and does not give birth to the child with the intention to transfer parental rights to another person or persons.[3]

A surrogate mother intentionally decides to conceive and bear a child for someone else as through the application of one of the methods of assisted reproductive technology, either *in vivo* or *in vitro*. Depending on the technique of fertilization and mutual relations between the participants in the procedure of medically assisted reproduction, we distinguish *partial surrogacy*, also known as *traditional surrogacy*, in which the genetic material used for fertilization comes from the surrogate mother and, as a consequence, she is both the genetic and biological mother of the

[1] P. Marianowski, "Zapłodnienie pozaustrojowe w leczeniu niepłodności", *Perinatologia, Neonatologia i Ginekologia*, 2010, Vol. 3, No. 2, p. 129; J. Gawinek, B. Naworska, "Zapłodnienie in vitro jedną z metod leczenia niepłodności w Polsce", *Problemy Pielęgniarstwa*, 2014, Vol. 22, No. 1, p. 102.

[2] W. Galewicz, "Macierzyństwo zastępcze – czym ono jest i co jest w nim złego?", *Debata: Jak uregulować kwestię macierzyństwa zastępczego?, 16–23.11.2009*; http://www.ptb.org.pl/pdf/galewicz_macierzynstwo_2.pdf (last accessed: 22 August 2018); M. Franaszek, "Umowy o surogację", *Prawo i Medycyna*, 2011; http://www.prawo imedycyna.pl/index.php?str=artykul&id=1029 (last accessed: 22 August 2018).

[3] M. Soniewicka, "Odpowiedź profesorowi Włodzimierzowi Galewiczowi – 'Macierzyństwo zastępcze – czym ono jest i co jest w nim złego?'", *Debata: Jak uregulować kwestię macierzyństwa zastępczego?, 16–23.11.2009*; http://www.ptb.org.pl/pdf/soniewicka_macierzynstwo_4.pdf (last accessed: 22 August 2018).

child, and *full surrogacy*, also known as *gestational surrogacy*, in which the genetic material of the surrogate mother is not used for fertilization and as a result the only bond between her and the child is the biological one, resulting from giving birth. Depending on the type of surrogacy, there are different relations between the surrogate mother and the child. To avoid such problems, the much more popular technique is full surrogacy.[4]

Medically assisted reproductive technology has made it possible to separate fertilization from pregnancy and delivery and, consequently, to separate genetic motherhood from the biological one. Genetic motherhood is based on providing genetic material, so it begins at the moment of fertilization. Biological motherhood is connected with pregnancy and giving birth to a child, so it binds the child with a particular woman, which is the result of pregnancy and the birth of the child. Moreover, we can mention sociological motherhood, in which the mother is the woman who initiated the process of creating a child (by ordering the procedure of artificial fertilization and having another woman give birth to the child), who wants to be the mother of the child and to raise it. And she does not have to be the donor of the genetic material. As a result, bringing a child to life with the use of medically assisted reproductive technology can involve as many as three women. In this context, there appear doubts concerning who is the real mother of the child and who should have parental authority.

3. *Mater semper certa est* under Polish law

Polish law does not allow surrogacy; it only states who the mother of a child is in cases of the use of medically assisted reproductive technology, but it does not determine the admissibility or prohibition of such technology. Art. 61^9 of the Family and Guardianship Code is of key importance here,[5] according to which "the mother of a child is the woman who gave birth to it," which determines who is the mother of the child by law. The fact of giving birth is obvious, which is the foundation of the principle *mater semper certa est*. Therefore, we cannot deny the motherhood of the woman who gave birth to a child (the biological mother) and we cannot determine

[4] M. Sandel, *Sprawiedliwość. Jak postępować słusznie?*, Warszawa 2013, pp. 136–137.

[5] Act of 25 February 1964 Family and Guardianship Code, unified text in Dz. U. 2017, item 682 as amended. (hereafter: FGC).

the motherhood of the woman who donated the genetic material to the biological mother. According to Art. 61[9] of the Family and Guardianship Code, giving birth to a child is the only, obligatory, premise for the determination of motherhood. In this way, the legislator determined that the biological origin of a child is of primary importance, is the most essential one, regardless of whether the conception of the child was natural or the result of medically assisted reproductive technology. The legislator here refers here to the natural fact, which is the biological process of pregnancy and giving birth to a child and its influence on the bond which appears between the mother (the woman who gave birth to the child) and the child itself.[6]

The fact of giving birth to a child is the basis for the issue of a birth certificate and determines its content. Pursuant to the act on civil registration,[7] birth is registered at a civil registry office competent for the place of birth of a child (Art. 14). A birth certificate is issued based on the record of a live birth or record of a stillbirth submitted by a medical facility and a report on the registration of birth or the electronic document informing about the birth of the child (Art. 53, para. 1). The registration of a child must be performed within 21 days from the date of issue of the record of a live birth and in the event of a stillbirth – within three days from the date of issue of the record of stillbirth (Art. 55, para. 1). The registration is done by the mother or father of the child who have full legal capacity. The child's mother or father who are over 16 years old register the birth if they have limited legal capacity. In other cases, the registration of birth is done by the statutory representative or guardian of the mother (Art. 57, para. 1). The birth certificate of a child is the only document certifying facts stated therein. It means that it is the very birth of a child that is of key importance for the issue of a birth certificate of a child, indicating the woman who gave birth to the child as its mother. Entering her name into the birth certificate of the child makes her act in the capacity of the child's mother.

The data contained in a birth certificate constitutes the basis for the determination of the origin of the child, which influences its civil status. Because the civil status of a person is indivisible, only one woman can be the mother of a child and only one man can be its father. The civil status indicates the child's descent from particular parents. Motherhood, therefore, is the starting point for the determination of the origin of a child is, which in turn is the necessary premise for the determination

[6] T. Smyczyński, "Prawo filiacyjne i alimentacyjne po reformie z 2008 r.", *Kwartalnik Prawa Prywatnego*, 2010, No. 2, p. 316.

[7] Act of 28 November 2014 on civil registration, unified text Dz. U. 2016, item 2064 as amended.

of paternity and makes it possible to make further determinations concerning the relationship between particular persons.

In a situation when a woman who did not give birth to the child is entered into its birth certificate, the matter can be brought to court for the denial of motherhood and to request the determination of motherhood of the woman who did give birth to the child. Since the issue of the child's origin is settled, first of all, based on biological evidence (blood or DNA testing), in a situation when a child is conceived using medically assisted reproductive technology and if the genetic material came from a woman other than the one who did actually give birth to it, the evidence would indicate that the child is descendent from her (the genetic mother). We must not forget that a surrogate mother does not have to be genetically related to the child she gives birth to. In order to avoid any doubts of this type, the legislator has restricted the list of entities authorized to initiate court proceedings for the denial of motherhood. According to Art. 61^{12} FGC, the authorized entities are: the mother (biological); the woman who is entered into the birth certificate as the mother and who did not give birth to the child; the child and the man, whose paternity has been determined in connection with the motherhood of the woman entered into the birth certificate as the child's mother. Apart from this, a prosecutor is entitled to start such proceedings if it is for the best interests of the child or for the protection of social order (Art. 61^{16} FGC). This list does not include the genetic mother; thus she cannot initiate court proceedings for the denial of motherhood of the woman who is entered into the birth certificate as the mother.

Considering the above, it should be said that the issue of motherhood in Polish law is regulated in an unambiguous way. Since the woman who gave birth to a child is regarded as its mother, the fact that another woman (the genetic mother) provided her genetic material is of no consequence in light of the applied solutions. In other words, proving the genetic origin of a child from a woman other than the one who gave birth to it is not proof of motherhood.

4. Information about genetic origin

In this context, however, we should add that the applied solution limits the child's right to learn about its genetic origin in a situation when the comparison of the basic biological features (blood type) makes the child aware of no genetic relationship

with the woman who is its mother based on the fact of birth.[8] The right to find one's descent is connected with the protection of the strictly personal interest of discovering and understanding oneself; whereas anthropological self-awareness is one of the elements of humanity.[9] The child's right to discover its own genetic origin can be derived, first of all, from the provisions of Art. 8 of the Convention on the Protection of Human Rights and Fundamental Freedoms,[10] which guarantees the right of protection of private and family life. It includes, particularly, the right to personal identity and development and the right to make and develop bonds with other people and with the outside world. The protection of private life provides, among others, for the right to determine the details of one's identity as a human being and to obtain relevant information in this respect.[11] Apart from this, the right to learn about the identity of one's parents is the consequence of the right to discover one's own self, which is guaranteed, primarily, by the Constitution of Poland[12] in Art. 30 (respect and protection of the dignity of a person), Art. 47 (protection of private life and the right to make decision about one's personal life), and Art. 72 (protection of the rights of the child). In view of the above, the right to find one's own genetic origin can be regarded as one of the most important rights of a person[13] and one of the most important constitutional values, which is the principle of the protection of the good of a child, which is superior to all regulations in the sphere of relationships between parents and children, including legal mechanisms concerning filiation issues.

The legislator does not treat the aspiration for truth of the biological origin of a child in an absolute way. The main principle used when interpreting the regulations

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[8] T. Sokołowski, J. Haberko, "Komentarz do art. 61[9]", [in:] *Kodeks rodzinny i opiekuńczy. Komentarz do art. 61[9] Kodeksu rodzinnego i opiekuńczego*, Dolecki H., Sokołowski T. (eds.), LEX/el 2013, note 5; T. Sokołowski, "Prawo dziecka urodzonego w wyniku zastosowania technik wspomaganej prokreacji do poznania swojego pochodzenia", [in:] *Prawne, medyczne i psychologiczne aspekty wspomaganej prokreacji*, J. Haberko, M. Łączkowska (ed.), Poznań 2005, p. 134.

[9] L. Bosek, "Prawo osobiste do poznania własnej tożsamości biologicznej", *Kwartalnik Prawa Prywatnego*, 2008, No. 3, p. 948.

[10] Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 amended by Protocols Nos 3, 5 and 8 and complemented by Protocol No. 2, Dz. U. 1993, No. 61, item 284 as amended.

[11] Judgment of the Constitutional Tribunal of 26 November 2013, P 33/12, Legalis No. 740186.

[12] Constitution of the Republic of Poland of 2 April 1997, Dz. U. 1997, No. 78, item 483.

[13] T. Smyczyński, "O potrzebie ustalenia pochodzenia dziecka zgodnie z tzw. prawdą biologiczną", [in:] *Finis legis Christus. Księga pamiątkowa dedykowana Księdzu Profesorowi Wojciechowi Góralskiemu z okazji siedemdziesiątej rocznicy urodzin*, J. Wroceński, J. Krajczyński (eds.), Warszawa 2009, Vol. 2, p. 1273.

of the family law is the protection of the best interests of the child. The imperative of the protection of the best interests of a child constitutes the main, superior principle of the Polish system of family law, to which all regulations in the sphere of relations between parents and children are subordinated. The principle of the best interests of the child can be implemented most fully by ensuring the possibility of it being raised in a family, first of all in a natural family, and thus under parental care exercised by persons tied with the child by biological bonds.[14] Therefore, if a court in a completely exceptional case decides that the application for the denial of motherhood is against the principles of community life, among others because during the course of proceedings the best interests of the child can be violated, Art. 5 of the Civil Code[15] can be applied, according to which "One cannot exercise one's right in a manner contradictory to its social and economic purpose or the principles of community life. Acting or refraining from acting by an entitled person is not deemed an exercise of that right and is not protected." Proceedings for the denial of motherhood cannot be only directed by issues of superiority of the objective truth of determining the child's civil status, if particular circumstances of the case indicate a conflict of the request with the principles of community life and the necessity to protect the best interests of the child. In a situation when the biological mother would like to deny the motherhood of the woman who raised the child who is emotionally attached to her and who regards her as its mother, such action can be dismissed as contradicting the principles of community life.[16] Besides, it should be added that there is no violation of principles of community life when the child knows the actual state of things. In such a situation, there is no risk that the child will experience mental shock or other potential detrimental consequences of discovering its origin.[17]

It is worth stressing here that the determination of the origin of a child can turn out to be essential also for potential alimony, which is connected with the issue of the protection of persons to whom the child is to be born. If the surrogate mother decides to keep the child, she can demand that the biological father of the child, if he is known, supports the child's maintenance. The solution applied here can, therefore, lead to an absurd situation when the commissioning persons, who wanted

[14] Judgment of the Constitutional Tribunal of 28 April 2003, K 18/02, OTK-A 2003, No. 4, item 32.

[15] Act of 23 April 964 the Civil Code, unified text Dz. U. 2018, item 1025 as amended (hereafter: CC)

[16] Judgement of the Supreme Court of 5 June 1968, II CR 164/68, OSNC 1969, No. 3, item 55.

[17] Decision of the Supreme Court of 7 June 1976, IV CR 177/76, OSP 1977, s. 5, item 85.

and expected a child, not only will not be able to make their plans of becoming parents come true but also the man, being the child's biological father, will have to support the child of a completely alien woman, with whom he never intended to have the child. Therefore, when it comes to using surrogate services, a lot depends on the character and attitude of the surrogate mother, who can use the situation for financial purposes and simply turn it into her sole source of income.

5. Invalid contract of surrogacy – reasons and consequences

5.1. No contractual status of mother, father or child

The civil status of a person can be shaped only by courts and only within limits set by the valid rules of law. No civil law contract concluded by parties can shape the civil status of a person, nor can it influence court decisions in this respect. Contracts entered into by a surrogate mother and the woman or spouses for whom the child is to be born have no influence on the determination of the child's origin. In other words, the parties cannot make arrangements with respect to who is going to be the mother of the child,[18] because in line with the legislator's intention, it will always be the one who gave birth to the child. Such contracts, referred to as surrogacy contracts, oblige parties to act in specific ways.

Surrogacy contracts most often contain the obligation of the donor of the genetic material to fertilize an ovum which does not come from his wife or partner and then to recognize and accept the child when it is born. The surrogate mother, in turn, is obliged to agree to the transfer of an embryo to her organism, to carry the child during pregnancy, give birth to it and then to hand it over to the ordering party. Provisions of surrogacy contracts can also deal with the issues of a proper way of life of the surrogate mother or the requirement for her to be under constant medical care in pregnancy.[19] Such contracts can be paid or gratuitous, that is why we distinguish contracts made for commercial or altruistic reasons. If according to the surrogacy contract, after giving birth the surrogate mother gives the child to the ordering party there is no problem, all matters are settled by the parties. The

[18] M. Soniewicka, *"Dylematy zastępczego macierzyństwa", Debata: Jak uregulować kwestię macierzyństwa zastępczego? 16–23 November 2009*, p. 14, http://www.ptb.org.pl/pdf/soniewicka_macierzynstwo_1.pdf (last accessed: 22 August 2018).

[19] J. Holocher, M. Soniewicka, "Analiza prawna umowy o zastępcze macierzyństwo", *Prawo i Medycyna*, 2009, No. 3, pp. 46–47.

situation gets complicated when the surrogate mother changes her mind and does not want to give the child away.

5.2. Invalidity of surrogacy contract in best interest of child

Under the valid rules of law, a surrogate mother cannot be made to give away the child she gave birth to, because a surrogacy contract is a violation of the law and as such is invalid. This is determined by the rules on legal transactions, which introduce the sanction of absolute invalidity of acts contrary to the law or which are designed to circumvent the law (Art. 58 § 1 CC), or also of legal acts contrary to the principles of community life (Art. 58 § 2 CC). A legal act concerning planning the creation of a child in a way different than the one provided by binding laws is invalid. Therefore, there is no need to analyze any other causes of invalidity of a surrogacy contract.[20]

Because surrogacy contracts are absolutely invalid, they have no legal effect, which is why parties are not authorized to make claims connected with the realization of their provisions. Therefore, based on such contracts, it is impossible to make claims both with regard to the performance of the obligation to hand over the child to the ordering party right after the birth and also with respect to the potential financial benefit for carrying pregnancy to term and giving birth. The ordering party cannot demand that the surrogate mother give the child away and waive her parental rights even when they are the genetic parents of the child. In turn, the surrogate mother cannot demand that the child be taken away from her after birth and be adopted by the ordering party. It should only be added in this context that parental rights cannot be the subject of legal transactions because they are excluded from trade; issues concerning parental rights are regulated by law and can be determined only in the course of court proceedings.

This solution fully deserves to be appreciated because of the protection of the best interests of the child. There is no doubt that the determination of people trying to have a child without regard to the way it is brought to life is conditioned not by the best interests of the child who is brought to life in such a way but by the desire to satisfy the needs of the people who want to have "their own child" regardless of the consequences. The best interests of the child that is brought to life, which are

[20] G. Jędrejek, "Komentarz do art. 61[9]", [in:] *Kodeks rodzinny i opiekuńczy. Komentarz aktualizowany,* LEX/el 2018, note 2.

the purpose of the actions of the people trying to have the child, paradoxically take the back seat. In the case of surrogate motherhood, which usually is motivated by difficulties connected with conceiving a child, it is the best interests of the parents that matter first, as they aim to satisfy their need to have offspring. The best interests of the child do not only mean bringing the child to life and to the world but they also require that the child is provided with clear and stable family relations. Although law cannot guarantee this to anyone, yet it should aim to create a legal framework that favors the realization of these principles. Whereas the provision of reproductive services in the form of surrogate motherhood poses an essential risk to the family by undermining both the clarity and explicitness of parental and family relations.[21] Therefore, the purpose of a surrogacy contract is by definition contrary to the best interest of the child. It is a fact that lack of a legal definition of the concept "best interests of the child" makes it vague,[22] requiring an individual evaluation in specific circumstances of each case.[23] We cannot deny, however, that a child with three parents, two of whom, as it may be, can be of the same sex, is in an unnatural situation, which makes it vulnerable to emotional problems of having to face such a situation.

The purpose of a surrogacy contract can be deemed contrary to the best interests of the child also because of its right to maintain emotional bonds with its mother, especially in situations when the surrogate mother is the genetic mother as well. The period of pregnancy naturally leads to the development of bonds between the woman and the child in her womb. Pregnancy and labor prepare a woman for motherhood and law, if it allows that the bonds between the mother and the child be broken, does so only in exceptional circumstances and only then, when it is necessitated by the best interests of the child.[24]

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[21] M. Soniewicka, *Dylematy zastępczego macierzyństwa*…, pp. 15–16.

[22] A. Patryk, *Dobro dziecka jako wartość nadrzędna przy orzekaniu władzy rodzicielskiej*, LEX/el 2014.

[23] Decision of the Supreme Court of 24 November 2016, II CA 1/16, LEX No. 2216088.

[24] M. Safjan, "Prawne problemy zastępczego macierzyństwa", [in:] *Prawne problemy ludzkiej prokreacji*, W. Lang (ed.), Toruń 2002, p. 300.

5.3. The issue of human dignity

A surrogacy contract should also be evaluated against the background of human dignity. It is obvious that a ban on the objectification of a person lies within the boundaries of the protection of human dignity, whereas a surrogacy contract, even gratuitous, objectifies both the surrogate mother and the child. As a result of the conclusion of the contract, human body/life is reduced to the role of a commodity available on the market. While human body/life, because of the subjectivity of a human being, cannot be a thing that is used commercially. A person with dignity cannot be treated like an object but must be treated subjectively as the reference point and target for all actions taken for its best interests; thus, it is based on treating a person as the highest value and a purpose in itself. In the original and natural way, everyone is entitled to dignity just based on the fact of being human, it does not depend on anything else and everyone is entitled to it in the same way, without any differences and regardless of statutory law. Thus, it is inseparably connected with being human; so without the risk of being wrong we can say that it is the embodiment of humanity.[25] What is more, as a synonym of "humanity", it is a natural value, which is the sum of unique features of each human being and its existence in the biological, mental, ethical and social dimensions, unique in the ontological world (among any other animate creatures and inanimate entities), and at the same time universal human features, which is universally inherent to every human being, regardless of external conditions, individual properties and the way of life or even the very awareness of having dignity.[26] Bearing that in mind, we should say that surrogate motherhood should be regarded as contrary to the constitutional principle of human dignity.

5.4. The problem of human trafficking

The conclusion of a surrogacy contract for financial benefits can be classified as the offence of human trafficking under Art. 189a § 1 of the Criminal Code.[27] According

[25] W. Lis, "Poszanowanie godności człowieka w kontekście swobody wypowiedzi", [in:] *Normatywny wymiar godności człowieka*, W. Lis, A. Balicki (eds.), Lublin 2012, p. 163.

[26] D. Dudek, "Bezpieczeństwo Rzeczypospolitej jako wartość konstytucyjna", [in:] *Bezpieczeństwo Polski. Historia i współczesność*, L. Antonowicz, T. Guz, M.R. Pałubska (eds.), Lublin 2010. p. 175.

[27] Act of 6 June 1997 the Criminal Code, unified text Dz. U. 2018, item 1600 as amended.

to it, "Anyone who carries out human trafficking is liable to imprisonment for not less than three years." Moreover, making preparations to commit the offence of human trafficking is penalized, and the possible penalty is a term of imprisonment from three months to five years (Art. 189a § 2). Making preparations to commit the offence of human trafficking includes all preparatory actions which aim to make human trafficking possible, which are to create conditions to enter the attempt stage. The object of protection is a human being, regardless of age, as a legal entity, human dignity in the area of the inadmissibility of accepting a situation created by an attempt to market a person on equal terms as a thing.[28] A person is not a commodity and as such cannot be treated commercially as an object of trade, regardless of the purpose of a transaction. The ban on human trafficking is meant to prevent this unambiguously negatively perceived phenomenon, whose aim is to exploit people. Whereby, from the point of view of prosecution of the offence of human trafficking, it does not matter whether the actions of the perpetrator are taken with the agreement of the aggrieved party or without it.[29] The offence of human trafficking requires three elements to appear: action in the form of recruiting, transporting, supplying, storing or receiving a person; action in the form of violence or lawless threats, kidnapping, deceit, misleading or exploiting a mistake or an inability to carry out the undertaken action, an abuse of the relationship of subordination, exploitation of a critical situation or helplessness, giving or receiving a material benefit or the promise of it to a person guarding or supervising another person; purpose of action in the form of exploiting a person, even with their consent, specifically for prostitution, pornography or other forms of sexual abuse, forced work or services, begging, slavery or other forms of exploitation which humiliate human dignity, or in order to obtain cells, tissues or organs against the provisions of law. The act of a surrogate mother handing over her child to other persons in return for a financial benefit is in fact the offence of human trafficking, in which the surrogate mother is in the role of the seller, the child is the commodity and the ordering party is the buyer. It does not matter if the subject of a surrogacy contract is a child, giving birth to a child or the service of a surrogate mother making her body available to carry a child during pregnancy and to give birth to it for the ordering party. The conclusion of a surrogacy contract for altruistic purposes is not an offence. Although

[28] M. Mozgawa, updated comments on Art. 189a of the Criminal Code, legal status as of 20 April 2018.

[29] See: the judgement of the Appellate Court in Warsaw of 11 December 2017, II AKa 282/17, LEX No. 2416068.

a surrogacy contract as such is invalid, due to it being contrary to the principles of community life (Art. 58 § 1 CC), because of its gratuitous character it is not lawless and as such it is not subject to punishment.

5.5. Circumventing the adoption requirements

Surrogate motherhood tries to satisfy the aspiration to have a child while avoiding the adoption procedure. Thanks to the application of medically assisted reproductive technology, a child constitutes an individual order to satisfy the needs of people aspiring to have a child but who cannot satisfy their aspirations through natural conception.[30] The conclusion of a surrogacy contract in light of the child adoption laws constitutes an attempt to circumvent the law. Giving away a newly born child to be raised by the ordering party does not correspond to any of the legal adoption procedures. Pursuant to Art. 117 § 1 FGC, adoption takes place only after a court issues a decision at the request of the adopting party. Adoption requires the consent of the parents of the adopted child, unless they have been deprived of parental rights or are unknown or reaching an agreement with them meets obstacles which are difficult to overcome. A guardianship court, under special circumstances, can also issue an order of adoption despite lack of consent of parents whose legal capacity is limited only if the refusal to give consent to adoption is clearly contrary to the best interests of the child. The problem is not solved by using targeted adoption, which takes place as a result of the surrogate mother waiving her parental rights and appointing the ordering party as the future parents of the child. They apply to the court for a full adoption of the child. This means that adoption, even with the best intentions, is not decided by the parties of the surrogacy contract but by the court, following the best interests of the child. We cannot rule out a situation when the court, considering the best interests of the child, dismisses the adoption application. We should add that an unborn child cannot be adopted, because according to Art. 114 FGC a minor can be adopted with a view of its best interests, and "Parental consent to the adoption of a child cannot be expressed earlier than six weeks after birth" (Art. 119^2 FGC).

[30] M. Mikluszka, *Zagraniczne procedury tzw. macierzyństwa zastępczego (surrogacy motherhood) w świetle zasady handlu ludźmi – zagadnienia węzłowe*, Warszawa 2017, p. 14.

The issues of surrogacy are closely connected with the issue of donating sex cells regulated by the law on treating infertility.[31] Pursuant to the provisions of Art. 30, para. 1, point 5, the donor neither holds nor can claim any rights with respect to a child born through the use of his sex cells during medically assisted reproductive technology. Thus, the donor has no rights or obligations resulting from the established origin of the child conceived and born with the use of his sex cells. It should be added that the legislator is not precise. Trying to regulate the issue of donating sex cells, the legislator refers to the 'male donor' that is a man (Art. 29), and the woman, from whom sex cells also can be collected to be used in the procedure of medically assisted reproduction, is omitted.[32] Although the legislator in Art. 32, para. 1 of the Act on Treating Infertility (ATI) refers to a woman, the legislator makes the reservation that sex cells can be collected from a woman but from the one in the role of the "recipient" to be used in the procedure of medically assisted reproduction, which means the possibility of collecting her own sex cells to be used in her subsequently.[33] Lack of precision in this respect makes the donation of ova legally doubtful. The construction of the provisions of Art. 30, para. 1, point 5 of ATI does not follow the principle of reflecting the child's right to find their genetic origin.[34] As a consequence, there is a collision of two different values – the right of the donor of sex cells to remain anonymous (Art. 38 in connection with Art. 37, para. 2, points 2 and 3)[35] and the child's right to find their origin.

To protect fertility, the act on treating infertility, apart from anonymous donation and reception of sex cells, allows pre-conception and pre-implantation diagnostics, which in combination with assisted reproductive technology creates the possibility

[31] Act of 25 June 2015 on treating infertility, unified text Dz. U. 2017, item 865.

[32] J. Haberko, "Komentarz do art. 29", [in:] *Ustawa o leczeniu niepłodności. Komentarz*, J. Haberko, Warszawa 2016, note 5.

[33] J. Haberko, "Komentarz do art. 32" …, note 2.

[34] J. Haberko, "Komentarz do art. 30" …, note 5; T. Smyczyński, *O potrzebie ustalenia pochodzenia dziecka* …, p. 1273.

[35] A child conceived thanks to the use of assisted reproductive technology and its mother will be able to read specific information concerning the donor stored in the register of donors of sex cells and embryos. The information includes: year and place of birth of the donor of sex cells or the donors of the embryo and the information on the state of health of the donor of sex cells or the donors of the embryo; results of medical and laboratory examinations which the candidate who wanted to be the donor had to undergo before sex cells were collected or before the embryo was formed. or embryos were collected, J. Haberko, J. Łuczak-Wawrzyniak, "Dobrodziejstwo nowoczesnych technik wspomaganej medycznie prokreacji czy problem rodziny i dziecka? Uwagi na tle projektu ustawy o leczeniu niepłodności (druk sejmowy 3245)", *Diametros*, 2015, No. 44, p. 26.

of making modifications in the development of an embryo already at its initial stage. Because modern medicine makes it possible not only to satisfy the aspirations to have a child, but also to choose its sex before conception[36] and to select some features in accordance with the parents' expectations for the child. Bearing that in mind, it comes as no surprise that "ordinary adoption" loses to the possibility of "genetically designing" a perfect child. Such actions prove the treatment of a human being like an object, which can be "built" according to someone's wishes, which is in sharp disagreement with the purpose of medically assisted reproductive technology, which is only to support cases connected with reproductive problems and not a method of conducting ethically and legally dubious medical experiments. This problem is also connected with the issue of using embryos that are created in connection with applying assisted reproductive technology, because the ones that have not been used remain at the place where they were created and their legal status is, under the current legal system, unclear and no one really knows what to do with them.

5.6. Other issues: citizenship, legal position of donor, prenatal damage

Because of the ease of travelling around the world and because of different legal solutions regulating surrogate motherhood, we should indicate problems connected with reproductive tourism. Namely, a situation when the ordering persons use the services of a surrogate mother in a country where it is completely legal while they are citizens of a country which prohibits the use of surrogates. Then there comes the question concerning the status of the child born by the surrogate mother in the country where surrogacy is legal.

According to Art. 14, point 1 of the act on Polish citizenship[37], "The child shall acquire Polish citizenship at birth when at least one of the parents has Polish citizenship." For a child born abroad to be legally brought to Poland, a Polish diplomatic outpost in the country where the child was born should be requested to issue a passport[38] which confirms Polish citizenship (Art. 4). The birth is registered at the

[36] Reproductive technologies which make this possible are referred to as preimplantation diagnostics, M. B. Daya, "Preimplantation Genetic Diagnosis"; http://www.emedicine.com/MED/topic3520.htm (last accessed: 22 August 2018).

[37] Act of 2 April 2009 on Polish citizenship, unified text Dz. U. 2017, item 1462 as amended.

[38] See: Articles 3 and 4 of the Act of 13 July 2006 on passports, unified text Dz. U. 2016, item 758 as amended.

place where it happened. A foreign civil registration document is proof of it, which can be transferred into the Polish civil register by transcription (Art. 104, para. 1). A Polish civil registry office registers birth which took place outside Poland and was not registered there or which happened in a country where there is no registration of births (Art. 99, para. 1). In such cases, the application for birth registration is accompanied by w document certifying this fact issued by a competent foreign authority, which forms the basis for the issue of a birth certificate by a Polish civil registry office. What follows is that genetic parents can be entered into the birth certificate in a country where surrogate motherhood is legal. This means that the registration of birth in Poland on the basis of such a document legalizes the procedure of surrogate motherhood.

In the context of surrogate motherhood and donation of sex cells we should also mention the problem of claims for compensation for prenatal damage.[39] We cannot simply rule out a situation which results in the damage to the child during its fetal life. Under the current legal system, a conceived child has legal personality already at the prenatal stage, which is not taken away from the child either by fact that it is located in the mother's body or by it gaining the ability to survive independently only after birth. According to Art. 446^1 CC, the child from the moment of birth can pursue its rights, including liabilities to remedy prenatal damage. The child is entitled to such claims regardless of the mother's potential insurance claims and other persons responsible towards the child with respect to alimony. It seems that prenatal damage, regulated by Art. 446^1 CC cover also damage to a child resulting from events prior to its conception, caused among others by a mistake which took place at the stage of a particular medical procedure of assisted reproductive technology or improper treatment of the mother in pregnancy.[40] Pursuing claims for prenatal damage is undoubtedly more complicated when a child is conceived though assisted reproductive technology and then develops in the body of a woman who serves the role of a surrogate mother.

[39] "Prenatal damage" – damage caused to the child during its prenatal life (i.e., from conception to birth), being the result of detrimental action affecting both directly the fetus or the mother's body, provided that it impacts the integrity of the fetus, M. Banyk, "Status prawny dziecka poczętego na tle jego prawa do ochrony życia i zdrowia, wynagradzania szkód doznanych przed urodzeniem oraz ochrony dóbr osobistych matki", http://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.desklight-92847a7a-afcd-45a5–9634-cde89ac353 a9/c/02_BANYK.pdf (last accessed: 22 August 2018).

[40] See: G. Karaszewski, "Komentarz do art. 446^1", [in:] *Kodeks cywilny. Komentarz*, J. Ciszewski (ed.), LexisNexis 2014.

6. Final remarks

Surrogate motherhood is one of the phenomena which appeared together with the development of medically assisted reproductive technology. Its use leads to questioning the previous understanding of motherhood and to undermining parental relations and also causes many previously unknown dilemmas, both moral and legal, among which we should point at, determining the genetic identity of the child; the creation of unclear, ambiguous and unstable family relations; commercialization of procreation and objectification of a human being – women used for reproductive purposes and children treated in the category of a commodity supplied by women. The possibility of ordering a child has resulted in natural motherhood no longer being perceived as a gift, which two people in love share and, at the same time, treat as a secret. Due to the inclusion of medically assisted reproductive technology into reproductive activities, the fact of conceiving a child has been reduced to "applying a procedure" and as such it has become a technological issue. Because of surrogate motherhood there appeared the separation of reproductive activity from the institution of marriage – conceiving a child does not require a partner, it has become a highly-specialized service provided to ordering persons, regardless of whether they are in marriage or not, whether they are a hetero or homosexual couple, or whether they live alone. The concept of motherhood needs to be re-defined, because the role of a surrogate mother ends just after the birth of the child, which means that she does not play a maternal role.

It should be said that the current legislation does not settle all problems connected with surrogate motherhood, which poses a real challenge for the legislator, the more so as the market of surrogacy services is developing rapidly, first of all because of decreased fertility of societies in developed countries but also because of the development of new social trends or simply whims. This has led to the development of the so-called "reproductive tourism" which is beyond any control. Despite controversies connected with surrogate motherhood, there is no doubt that many people who want to have children will choose this way to satisfy their natural desire to have a child. *Liberis nihil carius humano generi est.* Nonfeasance of a comprehensive settlement of issues connected with surrogate motherhood means allowing abuse and gives rise to justified disputes concerning the character of activities connected with bringing a human being to life. It seems that because of the principle of the protection of the best interests of the child and the best interests of the family, medically assisted reproduction and surrogate motherhood connected with it should be banned.

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Foreign surrogate motherhood procedures versus legal principles regarding the origin of the child (filiation)

1. Possible case studies in the context of the surrogate motherhood and paternity's establishment issues

The issue of establishment of maternity (which is the subject of another research paper prepared as part of this project) in the context of the so-called "surrogate motherhood" is discussed in the Polish family law doctrine more often than paternity issue of a child born to a surrogate mother. It does not mean that there are no legal problems in this area. This expertise's goals include:

1. presenting case studies which may occur in the context of paternity of the child given birth to by a surrogate mother;
2. selection and relating the wording of provisions of The Family and Guardianship Code[1], which is of paramount importance, given the perspective of the issues under discussion;
3. indicating a possibility of paternity establishment in each case.

By way of background, it is worth referring to jurisprudence of the Constitutional Tribunal.[2] The Tribunal finds regulation on affiliation based on the following three basic principles:

Firstly, the best interest of a child is a constitutional value of particular importance. Child welfare's protection order constitutes a principal, imperative rule of the

[1] *Journal of Laws* (2017), item 682, as amended.

[2] See: judgment of the Constitutional Tribunal (28 April 2003), K 18/02, Lex 78052 and judgment of the Constitutional Tribunal (16 July 2007), SK 61/06, Lex 299991.

Polish family law, to which all regulations in area of relationship between parents and children, including legal mechanism for affiliation issues, are subservient.

Secondly, constitutional norms enshrine the right to one's properly established descent. Family relations should be shaped – in principle – in accordance with existing biological ties. One of constituting elements of the child's welfare is its properly formed affiliation. According to the generally accepted view, complete realization of the principle of the best interests of the child may be performed by assurance of being raised in the family, foremost in the natural family, and so by parental custody held by people who are biologically related to the child. The analysis of affiliation mechanisms, which traditionally support family relationships, leads to an apparent trend of shaping parents-child legal relations adequate for the biological reality.

Thirdly, establishing biological bonds and regulation of family relationships in accordance with these bonds is not an absolute value and it allows limitations based on the necessity of the child and family welfare protection. The Tribunal considers that the biological bond between the father and the child is not unconditionally protected by the Constitution. The afore-mentioned values may, in the legislator's opinion, be considered to constitute a substantial limitation of this bond. The biological bond is unquestionably protected whenever this method of affiliation does not compete with the permanently established descent of the child.

To detail above approaches, one ought to point that within the Polish family law there exists the rule of marital status' indivisibility, which means that the child can be an offspring of only one woman and one man (correspondingly, from one mother and one father).[3] The specificity of legal relationship which indicates marital status, e.g., maternity and paternity, is that this relationship is based on the real (biological) descent of a human from parents.[4] As far as paternity is concerned, in principle – unlike maternity – it is linked to genetic relationship with a child.[5] Furthermore, it is worth emphasizing here that there is a substantial connection between the establishment of maternity and establishment of paternity, i.e., establishment of maternity constitutes the necessary ground for establishing paternity.[6]

[3] M. Andrzejewski, *Prawo rodzinne i opiekuńcze*, Warszawa 2011, p. 123; J. Ignatowicz, M. Nazar, *Prawo rodzinne*, Warszawa 2012, p. 266; T. Smyczyński, *Prawo rodzinne i opiekuńcze*, Warszawa 2014, pp. 183–184.

[4] T. Smyczyński, *Prawo rodzinne i opiekuńcze*, Warszawa 2014, p. 184.

[5] J. Haberko, T. Sokołowski, *Kodeks rodzinny i opiekuńczy*. Komentarz Lex, 541 (ed. by T. Sokołowski, H. Dolecki, Warszawa 2013).

[6] J. Ignatowicz, M. Nazar, *Prawo rodzinne*, Warszawa 2012, p. 267.

The consequence of this approach is the rule, according to which the determination of the non-existence of maternity automatically eliminates paternity related to denied maternity.[7] At this stage, one ought to highlight one more time that the starting point for determination of the child's descent from a certain man is maternity of certain woman.[8] Then, for the clarity of this opinion and for systematizing research, the possibility of the existence of the following factual (real-life) situations ought to be considered:

No.	Marital status	Method of fertilization	Description of situation
1.	married man	intercourse with his wife	A married man has an intercourse with his wife.
2.	married man	intercourse with the future so-called "surrogate mother"	A married man has an intercourse with the future so-called "surrogate mother."
3.	married man	medically assisted procreation treatment - partner donation	The wife's ovum is fertilized by the husband's semen and it is implanted in the wife as a recipient (there is no surrogacy issue).
4.	married man	medically assisted procreation treatment – donation other than by partners	The wife's ovum is fertilized by the semen coming from a man other than her husband and it is implanted in the wife as a recipient (there is no surrogacy issue).
5.	married man	medically assisted procreation treatment - embryo donation	The ovum of a woman other than the wife is fertilized by the semen coming from a man other than the wife's husband; such an embryo is implanted in the wife as a recipient or it is implanted in the so-called "surrogate mother."
6.	unmarried man	intercourse with an unfamiliar woman[9]	An unmarried man has an intercourse with an unfamiliar woman.
7.	unmarried man	intercourse with the future so-called surrogate mother	An unmarried man has an intercourse with the future so-called "surrogate mother."
8.	unmarried man	medically assisted procreation treatment - partner donation	The ovum of the woman is fertilized by the semen coming from her partner and it is implanted in the woman as a recipient (there is no surrogacy issue).
9.	unmarried man	medically assisted procreation treatment - donation other than by partners	The ovum of the woman is fertilized by the semen coming from a man other than her partner and it is implanted in her as a recipient (there is no surrogacy issue).
10.	unmarried man	medically assisted procreation treatment - embryo donation	The ovum of a woman other than the man's partner is fertilized by the semen coming from another man; thus produced embryo is implanted in the woman as a recipient or it is implanted in the so-called "surrogate mother."

[7] Ibid.

[8] J. Haberko, T. Sokołowski, *Kodeks rodzinny i opiekuńczy*. Komentarz Lex, 541 (ed. by T. Sokołowski, H. Dolecki, Warszawa 2013).

[9] For the purpose of the present text, an "unfamiliar woman" refers to a woman who is not the man's wife, partner nor a future surrogate.

Based on the above, for the purposes of the present elaboration, it should be taken for granted that "a married man" is a man who has entered into marriage on the basis of Art. 1 of The Family and Guardianship Code.

By donation, according to Art. 2, para. 1, point 7 of the Infertility Treatment Act of 25 June 2015[10], shall be understood a transfer of germ cells or embryos for human applications.

"Partner donation", according to Art. 2, para. 1, point 8 of the Infertility Treatment Act of 25 June 2015, means the donation of reproductive cells by a man, to be used for the purpose of medically assisted procreation procedure to the female recipient who is married to a male donor or a female recipient who has an intimate physical relationship with a male donor and it is confirmed by accordant statements of a donor and a recipient; in partner donation, recipient's reproductive cells are used.

By non-partner donation (there is no such a definition in the Infertility Treatment Act), according to the author of the present essay, shall be understood the donation of reproductive cells by a man, to be used for the purpose of medically assisted procreation procedure to the female recipient who is not married to a donor nor who has not an intimate physical relationship with him; in a non-partner donation, recipient's reproductive cells are used.

Embryo donation, according to Art. 2, para. 1, point 9 of the Infertility Treatment Act of 25 June 2015, is a donation of embryo to be used for the purpose of medically assisted procreation procedure to the recipient, who is not a donor of female reproduction cells and is not married to nor has an intimate physical relationship with a donor of male reproductive cell, from which embryo was derived.

2. The Presumption of paternity of mother's husband in the context of the so-called "surrogate motherhood"

The presumption of paternity of the mother's husband is a basic way, in the Polish family law, to establish an affiliation of the child from a man (in this case of a married man). This legal institution of the Polish family law is regulated in the provision of Art. 62–70 of The Family and Guardianship Code. The Code, not without reason, places the afore-mentioned institution at the top. It is a result of the fact that in the

[10] *Journal of Laws* (2017), item 865.

Polish society founding a family (including having children) is inseparably linked to the conclusion of marriage governed by the Polish family law.

In the Polish legal doctrine, it is emphasized that in the Polish law, since the draft of the Family Law Act of 1934 till The Family and Guardianship Code, which is currently in force, the rule of bonding paternity with the mother's husband (even when the child was born after the termination of marriage) has been constantly obtained.[11] It is considered that this presumption was implemented because marriage is a relation based on trust.[12] It should be mentioned that in available scholarship this rule was not questioned. Although in legal journalism, using paternity of the mother's husband presumption, if the child was born later than three hundred days after the pronouncement of the divorce or separation, has been criticized.[13]

In the context of other parts of this opinion (e.g. relating to recognition of paternity and judicial establishment of paternity), it only remains to add that the presumption of paternity of the mother's husband is not the only way to establishing affiliation of the child from a married man. Potentially, a situation may arise, in which a married man voluntarily recognizes his paternity of the child born out of marriage or he is a defendant in the paternity suit (wherein a plaintiff is a woman who is not his wife).

In view of the topics discussed above, there are two relevant provisions, which constitute Art. 62 and Art. 65 of The Family and Guardianship Code:

> Art. 62
> § 1. If a child was born during marriage, or within three hundred days from its termination, it will be presumed that he/she is the child of the mother's husband. This presumption will not apply if the child was born more than three hundred days after a judicial separation.
> § 2. If the child was born within three hundred days after the termination or annulment of the marriage, but after the conclusion of the mother's second marriage, it will be presumed that it is child of the mother's second husband.
> § 3. This presumption may be rebutted only as a result of a legal action taken to assert paternity.[14]

[11] J. Ignatowicz, M. Nazar, *Prawo rodzinne*, Warszawa 2012, p. 289.

[12] M. Andrzejewski, *Prawo rodzinne i opiekuńcze*, Warszawa 2011, p. 123.

[13] J. Ignatowicz, M. Nazar, *Prawo rodzinne*, Warszawa 2012, p. 289.

[14] N. Faulkner, "Kodeks rodzinny i opiekuńczy", The Family and Guardianship Code of 25 February 1964 (consolidated text, *Journal of Laws* of 2017, item 682), 51, (2nd ed., Warszawa 2018).

With regard to the Table which was presented in the first part of the present study, the above regulation will be applied only to the situations involving a married man, i.e., these include the following cases outlined in the table, such as 1, 3, 4, 5 (point 5, however, with an exception: only when the embryo is implanted in the man's wife). This provision will not be applied in the following cases described in the Table, namely, 2 and 5 (but in point 5 only when the embryo implanted in the surrogate mother).

It must be noted that the above provision only constitutes a general rule, to which there can be found exceptions, such as Art. 68 of The Family and Guardianship Code:

> Art. 68
> The denial of paternity is not admissible if the child was born as a result of medically assisted procreation treatment to which the mother's husband consented.[15]

The cited regulation is commented upon in legal literature both as a provision which forms a negative condition of the disavowal of paternity[16], and as a provision, where the legislator does not recognize the absolute supremacy of the principle of objective truth, and if it is found that this supremacy opposes the protection of the family, and above all the best interest of the child.[17] It is considered also that it may constitute an overt display of marital disloyalty which is contrary to the principles of social life.[18]

The provision in question is related to heterologous insemination.[19] Such an act of fertilization takes place when semen comes from a man other than the woman's husband. This means that the woman's husband has consented to a medically-assisted procreation procedure.

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[15] N. Faulkner, Kodeks rodzinny i opiekuńczy. The Family and Guardianship Code of 25 February 1964 (consolidated text, *Journal of Laws*, 2017, item 682), 53, (ed. 2, Warszawa 2018).

[16] This is consistent with the resolution of Supreme Court (taken by seven judges) of 27 October 1983 (III CZP 35/83, Lex no. 2950). There was pointed that disavowal action of the mother's husband, if the child was conceived as a result of artificial insemination with semen of another man, to which the mother's husband consented, may be recognised as contrary to the social norms.

[17] J. Ignatowicz, M. Nazar, *Prawo rodzinne*, Warszawa 2012, p. 290.

[18] M. Andrzejewski, *Prawo rodzinne i opiekuńcze*, Warszawa 2011, p. 129.

[19] See: G. Jędrejek, *Komentarz aktualizowany do art.68 Kodeksu rodzinnego i opiekuńczego*, Lex 2018.

This provision will be applied to the following situations described in the Table, namely, 4 and 5 (but in point 5 only when the embryo is used to be implanted in the man's wife). This provision will not be applied in the following cases described in the Table, namely, 1, 2 and 5 (but in point 5 only when the embryo is implanted in the surrogate mother).

3. Recognition of paternity in the context of the so-called "surrogate motherhood"

A different, in comparison with the previously presented findings, way to establish the child's affiliation from a particular man is the recognition (assertion) of paternity. This legal institution of the Polish family law is regulated in the provisions of Art. 72–83 of The Family and Guardianship Code. This method, not unlike judicial establishment of paternity, which will be discussed later, refers to establishing paternity of an illegitimate child. To my mind, this form of establishing of child's affiliation does not guarantee correct determinations. In this particular situation, too much, which also concerns the author of the present study, relies on wills and statements of the child's mother and the man claiming to be the child's father. My view is conditioned by the content of Art. 73 § 1 of The Family and Guardianship Code. It will be referred below. The rule which is constructed in that provision may lead to abuse and violation, especially in the context of surrogacy issues.

However, it must not be forgotten that according to current legal scholarship, recognition of paternity's grounds has been worded in such a way as to assure a maximum degree of compliance of legal parentage with biological reality, without proceeding with an evidentiary hearing.[20] It shall be regarded that voluntary acknowledgement of paternity, in consequence acceptance of rights and obligations towards a child which are indicated by paternity, gives grounds for assumption that the motive behind the recognition of the child is a genetic relationship[21] with the child.[22]

[20] J. Ignatowicz, M. Nazar, *Prawo rodzinne*, Warszawa 2012, p. 295. See also: T. Smyczyński, *Prawo rodzinne i opiekuńcze*, Warszawa 2014, p. 202.

[21] This genetic relation is noticed by A. Sylwestrzak, "Kodeks rodzinny i opiekuńczy. Komentarz Lex", 575 (edited by T. Sokołowski, H. Dolecki, Warszawa 2013).

[22] J. Ignatowicz, M. Nazar, *Prawo rodzinne*, Warszawa 2012, pp. 295–296. See also: M. Andrzejewski, *Prawo rodzinne i opiekuńcze*, Warszawa 2011, p. 129; T. Smyczyński, *Prawo rodzinne i opiekuńcze*, Warszawa 2014, p. 202.

In view of the topics under discussion, there are two relevant provisions, namely, Art. 73 and Art. 75^1 of The Family and Guardianship Code:

> Art. 73
> § 1. Paternity is recognized when the child's biological father makes a relevant declaration before the head of registry office, and this fact is confirmed by the child's mother within three months of the man's declaration.
> § 2. The head of registry office explains to those intending to make the declaration necessary to recognize paternity about the provisions regulating the rights and responsibilities arising from the recognition, about the provisions on the child's surname, and the difference between the recognition of paternity and the adoption of the child.
> § 3. The head of the registry office will refuse to accept the declaration necessary to recognize paternity if recognition is inadmissible, or if there are doubts about the child's parentage.
> § 4. Paternity can also be recognized before the guardianship court, and abroad before the Polish consul or a person designated to perform the consul's function, if recognition involves a child where one or both parents are Polish citizens. The provisions of § 1 to 3 apply accordingly.[23]

The formula cited above, obviously, is related to the paternity of a child born outside marriage, which is the result of the presumption already detailed in previous parts of this study.

All views presented in the Polish family law doctrine (in the context of the above-cited provision) acknowledge the paternity of a man who indeed has had a sexual intercourse with an unfamiliar woman (i.e., a partner who is not married to the man) or a surrogate. It is sufficient that a man from whom the child descends makes the full-on above-mentioned declaration and that the mother of the child confirms that he is the father of the child.

After all, it is noted in legal scholarship that recognition is performed only by the personal action of the child's mother and by the man from whom the child descends, because they can consciously make knowledge statements about the issue

[23] N. Faulkner, *Kodeks rodzinny i opiekuńczy*. The Family and Guardianship Code of 25 February 1964 (consolidated text, *Journal of Laws* of 2017, item 682), Warszawa 2018, pp. 55–57.

of paternity which is directly known to them.[24] It is claimed that a man who makes an act of recognition should be convinced that he is indeed the father of the child, because one's recognition of the particular child's paternity has to comply with the biological affiliation of the child.[25] It is then the statement of a man who is aware of unwavering his paternity.[26]

It follows therefrom that the discussed provision will be applied to situations described in the Table as 6, 7, and 8. In the present author's opinion, in the case of no. 7, there is a high degree of violation regarding the application of the institution of the recognition (assertion) of paternity. In consequence, this leads to the practice of "the change of the mother" (from the surrogate to the real-life partner of the man who has recognized his paternity):

> Article 75 [1]
> § 1. The paternity is determined as at the day of birth of a child also when, before the reproductive cells coming from an anonymous donor or an embryo created of the reproductive cells coming from an anonymous donor or from embryo donation are or is transferred to the woman's organism, the man makes a statement before the head of the registry office that he shall be the father of the child which will be born as a result of the medical procedure of assisted procreation with the use of the said cells or the said embryo, and the woman confirms at the same time or within three months as of the date of statement of the man that he will be the father of the child.
> § 2. The statements shall be effective if the child was born as a result of the medical procedure of assisted procreation referred to in § 1 within two years as of the day on which the man made the statement.
> § 3. If the child was born after the mother had entered into marriage with another man than the one who recognized the paternity, the provision of Article 62 shall not be applied.
> § 4. The provisions of Articles 73 §§ 1 and 4 and Article 74 shall not be applied.[27]

[24] J. Ignatowicz, M. Nazar, *Prawo rodzinne*, Warszawa 2012, p. 296.
[25] T. Smyczyński, *Prawo rodzinne i opiekuńcze*, Warszawa 2014, p. 204.
[26] M. Andrzejewski, *Prawo rodzinne i opiekuńcze*, Warszawa 2011, p. 130.
[27] Centrum Tłumaczeń PWN.PL, aktualizacja od 2015 r. Centrum Tłumaczeń i Obsługi Konferencji LIDEX, Kodeks rodzinny i opiekuńczy [Family and Guardianship Code], LEX 2018.

As far as the issues under discussion are concerned, the provision relating to the medical procedure of assisted procreation is more relevant. First of all, this provision does not relate to cases outlined in the Table, i.e., to ordinal numbers 9, and 10. But special attention should be given to the situation described in no. 10, which refers to embryo donation and transferring it to the so-called surrogate mother. In this case, in the present author's opinion, it leads to frequent abuse regarding the application of the recognition of paternity. Consequently, this violation results in "the change of the mother" (from the surrogate to the real-life partner of the man who has recognized his paternity).

4. Judicial establishment of paternity in the context of the so-called "surrogate motherhood"

In the Polish family law, there is one more way of establishing paternity, namely, affiliation proceedings. This procedure is regulated in the provisions of Art. 84–85 of The Family and Guardianship Code. The method, similar as it is to the already discussed paternity recognition, refers to establishing paternity of a child born out of wedlock. In the present author's opinion, it constitutes the least fallible way, not only because of the mandatory nature of the proceedings before the court, but primarily, because of the types of evidence permissible in judicial proceedings.

In view of the topics under discussion, there are two relevant provisions, i.e., Art. 85 and Art. 84 of The Family and Guardianship Code.

> Art. 85
> § 1. It is assumed that the father of the child shall be the man who had sex with the mother of the child no earlier than three hundred days and no later than one hundred and eighty-one days before the birth of the child, or the man who was the donor of the reproductive cell in the case of a child born as a result of partner donation as part of the medical procedure of assisted procreation.

> § 2. The fact that the mother had sexual intercourse also with another man in this period may be the basis to abolish the assumption only if the circumstances suggest that the paternity of the other man is more probable.[28]

The presumption expressed above is to be applied to the paternity of the child born outside marriage, obviously. It results from the presumption of the paternity of the mother's husband (which has been already detailed).

Following the text of the above provision, it must be noted that the woman's declaration of having had sexual intercourse with a certain man over the period of time set by the legislator results in the conclusion that this particular man is the father of the child in question. According to the doctrine, it is stated that the foregoing provision – in the context of the child's mother having sexual congress with a man – uses a continuous form of the verb, wherein there is no doubt that even one-time coitus during the conception period provides enough justification to create such a presumption.[29]

All views expressed in the Polish family law doctrine (in the context of afore-cited provision) are still valid in the case of judicial establishment of paternity, when the defendant is a man who indeed has had sexual intercourse with a surrogate.[30] Taking it into account, this provision will be applied to situations described in the Table and subsumed under 6 and 7. In such a case, it is only effective litigation, as far as evidence is concerned, that leads to the alleged father's establishment of paternity.

As far as the issues in question are concerned, the provision relating to medical procedure of assisted procreation is more relevant. It is clear from that provision that in the case of a child which was born as a result of the medical procedure of assisted procreation, the father is the man considered the donor of the reproductive cell (described in the Table, the situation is numbered 8). The legal solution presented above impels the court to a definitely faster decision, which stems, first and foremost, from the possibility of performing efficient evidentiary hearing.

Beyond doubt, this provision will not be applied to the man who was the donor of the reproductive cell in the case of the child which was born as a result of non-partner

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[28] Centrum Tłumaczeń PWN.PL, aktualizacja od 2015 r. Centrum Tłumaczeń i Obsługi Konferencji LIDEX, Kodeks rodzinny i opiekuńczy [*Family and Guardianship Code*], LEX 2018.

[29] J. Ignatowicz, M. Nazar, *Prawo rodzinne*, Warszawa 2012, pp. 295.

[30] Given the legal meaning of "interact", there is room for considerable doubt, though. For more on thetopic, see: J. Haberko, T. Sokołowski, *Kodeks rodzinny i opiekuńczy*. Komentarz Lex, 615 (ed. by T. Sokołowski, H. Dolecki, Warszawa 2013).

donation in the medical procedure of assisted procreation (described in the in the Table, the situation is numbered 8). Application of that provision is excluded by Art. 75^1 § 1 of The Family and Guardianship Code. The above provision cannot be applied either in the case of the man who was the donor of the reproductive cell of a child born as a result of embryo donation in medically assisted procreation treatment (described in the Table, the situation is numbered 10):

> Art. 84
> § 1. Court proceedings to establish paternity can be requested by the child, the mother, and the presumed father of the child. However, neither the mother nor the presumed father can make such a request after the death of the child, or after he/she reaches the age of majority.
> § 2. The child or the mother may bring legal action to establish paternity against the presumed father, and if he is dead then against the custodian established by the guardianship court.
> § 3. The presumed father of the child may bring legal action to establish paternity against the child and the mother, and if the mother is dead then against the child.
> § 4. Upon the death of a child who had initiated legal action, the establishment of paternity can be asserted by the child's descendants.[31]

The above-cited provision does not raise any doubts in the context of the issues discussed. All the views expressed in the Polish family law doctrine (in the context of the provision in question) are still valid in the case of judicial establishing of paternity, when a defendant is a man who indeed has had a sexual intercourse with a surrogate.

It is still possible to sue only one man. If the defendant is a man who was a donor of the reproductive cell, in the case of the child born as a result of the partner donation in the medical procedure of assisted procreation, knowledge of the child's mother appears to be significant. The woman's privilege to identify the man who was the donor of the reproductive cell, reduces substantially any evidentiary hearing in paternity proceedings. In this way, it creates a natural limitation of evidence and as such enforces DNA testing by default, because evidence related to the sexual

[31] Centrum Tłumaczeń PWN.PL, aktualizacja od 2015 r. Centrum Tłumaczeń i Obsługi Konferencji LIDEX, Kodeks rodzinny i opiekuńczy [Family and Guardianship Code], LEX 2018.

congress between the man and the woman is mutually eliminatory and thus becomes marginalized. The evidence gained in the course of a blood group test or fertility test may be helpful, but may remain inconclusive.

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Surrogate motherhood and the civil status registration in Poland

1. Introduction

The contemporary family law has been evolving in divergent directions. Even in Europe, where for many centuries the culture, family relations and public morality were uniformly influenced by Christianity, one can observe growing differences in approach. Some countries, including Poland, preserved a traditional (conservative) family model based on heterosexual marriage but in other states a liberal attitude has prevailed. New institutional forms of family relations are promoted (including homosexual marriages or registered partnerships). Additionally, the idea of same-sex parenthood is often accepted.

Another vital issue of family law that provokes different national responses is the concept of surrogate motherhood (SM). It may be defined as a situation when a woman agrees to carry a child for the intending parent(s) and is ready to relinquish her parental rights following the child's birth.[1] Thus, the family bonds between the child and the intending parent(s) are established not on the basis of biological bonds and blood links but further to a private contract. The opponents of surrogacy claim that it simply means "ordering" or – in case of arrangements made for-profit – "buying" the child from the surrogate mother. The supporters reply that, if properly regulated, it is an effective way to help infertile couples have children.

[1] Throughout this paper, the author will use the English nomenclature adopted by the working groups acting under auspices of Council of Europe and the Hague Conference of Private International Law; see a revised glossary: https://assets.hcch.net/upload/wop/gap2015pd03b_en.pdf, pp. 32–33 (last accessed: July 20, 2018).

There are many versions of surrogate motherhood depending, e.g., on the origin of gametes or the presence of remuneration for the carrying woman. Some countries firmly reject the whole concept while others accept it, either generally or with regard to selected types of surrogacy (usually the altruistic one). It is interesting to observe that as far as national positions on surrogate motherhood are concerned, the usual distinction of conservative and liberal family law systems is not very helpful as the division line follows a more complicated pattern.

A side effect of the divergence of contemporary family law is the proliferation of limping legal relationships (*rapports juridiques boiteuses*). These relations, while being fully effective in some countries, in others produce no legal effects or only limited ones. A lot of uncertainty is thus introduced into trans-border situations. In particular, when the international perspective is adopted, the principle of indivisibility of civil status, widely accepted under national laws, turns out to be seriously undermined. The said principle is based on the assumption that each person may have – at any given time – only one civil status, defined in a uniform way in all spheres of relations. This does not hold true in trans-border cases. Here, the civil status of an individual may be perceived differently depending on the local point of view.

Surrogate motherhood is a prime example of a construction which creates limping legal relations. A big number of surrogacy cases has an international flavor. When the intending parents, in their home jurisdiction, cannot find a solution concerning their need to have a child[2], they might decide to have recourse to overseas surrogacy. Accordingly, it is not infrequent that arrangements are made with a surrogate mother from a country that allows SM procedures. Regrettably, the parties involved tend to overlook important legal complications not realizing that family bonds between the child and the intending parent(s), legally established in one jurisdiction, may be challenged elsewhere. The rejection of surrogacy as acceptable means to procure legal parentage may put the child's civil status in question.

The purpose of this paper is the analysis of problems concerning the recognition and registration in Poland of civil status of children born in surrogacy proceedings. Poland does not allow surrogacy of any type and, despite the lack of clear legal provisions, it is universally accepted that surrogacy arrangements are not valid under Polish law as being against public order (Art. 58 of the Civil Code). Article 61^9 of the Family and Guardianship Code (KRO) proclaims that "The mother of

[2] In particular, the adoption proceedings often seem too long and cumbersome in comparison to SM.

the child is the woman who gave birth."[3] This provision is a strong, albeit indirect argument against the legality of surrogacy proceedings in Poland. Under Polish law the gestational mother is a legal mother of the child. The only exception concerns adoption – a unique way whereby the motherhood bond may be established with a woman who did not carry the child. Still, adoption always takes place under the supervision of the court and, especially in trans-border cases, it involves many important safeguards marking an important difference in comparison to surrogacy.[4]

Does it all mean that legal parenthood created through surrogacy will never be acknowledged under Polish law? How is the civil status of persons born abroad ascertained in Poland? What duties are incumbent upon a Polish Registrar in this respect? What is the status of children born in surrogacy proceedings? Which local courts may become involved and in what situations? These are only some questions that will be addressed in this study. It has to be said at the outset that looking out for answers a fair balance should be struck between local public order and the child's welfare. The situation is especially sensitive in cases when a genetic link exists between the child and the intending parents or when a long period of their being together resulted in the establishment of strong factual/family bonds.

But before embarking upon the analysis focused strictly on surrogacy issues, in order to put the discussion in a proper context, a few words about the Polish system of civil status registration must first be made.

2. The notion of civil status and the civil status registration in Poland

On 28 November 2014, a new Law on Civil Status Acts (PASC) was adopted in Poland bringing about a reform of the registration system concerning civil status of individuals. As from 1 March 2015, when the new act came into force, the registration is effected in the electronic form. All entries are made in one central and nationwide Civil Status Register. The Register was meant to replace traditional civil status books which have been kept in particular Registry Offices scattered all over

[3] This rule was added to the KRO in 2009 and was meant to dispel any potential doubts about the ways of establishing maternity in Poland.

[4] Nevertheless, it is not inconceivable that the intending parents will try to use adoption proceedings to "legally obtain the child" from the surrogate mother with whom they made a contract to carry the child.

the country. Civil status acts drawn up under former regulations are still stored in hard (paper) copies but they are gradually transferred to the Register. All new acts take the form of entries made directly in the electronic system.

Another important novelty of the 2014 Law is the definition of civil status introduced for the first time into the Polish legal system. According to Art. 2, Section 1 PASC, "Civil status is a legal position of a person expressed by features characterizing the individual, which are shaped by natural events, legal acts or court decisions, or decisions of other bodies, which position is to be found in the civil status act." The definition explains that civil status reflects certain aspects of the legal situation of an individual. When identifying the elements of the notion in question, it is important to remember about the "registration criterion" expressly mentioned in Art. 2, Section 1 PASC. Civil status includes only these personal features which can be found in civil status acts. To have a more precise list of civil status elements, other PASC provisions must be consulted and in particular Art. 49 concerning "the certificate of civil status." It is a special document issued from the Register with a view to demonstrating the civil status of an individual. Therefore, it may be assumed that the characteristics of a person disclosed in this certificate are precisely the elements of their civil status. Article 49, Section 2 of the Law on Civil Status Acts lists the following components of the document: surname, first name(s), family name, date and place of birth of the person concerned, sex, names and surnames of parents as well as the indication of marital status. The above list is exhaustive. Its contents make it clear that the Polish legislator adopted the broad concept of civil status. It includes the elements of both the family position (marital status, filiation) and the personal status (the name, surname and sex).[5]

The meaning of civil status under Polish law is important in this study for two reasons. On the one hand, the above remarks demonstrate that legal parentage is – unquestionably – an element of civil status and therefore the SM issues are directly related to the notion in question. On the other hand, the legal definition included in the 2014 Law shows that civil status is a private law concept. It describes the position of a person in the light of civil law and contains no public law elements. In particular, nationality (citizenship) is not covered by the analyzed notion. Consequently, difficult nationality questions which arise with regard to international

[5] M. Wojewoda, "Kilka uwag o definicji 'stanu cywilnego' w nowej ustawie Prawo o aktach stanu cywilnego", *Metryka*, 2/2014, pp. 24–27.

surrogacy shall not be addressed here. These questions concern the political status of an individual and they deserve a separate study.

3. The evidentiary power of foreign civil status acts and the transcription procedure

As it will be demonstrated below, the problem of recognition of the child's civil status which was established abroad through surrogacy procedures will surface in Poland in two types of situations. Firstly, the intending parents may be expected to use the birth act issued abroad as the proof of their parental status. Secondly, they might decide to apply for the transcription of the act to the Polish Register. Each of these situations will be addressed separately.[6]

As far as the evidentiary power of foreign civil status acts is concerned, it is important to know that according to Art. 1138 of the Polish Code of Civil Procedure (KPC), official documents issued abroad have the same probative value as Polish official documents. Local and foreign civil status acts are put on a par. Moreover, the Polish Supreme Court, with the support of legal doctrine, holds that Art. 3 PASC, which requires that civil status be proved exclusively by a civil status act, does not distinguish between documents issued in Poland and overseas[7]. Thus, both Polish and foreign acts constitute proofs of equivalent value.

Still, it must be remembered that civil status acts in Poland have only declaratory character. Despite their strong probative value, their contents may be challenged in appropriate judicial proceedings. In particular, Polish acts may be annulled or corrected by the court in accordance with Art. 39 and Art. 36 PASC. As far as foreign documents are concerned, they cannot be formally annulled in Poland but the facts and legal relations which they present (including legal parenthood) may still be questioned from the point of view of the local legal order. Generally, such

[6] In those surrogacy cases in which a court judgment was handed down abroad, confirming parentage of the intending parents and paving the way to the issuance of the appropriate birth act, the intending parents might also try to apply for the recognition of such foreign judgment in Poland. But this would mean that surrogacy is clearly admitted by the parents, which can result in the refusal of recognition since surrogacy is perceived as not consistent with the Polish *ordre public* (cf. Art. 1146 §1 point 7 of the Polish Code of Civil Procedure). The use of the birth act issued abroad, without showing the surrogacy judgment, has an advantage of keeping the surrogacy secret.

[7] See: the Supreme Court judgment of 20 November 2012, handed down by 7 judges, case III CZP 58/12.

questioning will be possible *ad casum* in various proceedings in which a given act is presented as a proof.

Although, as explained, foreign civil status documents can be freely used in Poland, there exists another way of proving civil status that was shaped abroad. One can apply to the Polish Register for the transcription of civil status acts issued in another country. According to Art. 104 Section 1 PASC, "A foreign civil status document, which is evidence of an event and its registration, may be transferred to the Civil Status Register by means of transcription". Transcription is, by and large, a simple "technical" act involving the faithful (literal) rewriting of the foreign document (Art. 104 Section 2 PASC). Naturally, since all records in the Register are made in the Polish language, transcription will be made on the basis of an official translation of the overseas act. The above procedure results in the creation of a Polish civil status act which is treated as any other act drawn up originally in the local registration system. Admittedly, transcription is a mechanism that opens the national Register to the whole world. It may be seen as a special kind of recognition ("nostryfikacja") of foreign documents of civil status.

For persons living in Poland, whose civil status was shaped abroad, transcription is a natural choice. If a child was born in another country, despite the fact that the foreign birth certificate can be used in Poland, it is much more convenient to have a local civil status act. After transcription, the act's excerpts can be obtained in any Registry Office in Poland. There is no more need for translations either. It should be remembered, too, that – pursuant to Art. 104 Section 5 PASC – when a Polish citizen applies for a Polish identity document or for a personal identification number (PESEL), transcription is obligatory since relevant applications must be accompanied by a birth certificate issued from the local Register.

Transcription bears some resemblance to the "procedural" recognition of foreign judgments. Still, there are important differences. A foreign act as such does not "settle" any legal issue. Civil status documents are generally declaratory. They have evidentiary value and do not possess the force of law typical for court judgments.[8] That is why, unlike the recognition of judicial decisions, the transcription mechanism does not grant any substantive effects to legal relationships recorded in a foreign civil status act. Still, once the foreign document is reproduced within the Polish Register, the respective Polish act is brought to life and starts its independent functioning

[8] See the authors cited by K.J. Saarloos, *European private international law on legal parentage*, Maastricht 2010, p. 220.

in the legal system. Unless successfully challenged before the court of law, the act remains the sole evidence of facts and relations revealed therein (Art. 3 PASC). For this reason, it is opportune to have a closer look at the transcription mechanism and see which acts can be introduced into the Polish Register.

It has to be remembered that despite its clear "international flavor", transcription is essentially an institution of internal law. Being an element of the official registration system, transcription has public law characteristics and as such is governed by local regulations. The final word – with regard to admissibility of transcription – belongs to the Polish legislator. The rewriting of foreign documents into the Register is possible with the observance of some rules which protect the integrity of the local system of civil status registration. It is submitted that these rules are not too intrusive and the control of foreign acts is rather limited.

Firstly, it should be observed that in transcription procedures the Registrar does not use choice-of-law rules designed for private law relations. The situation does not involve the application of substantive provisions of civil (family) law – either domestic or foreign. What is more, as a rule, the Registrar does not verify the contents of a foreign document. It is widely accepted that transcription has purely "reproductive" nature. It consists in the transposition of particular elements of a foreign document into the Register without interfering with their contents. The alternative theory, according to which transcription is not only technical but it involves registration activity (of a secondary nature), has been rejected by the case law[9]. The prevailing view holds that registration – in its strict sense – takes place only abroad. Transcription does not involve the assessment of substantive basis for individual records made abroad. If the foreign document is original and it was drawn up by a competent organ, there is a factual presumption that transcription can take place. No formal decision is taken by the Registrar who simply enters relevant data to the Register. Agreeably, a significant degree of trust towards foreign acts and foreign regulations is demonstrated by the Polish legislator.

Still, there exist certain safeguards. In Art. 107 PASC, negative conditions of transcription are envisaged. The provision in question reads that "the Registrar refuses to transcribe the foreign act if:

1. the document in the country of issue is not recognized as a civil status document, is not certified or issued by the competent authority, or raises doubts as to its authenticity, or confirms an event other than birth, marriage or death;

[9] See: the Supreme Court judgment of 20 November 2012, III CZP 58/12.

2. the foreign document was created as a result of transcription in a country other than the state of the event;
3. transcription would be contrary to basic principles of the legal order of the Republic of Poland."

The first two grounds for refusal are rather formal. The foreign document must concern birth, marriage or death. It should be authentic, validly issued, and it must not be the result of any earlier transcription. But the most interesting condition is definitely the third one. Article 107, point 3 PASC is the *ordre public* clause – an instrument well known especially in private international law and international civil procedure. Since the 2014 reform, the clause has been also present in the Polish civil status registration system. It constitutes a "safety valve" and the "last instance defense" invoked exceptionally when the local public order requires that certain foreign constructions be hold off (kept away). The practice of Registrars and the case law of administrative courts proves that incompatibility of foreign acts with the Polish *ordre public* is not infrequent. To take one example, Art. 107, point 3 PASC is often used with regard to certificates of homosexual marriages as well as birth certificates with parents of the same sex. As it will be demonstrated below, the clause will play an important role also in surrogacy cases.

The refusal of transcription always takes the form of an administrative decision. The Registrar's position may then be challenged and reviewed by the local Voivode. If the Voivode's decision is still negative, the administrative court can be involved. Upon the motion of the interested party, the court will evaluate the legality of actions undertaken by administrative organs who refused transcription.

Before the role of the *ordre public* clause in surrogacy cases is discussed in more detail, the case law of the European Court of Human Rights (ECtHR) concerning surrogacy will be presented. Judgments of the ECtHR shed important light on the issues which are to be weighed under national laws with regard to the civil status of children born by surrogate mothers. They might be seen as signposts to be considered by the member countries of the 1950 European Convention of Human Rights (ECHR) when approaching the SM questions.

4. Surrogacy and the case law of the European Court of Human Rights

The problems of surrogacy appeared before the European Court of Human Rights in a number of cases. One of the recurring issues in the ECtHR case law is the recognition of legal parenthood based on surrogacy and the transcription of foreign birth acts concerning surrogacy children. The most important cases are *Mennesson v. France* (application 65192/11), *Labassee v. France* (application 65941/11) – both decided on 26 June 2014, *Foulon v. France* (application 9063/14) and *Bouvet v. France* (application 10410/14) decided on 21 July 2016 as well as *Laborie v. France* (application 44024/13) decided on 19 January 2017. On top of that there is the case of *Paradiso and Campanelli v. Italy* (application 25358/12). It was decided on 24 January 2017 by the Great Chamber of the ECtHR acting as a court of 2nd instance (a higher court).

The *Mennesson* and *Labassee* cases of 2014 are the leading ones. They both have a similar factual background and concern two married French couples in which the wives were infertile. Eager to have children they went, respectively, to California and Minnesota and acting in compliance with state law they made surrogacy arrangements with local women. In both cases embryos were formed *in vitro* with donated eggs and the intending fathers' semen. The implanted embryos were then carried by surrogate mothers, who agreed to hand over the children, after birth, to the intending parents. In both cases local state courts were also involved. Appropriate judicial orders were given, which allowed to issue birth certificates naming the Mennessons and the Labassees as legal parents without any reference to the surrogate mothers.

The fate of these two birth certificates in France was different (at least initially). In the *Mennesson* case, the Californian act was first entered into the French register of civil status but then it was challenged by the public prosecutor. In the *Labassee* case the public prosecutor intervened at an earlier stage blocking the transcription of the Minnesota birth act from the outset. The appeal proceedings led in both cases to the French Supreme Court (*Cour de Cassation*) which took the restrictive position. The Court held that surrogacy arrangements were void as contrary to public policy, which stemmed from the express provisions of the French law (Art. 16–7 and Art. 16–9 of the French Civil Code). Additionally, it was underlined that civil status could not be disposed of by means of an agreement even if endorsed by a foreign court judgment. Thus, the judicial orders from California and Minnesota were also

found incompatible with the French public policy. On the other hand, the Supreme Court pointed out that the lack of transcription did not prevent the children from living with the intending parents and, admittedly, it did not change the affiliation status according to foreign law.

When reviewing the cases, the ECtHR found Art. 8 ECHR applicable in its two aspects concerning, respectively, the right to family and private life. Each of these aspects has to be considered separately.

Firstly, it was held that the refusal to legally recognize the family bond, created by the children and intending parents living together, constituted an interference with their right to respect for family life. However, because of surrogacy context, this refusal was found to be justified. It was motivated by a legitimate aim – the protection of health and of the rights and liberties of others – and was meant to discourage French nationals from having recourse to SM procedures (prohibited in France). The authorities acted with the view to protecting children and surrogate mothers. Thus, considering the relatively wide margin of appreciation enjoyed by French authorities (stemming from the fact that difficult ethical issues were involved), the decision of the *Cour de Cassation* struck a fair balance between the interests of the applicants and those of the French state.

The conclusions concerning the right to respect for private life were different. The ECtHR found here a clear breach of article 8 ECHR. In this regard, the French position exceeded the wide margin of appreciation that is present in surrogacy cases. The decisive element was legal uncertainty flowing from the non-recognition in the French legal order of the *de facto* affiliation bond between the interested persons. The refusal to acknowledge the overseas birth certificates resulted in the contradiction between the legal and social reality, which undermined the children's identity within French society (including questions of nationality, inheritance etc.). The ECtHR stressed also that the lack of recognition of the biological reality (the intended fathers were genetic fathers) was against the best interests of the children. Still, it is important to realize that the breach of Art. 8 ECHR was confirmed only with regard to the children and not to the parents who willingly acted against the French law.

The same line of arguments was repeated by the ECtHR in *Foulon* and *Bouvet* cases of 2016. They merit some extra attention, though, because of a new factual element. Here, each of the intending fathers – confronted with the refusal to enter children's certificates into the French civil status register – lived in homosexual relations. It was not an issue, though, as same-sex relationships are allowed and regulated in France. French authorities did maintain their former position on the

grounds that surrogacy was against public order and it was the reason why the parent-child relationship could not be endorsed in France. But the ECtHR condemned such attitude again, invoking arguments well known from the *Mennesson* case. And although the Court's reasoning was applied for the first time to same-sex families, it had no bearing on the final result. The decisive element was that the applicants were biological fathers and it should be noted that the birth certificates named the surrogate woman as the mother in each case.[10]

The only ECtHR surrogacy case in which there was no genetic link between the intending parents and the child was *Paradiso and Campanelli v. Italy*. The initial 2015 judgment, which found Italy in breach of Art. 8 ECHR, was reversed by the Great Chamber on appeal proceeding which ended with the judgment of 24 January 2017.

The case concerned SM procedures undertaken in Russia by an Italian married couple. When the child was born, the birth act was issued naming the Italian intending parents as legal parents. However, upon their return to Italy, not only were the intending parents faced with the refusal to transcribe the child's birth certificate into the local register but, upon the intervention of Italian authorities, they had also to give the child away. Importantly, during the legal battle which ensued, it turned out that no genetic link existed between any of the intending parents and the child.

The complaint to the ECtHR concerning the transcription refusal was dismissed since in this regard the applicants had not exhausted available domestic remedies. The case was found admissible, though, with regard to the child's removal from the intending parents. In the eyes of the first instance judges, the removal amounted to unjustified interference with *de facto* family life, which was not justified in a democratic society. Despite the lack of genetic link between the involved persons, the majority judgment held that Italian authorities had failed to strike the correct balance between the interests of the State and the intending parents. Moreover, the paramountcy of the child's best interest principle was overlooked.

Further to the appeal of the Italian government, the Great Chamber reconsidered the case. In another majority judgment, it was found that there was no interference with family life but rather with private life of the applicants when the authorities took the child away from them. Still, it was held that this interference was in accordance

[10] See: D. Straughen, "ECHR finds failure to recognise parents of children born as a result of international commercial surrogacy violates the right to privacy"; available at: https://www.hrlc.org.au/human-rights-case-summaries/echr-finds-failure-to-recognise-fathers-of-children-born-as-a-result-of-international-commercial-surrogacy-violates-the-right-to-privacy (last accessed: 20 July 2018).

with the law, had a legitimate aim and the measures taken by Italy were necessary in a democratic society. Italian authorities, applying local law, found the child "in a state of abandonment" because it was born abroad to unknown biological parents. The child could not establish legal link with the intending parents because SM procedures were illegal under Italian law. The measures taken in the circumstances were meant to prevent disorder, protect the rights and freedoms of others and, eventually, to protect the child. When evaluating the margin of appreciation of Italian authorities, the ECtHR expressly underlined that this time it was not restricted by any genetic considerations. The case was not about the recognition of genetic descent nor did it concern the choice to become genetic parents.

Thus, the removal of the child was not condemned by the Court. Accordingly, it seems clear that the refusal to acknowledge legal parentage created through surrogacy and the refusal to transcribe the foreign birth act into the Italian register were not in breach of the 1950 Convention, either.

What final observations can be made in the light of the above French and Italian cases? Is there a consistent line of arguments here? Keeping in mind the limited role of the ECtHR which only solves the case at hand, one can nevertheless make a few universal statements with regard to civil status issues concerning surrogacy procedures. Thus, it seems that the following lessons can be learnt from the ECtHR:

1. The receiving states are free to prohibit surrogacy agreements but once a child is born the local laws should not be used in a way that might prejudice the child's welfare;
2. It is the child's right to respect of private life that is protected (and not the parents' need to have children);
3. The genetic link between the child and the intending parents is a vital criterion when assessing the post-birth measures taken by state authorities;[11]
4. Each case ought to be treated individually. The national legislation or local practice must not be viewed in the abstract. Without overlooking the general context, the concrete issues raised in the case at hand should be considered.

Admittedly, the ECtHR's focus is relatively narrow. It does not go beyond the post-birth context. The Court will only assess the steps taken by the receiving state when

[11] P. Beaumont, K. Trimmings, "The European Court of Human Rights in Paradiso and Campanelli v. Italy and the way forward for regulating cross-border surrogacy", p. 12, available, as a Centre for Private International Law Working Paper, No. 2017/3, at: https://www.abdn.ac.uk/law/documents/CPIL%20Working%20Paper%20No%20 2017_3.pdf 2017 (last accessed: 20 July 2018).

the child is born abroad further to SM procedures.[12] Consequently, any concessions made by the ECtHR with regard to the recognition of the civil status of children born in surrogacy proceedings must not be seen as an acceptance of surrogacy as such.

The above observations concerning the significance of the ECtHR case law in surrogacy cases should be complemented by the conclusions of the recent advisory opinion P16-2018-001 of 10 April 2019,[13] delivered by the ECtHR Grand Chamber upon the request of the French *Cour de Cassation*. When dealing again with the *Mennesson* case, in which the parental link with the biological father was already acknowledged by French authorities, the national court had still to decide upon the situation of the intending mother. The ECtHR's advice in this respect has been as follows:

"In a situation where a child is born abroad through a gestational surrogacy arrangement and was conceived using the gametes of the intended father and a third-party donor and where the legal parent-child relationship with the intended father has been recognised in domestic law:

1. the child's right to respect for private life within the meaning of Article 8 of the Convention requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the "legal mother";

2. the child's right to respect for private life within the meaning of Article 8 of the Convention does not require such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad; another means, such as adoption of the child by the intended mother, may be used provided that the procedure laid down by domestic law ensures that it can be implemented promptly and effectively, in accordance with the child's best interests".[14]

Keeping in mind the above guidelines, it is time to have a closer look at the situation in Poland. Lack of provisions dedicated specifically to surrogacy means that, when tackling the problem, general instruments and mechanisms available under

[12] T. Murphy, "Judging Bioethics and Human Rights", [in:] *New Technologies for Human Rights Law and Practice*, eds. M.K. Land and J.D. Aronson, Cambridge 2018, p. 81.

[13] http://hudoc.echr.coe.int/eng?i=003-6380464-8364383 (last accessed: 2 May 2019).

[14] Cf. the judgment of the German Bundesgerichtshof of 23 April 2019 in which it was decided that adoption of the "surrogacy child" by intending parents was necessary even though they were both genetically related to the child, https://www.dw.com/en/german-woman-to-adopt-own-child-after-using-surrogate-mother/a-48445783 (last accessed: 2 May 2019).

Polish law will be used. As it will be demonstrated, these instruments leave considerable amount of appreciation, which may lead to divergent conclusions. Still, in the opinion of this author, it is the experience of the ECtHR that should help and guide the courts when taking particular decisions under the existing Polish regulations.

The main part of the analysis that follow shall concern the "official" surrogacy arrangements, i.e., the SM procedures taking place in compliance with the law of the country of origin (country of the child's birth). But a separate mention will be made, too, with regard to "private" surrogacy arrangements. Being secret, they can take place in any country, including jurisdictions that actively combat surrogacy.

It must be added that the considerations shall focus strictly on civil status registration issues appearing in front of the Polish authorities. As it was already hinted, nationality questions are set aside. Also, the problem of travel documents that are required to legally bring the child to Poland will not be investigated in any detail.

5. Birth acts issued as a result of the official surrogacy arrangements

Let us consider a typical situation of the intending parents applying for transcription of the child's birth act into the Polish Register. The motion may be filed in Poland (in any Registry Office) or abroad (via a Polish consul). The reaction of the Registrar will be in fact dependent on his knowledge about surrogacy. When surrogacy is apparent, it is argued that transcription should not take place (for reasons explained below). Otherwise, the foreign act will probably be introduced into the Register. What is important, the Polish Registrar will not be involved in any deeper investigations or complicated legal analyses, which are the domain of the courts.

The Registrar's role appears to be simple and rather technical. If the foreign document is a civil status act that comes from the country of birth, if it is authentic and was issued by a competent organ, there is generally no reason to refuse transcription (cf. Art. 107, points 1 and 2 PASC). Article 107, point 3 PASC and the *ordre public* clause will come into play only exceptionally.[15] One example is the case of a foreign

[15] On the *ordre public* clause in the registration cases, see also: M. Zachariasiewicz, *Klauzula porządku publicznego jako instrument ochrony materialnoprawnych interesów i wartości fori*, Warszawa 2018, p. 131 ff. and M. Pilich, „Mater semper certa est? Kilka uwag o skutkach zagranicznego macierzyństwa zastępczego z perspektywy stosowania klauzuli porządku publicznego", *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*, Vol. XVI, 2018, point 3.

birth act in which both parents are of the same sex. It does not matter if parenthood was established further to surrogacy procedures or otherwise (e.g. as a result of the adoption by a homosexual couple), the transcription of such a birth act should not be possible.[16] Parents named in a civil status acts drawn up in Poland are always of different sex. This is a reflection of a basic assumption accepted in Polish law that – further to the natural order – parenthood is based on predetermined roles of father and mother. That is why, potential transcription of an act with the same sex parents would amount to a serious disruption of the local registration system. The ensuing "disintegration of the system from the inside" would be contrary to the Polish public order.[17]

If parents are of different sex, the refusal of transcription is much less likely unless the Registrar has positive knowledge about surrogacy arrangements which led to the inclusion of the intending parents in the birth record. Such knowledge may result from the contents of the act (if it somehow mentions surrogacy) or from the accompanying documents (such as a court order to put the names of the intending parents in the birth act). It is submitted that establishing parenthood through surrogacy is *prima facie* contrary to the Polish public order. Accordingly, Art. 107, Section 3 PASC should be invoked as a reason to refuse transcription. The Registrar has neither skills nor procedural tools to conduct research and make subtle legal distinctions like those signaled in the ECtHR case law. That is why – in the opinion of this author – if the Registrar knows about surrogacy they should always hand down an administrative decision rejecting the transcription motion.

This decision need not to be final, though. More in-depth analyses are possible if a court is involved. Firstly, evidence findings are easier in judicial proceedings. Extra documents may be requested, witnesses may be heard and expert opinions may be ordered (e.g. about genetic links between the child and the intending parents). But even more importantly, the court – consisting of legal professionals trained to solve juridical problems – is better prepared to decide difficult surrogacy cases. That is why, if the intending parents possess arguments which – especially in the light of the ECtHR case law – sufficiently support their motion for transcription, they may try to put the case in front of a court. As the first step, they should exhaust

[16] See, however, a precedent judgment of the Supreme Administrative Court of 10 October 2018, II OSK 2552/16, in which the transcription was allowed with regard to the birth act of a child whose both parents – according to British law – were women.

[17] See: M. Wojewoda, "Transkrypcja aktu urodzenia dziecka, które zostało uznane za granicą", *Kwartalnik Prawa Prywatnego*, 2/2017, pp. 349–350.

the administrative appeal procedure by applying for the review of the Registrar's position by the local Voivode. If the Voivode's decision is still negative, the refusal of transcription can be challenged in the administrative court where the case will be heard by a three-judge panel.

It is to be expected, though, that in most cases the Registrar will have no knowledge about surrogacy and the transcription will take place. The birth act issued in the aftermath of SM procedures usually looks like any other civil status act drawn up in the country of origin. What is more, it will probably look like any birth act issued in Poland. If the intending parents are of different sex, the sheer fact that the child was born abroad is not a sufficient reason to look suspiciously at the foreign birth document. Additionally, as it was already said, the Registrar is not equipped with any special tools that would make it possible to investigate the case in any detail. Accordingly, if surrogacy is kept secret, a "surrogacy birth act" may be easily introduced into the Polish Register.

But such transcription can also be challenged. Civil status acts have only declaratory character and despite their strong evidentiary value, stemming from Art. 3 PASC, they may be contested. Naturally, it is the Polish act (generated in the transcription proceedings) that can be "attacked" once the surrogacy arrangements are discovered. Art. 39 PASC seems applicable here. It provides for the annulment of the civil status act if it describes the event not consistent with facts or if there are defects reducing the probative value of the act. On the one hand, the motherhood of the intending mother is not consistent with the facts since it was the gestational mother who gave birth to the child. On the other hand, the establishment of legal parenthood further to foreign surrogacy arrangements can be treated as a defect that undermines the reliability of the birth act as an official document. If Art. 39 PASC is used to challenge the act, the important difference with the judicial control of the transcription refusal is that the annulment action under Art. 39 PASC should be initiated before the civil law court (and not the administrative tribunal).[18]

Summing up the above remarks concerning the duties of the Registrars, let it be reiterated that they will usually act according to a simple scheme. If the Registrar has got reliable information that legal parenthood was established further to surrogacy arrangements, they should refuse transcription on the basis of Art. 107,

[18] The annulment action according to the provisions of public law (Art. 39 PASC) is preferable to the denial of motherhood under Art. 61^{12} KRO. The latter provision belongs to the body of Polish family law which is not always applicable in trans-border cases.

point 3 PASC (the *ordre public* clause). Otherwise transcription should take place. Still, the Registrar's position is not always conclusive. The real weighing of arguments with regard to the transcription of foreign birth documents in surrogacy cases will take place in proceedings in front of a competent court. These proceedings will be commented upon in the next part of the study.

6. Official surrogacy arrangements and the Polish courts – the *ordre public* clause

Depending on the initial decision of the Registrar with regard to transcription, two different paths will be followed. In case of transcription refusal, the intending parent(s) may ask for review of the Registrar's administrative decision. If the decision is not reversed by the Voivode, the Voivodeship Administrative Court may be engaged. Finally, a potential appeal may be lodged to the Supreme Administrative Court in Warsaw. When, on the other hand, the transcription did take place, the annulment motion based on Art. 39 PASC should go directly to the civil court. The petitioner will normally be the public prosecutor who obtained information about surrogacy arrangements concerning a child whose birth act was introduced to the Polish Register. A Regional Court will be competent in the first instance. A potential appeal may be launched to the District Court and the second instance judgment may even be susceptible of review by the Supreme Court.

Despite the procedural differences, the administrative and civil courts will deal basically with the same substantive issues. What is more, the weighing of arguments will generally take place under the same umbrella of the *ordre public* clause. In cases in which the refusal of transcription is challenged, the *ordre public* exception – as envisaged in Art. 107, point 3 PASC – is a direct point of reference. It will constitute the legal basis of the Registrar's negative decision and its use will be reviewed on appeal.

The situations will be different in the annulment proceedings based on Art. 39 PASC, which are conducted before the civil court. It is rather the *ordre public* clause from Art. 7 of the Private International Law Act of 2011 (PPM) that will come into play here. The reason why the Polish birth act created upon transcription should be annulled is its lack of sufficient probative value. Legal parenthood established through surrogacy arrangements generally cannot be recognized in Poland. Thus, the Polish act created upon transcription should be seen as incompatible with the local

perception of parenthood. But as a matter of law, the objection to legal parenthood established through surrogacy stems from the refusal to apply foreign law under which such parental link was "generated". Therefore, the proper legal basis will be art. 7 PPM which declares that "foreign law shall not be applied if its application would have effects contrary to the fundamental principles of the legal order of the Republic of Poland."

Although Art. 7 PPM and Art. 107 point 3 PASC are placed in different legal acts, they both provide for the same *ordre public* exception. Consequently, similar arguments will be considered when the above provisions are used in the surrogacy context.

Surrogacy arrangements – both altruistic and for-profit – are not valid under Polish law. But this observation is not sufficient to justify the use of the *ordre public* clause in every case in which some surrogacy issues are at stake. It is important to remember that the clause is not directed against foreign law as such. It has a defensive character and is meant to block these effects of the application of foreign law which cannot be reconciled with the local public order. Such effects must be carefully checked and weighed in the light of all the circumstances. The sheer fact that surrogacy is against Polish public order does not mean that all transcription cases concerning "surrogacy children" must be decided in exactly the same way. The jurisprudence of the ECtHR provides examples of situations when certain effects of surrogacy arrangements, such as legal parenthood, can or even should be recognized.

Keeping in mind that the approach adopted in a given situation must be adjusted to the circumstances of the case, it is crucial to identify the most important elements that may help decide whether legal parenthood established through overseas surrogacy procedures can be disclosed in the Polish Register.

7. Evaluating legal parenthood in the (post-birth) surrogacy context

It is often observed that surrogacy procedures generate serious dangers both to individuals and the society. When describing the problem, strong language is often used by some commentators. Countries allowing surrogacy and persons involved in the proceedings are accused of paving the way to commercialization of civil status, of instrumental treatment of surrogate mothers, or even of supporting child trafficking. Not surprisingly, a general prohibition of surrogacy is present in most

parts of Europe, including Poland. Also, the ECtHR rightly confirms that the ethical reservations concerning SM procedures fully justify local bans on surrogacy and various sanctions introduced in this regard.

It seems, however, that a more flexible attitude should be taken when a child is already born further to surrogacy arrangements, especially when deep family bonds have developed between the child and the intending parents. The post-birth perspective may and should be different from the general approach. What is at stake here is not surrogacy as such but the family life of concrete individuals. It is obvious that potential sanctions, such as the refusal to acknowledge parenthood or the removal of the child from the intending parents, will negatively affect the child's situation. That is why, in view of many experts, the restrictive approach, fully justified when preventing surrogacy, must be sometimes relaxed for the sake of children born despite preventive actions.

The fact that surrogacy is against public order does not mean that all its effects have the same characteristics. Let it be reiterated that the *ordre public* clause will come into play only if particular legal effects created under foreign law cannot be tolerated locally. To see if this is the case, careful balancing is needed. The dangers of surrogacy must be confronted with legitimate interests of all persons involved and especially with the principle of the child's welfare. Whenever the scales are tipped in favor of the family, legal parenthood established through surrogacy should be accepted even in a country which combats surrogacy.

When a Polish court (civil or administrative) deals with a surrogacy case in the context of civil status registration, the starting point will probably be that local *ordre public* was offended. But the court should consider all relevant circumstances and should not be indifferent to arguments in favor of recognizing the parental link with the intending parents. The most important arguments for letting "surrogacy parenthood" be recorded in the Polish Register are:

7.1. Welfare of the child

The principle of the child's welfare has always been a cornerstone of family law. But, paradoxically, the child's welfare does not mean the same in every country. The principle has become relative these days and its meaning often depends on local

approaches and regulations.[19] To take one example, some states does not accept same-sex parenthood since it is perceived as potentially detrimental to the child. Other states believe that children may develop properly also in families whose composition does not reflect the natural order.

How can the principle of the child's welfare be relevant in Poland in the surrogacy context? In this author's view, it may be invoked by the intending parents who want that their legal parenthood be recognized. If they can prove that they created a proper home for the child, with properly developed family bonds, it should be a strong argument in favor of transcription (or against the annulment of the transcribed act). The welfare of the child is the paramount consideration which also in Poland may counterbalance the illegality of surrogacy.

Every case must be assessed individually, though. Admittedly, if the intending parents are of the same sex, even the proof of strong emotional bonds and a loving environment created for the child might not be helpful. It must be recalled that Polish family law does not know same sex parenthood. The Polish Register can accommodate only such birth records which indicate parents in their roles of father and mother.

7.2. The genetic link

Another vital element of the judicial appraisal concerning parenthood based on surrogacy is the genetic link between the child and the intending parents. The child may be genetically related to both intending parents (whose gametes are used to create an embryo implanted into the womb of the gestational mother) but more often there is a genetic link only with the intending father (whose semen is used for insemination). In these circumstances, acknowledging legal parenthood is but a consequence of the recognition of genetic descent. Indeed, as it is consequently stressed by the ECtHR, the genetic link is an important criterion. In its light the illegality (from the local point of view) of surrogacy procedures may become a secondary

[19] Cf. P. Mostowik, "Problem obywatelstwa dziecka prawdopodobnie pochodzącego od obywatela polskiego niebędącego mężem surrogate mother. Uwagi aprobujące wyrok NSA z 6.5.2015 r. (sign. II OSK 2372/13 i II OSK 2419/13)", *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*, Vol. XVI, 2018.

consideration only. Precedence will often be given to the child's right to private and family life and to the adults' choice to become genetic parents.[20]

7.3. The time factor

On top of the above considerations one should mention the time factor. The longer the period during which the child and the intending parents stay together, the smaller the chances that the *ordre public* clause should intervene. The passing of time helps develop strong emotional bonds. Eventually, it may lead to a situation when the child's welfare outbalances public order objections. The decision to get involved in surrogacy proceedings is often taken by persons who turn out to be caring parents. In such circumstances, the potential severance of the *de facto* family bonds would be clearly detrimental to the child. Naturally, the child's age as well as its emotional and mental development must be properly considered. Still, it can be said that unless the surrogacy plot is discovered early, the chances to question child's legal parenthood may appear surprisingly small.

Summing up, unlike the Registrar who enjoys very limited discretion and whose decisions in surrogacy cases are rather schematic, the court should go much deeper and should meticulously weigh all the arguments. Judicial reasoning ought to be adjusted to the facts of every case, which facts have to be carefully ascertained. When examining the child's situation, the help of social workers and expert psychologists should not be avoided. In effect, despite the availability of the *ordre public* clause, it is not precluded that the Polish court will allow transcription or – as the case may be – will dismiss the motion to annul the "surrogacy birth act."[21] Now, a crucial question arises, is it a mere recognition of a foreign document submitted for transcription or does it mean the official acknowledgment of the child's civil status created in SM procedures?

[20] Again, there may be some exceptions. In particular, transcription will not take place if the intending parents, one of whom is blood related to the child, are of the same sex.

[21] It is worth mentioning here a recent judgment of the Supreme Administrative Court of 29 August 2018, II OSK 2129/16, in which the transcription of a Hindu "surrogacy birth act" was allowed in Poland even though the mother of the child (who renounced her parental rights) was not named in the document. According to the court, the deciding factor – speaking in favor of transcription – was the welfare of the child principle.

8. Recognition of a document or recognition of civil status?

As explained before, the transcription of a foreign birth act into the Polish Register is not by itself equivalent to the recognition of legal relations described in the act. Still, if a given transcription is legitimized by the judgment of the administrative or civil court, the consequences seem to be more far-reaching. The fact that the intending parents are named as legal parents in the Polish Register should be seen as a confirmation that legal parenthood created by surrogacy is acknowledged in Poland. Thus, what is at stake in the court proceedings is the underlying family relationship and not only the birth act as such. It must be observed that the parental relationship is acknowledged here without the use of a traditional private international law method which requires that, in order to make legal evaluations, applicable law is first identified further to appropriate conflict rules. The approach described here resembles an alternative mechanism whereby legal facts and relations created and officially certified in the country of origin are granted automatic effectiveness in another country.[22] Indeed, with regard to the "surrogacy birth acts", once it is finally settled by the court that such an act (naming intending parents) can stay in the Polish Register, the practical effect is close to the material recognition of parenthood created by a surrogacy arrangement.[23] This somehow disturbing conclusion is, however, justified by the welfare of the child principle. In effect it means that no additional steps would have to be taken to affirm in Poland parental relations with regard to a surrogacy child, in particular no adoption by intending parents would be needed.

Interestingly, when the respective court judgment is negative for the intending parents, its significance is slightly different. Even if transcription is ultimately refused or if the Polish birth act, drawn up as a result of transcription, is annulled, the effects thereof are limited. The conclusion that the birth act in question cannot be integrated into the Polish registration system is not equivalent with a total rebuttal of the parent-child relationship between the persons concerned. Firstly, it has to be remembered that the Polish judgment cannot annul the original foreign act of civil

[22] Cf. M.A. Zachariasiewicz, [in:] *System Prawa Prywatnego*, Vol. 20A, *Prawo Prywatne Międzynarodowe*, ed. M. Pazdan, p. 86 ff; M. Lehmann, "Recognition as a Substitute for Conflict of Laws?", [in:] *General Principles of European Private International Law*, ed. S. Leible, Wolters Kluwer 2016, Chapter 2.

[23] Theoretically, motherhood could still be challenged in front of the civil law court on the grounds of applicable family law but it should be expected that the same arguments that spoke in favor of transcription will be used to block such a challenge.

status. Judicial decisions taken on the grounds of Art. 107 point 3 PASC or Art. 7 PPM are always a reflection of the local view on parenthood. They do not alter the situation under foreign law. Thus, the original birth act will still be honored in the country of origin and, perhaps, in other countries accepting surrogacy. Secondly, even in Poland, the legal link created abroad between interested persons must not be totally ignored. For example, the refusal to recognize the parent-child relationship would not mean that the child should be treated in Poland as parentless. Let us take an example of foreign surrogacy arrangements whereby two persons of the same sex are named as legal parents of the child. Despite the fact that the parenthood link will not be recognized in Poland, the intending parents, whose rights are authorized by a foreign birth act, should still be treated as the child's legal guardians (especially if the "family" is only temporary Poland).

The protective steps concerning the child may sometimes prove necessary but they are not directly linked with the parenthood issue. The Polish authorities (including courts) should react in all situations when the welfare of a child is in danger. Appropriate and proportional actions should then be taken. In extreme instances, they may include the removal of the child from the intending parents (cf. Art. 109 KRO). But such actions can equally concern children raised in families where parenthood is unquestionable under Polish law.

To sum up, the refusal to accommodate a "surrogacy birth act" into the Polish system of civil status registration is not conclusive with regard to particular right and duties of the intending parents. Although they will not be able to enjoy the same treatment as legal parents that acquired this status in accordance with Polish law, in some areas they can be treated as persons who are entitled to live with the child, care for it and to take important decisions concerning the child.

One can argue, of course, that in all cases in which the parenthood link is accepted it means a stamp of approval on surrogacy as such. It is true that the position of the courts which are asked to weigh public and private interests in this sensitive area is most uncomfortable. As the High Court of Justice observed when assessing one of the surrogacy cases (only altruistic surrogacy is allowed in England) "Parliament is clearly entitled to legislate against commercial surrogacy and is clearly entitled to expect that the courts should implement that policy considerations in its decisions. Yet, it is also recognized that as the full rigor of that policy consideration will bear on one wholly unequipped to comprehend it let alone deal with its consequences (i.e.

the child concerned) that rigor must be mitigated by an application of a consideration of that child's welfare. That approach is both humane and intellectually coherent."[24]

In the opinion of this author, if only one child was to unjustifiably suffer from an excessively restrictive policy concerning surrogacy it would be too high a price for defending public order. The argument that a lenient approach (even in isolated cases) may open the floodgates and may encourage the "surrogacy industry" is not persuasive. There are other ways of discouraging international surrogacy arrangements. First of all, the issue should be tackled on international level. In particular, if countries which allow SM procedures decided to exclude from them persons coming from other jurisdictions, the number of difficult trans-border cases would probably be smaller and the problem would generally be limited only to so called private surrogacy arrangements. These arrangements deserve a separate mention now.

9. Private surrogacy arrangements

It is conceivable that persons eager to be parents and experiencing difficulties in having a child in a natural way, may take recourse to private arrangements with women ready to carry a child for them. These arrangements are made outside the official legal scheme, without the blessing of the country of origin. They are usually completely secret and as such they can take place in any state, potentially also in Poland.

Once the child is born, the birth certificate issued in the country of origin will probably confirm motherhood of the gestational mother. Still, it is conceivable that the intending father (whether genetically related to the child or not) would try to acknowledge his paternity in order to be mentioned in the birth act as the other legal parent. If the surrogate mother agrees to surrender the child, cooperates in acknowledging paternity and gives her consent to the father's custody over the child, the intending father may eventually assume full factual control over the child and take it (legally) out the country of origin.

If the child is brought to Poland and the father applies for transcription of the birth act, the Registrar will probably have no reasons to object. Additionally, one can expect a fairly smooth exercise of parental responsibilities in Poland. According

[24] Cited after: M. Wells-Greco, *The status of children arising from inter-country surrogacy arrangements*, The Hague 2016, p. 7.

to Polish law, which will be applicable as the law of the child's habitual residence[25], most decisions concerning the child may be taken by one parent only (Art. 97 §1 KRO). It is true that the father's wife (or partner) will not have any rights toward the child but they can all live together and develop *de facto* family bonds. What is more, after some time the (intending) father might try to deprive the surrogate mother of parental rights proving that she abandoned the child (Art. 111 KRO).

It should be marked in passing that all the above steps can also be taken by a male homosexual couple. If the child is brought to Poland and if one of the partners is a legal father, the child can effectively be raised by persons staying in the same-sex relationship.

In case of a heterosexual marriage even further possibilities open. Once the parents' rights are taken away from the surrogate mother, the spouses can initiate adoption procedures in order to make the wife a legal mother. The positive outcome of such proceedings will mark a "happy ending" of the intending parents' attempts to have a child and to become legal parents. It is probable that they will be able to live a normal family life without ever disclosing the means used to attain this goal.

Indeed, the surrogacy plot is usually kept secret. The biggest chances to disclose it are probably in adoption proceedings (if they are initiated) when the situation of the child and the family is assessed. Still, it is difficult to say what steps should be taken upon such discovery. On the one hand, dismissing the adoption motion of the wife and taking away parent's rights from the husband may be seen as adequate sanctions for their getting involved in illegal SM procedures. But on the other hand, the welfare of the child must be properly respected. The strong need to have children, pushing the intending parents towards surrogacy, will often result in building a happy home. Thus, if the surrogacy plot is discovered after a long time, any radical steps taken against the adult culprits will definitely harm the child, too. A decisive answer as to the right course of action requires careful analysis of all the facts of the case. Yet, in the opinion of this author, the child's welfare should always remain a paramount consideration.

[25] See: Art. 17 of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children.

10. Conclusions

It is submitted that both official and private surrogacy arrangements are still an exceptional phenomenon in Poland. The lack of dedicated regulations in this respect is not surprising then. What is more, it appears that the existing general rules of Polish family law, private international law as well as the regulations of the Law on Civil Status Acts of 2014 are fairly sufficient to deal with the problem.

Every surrogacy case has its specificity. Behind each of them there is some "family story." The best way of dealing with these cases is through the use of general legal constructions such as the *ordre public* exception and the welfare of the child principle. They have sufficient flexibility and allow to take decisions well adapted to individual circumstances. Introducing special rules regarding surrogacy can bring about undesirable rigidity and can make it more difficult to arrive at the best solutions.

The need for regulation exists undoubtedly on the international level. At this moment, it does not seem feasible to ban surrogacy all over the world. The legislators who already took a sovereign decision allowing surrogacy may not be willing to easily give up this idea. Still, they should be encouraged to act responsibly, in particular limiting the extraterritorial effects of their internal regulations. In this author's view, international efforts should be focused on limiting the number of overseas surrogacy cases and on protecting children born in SM procedures from the uncertainty concerning the recognition of their civil status outside the state of origin.

CHAPTER V Protection of *ordre public* of forum in internal and cross-border situations

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Remarks about Judgement of *Bundesgerichtshof* of 20 March 2019 (XII ZB 530/17)

1. Introductory remarks

The problem discussed below in detail is focused on the recent German Judgement of Federal Court of Justice (*Bundesgerichtshof, BGH*) of 20th March 2019 (XII ZB 530/17)[1]. It is indirectly connected with the issue of protection of *legis fori* fundamental principles. This ruling results of court civil proceedings concerning the parentage relation of German spouses to their genetic child who was born in Ukraine by the surrogate mother. BGH in order to rule this case applied the German law on the basis of Artile 19 (1) EGBGB[2]. The sentence of the ruling stated that "the habitual residence of a child born abroad [here: in Ukraine] by a surrogate mother, who according to the agreement of all persons involved in surrogacy is legally brought to Germany as soon as possible after the birth, is in Germany. A previous habitual residence in the country of birth did not exist."[3] The decisive connecting factor in this case was the habitual residence of the new born child that led BGH to German

[1] Beschluss von Bundesgerichtshof vom 20. März 2019, XII ZB 530/17, http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&az=XII%20ZB%20530/17&nr=94770, access: 10.05.19, further: "BGH judgement of 20th March 2019".

[2] Einführungsgesetz zum Bürgerlichen Gesetzbuche, https://www.gesetze-im-internet.de/bgbeg/, access: 10.05.19, further: "EGBGB".

[3] "*Der gewöhnliche Aufenthalt eines im Ausland (hier: in der Ukraine) von einer Leihmutter geborenen Kindes, das entsprechend dem* übereinstimmenden *Willen aller an der Leihmutterschaft beteiligten Personen alsbald nach der Geburt rechtmäßig nach Deutschland verbracht wird, ist in Deutschland. Ein vorheriger gewöhnlicher Aufenthalt im Geburtsland bestand dann nicht.*" (Sentence in German language of BGH judgement of 20th March 2019).

law. According to German substantive law – § 1591 BGB[4] the mother is the woman who gave birth to a child – in this case surrogate mother and not the genetic mother[5]. This ruling is interesting to analyse in order to show how the BGH arrived at the application of German law that is the law of the court.

2. BGH Judgement of 20th March 2019

2.1. Description of factual state

Party 1 and 2 are spouses, both German citizens that live in Germany. In this case the egg cell of the wife (Party 2) was fertilized by the sperm of the husband (Party 1) and inserted in Ukrainian surrogate mother (who was not a Party in this case). Ukrainian surrogate mother gave birth to a child what took place in Kiev (Ukraine) in December 2015. Before the birth of the child the Party 1 recognized the paternity with the agreement of the surrogate mother in the German Embassy in Kiev. After the child was born the surrogate mother declared in front of the private notary in Kiev that the child was born with the help of the additional reproductive technologies by means of the surrogate motherhood and its genetic parents are Party 1 and 2.[6] On the basis of this statement the Registry Office in Ukraine registered Party 1 and 2 as parents of the child and issued the birth certificate which confirmed their parentage. Afterwards Party 1 and 2 came back with the child to Germany[7].

Party 1 and 2 filed in January 2016 the motion to record in Germany the foreign birth of the child on the basis of the Ukrainian birth certificate. Then Registry Office (*Standesamt*) which is Party 3 learned from the German Embassy in Kiev that the child was born by the surrogate mother. On the basis of the motion of Registry Office Supervision (*Standesamtsaufsicht*) which is Party 4 to the District Court in Dortmund (*Amtsgericht Dortmund*) the entry to German register of birth was amended and instead of the wife (Party 2) the surrogate mother was registered as the mother

[4] Bürgerliches Gesetzbuch, http://www.gesetze-im-internet.de/bgb/, access: 10.05.19, further: "BGB".

[5] See more about German law in the context of surrogate motherhood in: E. Przyśliwska-Urbanek, *Surrogate motherhood z perspektywy systemów prawnych Austrii, Niemiec i Szwajcarii*, in: *Fundamentalne problemy prawne surrogate motherhood. Perspektywa polska*, (in print) p. 149 and the following.

[6] See more about Ukrainian law in the context of surrogate motherhood in: A.A. Herts, *Surrogate motherhood in Ukraine: method of infertility treatment, judges' activism and doctrine*, p. 421 and the following.

[7] BGH judgement of 20th March 2019, p. 2–3.

of the child. Party 1 and 2 appealed from this judgement. The Court of Appeal in Hamm (*Oberlandesgericht Hamm*) on 26th September 2017 rejected the appeal (*Beschwerde)* of Party 1 and 2 and in this way confirmed the entry of the surrogate mother as the mother of the child in the German birth register. The proceeding in front of the Court of Appeal in Hamm (*Oberlandesgericht Hamm*) took place with the participation of the surrogate mother. Spouses (Party 1 and 2) disagreed with such ruling of the Court of Appeal in Hamm (*Oberlandesgericht Hamm*) and filed cassation (*Rechtsbeschwerden*) to German Federal Court of Justice (*Bundesgerichtshof, BGH)*. BGH rejected the cassation (*Rechtsbeschwerden*) and confirmed the ruling of the Court of Appeal in Hamm (*Oberlandesgericht Hamm*) that the first entry to the German birth register was incorrect because the surrogate mother is a mother of the child in this case[8].

2.2. Justification of judgement

In general, the reasoning of BGH was the following. In this case BGH applied the conflict rule expressed in Article 19 section 1 EGBGB which led to the Geman law. And according to German material law- § 1591 BGB the mother of the child is the woman who gave birth to the child[9]. Application of Geman law, i.e. § 1591 BGB, caused that the surrogate mother is the mother of the child and she should be inscribed in the birth register as the mother and not the wife (Party 2)[10]. BGH arrived at the application of the German law in this ruling mainly on the basis of the interpretation of the notion of habitual residence of the child which is the connecting factor used in Art. 19 section 1 sentence 1 EGBGB. The provision Article 19 section 1 EGBGB has the following content :"The descent of a child is governed by the law of the country in which the child has its habitual residence. It may also be determined in relation to each parent by the law of the state to which that parent belongs. If the mother is married, her parentage may also be determined by the law governing the general effects of her marriage at birth as referred to in Article 14 (2); if the marriage was previously dissolved by death, then the time of dissolution is decisive."[11]

[8] BGH judgement of 20th March 2019, p. 3.

[9] § 1591 BGB in German language: "*Mutter eines Kindes ist die Frau, die es geboren hat.*"

[10] BGH judgement of 20th March 2019, p. 3.

[11] Art 19(1) EGBGB in German language: *"Die Abstammung eines Kindes unterliegt dem Recht des Staates, in dem das Kind seinen gewöhnlichen Aufenthalt hat. Sie kann im Verhältnis zu jedem*

Before the analysis of Article 19 section 1 EGBGB the German Federal Court of Justice (*Bundesgerichtshof)* concluded that the recognition of the Ukrainian birth certificate is not possible as this is not the judgement capable to be recognized (*anerkennungsfähige Entscheidung)* according to Art. 108 FamFG[12]. The German doctrine considers Ukrainian birth certificates and the entry to Ukrainian birth register as having only declaratory effect and therefore they are not recognized in Germany[13]. This problem is broader discussed below (see point 3).

Therefore the German Federal Court of Justice (*Bundesgerichtshof)* had to decide about the parentage of the child irrespective of the entry to the Ukrainian birth register. As it was already mentioned above the conflict of law rule applied in this case is Art. 19 section 1 EGBGB. This provision indicates the applicable law concerning the descent (parentage, *Abstammung*) of the child. This law may change in time when it depends on the habitual residence of the child (also other two connecting factors are used in Art. 19 section 1 EGBGB)[14].

The court refers also to Ukrainian conflict of law rules but there is no particular provision concerning the descent of the child. This problem is regulated in Ukrainian law by the personal status of the child and the applicable law which regulates it is indicated by the connecting factor of the nationality of the child. If the child has two nationalities than the applicable law is the law of the country with which the person is most closely connected, i.e. has its habitual residence. According to BGH in this case the child has Geman nationality because the father (Party 1) recognized the paternity and additionally the child is most closely connected to Germany[15].

On the basis of German conflict of law rules – Art. 19 section 1 sentence 1 EGBGB -the Ukrainian law would be applicable in this case, only if the child had the habitual residence in Ukraine at the moment of birth[16]. However the German Federal

Elternteil auch nach dem Recht des Staates bestimmt werden, dem dieser Elternteil angehört. Ist die Mutter verheiratet, so kann die Abstammung ferner nach dem Recht bestimmt werden, dem die allgemeinen Wirkungen ihrer Ehe bei der Geburt nach Artikel 14 Absatz 2 unterliegen; ist die Ehe vorher durch Tod aufgelöst worden, so ist der Zeitpunkt der Auflösung maßgebend."

[12] Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit, https://www.gesetze-im-internet.de/famfg/, access: 10.05.19, further: "FamFG".

[13] See, BGH judgement of 10th December 2014 , Az. XII ZB 463/13; E. Przyśliwska-Urbanek, *Macierzyństwo zastępcze z perspektywy prawa Niemiec*, Instytut Wymiaru Sprawiedliwości, Warszawa 2017, p. 8–9, https://iws.gov.pl/wp-content/uploads/2018/08/IWS-Przy%C5%9Bliwska-Urbanek-E.-Macierzy%C5%84stwo-zast%C4%99pcze-z-perspektywy-prawa-Niemiec.pdf, access: 10.05.19.

[14] BGH judgement of 20th March 2019, p. 4.

[15] BGH judgement of 20th March 2019, p. 4–5.

[16] BGH judgement of 20th March 2019, p. 5.

Court of Justice (*Bundesgerichtshof)* stated that "(…) foreign residence, planned in advance only for a limited period of time, does not constitute a habitual residence in the country of the birth. All the persons involved in the surrogacy had in advance agreed that the Parties 1 and 2 would leave for Germany with the child as soon as possible and live there at the domicile of the Parties 1 and 2".[17] This resoning led BGH to conclusion that in this case the child had no habitual residence in Ukraine. Additionally BGH mentiones that only on the basis of application of German law the child has the mother for sure and therefore also the principle of favour test (*Gunstigkeitsprüfung*) indicates German law[18].

3. Meaning of entry into Ukrainian register

According to the BGH judgement of 20th March 2019 and the judgement of the Court of Appeal in Hamm (*Oberlandesgericht Hamm*) the correction of the entry to Greman birth register does not have to be preceded by the recognition of entry to Ukrainian birth register. Because the certificate issued by the Ukrainian birth register is not the judgement that can be recognized according to §108 sec. 1 FamFG[19].

The German doctrine classifies the documents from the Ukrainian register as having only the declaratory effect because they are based only on the will of the parties concerning person who is indicated as parent in the birth certificate[20]. Therefore such documents are not treated as the judgement capable to be recognized (*anerkennungsfähige Entscheidung)* according to § 108 FamFG[21]. Instead of being recognized such documents may have effect but from the point of view of conflict

[17] *"(…) dessen von vornherein nur zeitlich beschränkt geplanter Auslandsaufenthalt keinen gewöhnlichen Aufent-halt in dem Land seiner Geburt begründe. Bei sämtlichen an der Leihmutter-schaft beteiligten Personen habe von vornherein der* übereinstimmende *Wille bestanden, dass die Beteiligten zu 1 und 2 mit dem Kind zeitnah nach Deutsch-land ausreisen und dort am Wohnsitz der Beteiligten zu 1 und 2 leben würden." (*BGH judgement of 20th March 2019, p. 5.)

[18] BGH judgement of 20th March 2019, p. 5.

[19] BGH judgement of 20th March 2019, p. 5–6; BGH judgement of 10th December 2014 , Az. XII ZB 463/13; BGH judgement of 20th March 2019, Az. XII ZB 320/17; E. Przyśliwska-Urbanek, *Macierzyństwo*…, p. 8–9; See about the recognition C. Thomale, *Mietmutterschaft,* Tübingen 2015, p. 41 and the following.

[20] See, E. Przyśliwska-Urbanek, *Macierzyństwo*…, p. 8–9.

[21] See, A. Diel, *Leihmutterschaft und Reproduktionstourismus*, Frankfurt am Main 2014, p. 155–156, BGH judgement of 10th December 2014 , Az. XII ZB 463/13; BGH judgement of 20th March 2019, Az. XII ZB 320/17.

of law rules and not the rules of international civil procedure[22]. Such classification of Ukrainian birth certificate as having only declaratory and not constitutive effect should be welcomed. But it should be underlined that it concerns the case (i.e. Ukrainian certificate of birth register) in which the entry to birth register was based only on the will of the parties and the registration office had no authority to check, if the entry is true or false. Therefore the nature of the documents from abroad should be taken into account when the decision is made in each particular case.

4. Application of German law on the basis of habitual residence of the child

4.1. Introductory remarks

As the recognition of certificate from the Ukrainian birth register was excluded, the German Federal Court of Justice (*Bundesgerichtshof)* had to answer the question of the parentage of the child. In order to do it the court had to decide first which law is applicable in this case. The court used German conflict of law rules in order to indicate the applicable law as each court indicates the applicable law on the basis of its conflict of law rules.

The German Federal Court of Justice (*Bundesgerichtshof)* analyses Art. 19 section 1 EGBGB. All connecting factores mentioned in this provision, i.e. (1) habitual residence of the child (Art. 19 sec. 1 sentence 1 EGBGB), (2) national law of parents (Art. 19 sec. 1 sentence 2 EGBGB) and (3) law of marriage effects (Art. 19 section 3 sentence 1 EGBGB) have the equivalent position[23].

According to BGH in this case connectiong factor 2 and 3, that is national law of parents (Art. 19 sec. 1 sentence 2 EGBGB) and law of marriage effects (Art. 19 section 3 sentence 1 EGBGB) lead to German law and only connecting factor 1 – habitual residence of the child may lead also to Ukrainian law[24]. However BGH forgets while analysing the national law of parents (Art. 19 sec. 1 sentence 2 EGBGB) about the parentage of surrogate mother[25]. BGH only states that "The national statute of the parents and the marriage effects statute undoubtedly lead to the applicability of German

[22] See more, E. Przyśliwska-Urbanek, *Macierzyństwo*…, p. 9.

[23] BGH judgement of 20th March 2019, p. 6; BGH judgement of 3rd August 2016, Az. XII ZB 111/16; K. Duden, *Leihmutterschaft im Internationalen Privat- und Verfahrensrecht,* Tübingen 2015, p. 30–32.

[24] BGH judgement of 20th March 2019, p. 7.

[25] About the notion of parent (*Elternteil)* see K. Duden, *Leihmutterschaft..,* p. 68.

law in the present case with regard to a legal parenthood of the parties to 1 and 2."[26] BGH does not mention in this part that the potential parent is in this case surrogate mother whose national statute leads to Ukrainian law which excludes her from beeing the mother of the child. Also German law which applies to wife (Party 2) excludes her from being a mother. Therefor the application of this connecting factor in this case would lead to situation that the child has no mother at all. However in another part of judgement (p. 5, 8) BGH mentiones that only the application of German law guarantees that the child has the mother[27] and that in this case the applicable law have different solutions concerning the parentage of the child[28].

4.2. Notion of "habitual residence of the child"

BGH analyses in a very detailed way the notion of habitual residence of the child according to Art. 19 sec. 1 sentence 1 EGBGB[29]. According to this definition it should be the life center (*Daseinsmittelpunkt*) of the person[30]. In order to find such place the factual circumstances should be analysed as well as the time of the stay and if the person is the new born child the habitual residence of people who take care of the child as well as the social and family background are important factors[31]. Only temporary stay in the country does not constitute the habitual residence[32]. BGH analyses three situations of the habitual residence: (1) when the child has the habitual residence of its parents; (2) the child has the habitual residence of another care person and (3) the child has exceptionally its own life center[33].

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[26] *„Das Heimatstatut der Eltern und das Ehewirkungsstatut führen in der vorliegenden Fallkonstellation im Hinblick auf eine gesetzliche Elternschaft der Beteiligten zu 1 und 2 unzweifelhaft zur Anwendbarkeit des deutschen Rechts."* (In German language BGH judgement of 20th March 2019, p. 7.)

[27] BGH judgement of 20th March 2019, p. 5.

[28] BGH judgement of 20th March 2019, p. 8.

[29] BGH judgement of 20th March 2019, p. 7 and the following.

[30] BGH judgement of 20th March 2019, p. 7.

[31] BGH judgement of 20th March 2019, p. 7, ECJ 22 December 2010, Case C-497/10 PPU, Barbara Mercredi v Richard Chaffe, ECLI:EU:C:2010:829, further: "Case Mercredi", n. 53; ECJ 28 June 2018, Case C-512/17, ECLI: ECLI:EU:C:2018:513, n. 41, 42, further: "Case C-512/17".

[32] BGH judgement of 20th March 2019, p. 7, Case Mercredi, n. 51; Additionally in order to estimate the place of habitual residence it is necessary that the person is physically present in that country see ECJ 17 October 2018, Case C-393/18 PPU, ECLI:EU:C:2018:835, n. 52.

[33] BGH judgement of 20th March 2019, p. 8.

In this case the BGH and the Court of Appeal in Hamm (*Oberlandesgericht Hamm*) state on the basis of abovementioned definition of habitual residence that the habitual residence of the child is in Gemany[34]. The court underlines that it complies with agreed from the beginning intention of all parties involved in surrogacy that the child was to arrive as soon as possible to Germany with Parties 1 and 2 and to remain permanently there after birth.[35] Additionally for the Court it is important that Party 1 is the father of the child according to German and Ukrainian law. On the basis of German law (§ 4 sec. 1 StAG[36]) the fatherhood of Party 1 gives the child German nationality and the legal stay in this country[37].

4.3. Evaluation of interpretation of the concept of "habitual residence of the child"

The BGH and The Court of Appeal in Hamm (*Oberlandesgericht Hamm*) also concluded that there is no assignment of parentage of Party 2 according to Ukrainian law that could be respected in Germany. BGH states that until now there was no BGH ruling concerning the changeability of connecting factor and the influence of lawful assignment of parentage in one country on the situation in another country[38]. BGH decided in various cases on the possibility of continued existence of vested rights[39]. However in this case this question may remain open as the motherhood of Party 2 was not granted by Ukrainian law.

The application of Ukrainian law in order to decide about the descent of the child would be possible only on the basis of connecting factor of habitual residence of the child (Art. 19 sec. 1 sentence 1 EGBGB). However in this case in opinion of the court – on the basis of the factual situation (according to intention of all involved people the child came after the birth as soon as possible with Party 1 and 2 to Germany in order to stay there permanently)- there is no habitual residence of the

[34] BGH judgement of 20th March 2019, p. 8.

[35] BGH judgement of 20th March 2019, p. 8–9; Compare in relevance to the intention of the parent of settling in the state: Case C-512/17, n. 46, 62, 63, 66.

[36] Staatsangehörigkeitsgesetz, https://www.gesetze-im-internet.de/stag/BJNR005830913.html, access: 10.05.19, further "StAG".

[37] BGH judgement of 20th March 2019, p. 9.

[38] BGH judgement of 20th March 2019, p. 9.

[39] See examples in BGH judgement of 20th March 2019, p. 9.

child in Ukraine at any point of time[40]. In Ukraine the child only stayed for a short, temporary time and has no habitual residence there. In opinion of the court in this case the child has no habitual residence in Ukraine although in this country is the habitual residence of the woman who gave birth to this child[41].

In this case the alternative connecting factors lead to German (Art. 19 sec. 1 sentence 1 EGBGB) and Ukrainian (Art. 19 section 1 sentence 2 EGBGB) law. However only German law creates parentage relation between the child and parent what is the sense of Art. 19 sec. 1 EGBGB[42]. Additionally, German law is the law that creates fatherhood and therefore should be used also to decide about motherhood. Therefore the Party 2 may achieve the aim of being a mother from the legal point of view according to the adoption proceeding[43].

The BGH arrived at the application of German law mainly by the interpretation of the notion of habitual residence of the child. The court found no habitual residence of the child on the territory of Ukraine although there was the habitual residence of the surrogate mother and the child was born there and stayed there for a period of time after the birth until all formalities concerning parentage have been arranged by the genetic parents. Instead BGH stated that the habitual residence of the child is in Germany because according to the agreement of all persons involved in surrogacy the child was legally brought to Germany as soon as possible after birth in order to stay there permanently[44]. Such interpretation of the habitual residence causes that the applicable law is German law and that the mother inscribed in birth register is surrogate mother and not the woman inscribed in Ukrainian birth register as a mother for the same child. Therefore the same child has the different parents according to German and Ukrainian birth register. Despite such inconvenient effect interpretation of the notion of habitual residence of BGH in this case is to be welcomed. It is important to find the center of life of the child and in this case Germany is such country on the basis of the factual situation (place of habitual residence of the people who take care of the child – among others the father of the child, intention of all parties that the child stays in Germany permanently, legal arrival of the child to Germany as soon as possible after birth and following this the legal stay of the child in this country). The stay in the Ukraine in this case is similar to being

[40] BGH judgement of 20th March 2019, p. 10.
[41] BGH judgement of 20th March 2019, p. 10.
[42] BGH judgement of 20th March 2019, p. 11.
[43] BGH judgement of 20th March 2019, p. 12.
[44] See K. Duden, *Leihmutterschaft…*, p. 97, A. Diel, *Leihmutterschaft..*, p. 190.

temporary in one country (like on holidays) which creates no habitual residence. Such interpretation is also in line with the ECJ judgements[45].

5. Final remarks

Summarizing, taking into consideration the private international law (i.e. conflict of law rules and rules of international civil procedure) the BGH judgement of 20th March 2019 can be evaluated as correct. First of all, it should be welcomed that the documents which have only declaratory effect like certificate from Ukrainian birth register should not be recognized. Secondly, the interpretation of the notion of the habitual residence of the new born child by BGH in this case seems to be correct and coherent with the judgements of ECJ concerning this problem. Only the outcome of the case which leads to the situation that the child has different mother inscribed in German and Ukrainian register may cause potentential inconvenience. As the last remark it is to point out that such interpretation of the habitual residence which leads to the law of the court, has in practice the same function as public order clause[46].

[45] E.g.: Case Mercredi, n. 56, 57; Case C-512/17,n. 41, 42, 66.

[46] See about public order clause C. Thomale, *Mietmutterschaft…*, p. 26 and the following.

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Selected issues of civil proceedings concerning personal and financial aspects of surrogate motherhood

Introduction

The Institution of surrogate motherhood has been regulated by the Polish legislator indirectly, not only on the grounds of broadly understood substantive civil law – including family law primarily – but also with regard to procedural civil law. This state of affairs can be regarded as a simple consequence of the principle contained in Art. 61^9 of the Family and Guardianship Code[1], according to which the mother of the child is the woman who gave birth (and therefore it is the biological mother[2]). There is no doubt that the above regulation is the basic principle of the Polish legal order, and its introduction by the Polish legislator was a fully conscious and deliberate act. In the justification of the bill[3] of 6 November 2008 amending the Act – the Family and Guardianship Code and certain other acts[4] attention was drawn to the fact that the consequence of the development of modern medicine was the emergence of an institution of surrogate motherhood. In this state of affairs – in order

[1] Act of 25 February 1964 – the Family and Guardianship Code (uniform text Journal of Laws of 2017, item 682, as amended), hereinafter referred to as: FGC.

[2] The literature distinguishes three types of mothers: genetic (i.e. the one that is the donor of an egg cell), biological (the one that gives birth to a child) and sociological (the one that raises a child). More on this subject, cf. J. Holocher, M. Soniewicka, "'Dziecko z umowy': Problem dyskrecjonalności sędziowskiej w kontekście umowy o zastępcze macierzyństwo", [in:] *Dyskrecjonalność w prawie. Materiały XVIII Ogólnopolskiego Zjazdu Katedr Teorii i Filozofii Prawa* (Miedzeszyn near Warsaw, 22–24 September 2018), eds. W. Staśkiewicz, T. Stawecki, Warszawa 2010, p. 383.

[3] Sejm paper No. 888 (Sejm of 6th term).

[4] Journal of Laws of 2008, No. 220, item 1431.

to avoid a dispute over who is the mother of a child – the Polish legislator decided unequivocally that motherhood is based on the fact of childbirth. In this way, the legislator gave the rank of a legal norm to the position previously fixed in the case-law and widely accepted in practice. Therefore, it was unnecessary to separate and regulate the institution of surrogate motherhood.

The principle of biological motherhood is directly reflected in the registration of civil status. The only proof of the birth of a child by a specific person is the birth certificate, which is one of the civil status records (next to the marriage certificate and the death certificate). In the register of civil status, the woman who gave birth to a child always appears as the mother of this child. It should be remembered that civil status records are the sole proof of events identified in them. This means that their inconsistency with the truth can only be proven in court proceedings (Art. 3 of the Act of 28 November 2014 – Law on Civil Status Records[5]).

The unambiguous adoption by the Polish legislator (as by many other countries) of the principle of biological motherhood deserves a positive evaluation. However, it does not automatically eliminate all problems related to surrogate motherhood. The reason for this is the fact that the vast majority of surrogacy arrangements are concluded for profit (against payment) and there is an international (cross-border) element in them. In addition, even on the grounds of the position on the invalidity of surrogacy arrangements, it is possible to formulate and pursue certain claims related to the conclusion of such arrangements.

Before referring to matters concerning the institution of civil procedure and types of cases related to surrogate motherhood, the position regarding the legal character of the surrogacy arrangement and its validity should be considered. Remarks made in this respect on the basis of Polish law will, in principle, also be valid in relation to those legal orders in which the conclusion of a surrogacy arrangement is unacceptable.

The surrogacy arrangement is of special character as it has effects within the personal and family law. The essence of this arrangement is the commitment of a woman (the surrogate mother) to get pregnant for the intending parents and to hand them over the baby after birth and transfer the status of motherhood (parenthood) to them.[6] However, the other party to the arrangement (intending parents)

[5] Uniform text Journal of Laws of 2016, item 2064, as amended, hereinafter referred to as: LCSR.

[6] J. Holocher, M. Soniewicka, "Analiza prawna umowy o zastępcze macierzyństwo", *Prawo i Medycyna*, 2009, No. 3, p. 46; cf. also: M. Fras, A. Błażewicz, "Reżim prawny macierzyństwa zastępczego na tle porównawczym", *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*,

usually agrees to pay a certain amount of money (or alternatively to fulfil another performance) and to take the child. It also obtains the legal status of a child's parent. The arrangement may also be free of charge and contain additional provisions (e.g. regarding appropriate behaviour of a surrogate mother during pregnancy).[7] It should be agreed that the purpose of such an arrangement is not to give birth to a child "at all", but to give birth to a child "for someone", and its subject is a specific maternity service related to the transfer of civil status (and in particular the origin of a child).[8]

On the basis of Polish law, the view of the invalidity of surrogacy arrangement is generally accepted. In the absence of legal regulations concerning directly the institution of surrogate motherhood, the position of J. Ignatowicz should be shared, according to which the civil status of a human being, shaped on the basis of events strictly defined by the legislator, cannot be changed by way of a legal action.[9] On the basis of family law, the principle of freedom of contract does not apply, but such principles as: the principle of best interest of the child, the principle of best interest of the family and the principle of reliability and stability of civil status apply.[10] As a consequence, the surrogacy arrangement should be regarded as invalid on the basis of Art. 58 § 1 and § 2 of the Civil Code[11], i.e., both due to the inconsistency with the law and with the principles of social coexistence, such as the principle of unambiguous and clear family relationships and the principle of the best interest of the child.[12] Due to the invalidity of such an arrangement, two most important issues appear which will be analyzed in this study. The first of these is the issue of changes of entries in documents confirming the civil status of a child born by a surrogate mother (in particular in a situation where such entries were made on the basis of documents stating an event inconsistent with the actual state). The second issue is the matter of settlements between the parties related to the conclusion of

Vol. VI, A.D. MMVIII, pp. 35 – 36; M. Fras, A. Błażewicz, "Umowa o macierzyństwo zastępcze i jej dopuszczalność na tle prawa polskiego", *Rodzina i Prawo*, 2008, No. 9–10, p. 95 et seq.; M. Wałachowska, "Macierzyństwo zastępcze w systemie *common law*", *Państwo i Prawo*, 2003, No. 8, p. 97.

[7] J. Holocher, M. Soniewicka, "Analiza prawna umowy o zastępcze macierzyństwo", *Prawo i Medycyna*, 2009, No. 3, p. 46.

[8] Ibidem, p. 47.

[9] J. Ignatowicz, "Stan cywilny i jego ochrona", *Annales UMCS*, Vol. X, Lublin 1963, p. 149.

[10] Cf. J. Holocher, M. Soniewicka, "'Dziecko z umowy": Problem dyskrecjonalności sędziowskiej…", pp. 385–386.

[11] Act of 23 April 1964 – the Civil Code (uniform text Journal of Laws of 2018, item 1025, as amended), hereinafter referred to as: CC.

[12] J. Holocher, M. Soniewicka, "Analiza prawna umowy…", pp. 57–58.

an invalid surrogacy arrangement (in particular the problem of reimbursement of paid remuneration).

The subject matter of this study is very extensive and complex. Therefore, it is necessary to make some initial assumptions before its analysis and indicate the order in which particular problems will be discussed.

In the first place, issues related to the law applicable to the child's origin (in particular motherhood) will be briefly presented, as well as basic rules of national jurisdiction and rules on the basis of which judgments of courts of foreign states or decisions of other authorities of foreign states in personal and family matters are becoming effective in Poland. Due to the position accepted in most countries (including Poland) on the inadmissibility of surrogacy arrangements, the regulations excluding the possibility of recognizing judgments of courts of foreign states issued in countries where the law allows such arrangements or the possibility of recognizing foreign registration of civil status are of fundamental importance. In order to anticipate further considerations, attention should be paid here to the issue of the fundamental principles of the legal order functioning in a given country and setting the acceptable limits for the application of foreign law or the recognition of foreign registration of civil status.

The main subject of the analysis will be civil proceedings related to foreign procedures regarding the registration of civil status, and in particular the issue of the treatment of foreign official documents confirming civil status and questioning the temporary status on their basis. It should be remembered that full recognition of the effects of foreign procedures in the given legal system, i.e. the application of foreign law or the recognition of foreign registration of civil status, has the same effects as the direct introduction of the institution of surrogate motherhood in the provisions of substantive law. In Polish law, possible irregularities committed at the registration of civil status based on foreign documents may be removed in cases for rectification, supplementation, annulment and determination of the contents of the civil status record pending before a court in non-litigious proceedings (Art. 35–40 of LCSR).

A direct relationship with a surrogacy arrangement – regardless of whether it was concluded abroad or in Poland – has the issue of civil proceedings in matters concerning the determination and denial of maternity and the denial of paternity. Those issues are recognized in separate legal proceedings on matters resulting

from relationship between parents and children (Art. 453–458 of the Code of Civil Procedure[13]).

Subsequently, the most important legal and non-litigious proceedings, which may be applied as a consequence of the conclusion of a surrogacy arrangement (on the basis of the adopted position on its invalidity) will be presented (or rather signalled) on the example of regulations applicable in Poland.

Finally, the last category, which will be discussed below, are proceedings aimed at restitution of performances and contractual and non-contractual settlements between intending parents, intermediary or organizer, and surrogate mother. These proceedings will be discussed on the example of Polish regulations regarding the institution of unjust enrichment, which are similar to the solutions functioning in other European countries.

It should be noted here that some of the issues mentioned above will be discussed in a general way or only signalled. This is intentional both due to the extensiveness of the problem and due to the fact that a part of this problem has already been discussed in detail in available scholarship.

1. National jurisdiction and recognition of judgments of courts of foreign states or decisions of other authorities of foreign states in personal and family matters

At present, there is no multilateral international legal instrument on surrogate motherhood. Despite the work conducted in this regard by the Hague Conference on Private International Law (HCCH) and the Committee on Social Affairs, Health and Sustainable Development of the Parliamentary Assembly of the Council of Europe, no agreement has been reached on the most important issues regarding surrogacy.[14] Therefore, in each particular case, it should be assessed what law will apply to particular issues related to the conclusion of a cross-border surrogacy arrangement. The first issue to be decided is to determine the origin of a child born in connection with the conclusion of a surrogacy arrangement. The rule is that indi-

[13] Act of 17 November 1964 – the Code of Civil Procedure (uniform text Journal of Laws of 2012, item 1360, as amended), hereinafter referred to as: CCP.

[14] Cf. report "Children's rights related to surrogacy" prepared by P. De Sutter within the Committee on Social Affairs, Health and Sustainable Development; http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=23015&lang=en (last accessed: 24 September 2018).

vidual countries have provisions that provide for the application of their own law to persons who are nationals of these countries, or have their place of residence or permanent residence in these countries. Therefore, in Poland, the issue of the child's origin should be assessed on the basis of Polish law, as the national law (*lex patriae*) of the child at the time of his or her birth. This results from Art. 55 of the Act of 4 February 2011 – Private International Law.[15] This article specifies the law applicable to the problem of filiation (kinship), i.e., the origin of the child, the relationship of maternity and paternity, and thus the civil status component.[16] On the other hand, it does not determine the law applicable to the consequences of the relationship of maternity and paternity. Other issues in the field of relations between parents and children – i.e. issues of child adoption and parental authority and contacts with the child and the maintenance obligation are subject to separate conflict-of-law rules.[17] It should be noted that the origin of the child (maternity or paternity) will be essentially a preliminary issue in matters of parental authority and contact with the child and in matters of parents' obligation to provide child support.[18]

The issue of domestic jurisdiction in cross-border cases regarding claims related to the conclusion of a surrogacy arrangement – both under the legal systems that allow the conclusion of such an arrangement as well as those, which consider it invalid – is governed by internal regulations in force in individual countries. In particular, in European Union countries, the provisions of Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast version)[19] will not apply to matters related to the pursuit

[15] Uniform text Journal of Laws of 2015, item 1792.

[16] P. Mostowik, "Komentarz do art. 55 ustawy – Prawo prywatne międzynarodowe, teza 1", [in:] *Prawo prywatne międzynarodowe. Komentarz*, ed. J. Poczobut, Warszawa 2017 (System Informacji Prawnej LEX).

[17] These are respectively: Art. 57–58 of the Private International Law Act, Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption – drafted at The Hague on 20 May 1993 (Journal of Laws of 2000, No. 39, item 448, with corrigendum), Art. 15–22 of the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children – drafted at The Hague on 19 October 1996, (Journal of Laws of 2010, No. 172, item 1158) and Protocol on the law applicable to maintenance obligations (OJ L 331, p. 19 et seq. of 16 December 2009).

[18] P. Mostowik, "Komentarz do art. 55 ustawy – Prawo prywatne międzynarodowe, teza 5", [in:] *Prawo prywatne międzynarodowe. Komentarz*, ed. J. Poczobut, Warszawa 2017 (System Informacji Prawnej LEX).

[19] OJ L 351, p. 1 et seq. of 20 December 2012, as amended.

of claims from valid or invalid surrogacy arrangements. Such a conclusion should be formulated when analyzing the content of Art. 1(2)(a) of the above Regulation, which excludes its application in cases concerning civil status or legal capacity of natural persons. In order to ensure, as far as possible, that the rights and obligations which derive from the Regulation for the Member States and the persons concerned are equal and uniform, the concept of "the status or legal capacity of natural persons" must be given an autonomous interpretation.[20] This means that this act is not applicable to matters relating to personal law (e.g. for incapacitation, declaration of death, declared death *in absentia*), matters relating to the origin of a child and the annulment of child's acknowledgment or matters regarding the adoption of a child or declaration of child's majority, as well as in cases of marriage annulment, separation or divorce, matters concerning citizenship or place of residence, relations between parents and children, matters relating to care, guardianship, adoption.[21] It should be noted here that the provisions of the Regulation will not apply to both for-profit and altruistic surrogacy arrangements, because the subject of these arrangements is a specific maternity service related to the transfer of civil status.

Under Polish law, the issue of domestic jurisdiction in matters arising from the conclusion of an invalid surrogacy arrangement is regulated in Art. 1103 of CCP, Art. 1103^2 of CCP, Art. 1103^3 of CCP and Art. 1103^7 of CCP (in relation to cases recognized in the trial) and in Art. 1106^3 of CCP and Art. 1106^4 of CCP (in respect to cases recognized in non-litigious proceedings). According to the general rule contained in Art. 1103 of CCP, cases recognized in the trial (including cases for claims arising from an invalid surrogacy arrangement) belong to national jurisdiction if the defendant has a place of residence, place of habitual residence or main office in the Republic of Poland. Cases recognized in the trial from relations between parents and children also belong to national jurisdiction if: 1) the child, adoptee or adopter have a place of residence or place of habitual residence in the Republic of Poland; or 2) the plaintiff, unless it is the child, has a place of residence or place of habitual residence in the Republic of Poland for at least one year immediately prior to the institution of proceedings; or 3) the plaintiff, unless it is the child, is a citizen of

[20] Judgment of the EU Court of Justice of 3 October 2013 in case C-386/12 Schneider, point 19.

[21] J. Zatorska, Komentarz do rozporządzenia nr 1215/2012 w sprawie jurysdykcji i uznawania orzeczeń sądowych oraz ich wykonywania w sprawach cywilnych i handlowych, System Informacji Prawnej LEX 2015; A. Adamek, A. Frań-Adamek, Komentarz do rozporządzenia Rady (WE) nr 44/2001 w sprawie jurysdykcji i uznawania orzeczeń sądowych oraz ich wykonywania w sprawach cywilnych i handlowych, System Informacji Prawnej LEX 2004.

Poland and has a place of residence or place of habitual residence in the Republic of Poland for at least six months immediately prior to the institution of proceedings; or 4) the plaintiff and the defendant are citizens of Poland (Art. 1103^2 § 1 of CCP). As a rule, national jurisdiction in the analyzed cases is optional. However, in regards to matters referred to in Art. 1103^2 § 1 of CCP national jurisdiction is exclusive if all persons appearing as parties are Polish citizens and have a place of residence and place of habitual residence in the Republic of Poland (Art. 1103^2 § 2 of CCP). In addition, in relation to claims arising in connection with the conclusion of invalid surrogacy arrangements, Art. 1103^7 point 2 of CCP will be applied, according to which cases other than those listed in Art. 1103^1–1103^6 of CCP belong to the national jurisdiction also when they concern a liability not resulting from a legal transaction that arose in the Republic of Poland (in particular liabilities resulting from unjust enrichment of the intending parents or intermediaries and entities organizing surrogate motherhood).[22] In a situation of adopting a position in which some of the provisions of surrogacy arrangement were acceptable under Polish law[23], Art. 1103^7 point 1 of CCP would apply, which states that the national jurisdiction also includes matters relating to the obligation arising from a legal transaction that has been, is to be or was supposed to be carried out in the Republic of Poland.

On the other hand, matters considering the relations between parents and children, recognized in non-litigious proceedings, belong to national jurisdiction if: 1) the child concerned has a place of residence or place of habitual residence in the Republic of Poland, or 2) the applicant and the child concerned are Polish citizens (Art. 1106^3 of CCP). In addition, domestic jurisdiction includes adoption cases if the person to be adopted is a Polish citizen or, being a foreigner, has a place of residence or place of habitual residence in the Republic of Poland (Art. 1106^4 § 1

[22] The Polish court, when assessing the existence of national jurisdiction on the basis of a link to the place of performance of an obligation, should take into account the content of the relevant foreign substantive law and, on its basis, qualify the concept of place of performance of an obligation (decision of the Supreme Court of 5 January 2001, I CKN 1180/00, OSNC 2001, No. 7–8, item 112, decision of the Supreme Court of 19 June 2007, III CSK 444/06, LEX No. 347315). Pursuant to Polish law, the place of performance of an obligation – in the absence of a designation in the legal action and if it does not result from the characteristics of the obligation – is determined in accordance with the rules laid down in Art. 454 of CC. (M.P. Wójcik, "Komentarz do art.1103^7 k.p.c. – teza 2 i 3", [in:] *Kodeks postępowania cywilnego. Komentarz aktualizowany. Vol. II. Art. 730–1217*, ed. A. Jakubecki, System Informacji Prawnej LEX 2018).

[23] Such a possibility is pointed out by J. Holocher and M. Soniewicka (cf. J. Holocher and M. Soniewicka, "Analiza prawna umowy…", pp. 53–54), however, the authors opt against the adoption of such a concept.

of CCP). Such matters also belong to the national jurisdiction if the adopter is a Polish citizen and has a place of residence or habitual residence in the Republic of Poland. In the event of joint adoption by the spouses, it is sufficient that one of the spouses is a Polish citizen and has a place of residence or place of habitual residence in the Republic of Poland (Art. 1106^4 § 2 of CCP). For matters concerning the adoption, national jurisdiction is exclusive if the adopter, and in the case of joint adoption – each of the adopting spouses, and the person to be adopted, are Polish citizens who have a place of residence and place of habitual residence in the Republic of Poland (Art. 1106^4 § 3 of CCP). The national jurisdiction includes also cases recognized in the non-litigious proceedings concerning care and guardianship over a person who is a Polish citizen or a foreigner who has a place of residence or place of habitual residence in the Republic of Poland (Art. 1107 § 1 of CCP).

It should be emphasized that the optional jurisdiction of Polish courts does not preclude the recognition or enforcement of judgments of courts of foreign states issued with violation of the provisions on that jurisdiction. On the other hand, judgments issued by courts of foreign states in matters falling within the exclusive jurisdiction of Polish courts is an obstacle preventing the declaration of enforceability and recognition of those decisions in Poland (Art. 1146 § 1 point 2 and Art. 1150 of CCP) as well as the conclusion of an agreement excluding the jurisdiction (Art. 1105 § 2 point 1 of CCP).[24]

Another important issue from the point of view of the analyzed problem is the rules on which judgments of courts of foreign states or decisions of other authorities of foreign states in personal and family matters become effective in Poland. It should be emphasized here that the structure of surrogate motherhood can be introduced into the legal system of a given country either directly (i.e. in substantive law provisions) or indirectly (i.e. through the application of a foreign law or the recognition of foreign registration of civil status). The application of foreign law has already been mentioned above (also in the context of determining national jurisdiction). On the other hand, the recognition of foreign registration of civil status on the basis of the law of countries where the conclusion of surrogacy arrangements is unacceptable (including, *inter alia*, Polish law), may have similar effects as a valid surrogacy arrangement. If such recognition were not limited in any way, then the current

[24] M.P. Wójcik, "Komentarz do art.1103 k.p.c. – teza 1", [in:] *Kodeks postępowania cywilnego. Komentarz aktualizowany. Vol. II. Art. 730–1217*, ed. A. Jakubecki, System Informacji Prawnej LEX 2018.

provisions of law would be circumvented. Particularly blatant would be the situation in which a child's birth certificate drawn up in the execution of the provisions of the surrogacy arrangement and stating a fiction that it comes from two women or from two men or even from one woman or one man would be considered valid.

When discussing the above issues on the example of Polish law, it is first necessary to indicate the regulation contained in Art. 1138 of CCP. This article provides that foreign official documents have probative value equal to Polish official documents. This regulation applies, among others, to foreign official documents confirming civil status, i.e., judgments of courts of foreign states and decisions of other authorities of foreign states regarding civil status.[25] However, in accordance with Art. 1145 of CCP, such judgments and decisions – as issued in civil cases in the field of personal and family law – are subject to recognition by virtue of law, unless there are obstacles specified in Art. 1146 of CCP. These obstacles include, among others, the situation (mentioned in point 7) in which recognition would be contrary to the fundamental principles of the legal order of the Republic of Poland (public order clause).[26] One of the basic principles of the Polish legal order is undoubtedly the principle of biological motherhood (resulting from Art. 61^9 of FGC referred to in the introduction), the principle of best interest of the child, the principle of best interest of the family (protecting its stability and integrity), the principle of reliability and stability of civil status, and the principle of judicial control over adoption.[27]

Due to the automatic (by law) recognition of judgments of courts of foreign states and decisions of other authorities of foreign states regarding civil status, Polish legislator introduced the possibility of determining in court whether a particular judgment or decision is subject to recognition or not. Under Art. 1148 § 1 of CCP, anyone who has a legal interest in it, may apply to the court to determine whether a particular judgment of a court of a foreign state is subject to recognition or not. In doctrine and jurisprudence, it is aptly assumed that the above provision is a special regulation in relation to Art. 189 of CCP, excluding its application. To the proceeding for determining the judgment of a court of a foreign state (or the decision of

[25] Cf. K. Weitz, "Uznanie ex lege zagranicznych orzeczeń a prawo o aktach stanu cywilnego", [in:] *Prawo rodzinne w dobie przemian*, eds. P. Kasprzyk, P. Wiśniewski, Lublin 2010, p. 340 et seq.

[26] Cf. A. Nowicka, "Klauzula porządku publicznego w prawie prywatnym międzynarodowym", [in:] *Współczesne wyzwania prawa prywatnego międzynarodowego*, ed. J. Poczobut, Warszawa 2013, pp. 203–205.

[27] J. Holocher, M. Soniewicka, "'Dziecko z umowy': Problem dyskrecjonalności sędziowskiej…", pp. 385–386.

another authority of a foreign country), which is a special proceeding, the object of which is a foreign judgment or decision (and not a right or a legal relationship), the provisions on a trial apply accordingly (Art. 13 § 2 of CCP). However, the application – even if appropriate – of the general provisions regulating non-litigious proceedings is excluded.[28]

A request to determine if a judgment of a court of a foreign state is subject to recognition or not is examined by a regional court that would have been competent to consider the case resolved by a judgment of a foreign state court or in which district a competent district court is located, and in the absence of this basis – Regional Court in Warsaw (Art. 1148^{1} § 1 of CCP). The decision of the regional court regarding the determination may be appealed against, and against the decision of the court of appeal it is possible to file a cassation appeal. It is also possible to demand resumption of proceedings, which has been ended with a final decision on the determination and the declaration of unlawfulness of a final decision issued on this subject (Art. 1148^{1} § 3 of CCP).

In cases regarding claims related to the conclusion of a surrogacy arrangement the request pursuant to Art. 1148 of CCP may be filed either on own initiative by an entity that has a legal interest in it (e.g. a surrogate mother) or as a consequence of a notification made by the head of the registry of civil status.[29] According to Art. 107 of LCSR, the head of the civil registry office refuses to transcribe a foreign record of civil status, among others in a situation when the transcription would be contrary to the fundamental principles of the legal order of the Republic of Poland (e.g. when in such a record two men were to be entered as parents of a child). In the above case, the head notifies the applicants in writing of the reasons for the refusal, informing them of the right to apply pursuant to Art. 1148 of CCP to the common court to decide whether the judgment of a country of a foreign state is subject to recognition or not (Art. 108 paragraph 4 of LCSR).

[28] Cf. T. Ereciński, "Komentarz do art. 1148 k.p.c. – Teza 1 i 4–6", [in:] *Kodeks Postępowania Cywilnego. Komentarz. Vol. VI. Międzynarodowe postępowanie cywilne. Sąd polubowny (arbitrażowy)*, ed. T. Ereciński, Warszawa 2017 (System Informacji Prawnej LEX).

[29] Such a request may also be submitted by the prosecutor on general terms (Art. 7 of CCP).

2. Civil proceedings related to foreign procedures regarding the registration of civil status

Due to the above-mentioned principle of recognition by law of judgments of courts of foreign states and decisions of other authorities of foreign states regarding civil status on the example of Polish solutions, in practice, it is important to be able to rectify (correct) and invalidate incorrect entries in Polish civil status records made as part of the transcription of foreign civil status records.[30] The necessity of rectifying and invalidating foreign official documents confirming civil status (in particular the origin of a child from specific parents) entered into the Polish civil registry office takes place when the documents confirm a factual situation inconsistent with reality (e.g. when the child birth by a surrogate mother was intentionally concealed) or when their transcription was made against the basic principles of the legal order of the Republic of Poland (public order clause).

According to Art. 35 paragraph 1 of LCSR, a record of civil status, which contains information that is contrary to foreign civil status documents, is subject to rectification by the head of the registry of civil status. The rectification of a record of civil status can be made on the basis of a foreign civil status document if in the country of issue, it is recognized as a civil status document, or on the basis of another foreign document confirming civil status, issued in a country where civil status registration is not kept, if they contain information that is subject to correction, state an earlier event and concern the same person or their ascendants (Art. 35 paragraph 2 of LCSR). If the rectification of the record of civil status (in particular, the child's birth certificate) by the head of the civil registry office is not possible on the basis of foreign civil status documents or it is not possible solely on the basis of these documents, the correction of the civil status record is done by a court in non-litigious proceedings. The proceedings can be initiated only at the request of the interested person, prosecutor or head of the civil registry office (Art. 36 of LCSR), and their course is governed by general provisions on non-litigious proceedings (Art. 506 – Art. 525 of CCP). Courts are obliged to provide the civil registry office with copies of final decisions made in cases concerning the correction of the civil status record, which constitute the basis for placing additional note in the relevant civil status record.

[30] Cf. Art. 104 of LCSR and P. Wypych, "Charakter prawny transkrypcji aktu stanu cywilnego sporządzonego za granicą", *Kwartalnik Prawa Prywatnego*, 2003, No. 1, p. 189 et seq.

The civil status record, which does not contain all the required data, is supplemented by the head of the civil registry office who prepared it. Such a supplement is made, e.g., on the basis of other civil status records, in particular foreign civil status documents (Art. 37 paragraph 1 and 2 of LCSR).[31] With reference to a death certificate, which does not contain the date or time of death, the court supplements it in non-litigious proceedings, at the request of the interested party or prosecutor (Art. 38 of LCSR). Such a supplement cannot be made by a court in respect of a child's birth certificate.

The furthest-reaching consequences of a defective civil status record are regulated by Art. 39 paragraph 1 of LCSR, according to which the court annuls the civil status record or the additional note attached to it, if this record or note state an event which is inconsistent with the actual state of affairs or if there are deficiencies which reduce its probative value.

The annulment takes place in non-litigious proceedings at the request of the interested person, prosecutor or head of the civil registry office. In the case of annulment of a civil status record, the court may decide to draw up a new record (Art. 39 paragraph 2 of LCSR).

In the justification of the resolution of 10 May 1994[32], the Supreme Court stated that the inconsistency of civil status records with the truth consists in the inconsistency of the event stated in the record with reality. In particular, such inconsistency may consist in confirming in the civil status record events such as the birth of a child, marriage or death of a specific person that did not occur at all, or the statement, in the form of an additional note added to the record, affecting the content or validity of the record, although the event did not take place. The inconsistency with the truth of entries in civil status records may be caused by mistakes, misleading the head of the civil registry office by the person making the notification of birth or death, falsification of the civil status record or other infringements. Adjustment of the content of a civil status record stating an event that is not true to the actual state can only take place in court proceedings.

The possibility of annulment of a child's birth certificate is very important in the case of surrogate motherhood. In countries where surrogacy arrangements are

[31] More on this subject cf. A. Czajkowska, "Komentarz do art. 37 ustawy – Prawo o aktach stanu cywilnego", [in:] *Prawo o aktach stanu cywilnego z komentarzem. Przepisy wykonawcze i związkowe oraz wzory dokumentów*, Warszawa 2015 (System Informacji Prawnej LEX).

[32] Resolution of the Supreme Court of 10 May 1994, III CZP 65/94, Orzecznictwo Sądów Polskich 1994, No. 12, item 242.

allowed, the birth certificates may state fiction that the child's parents are two men or two women, or even one man or one woman. If the information contained in such a record will be transferred by transcription to the Polish civil status record (which is unlikely), the only way to eliminate such a record from legal transactions is to annul it.

In addition to the rectification, supplementation and annulment of a civil status record, the court may also determine its content. According to Art. 40 of LCSR, the determination of the content of the civil status record is made by the court in non-litigious proceedings, if it decided to prepare a new civil status record, or at the request of the interested person, prosecutor or head of the civil registry office if: 1) the annulled civil status record is to be replaced by a new one; 2) the birth certificate or marriage certificate has not been prepared and cannot be made by the head of the civil registry office. Determining the content of the birth certificate is not possible if the information about the parents is unknown and it cannot be determined. In this situation, the content of the birth certificate is determined on the basis of Art. 62 of LCSR.[33]

In the abovementioned resolution of 10 May 1994, the Supreme Court stated that annulment of the birth certificate and establishing its new content (Art. 39 and 40 of LCSR) is not permissible on the ground that persons entered as parents are not biological or legal parents of the child. This matter can be settled only in the trial. Justifying its position, the Supreme Court referred to the regulation currently contained in Art. 3 of LCSR. According to this article, civil status records are the sole proof of the events contained in them and their non-compliance with the truth can only be proved only in court proceedings. However, the legislator did not prejudge in what proceedings this is to be proved: court or non-litigious proceedings. Therefore, in the scope in which the legislator provided in Art. 425 – 458 of CCP separate court proceedings for claiming civil status rights, the course of court proceedings is appropriate.[34] Whereas, in the scope in which special procedures for marital matters and matters arising from the relationship between parents and children are not provided, the course of non-litigious proceedings is appropriate. In separate court proceedings in cases concerning the relationship between parents and

[33] Decision of the Supreme Court of 19 October 1963, III CR 246/63, OSNCP 1964, No. 6, item 125.

[34] This conclusion results from Art. 13 § 1 of CCP, according to which: "[t]he court recognizes cases in the trial, unless the act provides otherwise. In cases provided for by the act, the court resolves cases in accordance with the provisions on separate proceedings."

children (Art. 453 – 458 of CCP), the court rules in cases concerning establishing or denying the child's origin, establishing ineffectiveness of recognition of paternity and dissolving the adoption. The way of the trial is therefore correct when it comes to establishing or denying maternity in the case when a woman entered as a mother in child's birth certificate is a woman who did not give birth to this child (e.g. a genetic mother). The trail is also appropriate when it comes to denying paternity in the case when the mother's husband, entered in the birth certificate of the child, could not be the father. The situation is similar in the case of filing an action to establish the ineffectiveness of recognition of paternity due to defects of the declaration of will of the recognizing men, or declaration of the persons whose consent was required for the validity of the recognition, or if the man who recognized the child is not the father of the child (Art. 78 – 81 of FGC), as well as, in the case of judicial determination of paternity, in a situation when at the time of creating the birth certificate the father was not known (Art. 84 of FGC). All the above-mentioned cases concern primarily the determination of the actual civil status of a person, and adjusting the content of civil status record stating events that are not in the accordance with the truth to the actual state is a secondary effect. Basing on the judgments given in these cases, changes resulting from them are entered into civil status records in the form of additional notes. Consequently, it should be assumed that if in the child's birth certificate the mother is a woman who is not the mother, and the father is the mother's husband, who could not be the father, the way of the trial is the right one. This includes, in particular, separate proceedings for denying maternity or for denying paternity. In such situations non-litigious proceedings for annulment of the child's birth certificate (Art. 39 of LCSR) do not apply.

The above-mentioned argumentation of the Supreme Court should be considered accurate. The determination of the actual civil status of a person takes place in separate court proceedings in matters considering relations between parents and children. However, proceedings for rectification, supplementation, annulment and determination of the content of the civil status record are aimed at adjusting the content of civil status records stating events that are untrue to the real state. It should be emphasized that these proceedings are important in practice, because they allow for a relatively quick elimination of the effects of entries in civil status records that do not match the actual state of affairs. As mentioned above, this is particularly important in the situation when entries in Polish civil status records were made on the basis of foreign documents confirming civil status, drawn up in countries where it is permissible to conclude surrogacy arrangements.

3. Civil proceedings in matters considering claims arising from valid surrogacy agreements

In countries where it is permissible to conclude surrogacy arrangements, it is possible to pursue claims from these agreements on general terms. The literature distinguishes two categories of actions, which may be brought in connection with the non-performance or improper performance of such arrangements. The first one is the actions related to the failure of the parties to perform the obligation to hand over and take the child after birth. The second category is the actions for damages for improper performance of other provisions of the surrogacy arrangement.[35] It should be noted here that the enforcement of judgments considering the first category of actions must be regulated in a special way. A child cannot be treated as an object and should not be exposed to negative emotions and stress. The most rational solution in this regard seems to be the use of an institution of a fine for coercion or institution of a compulsory sum.[36]

In the event that the surrogate mother refused to hand over the child after giving birth – contrary to the provisions of the surrogacy arrangement – the intending parents are entitled to claim the handover of the child in accordance with the arrangement. In such a case, it would also be necessary to simultaneously make a claim for the transfer of the status of motherhood (parenthood) to the intending parents. In individual legal systems, the pursuit of such claims can be regulated in a different way. Due to their nature (contractual obligations), it seems the most rational to pursue them in trial as adversarial proceedings between two parties. However, if the claim for handing over a child is acknowledged, the court should also issue a decision, which will be a substitute of the declaration of the will of the surrogate mother on consenting to the transfer of the status of motherhood (parenthood) to the intending parents.

A different situation occurs when the intending parents refuse to take the child and adopt the status of motherhood (parenthood). Such a case can take place, among others in a situation when the child born by the surrogate mother has genetic defects or is affected by a serious illness or when the family situation of the intending parents has changed significantly after the conclusion of the surrogacy arrangement

[35] J. Holocher, M. Soniewicka, "Analiza prawna umowy…", pp. 51–53.

[36] Cf. M. Krakowiak, *Suma przymusowa w polskim postępowaniu cywilnym*, Warszawa 2017, p. 85 et seq.

(e.g. their own child was born). At this point, the question should be answered as to whether courts should issue orders requiring intending parents to take the child and to accept the status of motherhood (parenthood). There is no doubt that forcing intending parents to accept a disabled or ill child against their will would first of all be contrary to the principle of the child's best interest present in most legal systems. It seems more rational to establish foster care or care for such a child or to give them up for adoption. On the other hand, the intending parents, without whom the child would not have been born, should be obliged to pay maintenance to the child (at least in the event when the child is not adopted).

Claims for damages for insufficient performance of other provisions of the surrogacy arrangement have a completely different nature. These may include, for example, violation of the obligation of proper nutrition during pregnancy by the surrogate mother or the obligation to use appropriate medical care during pregnancy. Pursuing such claims will be based on general principles. First of all, it will be necessary to indicate the damage and determine its amount, and then to demonstrate the relationship between the damage, pregnancy and labour.[37] In practice, if a child was affected by genetic defects or a serious illness, it would be difficult to indicate the damage suffered by intending parents and determine its amount.

It should be noted that all the afore-mentioned claims from surrogacy arrangements cannot be effectively pursued in those countries where the conclusion of such arrangements is unacceptable, including Poland. On the basis of Polish law, in connection with the rule of biological motherhood (Art. 61^9 of FGC), there are no substantive grounds for pursuing claims for handing over a child together with the transfer of the status of motherhood (parenthood) and claims for taking the child. Such actions should be dismissed by the court. However, other claims related to the conclusion of an invalid surrogacy arrangement will be discussed later in this study.

4. Civil proceedings in matters considering claims aimed directly at determining civil status

Actions aimed at establishing a child's civil status may be brought in legal systems in which conclusion of surrogacy arrangements is allowed, as well as in systems where such arrangements are unacceptable (invalid). As already stated above, such

[37] J. Holocher, M. Soniewicka, "Analiza prawna umowy…", p. 52.

actions have priority over requests for rectification, supplementation, annulment and determination of the civil status record.

From the perspective of the analyzed issue of surrogate motherhood, the following claims are important: for the determination of maternity, for the denial of maternity, and for the denial of paternity. Under Polish law the first of the above actions may be brought when a birth certificate of the child of unknown parents has been made or the maternity of a woman entered in the birth certificate as a mother has been denied (Art. 61^{10} of FGC). One of such cases is the deliberate misleading of the head of the registry of civil status when reporting a child's birth by submitting a woman who has not given birth to the child as a mother.[38] In the case of surrogate motherhood such a situation can take place, among others, when a woman different than the surrogate mother claims to be the mother. As mentioned above, it this situation it is not possible to annul the birth certificate and establish its new content (Art. 39 and 40 of LCSR) on the ground that the persons entered as parents are not the biological or legal parents of the child. The premise for establishing maternity on the basis of Art. 61^{10} of FGC is the earlier denial of maternity of a woman entered in the child's birth certificate.[39] An action to determine maternity is brought by a child against a mother, and if the mother is dead, against a guardian appointed by a guardianship court (Art. 61^{10} § 2 of FGC) or a mother against a child (Art. 61^{10} § 3 of FGC). In order to protect the interests of the child, the legislator introduced a ban on bringing the above-mentioned action by a mother after a child reaches the age of majority (Art. 61^{11} of FGC) and a ban on establishing maternity after the death of the child, except when the determination of maternity is pursued by the descendants of the child who brought the action (Art. 61^{15} of FGC).

The action for denial of maternity can be brought if a woman entered in a child's birth certificate as a mother, has not given birth to this child (Art. 61^{12} § 1 of FGC). An action for denial of maternity is brought by: 1) the child against the woman entered in the birth certificate as the mother, and if she is dead, against the guardian appointed by the court (Art. 61^{12} § 2 of FGC); 2) the biological mother of the child against the woman entered in the birth certificate of the child as the mother and against the child, and if that woman is dead – against the child (Art. 61^{12} § 3 of FGC); 3) the woman entered in the birth certificate of the child as the mother

[38] Cf. J. Ignatowicz, M. Nazar, *Prawo rodzinne*, Warszawa 2010, p. 237.

[39] J. M. Łukasiewicz, "Ustalenie i zaprzeczenie macierzyństwa (rozdział 6.2)", [in:] *Instytucje prawa rodzinnego*, ed. J. M. Łukasiewicz, Warszawa 2014 (System Informacji Prawnej LEX).

against the child (Art. 61^{12} § 4 of FGC); 4) the man entered in the child's birth certificate as the father (i.e. the husband of the woman entered in the birth certificate as the mother; or her partner, who recognized the child or in relation to whom the paternity was determined by the court) against the child and that woman, and if she is dead – against the child (Art. 61^{12} § 5 of FGC). Denial of maternity (just like its determination) is not allowed after the death of a child (Art. 61^{15} of FGC).

The doctrine aptly assumes that, due to the unambiguous regulation contained in Art. 61^{9} of FGC, it is not allowed to deny maternity of surrogate mother entered in the birth certificate.[40] On the other hand, an action for denying the maternity of a woman who has not delivered a child (e.g. a genetic mother) may be brought by the surrogate mother in a situation where, contrary to the concluded surrogacy arrangement, she did not hand over the child to the intending parents.

It should be emphasized that an action for establishing or denying maternity may also be brought by the prosecutor, if the good of the child or protection of the social interest requires it. Also in relation to the prosecutor, filing a claim for denial of motherhood is not allowed after the death of the child (Art. 61^{16} of FGC). In addition, the legislator introduced, in relation to some entities, deadlines for bringing actions for the determination or denial of maternity. The possibility to bring an action for the determination of maternity is not limited by any deadline in relation to the child and the prosecutor. However, as mentioned above, the mother cannot bring such an action after the child reaches the age of majority. The biological mother of the child or the woman entered in the birth certificate as the child's mother may bring an action for denial of maternity within 6 months from the date of preparation of the birth certificate of the child (Art. 61^{13} § 1 of FGC). The deadline for bringing such an action by a man entered in the child's birth certificate is 6 months from the day on which he learned that the woman entered in the birth certificate of a child is not the mother of a child, but not later than until the child reaches the age of majority (Art. 61^{13} § 2 of FGC). In turn, the child may bring an action for denying maternity within 3 years of reaching the age of majority (Art. 61^{14} of FGC). The abovementioned terms in which it is possible to bring an action for denial of maternity are shorter and stricter than in the case of actions for determination of

[40] H. Haak, *Kodeks rodzinny i opiekuńczy, Komentarz do art. 61^{7} – 91*, Toruń 2009, p. 18.

maternity due to the fact that denial of maternity may lead to the deterioration of the child's legal situation.[41]

The last action aiming directly to establishing civil status, which may be brought in situations of surrogate motherhood, is an action for denying paternity. Its brining is aimed at overthrowing the legal presumption of the origin of the child from the mother's husband. According to Art. 62 § 1 first sentence of FGC, if the child was born during the marriage or three hundred days before its dissolution or annulment, it is presumed that he or she comes from the mother's husband. This presumption creates a legal relationship of fatherhood based on the statement of motherhood. If the surrogate mother was married, and her husband would not want a relationship of kinship between him and the child, he should bring an action for denying paternity.[42] Denial of paternity occurs by proving that the mother's husband is not the father of the child (Art. 67 of FGC). The action for denying paternity can be brought by: 1) the mother's husband against the child and the mother, and if the mother is dead – against the child (Art. 66 of FGC); 2) the mother against the husband and the child, and if the husband is dead – against the child (Art. 69 § 2 of FGC); 3) the adult child against the mother's husband and the mother, and if the mother is dead – against her husband (Art. 70 § 2 of FGC). Due to the protection of the child's interests, the possibility to bring the action in question has been limited in time – as in the case of an action for denying maternity.[43] An action for the denial of paternity may also be brought by a prosecutor, if the good of the child or protection of the social interest requires it. Correspondingly, as in the case of an action for a denial of maternity, bringing an action for denial of paternity is not admissible after the death of a child (Art. 86 of FGC).

From the point of view of the issue of surrogate motherhood, the regulation contained in Art. 68 of FGC is of significant importance. This provision provides that the denial of paternity is not permissible if the child was born following a medically assisted procreation for which the mother's husband agreed. This exclusion applies,

[41] J. M. Łukasiewicz, "Ustalenie i zaprzeczenie macierzyństwa (rozdział 6.2)", [in:] *Instytucje prawa rodzinnego*, ed. J. M. Łukasiewicz, Warszawa 2014 (System Informacji Prawnej LEX).

[42] J. Holocher, M. Soniewicka, "Analiza prawna umowy…", p. 50.

[43] The mother's husband may bring the discussed action within six months from the date on which he learned of the child's birth, but not later than until the child reaches the age of majority (Art. 63 of FGC) and the mother may bring an action to deny her husband's paternity six months after the birth of the child (Art. 69 § 1 of FGC). On the other hand, the child may bring an action to deny the paternity of the mother's husband no later than three years after reaching the age of majority (Art. 70 § 1 of FGC).

among others, to the situation in which the mother was fertilized with the seed of another man as a consequence of the conclusion of the surrogacy arrangement.

All the above-mentioned actions are recognized in a separate court proceeding in matters of relations between parents and children (Art. 453 – Art. 458 of CCP). The Polish legislator decided to introduce this proceeding due to the special character and social significance of the cases recognized in it. The broad possibility of the prosecutor's participation in proceedings in cases concerning determination or denial of the child's origin results from the necessity to determine the actual state of affairs due to the protection of the social interest. Such a regulation means that in the discussed proceedings the adversarial principle[44] is limited in favour of the investigation principle. The obligation provided for in Art. 457 of CCP to present the prosecutor with a copy of the statement of claim and notify him or her of the dates of the hearing serves, in particular, to implement the principle of the good of the child. A similar purpose has the regulation contained in Art. 456^1 of CCP providing the obligation to inform about the ongoing trial (by serving a copy of the lawsuit) the man who is presumed to be the father as the mother's husband (in cases concerning the establishment of motherhood) and the man whose paternity is the subject of the outcome of the proceedings (in cases concerning denial of motherhood). Limitation of the scope of the adversarial principle and the principle of disposition[45] in the analyzed proceeding results from Art. 458 § 1 in connection with Art. 431 of CCP. In matters relating to establishing or denying the origin of a child, to determine ineffectiveness of recognition of paternity and to dissolve adoption, it is not possible to base the decision solely on the recognition of an action (Art. 213 § 2 of CCP) or on the admission of actual circumstances (Art. 229 of CCP). It means that in these cases the evidentiary proceedings must be carried out in order to determine the actual state of affairs. For this purpose, appropriate requests for taking evidence should be submitted by the prosecutor who brought the action. If necessary, the court may also allow *ex officio* evidence not provided by the party (Art. 232 second sentence of CCP). In order to establish the actual state of affairs and protect the social interest (and above all to implement the principle of the good of the child), the court may order an environmental interview carried out by the

[44] This principle has been expressed in Art. 232 of CCP, according to which "[t]he parties are obliged to indicate evidence to establish the facts from which they derive legal effects. The court may admit evidence not provided by the party."

[45] More on these principles and their mutual relations, cf. R. Flejszar, *Zasada dyspozycyjności w procesie cywilnym*, Warszawa 2016, p. 200 et seq.

designated person to determine the conditions in which the child lives and grows (Art. 458 § 1 in connection with Art. 434 of CCP). Among other separateness of the discussed proceeding it is necessary to indicate the obligation to grant a special power of attorney to represent the party (Art. 458 § 1 in connection with Art. 426 of CCP), the inadmissibility of counterclaim in cases concerning determination or denial of maternity and for establishing or denying paternity (Art. 454^1 of CCP), the obligation to discontinue the proceedings in the event of the death of one of the parties (Art. 456 of CCP), and the extended validity of the judgment issued in these cases (Art. 458 § 1 in connection with Art. 435 of CCP).

5. Other civil proceedings in matters related to the conclusion of surrogacy arrangements

In connection with the position adopted in this report, that the surrogacy arrangement is invalid in Polish law, the only way for the surrogate mother to comply with its provisions regarding the obligation to transfer parental rights to the child and the acquisition of these rights by the genetic mother is the way of adoption. Cases for adoption are recognized in non-litigious proceedings (Art. 585 – 589 of CCP). In the event when the adoption is impossible, the possibility of appointing the intending parents as legal guardians of a child born by a surrogate mother should also be considered (in non-litigious proceedings regulated in Art. 590 – 598 of CCP).

If an adoption due to the fulfilment of the statutory criteria by intending parents (e.g. genetic parents) took place, in the future it would be also possible to bring an action to dissolve the adoption. According to Art. 125 of FGC, both the adopted and the adopter may demand the dissolution of adoption by the court for important reasons. The dissolution of adoption is not acceptable if as a result of it the good of a minor child would suffer. Cases for the dissolution of adoption are recognized in the same separate court proceedings as cases for determining the origin of a child (Art. 453 – 458 of CCP).[46]

In a situation when the intending parents do not want to take the child, and the surrogate mother does not want to raise him or her (e.g. because of a disability or

[46] Those proceedings have been discussed above.

state of health), the waiver of parental rights and the consent to the adoption or placement of a child in foster care takes place.[47]

6. Proceedings in cases for reimbursement for invalid surrogacy arrangements and arrangements concluded with intermediaries and organizers of surrogate motherhood

In some countries, claims for handing over a child, taking a child and for the transfer of the status of motherhood (parenthood) result from a valid and acceptable in particular legal systems surrogacy arrangement. Under this arrangement, it is also possible to pursue all claims arising from its non-performance or improper performance. On the basis of Polish law, due to the fact that the analyzed arrangement is invalid, such claims cannot be effectively pursued. On the other hand, it is possible to pursue restitution claims resulting from unjust enrichment.

It should be assumed that, under Polish law, both for-profit and altruistic surrogacy arrangements are invalid. As mentioned above, also invalid surrogacy arrangements may result in specific claims of both parties. Those cannot be claims for damages for non-performance or improper performance of the arrangement, based on Art. 471 of CC. According to this provision, the debtor is obliged to remedy any damages resulting from non-performance or improper performance of the obligation, unless the non-performance or improper performance results from circumstances for which the debtor is not liable. Due to the fact that the surrogacy arrangement is not valid, the liability relation cannot be created directly on the basis of it. However, such a relation may arise in connection with the conclusion of such an invalid arrangement.[48] Its source will not be the arrangement itself, but another relevant legal event, i.e. unjust enrichment. The definition of this concept can be found in Art. 405 of CC: "Anyone who without legal grounds has gained a financial benefit at the expense of another person is obliged to hand over the benefit in kind, and if this is not possible, to return its value." Obligations resulting from unjust enrichment fall under the category of non-contractual obligations to

[47] Placement of a child in foster care takes place in non-litigious proceedings in matters relating to relations between parents and children (Art. 579^1 – Art. 579^4 of CCP).

[48] Cf. T. Wiśniewski, "Komentarz do art. 471 Kodeksu cywilnego, teza 1 i 2", [in:] *Kodeks cywilny. Komentarz. Vol. III. Zobowiązania. Część ogólna*, ed. J. Gudowski, Warszawa 2018 (System Informacji Prawnej LEX).

distinguish them from contractual obligations.[49] Four general grounds for a claim for unjust enrichment arise from Art. 405 of CC and those are: enrichment of one entity, impoverishment of another entity, connection between enrichment and impoverishment, and lack of legal basis for enrichment.[50] The basic premise provided for in Art. 405 of CC is the existence of enrichment, and only then the existence of impoverishment, which means that first of all the fact that the defendant benefited and the value of this benefit need to be proved, and only then the evidence for impoverishment of the plaintiff can be presented.[51]

A special case of unjust enrichment is undue performance. According to Art. 410 § 1 of CC, provisions of Art. 405 – 409 of CC regulating unjust enrichment apply in particular to undue performance. In the judgment of 24 November 2011, the Supreme Court stated that the general conditions for unjust enrichment should be understood in a specific way in the case of undue performance. This is due to the fact that if the undue performance is made, there is no need to examine whether and to what extent the fulfilled performance enriched the person for whom the performance was fulfilled (*accipiensa*), as well as whether the estate of the person fulfilling the performance (*solvensa*) decreased. The mere fact of making an undue performance justifies a restitution claim. Obtaining an undue performance fulfils the premise of enrichment, and fulfilment of this performance the premise of impoverishment.[52] When assessing whether a performance has occurred under a given relationship, the creditor's point of view is crucial, i.e., the circumstance, whether he or she could have considered, on the basis of recognizable circumstances, the taken action as the performance.[53] One of the grounds for undue performance is the invalidity of a legal act (Art. 410 § 2 of CC[54]). The invalidity of a legal act as a basis for an undue performance is in fact a modification of the premise for the lack of the basis for the fulfilled performance, due to the *et tunc* sanction of invalidity of a legal act that

[49] Such a concept was used, among others, in Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (OJ L 199, p. 1 et seq.).

[50] Judgment of the Court of Appeal in Łódź of 17 June 2015, I ACa 1781/14, LEX No. 1771307.

[51] Judgment of the Supreme Court of 7 August 2003, IV CKN 340/01, LEX No. 602728.

[52] Judgment of the Supreme Court of 24 November 2011, I CSK 66/11, LEX No. 1133784.

[53] Judgment of the Supreme Court of 13 October 2011, V CSK 483/10, LEX No. 1102551.

[54] According to this provision: "A performance is undue if the person who makes it is not under any obligation or is not under any obligation towards the person to whom the performance is made, or if the basis of the performance has ceased to exist or the intended purpose of the performance is not attained, or if the legal act binding the person to make the performance is invalid and does not become valid after the performance is made."

forms the basis of the fulfilled performance which does not become valid after the performance is made by the impoverished.[55] In the case of the discussed basis of the undue performance, it is irrelevant whether the invalidity of a legal act results from general Art. 58 of CC (as, inter alia, in relation to surrogacy arrangements), or from special provisions.

In a situation where the surrogacy arrangement is invalid, the intending parents cannot bring an effective action against the surrogate mother for handing over the child. Also, the surrogate mother cannot bring an effective action against the intending parents for taking the child born by her. However, it is possible for the intending parents to pursue a claim for reimbursement of the remuneration paid to the surrogate mother or for reimbursement of other benefits related to the conclusion of a surrogacy arrangement, both provided in kind and cash.

The problem of restitution claims due to unjust enrichment may arise both in relation to for-profit and altruistic surrogacy arrangements. In the case of altruistic surrogacy arrangements, there will be no claims of the intending parents for reimbursement. However, the surrogacy mother may receive, in connection with the conclusion of such an arrangement, the reimbursement of reasonable expenses related to surrogate motherhood. Such expenses include, for example, costs of medical care during pregnancy and immediately after childbirth, as well as the costs of a special diet of the surrogate mother during pregnancy. The question arises whether, due to the invalidity of the altruistic surrogacy arrangement, the ordering parents have a right to claim the reimbursement of these expenses. It seems justified to opt for the position that pursuing such a claim is not possible. In the case of surrogate motherhood, justified expenses incurred directly for the surrogate mother are indirectly expenses for the child being born. Proper care of a surrogate mother during pregnancy and immediately after it is supposed to ensure the birth of a healthy child. On the basis of Polish law, such justified expenses – related to the conclusion of an invalid surrogacy arrangement –should be considered non-refundable. The legal basis for such a position is the regulation contained in Art. 411 point 2 of CC, according to which the return of a performance cannot be demanded if the performance satisfies the principles of social coexistence. Undoubtedly, such performances (services) constitute reasonable expenses related to surrogate motherhood, because

[55] D. Fuchs, A. Malik, "Komentarz do art. 410 Kodeksu cywilnego, teza 16", [in:] *Kodeks cywilny. Komentarz. Vol. III. Zobowiązania. Część ogólna (art. 353–534)*, eds. M. Fras, M. Habdas, Warszawa 2018 (System Informacji Prawnej LEX).

they serve to implement the principle of the good of the child. Consequently, the action for the reimbursement of such justified expenses by the intending parents should be dismissed by the court.

It should be noted that also in the case of for-profit surrogacy arrangements, this part of the remuneration of the surrogate mother, which was used to cover legitimate expenses related to surrogate motherhood, is not refundable to the intending parents on the basis of Art. 411 point 2 of CC. However, in the proceedings for reimbursement for an invalid surrogacy arrangement, the defendant (surrogate mother) must prove the amount of her justified expenses related to the birth of the child.

In the case of invalid for-profit surrogacy arrangements – differently than in the case of altruistic arrangements – the intending parents have a claim against the surrogate mother for reimbursement of the remuneration paid in connection with the conclusion of such an agreement. As mentioned above, it is reasonable to assume that the amount (value) of this claim should be reduced by the amount of reasonable expenses related to childbirth by the surrogate mother. A claim for reimbursement for an invalid surrogacy arrangement becomes due as soon as the remuneration is paid (the invalidity will take *ex tunc* effect). The intending parents should, however, set the exact time to return the unduly paid remuneration for the surrogate mother. According to Art. 455 of CC, if the time for making the performance is not specified and does not follow from the nature of the obligation, the performance should be made immediately upon the debtor being called on to make the performance. After the expiry of the specified time limit, the intending parents may also demand interests from the surrogate mother for delay in the return of the amount of undue remuneration.

A claim for a refund of the remuneration is made on general terms in court proceedings. The surrogate mother sued in such a case may raise the objection that there is no obligation to return the benefit or its value, because she has used it up or discarded in such a way that she is no longer enriched. According to Art. 409 of CC the obligation to return the benefit or its value is extinguished if the person who obtained the benefit has used it up or discarded it in such a manner that he or she is no longer enriched unless, when discarding or using up the benefit, he or she should have taken into account the obligation to return it. There is no doubt that, as a rule, a surrogate mother should take into account the obligation to return the received benefit (remuneration) due to the invalidity of the for-profit surrogacy arrangement. However, it should be remembered that surrogate mothers are usually poor people who have decided on surrogate motherhood for economic reasons, in order to

improve their financial situation, and often also the financial situation of their family members. Therefore, if in a particular trial, the surrogate mother proves that the remuneration received in connection with the invalid surrogacy arrangement has already been used to satisfy basic life needs, both of hers and her family members, the court may dismiss the claim of the intending parents in whole or in part.

A special kind of situation will take place when a surrogate mother decides to raise a child born by her. Then, in the proceedings for reimbursement of unduly received remuneration for an invalid surrogacy arrangement, the surrogate mother may raise the objection that the remuneration she received will only be used to meet the child's needs. In such a situation, the court should dismiss the action of foster parents for reimbursement of unduly received remuneration, assuming that its fulfilment satisfies the principles of social coexistence (Art. 411 point 2 of CC), and above all the principle of the good of the child. It should be noted that the birth of a child by the surrogate mother is a consequence of the decision on the conclusion of a surrogacy arrangement taken by intending parents. Therefore, a claim for reimbursement from a surrogate mother who decided to raise her own child would be against the child's good (well being). In addition, bringing an action by the intending parents for reimbursement of the remuneration unduly received by the surrogate mother could be treated in this situation as an abuse of procedural law (Art. 3 of CCP[56]).

The question is whether the indenting parents are entitled to pursue the claim for reimbursement of the remuneration from the invalid surrogacy arrangement even when – after fulfilling additional conditions – they adopted the child born to a surrogate mother. It seems that in such a situation the sued surrogate mother should also raise the objection that the payment of such remuneration satisfies the principle of social coexistence (Art. 411 point 2 of CC). Adoption of the child by intending parents would not be possible if the child had not been born as a consequence of the conclusion of an invalid surrogacy arrangement.

It is also necessary to refer to various contracts, the essence of which is the intermediation in the conclusion of surrogacy arrangement between intending parents and surrogate mothers as well as enabling (facilitating) and organizing surrogate motherhood. The activities of entities dealing with surrogate motherhood are based

[56] This article states the following: "The parties and participants in the proceedings are obliged to act in accordance with good morals, give explanations as to the circumstances of the case truthfully and without concealing anything and provide evidence."

on contracts concluded (often implicitly) with such entities by both candidates for surrogate mothers and intending parents. The scope of this activity is very diverse and includes both running internet portals enabling contact between potential parties to surrogacy arrangements, as well as running organized centres for surrogate mothers. If a surrogacy arrangement is admissible in a given country, it is also possible to conclude intermediary contracts on its conclusion. As a consequence, the parties to such arrangements may, on general terms, pursue claim for damages for their non-performance or improper performance.

However, in countries where surrogacy arrangements are considered invalid, the contracts aiming at intermediation in the conclusion of surrogacy arrangements and the provision of all kinds of services related to surrogacy are also invalid. These contracts are in conflict with both the law (including the rule from Art. 61^9 of FGC indicated at the beginning of this study) and the rules of social coexistence (Art. 58 of CC). It should be stressed that pursuing claims resulting from such invalid contracts is often difficult or impossible due to their cross-border nature. Under Polish law, claims related to the conclusion of such invalid contracts will be based on the construction of undue performance discussed above. Also in the case of the intermediaries and organizers of surrogate mothers claiming for the reimbursement of unduly collected performances, the surrogate mother will be able to defend herself by raising the objection that the fulfilment of the performance satisfies the principle of social coexistence (Art. 411 point 2 of CC). However, in the proceedings of intending parents against intermediaries and organizers of surrogate motherhood for reimbursement of remuneration, the defendant will not be able to effectively plead that the fulfilment of the performance satisfies the principle of social coexistence. The plea that the intending parents knew that they were not obliged to fulfil the obligation will also be ineffective. In such a situation, it is possible to demand reimbursement of an undue performance if it has been fulfilled under an invalid contract (Art. 411 point 1 of CC).

7. Cases for forfeiture of a performance to the State Treasury in the case of invalid surrogacy arrangements and contracts concluded with intermediaries and organizers of surrogate motherhood

For surrogacy arrangements governed by Polish law, as well as for contracts aimed at enabling (facilitating) and organizing surrogate motherhood concluded by entities engaged in the professional surrogate motherhood Art. 412 of CC applies: "A court may decide that a performance forfeits to the State Treasury if the performance was knowingly fulfilled in exchange for an act prohibited by the law or for a base purpose. If the object of the performance was used up or discarded, its value may be forfeited." The scope of application of the above-mentioned regulation mainly covers base performances fulfilled in the execution of illegal and invalid contracts.[57] There is no doubt that this category includes not only surrogacy arrangements, but also all contracts concerning surrogate motherhood concluded by specialized entities with intending parents and with potential surrogate mothers in order to make a profit. The possibility of declaring the forfeiture of a performance obtained in connection with the conclusion of such invalid contracts constitutes an additional sanction for violating the prohibition of the conclusion of surrogacy arrangements and the prohibition of facilitating and organizing surrogate motherhood. This regulation should be used, among others when the intending parents are not bringing an actions suing for the reimbursement of the remuneration paid to the intermediary facilitating or organizing the surrogate motherhood. Its use seems to be advisable also in the situation when the intending parents obtained the reimbursement of remuneration for an invalid surrogacy arrangement from the surrogate mother (both voluntarily and on the basis of a court decision).

The court's decision on forfeiture is optional, which reduces the practical meaning of Art. 412 of CC. The doctrine emphasises that in order to use the discussed regulation it is not enough to face a situation which is simply contrary with the law or principles of social coexistence, but a situation which is qualified as base.[58] The

[57] R. Trzaskowski, "Komentarz do art. 412 Kodeksu cywilnego, teza 7", [in:] *Kodeks cywilny. Komentarz. Vol. III. Zobowiązania. Część ogólna*, ed. J. Gudowski, Warszawa 2018 (System Informacji Prawnej LEX).

[58] Cf. P. Mostowik, TYTUŁ?, [in:] *System prawa prywatnego. Vol. 6. Prawo zobowiązań – część ogólna*, ed. A. Olejniczak, 3rd edition, Warszawa 2018, § 13, Nb 361 and 363 (System Informacji Prawnej Legalis).

qualified nature of the prerequisites for the application of sanctions under Art. 412 of CC is expressed in a particularly negative, from the moral or social point of view, evaluation of the performance fulfilled in exchange for an action prohibited by law or contrary to the principles of social coexistence.[59] For the baseness of the purpose of the performance, it is irrelevant whether the parties are aware of this baseness. It is enough that they are aware of the circumstances causing this blameworthiness.[60] Therefore, it is irrelevant that the parties to the surrogacy arrangement do not see it being blameworthy. The most important is the fact that from the point of view of socially accepted morality, the obligation to break a maternal bond with a born child must cause profound disapproval. As a consequence, payment for such a performance may be forfeited.[61]

In the case of circumstances provided for in Art. 412 of CC, the State Treasury should submit a main intervention (Art. 75 of CCP) in a case brought by the intending parents against the surrogate mother or against the intermediary facilitating or organizing surrogate motherhood, or submit a separate or with a separate claim for awarding the performance.[62] In the event of a separate action being brought, both parties of the invalid surrogacy arrangement or invalid contract concluded with the intermediary or the organizer of surrogate motherhood act as necessary co-participants. In matters relating to the forfeiture of a performance, the State Treasury is represented by the minister responsible for public finances.[63] These matters should be recognized in court proceedings under general principles.[64] The possibility of

[59] P. Mostowik, TYTUŁ?, [in:] *System prawa prywatnego, Nb 363*. For more, cf. P. Księżak, *Świadczenie niegodziwe*, Warszawa 2007, pp. 184–186.

[60] R. Trzaskowski, "Komentarz do art. 412 Kodeksu cywilnego, teza 15", [in:] *Kodeks cywilny. Komentarz. Vol. III. Zobowiązania. Część ogólna*, ed. J. Gudowski, Warszawa 2018 (System Informacji Prawnej LEX).

[61] P. Księżak, *Świadczenie niegodziwe*, p. 195.

[62] Judgments of the Supreme Court of 30 May 1995, 42/95, Biuletyn SN 1995, No. 9, item 24; cf. also M. Kozaczek, "Powództwo o orzeczenie przepadku świadczenia spełnionego w zamian za dokonanie czynu zabronionego lub w celu niegodziwym", *Przegląd Sądowy*, 2006, No. 4, p. 22.

[63] Resolution of the Supreme Court of 29 June 2000, III CZP 19/00, Orzecznictwo Sądów Polskich 2001, No. 3, item 44.

[64] In practice, most of the cases under Art. 412 of CC are recognized by district courts due to the value of the object of the dispute not exceeding 75,000 PLN (Art. 16 of CCP in connection with Art. 17 point 4 of CCP). It is a wrong practice to issue in such cases payment orders in proceedings by writ of payment and to base the decision solely on judgments of criminal courts (see: P. Rosiak, *Problematyka przepadku przedmiotu świadczenia niegodziwego na rzecz Skarbu Państwa*, Białystok 2015, p. 203 et seq.; available at: https://repozytorium.uwb.edu.pl/jspui/simple-search?query=rosiak (last accessed: 14 September 2018).

declaring forfeiture is not limited by a specific date, and the judgment declaring the forfeiture of a performance to the State Treasury is of a constitutive nature.[65]

8. Summary

The above considerations clearly indicate that the issue of civil proceedings related to the institution of surrogate motherhood is extremely complex and multithreaded. It is shaped differently in those legal systems in which it is permissible to conclude surrogacy arrangements and in the systems that recognize such arrangement as unacceptable (invalid). In the former systems, it is possible to pursue all claims arising from a valid surrogacy arrangement (in particular claims to hand over and take the child). However, in the second group of countries, despite the invalidity of surrogacy arrangements, it is possible to pursue claims of non-contractual nature arising from their conclusion (including primarily claims for undue performance). Problems with surrogate motherhood appear primarily due to its cross-border nature. Due to the different national approaches to determining and questioning the civil status of children born in connection with the conclusion of surrogacy arrangements, in situations where such children are associated with more than one country or are moving abroad, different rules on jurisdiction, applicable law and international circulation of foreign official documents (including documents confirming the child's civil status) apply. Consequently, in such situations, there is uncertainty as to the legal origin of the child and all aspects related to it (e.g. citizenship).

Out of all civil proceedings discussed above, the most important are the non-litigious proceedings as their purpose it to determine that the judgment of a foreign court (or the decision of another foreign state authority) regarding the civil status of a child born in connection with the conclusion of a surrogacy arrangement is not recognized by law due to the breach of the public order clause, and the proceedings for annulment of Polish civil status records drawn up as part of the transcription of foreign civil status records containing information inconsistent with the actual state. Claims for recognition of civil status acquired on the basis of foreign law (including surrogacy arrangements) will appear in practice more frequently (e.g. in the context of the acquisition of citizenship). It should be emphasized that the basic

[65] M. Kozaczek, "Powództwo…", pp. 34–35; M. Domański, *Orzekanie przepadku świadczenia "niegodziwego" (art. 412 k.c.)*, Warszawa 2007, pp. 75–76; P. Księżak, *Świadczenie niegodziwe*.., pp. 317–318.

principles of Polish family law (and above all the principle of the good of the child and the certainty of civil status) are of fundamental importance for the application of a different foreign law and for the recognition or non-recognition of foreign judgments and registrations of civil status. Due to these principles – which are the basic principles of the Polish legal order – it is not possible to allow the application of foreign law, nor the recognition of such foreign judgments and decisions on civil status that are contrary to these principles.

It is also necessary to postulate the introduction of multilateral international legal instruments on surrogate motherhood. The adoption of such international conventions will be probably possible only by states having the same attitude to the issue of the admissibility of surrogacy arrangements. The subject of regulation in international agreements concluded by states advocating against the admissibility of surrogate motherhood should be, in particular, the issue of claims between intending parents, intermediaries or organizers and surrogate mothers.

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International surrogacy – conflict-of-laws and procedural issues of judicial cooperation in civil matters

1. Preliminary issues

1.1. Initial remarks

Surrogate motherhood is a very complex phenomenon in both social[1] and legal terms.[2] Despite the fact that this phenomenon has been the subject of research for almost 30 years[3], no uniform legal position on international plane has been developed. This may be due to several reasons, but it seems that the adoption of various assessments in the field of this phenomenon and the implementation of regulations that apply to it result in the adoption of different worldviews regarding the existence and functioning of the family as the basic social cell.[4] The idea and applications of the indicated phenomenon are also changing. At the beginning, this phenomenon was a remedy for infertility. Nowadays, resorting to the discussed phenomenon is not related only to the desire to obtain an offspring despite one's lack of physical or health abilities to obtain it in a natural way, but also for reasons not linked with physical factors affecting intending parents, among others their lifestyle.

[1] Cf. S. Markens, *Surrogate Motherhood and the Politics of Reproduction*, Los Angeles 2007, p. 2 and ff.

[2] Cf. A. M. Capron, M. J. Radin, "Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood" [in:] *Surrogate Motherhood: Politics and Privacy*, ed. by L. Gostin, Indiana University Press 1990, p. 60 and next.

[3] For further information, see: O.B.A. Van Den Akker, *Surrogate Motherhood Families*, London 2017, p. 9.

[4] For further information, see: J. L. Dolgin, *Defining the Family: Law, Technology and Reproduction in an Uneasy Age*, New York – London 1997, p. 67.

Notwithstanding the above, there is no doubt that in the field of surrogate motherhood one can now speak about the existence of a specific legislative competition between individual countries.[5] It is justifiably possible to distinguish countries in which surrogate motherhood is acceptable, as well as countries in which it is completely forbidden.[6] In consequence, one can speak about a kind of maternity tourism on the international plane, boiling down to subjecting legal relations related to surrogate motherhood to the law of the state that allows it, in order to avoid prohibitions in the legal area close to surrogate parents, but providing a prohibition on the use of surrogate motherhood.[7] The above makes surrogate motherhood a significant legal problem not only from the point of view of civil, medical or criminal law, but also in the light of private international law and international civil procedure.[8]

Legal aspects of surrogate motherhood fall within the scope of private law rather than public law. Of course, registration of marital status is a public law regulation, however, issues of kinship, parental authority, adoption or relations accompanying surrogate motherhood are regulated by the provisions of family and civil law, thus they are typified by a private law nature. Therefore, if only the above issues are connected with more than one legal area, then reaching for rules and institutions of private international law seems indispensable, which will in turn indicate law applicable to certain life situations within surrogacy arrangements and define to what extent it should be applied. At this point, it should be recalled that private international law does not directly regulate social relations. In other words, it is not a source of rights and obligations between parties to a legal relationship. The basic task of private international law in the narrow perspective is only to indicate law applicable to a specific legal relationship (social relationship regulated by legal

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[5] Cf. O.B.A. Van Den Akker, *Surrogate*…, p. 212.

[6] For further information, see: Ł. Mirocha, "Tzw. macierzyństwo zastępcze (surrogacy, Leihmutterschaft) w bieżącym orzecznictwie Europejskiego Trybunału Praw Człowieka w Strasburgu", Warszawa 2017, p. 5; available at: https://www.iws.org.pl/pliki/files/IWS%20Mirocha%20Ł.%20Tzw.%20macierzyństwo%20zastępcze%20%28surrogacy%2C%20Leihmutterschaft%29%20w%20bieżącym%20orzecznictwie%20Europejskiego%20Trybunału%20Praw%20Człowieka%20w%20Strasburgu.pdf (last accessed: 18 June 2018); see: O.B.A. Van Den Akker, *Surrogate*…, p. 210.

[7] For further information, see: D. Morgan, "Enigma Variations: Surrogacy, Rights and Procreative Tourism" [in:] *Surrogate Motherhood: International Perspectives*, eds. by R. Cook, S. Day Sclater, F. Kaganas, Oxford 2003, p. 76.

[8] See: R.C. Black, "Legal Problem of Surrogate Motherhood", 16 *New Eng. L. Rev.* 373 (1980–1981), p. 375.

norms)[9], if only there are foreign elements that determine its connection with the law of more than one state. In the legal doctrine, there are on-going disputes about the scope of application of conflict-of-law rules of private international law depending on the existence of a foreign element[10], but it should be assumed here that they do not have much practical significance for issues raised in the present article. Private international law is strictly functionally linked with international civil procedure, which is essentially aimed at resolving disputes and providing legal protection in civil matters with a foreign element. In connection with the above, some of the considerations within framework of this paper will also be devoted to these problems.

It seems necessary to consider the following issues from the perspective of private international law: characterization of legal relationships in regard to surrogate motherhood, determination law applicable to legal relationships referring to surrogate motherhood, legal concepts concerning refusal to apply foreign law with respect to legal relationships within surrogate arrangements, and selected issues on international civil procedure in regard to surrogate motherhood. All the problems described above will be discussed in the framework of this study.

Finally, it should be underlined that surrogate motherhood poses a great challenge to private international law and international civil procedure, as evidenced by the activities undertaken in various international forums[11], among others The Hague Conference on Private International Law[12], aimed at identifying the needs and possible work on legal instruments in this area. Nevertheless, these bodies focus mainly on aspects related to recognition and enforcement of judgments in the discussed area, and not on typical conflict-of-law issues related to the determination of law applicable. Researchers of private international law clearly indicate the need to take action in the field of adopting legal instruments in the area of private international law and international civil procedure relating to surrogate motherhood.[13] Notwithstanding the foregoing, no particular legal instrument in this

[9] See: M. Pazdan "TYTUŁ" [in:] *Prawo Prywatne Międzynarodowe. System Prawa Prywatnego*, Vol. 20A, ed. by M. Pazdan, p. 11.

[10] See: P. Rodziewicz, *Stwierdzenie treści oraz zastosowanie prawa obcego w sądowym postępowaniu cywilnym*, p. 34. CH Beck, 2015.

[11] For issues on surrogacy arrangements are also in field of interest of EU bodies, see: http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/571368/IPOL_BRI(2016)571368_EN.pdf.

[12] See: https://assets.hcch.net/docs/0510f196–073a-4a29-a2a1–2742c95312a2.pdf.

[13] See: K. Trimmings, P. Beaumont, "International Surrogacy Arrangements: An urgent need for Legal Regulation at the International Level", *Journal of Private International Law*, 7:3, 627–647, DOI: 10.5235/jpil.v7n3.627.

regard has yet been adopted, therefore legal solutions for surrogacy arrangements have to be searched on general provisions in the field of private international law and international civil procedure.

1.2. Definitions

Surrogate arrangements are approached from different perspectives, so to avoid any doubts about the essence of the discussed phenomenon, it seems to be crucial to determine the basic phrases and terms in regard to the phenomenon under discussion. While considering basic concepts, I will refer to the conceptual network developed under the auspices of the Hague Conference on Private International Law.[14] First of all, the concept of **traditional surrogacy arrangement** will be analysed. It is a procedure in which a surrogate mother provides her own genetic material (egg) and thus the child born is genetically related to the surrogate. In this case, the mother who gives birth to the child is also the genetic mother of said child. This arrangement may involve natural conception or artificial insemination procedures.[15] Another variation of surrogate motherhood is based on **gestational surrogacy arrangement**.[16] In this type of surrogacy agreement, the surrogate does not provide her own genetic material. Therefore, the child is not genetically related to the woman who gave birth to it. Genetic material may come from intending parents or from third parties.[17] Both mentioned types of surrogacy can also give a twofold figure. Birth can take place in exchange for remuneration or without any remuneration, and at most in return for the reimbursement of reasonable costs associated with surrogacy. In the first case, it stands out as a **for-profit surrogacy arrangement**, while in the second one it is an **altruistic surrogacy arrangement**.[18] In the case of a for-profit surrogacy arrangement, the surrogate may obtain compensation for pain and suffering or fee/remuneration for carrying the child.[19] In the extreme case, the birth of a child under a surrogate motherhood agreement may directly affect up

[14] See: Prel. Doc. No. 3 B; *The Desirability and Feasibility of Further Work on the Parentage / Surrogacy Project* – https://assets.hcch.net/upload/wop/gap2015pd03b_en.pdf.

[15] *Ibidem.*

[16] *Ibidem.*

[17] *Ibidem.*

[18] *Ibidem.*

[19] *Ibidem.*

to 5 persons. We may distinguish a **surrogate (biological mother)**, i.e., a woman who agrees to carry a child for the **intending parent(s) (sociological parents)** and relinquishes her parental rights following the birth to them. Intending parents are parents who will raise the child and take due legal care of it. In addition, the people who have shared their genetic material for the purpose of surrogacy should be named and are referred to as further **gamete donors (genetic parents)**.[20]

Further considerations in the present paper will refer to the terms and phrases discussed in this section.

2. Characterization issues regarding surrogate motherhood

Any analysis concerning conflicts and contradictions of legal rules, which may be used in order to determine law applicable to legal relationships on surrogacy arrangements, must be proceeded by considerations on characterization in this regard.[21] I reserve that for the purpose of considerations in this paper and in doing so I will follow the method of characterization based on *lex fori* doctrine as generally accepted in regard to determination of applicable law. In my opinion, it is also appropriate in regard to considerations on surrogate arrangements.[22] In order to determine law applicable to surrogate motherhood, it is necessary to classify legal relationships within it to a specific group of legal relationships. This will allow to determine appropriate conflict-of-laws rules in order to indicate law applicable to legal issues within surrogate motherhood.[23]

The phenomenon referred to as a surrogacy arrangement is not homogeneous from the legal point of view. There are several legal relations behind it. Therefore, from the private international law point of view it is constantly gaining importance, because each legal relationship constitutes a separate life situation for which law applicable should be determined separately. Bearing in mind the various types of surrogate motherhood, it is possible to distinguish the following legal relationships which make up this phenomenon:

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[20] *Ibidem*.

[21] Cf. V. Allarousse, "A Comparative Approach to the Conflict of Characterization in Private International Law", *Case Western Reserve Journal of International Law*, Vol. 23, Issue 3, 1991, p. 479 and ff.

[22] Cf. P. Rodziewicz, *Stwierdzenie…*, p. 224 and ff.

[23] For further information, see: P. Rodziewicz, *Stwierdzenie…*, p. 225.

1. relationship between intending parents (social parents) and surrogate (biological mother);
2. relationship between gamete donors (genetic parents) and intending parents (social parents);
3. relationship between the surrogate (biological mother) and the child born;
4. relationship between intending parents (social parents) and the child born;
5. relationship between gamete donors (genetic parents) and the child born.

Referring to the first relation between social parents and biological parents, it needs to be noted that this relationship is crucial from the point of view of surrogate motherhood. Other social relations can also be distinguished, which simultaneously constitute a form of separate legal relations within surrogacy arrangement. However, the relation between the biological mother and social parents seems to be key in regard to surrogate motherhood phenomena from the point of view of its legal admissibility and its assessment.[24] The basis of this relationship depends on the type of surrogacy arrangement. In effect, such a relationship relies on the assumption that the biological mother agrees to the obligation to have embryos implanted, to report pregnancy and to hand over the child upon its birth to the social parents, or she may also commit herself to granting her own genetic material (egg) for the purpose of artificial insemination.[25] If the genetic material of a child comes from a surrogate mother and a social father who is also a genetic father, then the relationship described under letter b. above is not formed. However, if genetic material of a child does not come from a biological mother and social parents, then such a surrogate arrangement will be accompanied by an additional legal relationship.[26] On the other hand, as part of this relationship, depending on the type of surrogate motherhood, social parents commit themselves to paying the determined amount of the remuneration for the biological mother's performance[27] or, as part of altruistic surrogacy arrangement, undertake to cover the actual costs borne by the biological mother, related to the course of pregnancy and biological mother increased needs.[28] The analysis of the content of the relationship between the biological mother and the

[24] See and cf. B.M. Dickens, "Surrogate Motherhood Legal and Legislative Issues" [in:] *Genetics and The Law III*, ed. by A. Milunsky, G.J. Annas, New York – London 2013, p. 183 and ff.

[25] *Ibidem*, p. 184.

[26] See: *ibidem*, p. 184.

[27] See: R. Walker, L. Van Zyl, *Towards a Professional Model of Surrogate Motherhood*, London 2017, p. 35 and ff.

[28] See *ibidem*, p. 3 and ff.

social parents leads to the conclusion that each of the parties is obliged to a specific behaviour, which is nothing other than certain benefits. It should be concluded that there is a commitment between the social parents and the biological mother. The manner in which this obligation arises leads to the conclusion that it is a contractual obligation; the source of its creation is the legal act of the parties, which consists of statements of will submitted by social parents and biological mother.[29] These statements can also be made *per facta concludentia*. There is no doubt that in the described area we are dealing with a social relation between the surrogate and intending parents; this relationship from a legal point of view is most naturally determined by the provisions of contract law. Considering the way it was created, it is justifiable to come to the conclusion that it is a contractual obligation. Consequently, legal relationship under letter a. above shall be characterized as a contractual obligation between the surrogate and intended parents.

As it was underlined, if the child's genetic material does not come from the surrogate and intending parents, but it comes from a third person or is provided by a third party (entity providing genetic resource bank services), then there is another legal relationship complementary to the relationship between surrogate and the intended parents which has to be qualified.[30] The characteristic elements of this relationship are usually that the person gives his/her genetic material or it is transferred by the entity running the bank of genetic material in exchange for payment of a specific sum of money, possibly with a free title.[31] On the other hand, usually social parents undertake to pay a certain amount of money, unless the material is transferred for free. In case of this relationship, similarly as in the case of the relationship between the biological mother and social parents, a legal relationship is established, which has features characteristic of the law of obligations. The source of the obligation described above appears to be a contract between genetic material donors (entity providing genetic resource bank services) and social parents.[32] Consequently, it

[29] See and *cf.* M. D. Townsend, "Surrogate Mother Agreements: Contemporary Legal Aspects of a Biblical Notion", 16 *U. Rich. L. Rev.* 467 (1982), p. 469; available at: http://scholarship.richmond.edu/lawreview/vol16/iss2/10; J.L. Dolgin, "Status and Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate", 38 *Bu. L. Rev.* 515 (1990), p. 536; available at: http://scholarlycommons.law.hofstra.edu/faculty_scholarship/438.

[30] See: Ch.P. Kindregan, M. McBrien, *Assisted Reproductive Technology. A Lawyer's Guide to Emerging Law and Science*, Chicago 2006, p. 100.

[31] See and *cf.* B. Elger, *Ethical Issues of Human Genetic Databases: A Challenge to Classical Health Research Ethics?*, London – New York 2016, p. 40.

[32] See and *cf.* D. Danna, *Contract Children: Questioning Surrogacy*, Stuttgart 2015, p. 33 and next.

should be assumed that from the legal point of view the legal relationship between social parents and donors of genetic material (entity providing genetic resource bank services) is a contractual obligation.

In the case when the contractual relationship between the social parents and the biological mother or social parents and donor of genetic material is invalid (for various reasons, some of which will be discussed below), and on the basis of which the cash benefit is fulfilled, the legal relationship related to this settlement may arise for which the law applicable should be determined independently. Usually the settlement in such a situation should take place in accordance with the provisions on unjust enrichment.[33] However, it can not be ruled out that a cash benefit resulting from one of the above described relations can be considered a wicked benefit by a specific legal system, which is also the subject of a separate regulation. Nevertheless, settlement in the case when the contract concerning surrogacy arrangement is null and void constitutes a separate life situation, for which law applicable has to be established.

The next type of relationship that can be identified within surrogacy arrangement from the legal point of view is the relationship between a surrogate who gives birth to a child and the child itself. Undoubtedly, this is the most important relationship of all those making up surrogate motherhood, in terms of legal protection of both motherhood and the child. The source of a legal relationship between a biological mother and a child is a civil law event, which is the birth of a child, with which legal systems bind certain legal consequences.[34] In most legislations, the birth of a child essentially results in legal consequences from two perspectives, namely filial relations (child's origin) between the child and the biological mother and the relationship between a child and its parents, which is defined as parental responsibility.[35] Both filial relations and parental responsibility constitute separate life situations from the perspective of private international law, for which law applicable is established by means of the separate conflict of legal rules.[36] When making the qualification, it

[33] See and *cf.* T.A. Baloch, *Unjust Enrichment and Contract*, Oxford – Portland – Oregon 2009, p. 70; P. Mostowik, *Bezpodstawne wzbogacenie* [in:] *Prawo zobowiązań – część ogólna. System Prawa Prywatnego*, Vol. 6, ed. by. A. Olejniczak, 3rd edition, Warsaw 2018, p. 340.

[34] See and *cf.* R. Strugała, "Comment on Art. 8 Civil Code" [in:] *Kodeks cywilny. Komentarz*, 8th edition, ed. by. E. Gniewek and P. Machnikowski, Warsaw 2017, Legalis.

[35] See and cf. K. Bagan – Kurluta, *Przysposbienie międzynardoowe dzieci*, Białystok 2009, p. 376 and ff.

[36] See and *cf.* J. Słyk, "Comment on Art. 92 Family Code" [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, 1st edition, ed. by. K. Osajda, Warsaw 2017, Legalis.

should be noted that, on the one hand, it will be necessary to determine law applicable to filiation relations between the child born and the biological mother and possibly genetic parent, and, on the other hand, law applicable to parental responsibility, which should be determined separately.[37] It should be emphasized that law applicable to indicated life situations is determined by the conflict of laws rules based on different connecting factors, which leads to the applicability of different laws.[38]

Finally, within surrogate arrangements a relationship between the child born and intended parents as well as the child born and genetic parents can be distinguished. With regard to the former, from the legal point of view, one can speak of two legal relations, namely adoption, as well as parental responsibility of social parents for a minor (child), as an adoption consequence.[39] For each of the indicated legal relations, law applicable should be indicated by the separate conflict of laws rules. Regarding the latter, there might occur legal problems concerning the child's origin and therefore, as such, it might be subject to indication law applicable to the child's origin.

In conclusion, surrogacy arrangement is a complex and complicated phenomenon that, as it has already been presented from the point of view of characterization for the purposes of private international law, leads to the identification of, at least, seven life situations associated with it, for which it may be indispensable to determine laws applicable. The complexity of the legal regulation of a surrogate arrangement can lead to serious problems also at the stage of applying the laws applicable. In this situation, it may be indispensable to resort to the institutions of the general part of private international law directly, affecting application of law applicable such as adaptation.[40]

[37] See: P. Mostowik, *Komentarz do art. 56* [in:] *Prawo prywatne międzynarodowe. Komentarz*, ed. by J. Poczobut, Warszawa 2017, p. 866.

[38] Basically, in regard to the child's origin, law applicable is indicated by the citizenship of a child, as a connecting factor. The basic connecting factor for parental responsibility is the child's place of habitual residence.

[39] See and cf. P. Mostowik [in:] *Prawo…*, p. 866 and ff.

[40] See: P. Rodziewicz, *Stwierdzenie…*, p. 228.

3. Law applicable to legal relationships within surrogate motherhood

Surrogate motherhood is a complex phenomenon, therefore, as it has already been mentioned, legal relationships within it are complex and the determination of law applicable to them needs to refer to many different acts on private international law and different conflicts of legal rules. In this part of the article, conflicts of laws rules intended to determine law applicable to life situations that include surrogate arrangements will be discussed.

3.1. Law applicable to contract between surrogate and intended parents

The above-mentioned findings boil down to the assumption that the legal relationship between a surrogate and intending parents is a contractual obligation, which implies searching for law applicable on the basis of the conflict of laws rules contained in Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).[41] In order to determine law applicable to the contract in question, it should be referred to Art. 3 and Art. 4 Rome I. According to Art. 3 Rome I, parties to contract are free to choose law applicable to their obligation. As the law applicable, they may choose the law of any state; the very choice of law under this provision is unlimited.[42] In view of the general assumptions indicated above, there are no obstacles to including in the contract between the parents and the surrogate the choice of law clause, thus subjecting the contract to the law of the state of the parents' choice. Of course, the condition for effective selection of the applicable law is that the obligation created by the contract would contain a foreign element and therefore remain in connection with more than one legal system.[43] Otherwise the choice of law would have only the effects appropriate to the substantive indication of the legal regulation.[44] The choice of law seems to be of significant importance when parties have their

[41] OJ L 177, 4.7.2008, pp. 6–16; hereinafter: "Rome I."

[42] See: H. Heiss, "Party Autonomy" [in:] *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe*, ed. by F. Ferrari, S. Leible, Munich 2009, p. 2.

[43] See and cf. *ibidem*, p. 4.

[44] See and cf. *ibidem*, p. 4.

place of habitual residence or domicile in jurisdictions which do not allow for the contract concerning surrogate motherhood to be concluded. This is illustrated by an example in which intending parents have a place of habitual residence in Italy, while the surrogate, who has a Ukrainian citizenship, lives in France. In both these countries, i.e., France and Italy[45], contracts regarding surrogate arrangements are forbidden by law.[46] The parties to the contract selected the Ukrainian law as the law applicable. In this situation, from the perspective of Rome I, there are no grounds to assume that the choice of law is ineffective. Although the legal relation in question contains a foreign element, it is connected with more than one legal order. What is more, it is legitimate to say that due to the citizenship held by the surrogate mother, such a contract would even show a connection with the Ukrainian legal order. It seems that in this situation there is no basis for challenging the choice of law and non-application of the Ukrainian law at the stage concerning the determination of the law applicable. Nevertheless, application of the Ukrainian law may be refused at the stage concerning the application of the foreign law based on the public policy clause (for more, see point IV. a of the present paper). Moreover, regardless of the choice of law applicable, the application of Art. 9 para. 3 Rome I may in consequence lead to the invalidity of the concluded contract, even if the law of state which admits the conclusion of contracts on surrogate motherhood has been chosen as the law applicable. According to this provision, legal effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract must be or have already been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to overriding mandatory provisions it is important that the remark should be returned to their nature and purpose and to the consequences of their application or non-application. Of course, it in not possible *in abstracto* to decide that some type of rules, without reference to any certain legal order, which do not allow contracts on surrogate motherhood, constitute overriding mandatory provisions. Nevertheless, it supposes that such rules play a significant role from the public policy point of view. Therefore, in my opinion, in most legal systems they should be treated as overriding mandatory rules, the application of which ought to be duly considered. Returning to the example of the surrogate living in France and

[45] See and cf. Ł. Mirocha, *Tzw. macierzyństwo…*, *op. cit.*, p. 5.

[46] See: E. Corral Garcia, "Chapter 11. Saying No to Surrogacy: A European View" [in:] *Handbook of Gestational Surrogacy: International Clinical Practice and Policy Issues*, ed. by E. Scott Sills, Cambridge 2016, p. 82.

intending parents from Italy, the choice of the Ukrainian law will be valid; however, it should be considered whether application of the provisions of the surrogate's place of residence as the provisions of the place of the contract performance will not lead to the annulment of said contract. In France, there are provisions in force which completely prohibit contracts regarding surrogate motherhood.[47] It seems that in order for the contract to remain in force, the best solution would be to change the surrogate's place of residence from France to Ukraine for the duration of the contract and perform it in Ukraine. However, such an action undertaken by the surrogate and intending parents may be qualified as circumvention of law in private international law (for more on the issue, see point IV. c of the present article).

If parties do not choose the law applicable to the contract or if the choice of law is invalid, then the law applicable to contract between intending parents and the surrogate shall be determined according to Art. 4 Rome I. This provision contains four rules for determining the law applicable: the so-called "catalogue principle" within which particular types of contracts have been indicated for which separate conflict rules are provided[48]; the principle of a characteristic performance; an escape clause[49] and the principle of the closest connection.[50] It seems that the agreement between intending parents and a surrogate cannot be qualified within one of the rules contained in the catalogue in Art. 4 para. 1 Rome I. It is difficult to accept that this contract constitutes a contract for the provision of services. Due to the lack of possibility to indicate the applicable law by means of a catalogue, reference should be made to the principle of a characteristic performance. According to Art. 4 para. 2 Rome I, where the contract does not fall in types listed in catalogue contained in Art. 4 para. 1 Rome I, then it shall be governed by the law of the country where the party required to give effect to the characteristic performance of the contract has their habitual residence.[51] Determination concerning which party to a contract is obliged to fulfil a characteristic performance requires an analysis of mutual obligations of the parties in order to single out the centre of gravity of the contract.[52] The centre of gravity of the contract should be determined by criteria such as the essence

[47] See: L. Perreau – Saussine, N. Sauvage, *France* [in:] *International Surrogacy Arrangements: Legal Regulation at the International Level*, ed. by K. Trimmings, P. Beaumont, Oxford 2013, p. 121.

[48] See: M. Czepelak, *Międzynarodowe prawo zobowiązań Unii Europejskiej*, Warsaw 2012, p. 158.

[49] See: *ibidem*, p. 158 and ff.

[50] See: *ibidem*, p. 158 and ff.

[51] See: *ibidem*, p. 172 and ff.

[52] See: and *cf.* T. Petz, "Austria" [in:] *Intellectual Property and Private International Law: Comparative Perspectives*, ed. by T. Kono, Oxford 2012, p. 230.

of the obligation or the socio-economic function of performance.[53] The analysis of the parties' obligations under the contract cannot be done in a universal way due to different possible models of shaping a contract between intending parents and the surrogate. However, it should be noted that the surrogate performance is partly the same for each surrogate arrangement type. The obligation of intending parents may rely on a duty to pay a specific remuneration to the surrogate or only cover the costs related to pregnancy and childbirth by the surrogate. In connection with the above, one should come to the conclusion that the surrogate is the party obliged to fulfil the characteristic performance. In this situation, the law applicable to the contract should be the law of the country of habitual residence of the surrogate. In the case of determining the applicable law by means of the characteristic performance rule, the corrective clause may be applicable. If in a specific case the obligation which follows from a contract will show a closer connection with the law of other country than indicated by the characteristic performance principle, then the law of this more closely related state will be applicable. As it has already been mentioned, the place of performance of the surrogate arrangement typically will be the same place in which the surrogate has her place of habitual residence. Therefore, overriding provisions of this state shall be applicable, however, in this situation not on the basis of Art. 9 para. 3 Rome I, but Art. 9 para. 1 Rome I (*lex cause* overriding mandatory rules).

It should be stressed that the rules of private international law do not determine the permissibility conclusion of contract between intending parents and the surrogate. They do not also regulate the nature of this contract, nor indicate whether it is to be a paid or unpaid contract. The conflict of laws rules is intended only to indicate a legal system of a certain state, which will subsequently govern all the substantive law issues.

3.2. Law applicable to contract between intending parents and gamete donors

Rome I applies also to the indication of law applicable to contract between intending parents and gamete donors regarding provision of genetic material. As in the case

[53] See and cf. F. Seatzu, *Insurance in Private International Law: A European Perspective*, Oxford 2003, p. 103; *cf.* C. Kessedjian, "Party Autonomy and Characteristic Performance in the Rome Convention and the Rome I Proposal" [in:] *Japanese and European Private International Law in Comperative Perspective*, eds. J. Basedow, H. Baum, Y. Nishitani, Tubingen 2008, p. 91.

of the afore-mentioned contract, the parties may also choose the law applicable for a contract on provision of genetic material. In the absence choice of law, law applicable should be indicated by characteristic performance principle from Art. 4 para. 2 Rome I. The analysis of the parties' rights and obligations under the contract, where the donor undertakes to provide his genetic material for the purpose of insemination, and social parents, depending on the type of contract, undertake to pay or donate is free, leads to the conclusion that characteristic performance is the donor performance. If it is assumed that the provision of a genetic material by a donor is a characteristic performance, then law applicable to the contract in the absence of choice of law is the law of the country in which said donor has their place of habitual residence. It should be emphasised that an agreement regarding transfer of genetic material may be concluded with a natural person from whom the genetic material originates, as well as with a bank of genetic material that professionally deals with getting and sharing genetic material. However, this does not affect arrangements made in the field of law applicable to such a contract.

It should be emphasized that contracts for obtaining genetic material are regulated differently by the laws of individual countries. According to the Polish law, it is permissible to conclude contracts regarding transfer of a genetic material, but they cannot have a commercial character. In other words, the donor of the genetic material cannot receive remuneration, but only reimbursement of costs, scope of which is specified in detail in the Act. The above results from Art. 28 para. 1 and from para. 2 of the Act of 25 June 2015 on the treatment of infertility.[54] In accordance with the Act, costs that are reimbursable include costs of collection, storage, processing, distribution, and use of reproductive cells, obtain, store, process, distribute, and use embryos. Analysis of the indicated act inclines to the conclusion that the provisions contained in it regarding the supply of genetic material have a character of overriding mandatory rules. As such, they protect special (enshrined) values from the point of view of the legal order.[55] The best confirmation of the above may be that criminal liability was foreseen for their breach.

Nevertheless, parties to the mentioned contract are entitled within the scope of parties will autonomy in private international law to use the so-called regulatory competition between states. It may manifest in the choice as the law applicable law

[54] OJ 2017 pos. 865 uniform text.

[55] See and cf. justification in favour of a draft act on legislative procedure: http://orka.sejm.gov.pl/Druki7ka.nsf/o/96EAB9DED84643BDC1257A45003F73B1/%24File/608.pdf.

of the state which allow parties to shape the legal relationship in the most preferential way and the resignation of the law of another state which is for parties less preferential. However, parties have to take into account Art. 9 para. 3 Rome I, which is basis for application of overriding mandatory provisions, which are in force in state of contract performance.

3.3. Law applicable to settlements if contract between surrogate and intending parents as well as intending parents and gamete donors are invalid

Contracts regarding surrogate arrangements and contracts regarding provision of genetic material have been discussed above in regard to the determination of law applicable to them. Nevertheless, if these contracts are null and void according to law applicable to them, then the problem of settling fulfilled performances on their basis may arise. If the contract is deemed null and void, legal basis for the performance falls out, which leads to the conclusion that the performance under contract is undue and should be reimbursed as such.[56] The issue of whether, for example, covered costs associated with the pregnancy of the surrogate mother should be returned due to the invalidity of the contract is highly discouraged from the point of view of ethical norms, which, due to general clauses permeate into legal system. Regardless of this, it is not a matter of private international law but of substantive law that carries value in the indicated scope. The question concerning whether a cash payment on the basis of a contract for surrogacy should be classified as a benefit for a wicked purpose is a question concerning proper substantive law provisions. Therefore, this issue goes beyond the problems of private international law and it should be solved exclusively, based on the relevant substantive law rules. The role of private international law is technical and boils down to indicating law applicable to legal institutions regulating settlements between the parties in case when the contract turns out to be invalid. The invalidity of the contract leads to a situation in which the contractual obligation does not exist. However, it is possible that the provisions of legal systems in such a situation, combined with the existence of specific factual circumstances, arise out of the obligation, which will not be contractual. Such an obligation is an obligation for unjust enrichment, including undue consideration.

[56] P. Mostowik, *Bezpodstawne wzbogacenie* [in:] *Prawo zobowiązań…*, p. 241 and ff.

At the same time, it cannot be ruled out that contract law provisions on wicked performance may also be applied if contracts in question are considered to provide such a performance. Accordingly, depending on the specific situation, law applicable should be sought under the law applicable to the contract itself, assuming that its invalidity does not exclude some provisions of the contractual statute allowing, for example, for the forfeiture of wicked performance by a state, except for the ineffectiveness of the contract itself. The law applicable to settlements between parties if it is based on unjust enrichment is indicated by Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).[57] Rome II allows parties to choose law applicable to an obligation arising out of unjust enrichment, however it should be made when obligation has already arisen.[58] However, it should be noted that the choice of law for the surrogate arrangements contract, which then may turn out to be invalid, indirectly affects law applicable to obligation from unjust enrichment. Because, if unjust enrichment concerns a relationship existing between the parties, such as one arising out of a contract, that is closely connected with that unjust enrichment, law applicable to this contract is applicable to an obligation arising out of unjust enrichment. In case of the above-mentioned contracts, there is no doubt that law applicable to them shall be also applicable to unjust enrichment, therefore there is a strict link between a contractual obligation and unjust enrichment.

The above results from the fact that Rome II provides a four-step regulation in regard to determination law applicable to unjust enrichment.[59] First of all, according to Art. 10 para. 1 Rome II, if an obligation arising out of unjust enrichment concerns a relationship existing between the parties, such as one arising out of a contract, that is closely connected with that unjust enrichment, law applicable to this relation shall be deemed applicable to unjust enrichment.[60] If this rule does not allow to indicate law applicable and parties to obligation have their place of habitual residence in the same country, the law of this country is applicable. Last but not least, the rule is that, if discussed rules do not allow to determine law applicable, then unjust enrichment is governed by the law of state in which it took place.[61] Rome II introduces also

[57] OJ L 199, 31.7.2007, pp. 40–49; hereinafter: "Rome II."

[58] See: M. Mostowik, *Bezpodstawne wzbogacenie* [in:] *Prawo zobowiązań…*, p. 236.

[59] See: *ibidem*, p. 237.

[60] See: M. Świerczyński, Ł. Żarnowiec, *Komentarz do art. 10 Rzym II* [in:] *Prawo prywatne międzynarodowe. Komentarz,* Warszawa 2018, p. 948.

[61] See: *ibidem*, p. 949.

a corrective clause, according to which if it is clear from all the circumstances of the case that the non-contractual obligation arising out of unjust enrichment is manifestly more closely connected with a country other than that indicated by listed rules, then it shall be governed by this other more strictly connected law. However, it should be noted that the choice of law for the contract on surrogate, which then may turn out to be invalid, indirectly affects law applicable to obligation from unjust enrichment. Because, if unjust enrichment concerns a relationship existing between the parties, such as one arising out of a contract that is closely connected with that unjust enrichment, law applicable to this contract is applicable to an obligation arising out of unjust enrichment. In case of the above-mentioned contracts, there is no doubt that the law applicable to them shall be also applicable to unjust enrichment. It should be noted that the invalidity of the main contract does not automatically result in the invalidity of the choice of law clause on law applicable.[62] Therefore, the choice of law for a commitment that does not arise because of the invalidity of the legal act that creates it may remain in force.

In conclusion, the analyses carried out with regard to the above-mentioned issue indicate that any unjust enrichment related to the invalidity of a surrogate arrangement contract or to a contract concerning the transfer of genetic material should be governed by the same law as is applicable to contracts or should be applicable to a specified contract, pursuant to Art. 10 para. 1 Rome II, with reservation that parties to obligation from unjust enrichment does not choose law applicable, according to Art. 14 para. 1 Rome II.

3.4. Law applicable to the child's origin

The child's origin has a crucial importance from the legal point of view. It determines not only family law legal relationships, but it has a wider impact on child's legal sphere, for example, on the issue of acquiring citizenship in a situation where a given country expects to acquire citizenship based on the principle law of blood (*ius sanguinis*).[63] Analysing the problem of child's origin, it should be noted that

[62] See: P. Rodziewicz, "Wybór prawa właściwego (klauzula wyboru prawa)" [in:] *Wykładnia umów. Standardowe klauzule umowne. Komentarz praktyczny z przeglądem orzecznictwa. Wzory umów*, 2nd ed., ed. by R. Strugała, Warsaw 2018, p. 382.

[63] See: M. Pilich, *Zasada obywatelstwa w prawie prywatnym międzynarodowym. Zagadnienia podstawowe*, Warsaw 2015, p. 115 and ff.

till recently while the mother of the child always remained unquestionable, i.e., she was a woman who gave birth to the child, it was, however, problematic from the legal point of view to determine the child's father. For this reason, prescriptions regarding paternity were introduced in numerous legislations, while the issue of motherhood remained beyond any doubts, in accordance with the Roman maxim *mater certa est*. However, the development of medical sciences, in particular, in the field of artificial insemination, led to a situation in which the rules for determining the child's origin must be redefined. While these hypotheses apply to substantive law, in the case of private international law they do not seem up to date. However, it is justified to review the conflict of laws rules of private international law in the scope of their compliance with a directing directive of private international law[64], according to which connecting factors shall be shaped in a manner allowing to indicate as law applicable to a given life situation the law of state which from the factual point of view is the most strictly connected.

Moving to conflict of laws rules intended to indicate law applicable to the child's origin, it should be noted that they are contained in Art. 55 of the Act of 4 February 2011 on private international law.[65] According to para. 1, determination and negation of the child's origin is subject to the law of nationality of the child at the moment of its birth.[66] At first sight, it seems that this conflict of laws rules is clear and the phenomenon of surrogate motherhood does not give rise to any doubts regarding its use. However, it should be noted that citizenship essentially remains outside the scope of private international law. It is an institution of administrative and constitutional law with which conflict-of-law rules bind certain legal consequences with regard to the indication of law applicable.[67] Therefore, citizenship, even though it is an institution outside of private international law, is of great importance in determining the law applicable. Determination of child's citizenship at the moment of its birth might be highly complicated. There are two basic concepts concerning acquisition of citizenship. A concept based on the principle of the law of the land (*ius soli*), according to which citizenship is acquired by birth on the territory of a given state

[64] See and cf. *ibidem*, p. 178 and ff.

[65] OJ 2015 pos. 1792 uniform text; hereinafter: "PIL."

[66] For further information, see: P. Mostowik, *Pochodzenie dziecka oraz odpowiedzialność rodzicielska* [in:] *System Prawa Prywatnego. Prawo prywatne międzynarodowe*. Vol. 20C, ed. by M. Pazdan, Warsaw 2015, p. 309 and next.; P. Mostowik, "Stosunki między rodzicami i dzieckiem" [in:] *Prawo prywatne międzynarodowe. Komentarz*, ed. by J. Poczobut, Warsaw 2017, p. 843 and ff.

[67] See and cf. M. Pilich, *Zasada*…., p. 99.

and the concept of the law of blood (*ius sanguinis*), according to which citizenship is acquired from parents. In the case of surrogate motherhood, a fundamental issue comes into question, namely, which mother should be taken into account for the purpose of citizenship: genetic, biological, and perhaps social? Hypothetically, they may have different citizenships. However, the indicated problem is not a problem in the field of private international law from the point of view of the Polish doctrine. In Poland, unlike in France, the law on citizenship is outside the scope of private international law.[68] Of course, establishing a child's citizenship in such a situation causes a number of legal problems; nevertheless, these problems should be resolved at the level of regulation of substantive law relating to citizenship. However, it is impossible to avoid recourse to substantive family law in determining who the parent of a child is for the purpose of determining the child's citizenship, which in turn requires determining which state family law is applicable. In fact, there is feedback on the one hand, the issue of determining the child's citizenship is an administrative matter outside the scope of private international law, on the other hand, in the case of blood law, the determination of citizenship is a derivative of filial relations, which means that it determines the law applicable to the child's origin, and as such is a preliminary issue for further establishing its citizenship. Nevertheless, in the Polish legal system the biological view of parenthood (the origin of a child from the union of a woman and a man)[69] is the acceptable one. In regard to the above, in fact citizenship of biological mother is relevant to determine law applicable to child's origin. Except general provision on child's origin, Art. 55 para. 2 PIL states that if the law of child's citizenship at the time of birth does not provide for the judicial establishment of fraternity, to judicially establish the fraternity of the child, the law of child's citizenship at the time of determining the child's origin shall be applied. Separately in PIL, the regulated determination of the law is applicable to the recognition of the child. According to Art. 55 para. 3 PIL, the recognition of a child shall be governed by the law of the child's citizenship at the time of its recognition. If the law does not provide for recognition of the child, the child's national law at the time of its birth applies, on condition that this law provides the possibility of

[68] See: M. Pazdan, *Zagadnienia ogólne* [in:] *Prawo prywatne miedzynarodowe. System Prawa Prywatnego*, Vol. 20A, ed. by. M. Pazdan, Warsaw 2014, p. 11.

[69] See: P. Mostowik, "O problemach ze stwierdzeniem obywatelstwa dziecka prawdopodobnie pochodzącego genetycznie od obywatela polskiego niebędącego mężem tzw. rodzicielki zastępczej (surrogate mother). Uwagi aprobujące wyroki NSA z dnia 6 maja 2015 r. (II OSK 2372/13 i II OSK 2419/13)", *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*, Vol. XVI, 2018.

the child's recognition. If the child is conceived but unborn, its recognition shall be subject to the mother's law at the time of recognition.

From the point of view of this study, the most important is that the determination of the child's origin is a separate life situation for which law applicable is determined separately. Thus, it is not enough for intended parents to be established as parents of a child in a surrogacy arrangement contract, although the law applicable to the child's origin, which is determined separately from law applicable to contract, permits it.

3.5. Law applicable to parental responsibility

Law applicable to parental responsibility is indicated by The Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, concluded in The Hague on 19 October 1996 (hereinafter called: "**Hague Convention**"). Issues related to the law applicable to the acquisition and loss of parental authority are of key importance from this paper's perspective. However, acquisition and loss of parental responsibility is essentially linked to relationships in the field of the child's origin and adoption. According to Art. 16 para. 1 Hague Convention, the attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child. Similarly, attribution or extinction of parental responsibility by an agreement or a unilateral act, without intervention of a judicial or administrative authority, is governed by the law of the state of the child's habitual residence at the time when the agreement or a unilateral act takes effect. If parental responsibility is attributed or extinct on basis of judicial act, then the law which is in force in the state where the court hears a case is law applicable. However, as a rule, the competent court in the above-mentioned matters is the court of the child's habitual residence.

In conclusion, with regard to attribution and extinction of parental responsibility, law applicable is the law of the state in which the child has its place of habitual residence.[70] Nevertheless, attribution and extinction of parental responsibility

[70] See: P. Mostowik, *Władza rodzicielska i opieka nad dzieckiem w prawie prywatnym międzynarodowym*, Kraków 2014, p. 311 and ff.

constitutes yet another life situation independent from the law applicable to a surrogate contract, for which law applicable has to be determined separately.

3.6. Law applicable to adoption

Adoption is a legal institution by means of which connection between unrelated people is created, thus intending to substitute relations between parents and children.[71] Adoption is a life situation separate from the private international law point of view, for which law applicable is determined separately. Adoption in private international law is not regulated on the EU level. There is also no multilateral international convention which addresses conflicts of laws on adoption, however, The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption applies (hereinafter: "**Hague Adoption Convention**"), established under auspices of the Hague Conference on Private International Law. This convention does not address conflicts of laws rules intended to indicate law applicable to adoption. It provides a source of substantive law aiming to protect children and their families against the risks of illegal, irregular, premature or ill-prepared adoption abroad.[72] Art. 57 PIL discusses law applicable to adoption, distinguishing two types of adoption: single adoption and joint adoption by spouses. According to para. 1 of this provision, single adoption is subject to the law of the state whose citizen is the adopter. Therefore, the law applicable to single adoption is indicated by the adopter's citizenship as a connecting factor. A separate rule on adoption is included in Art. 57 para. 2 PIL. It concerns common adoption by spouses; according to this rule, common adoption by the spouses shall be subject to their common law of citizenship. In the absence of common citizenship, the law of the country in which both spouses have their place of permanent residence – or, in the absence of the latter, of their common habitual residence – shall apply. If spouses are not habitually resident in the same country, the law of the country with which both of them are otherwise most strictly connected constitues law applicable. Nevertheless, single adoption and common adoption cannot take place without keeping the law of the

[71] See: *ibidem*, p. 22.

[72] See: H. Baker, *A Possible Future Instrument on International Surrogacy Arrangements: Are There 'Lessons' to be Learnt from the 1993 Hague Intercountry Adoption Convention?* [in:] *International Surrogacy Arrangements: Legal Regulation at the International Level*, ed. by K. Trimmings, P. Beaumont, Oxford 2013, p. 412 and ff.

state whose citizen is an adoptee regarding the consent of that person, the consent of its statutory representative and the authorization of the competent state authority, as well as the adoption restrictions due to the change of the place of residence after adoption.[73] Law applicable to adoption is determined irrespective of the law applicable to the contract governing surrogate arrangements. Adoption for a child conceived and born within a surrogate arrangement is not determined by the law applicable to the contract, but the law applicable to adoption.

4. Refusal to apply foreign law with respect to legal relationship connected with surrogate motherhood

4.1. Public policy clause

If the conflict of laws rules indicates a foreign law as law applicable to a particular life situation, then the Polish court is obliged to ascertain content of this law and apply it *ex officio*.[74] The indicated obligation results directly from Art. 51a § 1 Act of July 21, 2001 the law on the system of common courts.[75] Nevertheless, in exceptional circumstances Polish courts may deny application of proper foreign law, if its application violates basic principles of public order. Refusal to apply a relevant foreign law takes place on the basis of the public policy clause. In the scope discussed in this study, regulation on public policy clause should be taken into account not only in PIL, but above all in Rome I, Rome II and the Hague Convention. Irrespectively of the source of regulation on public policy clause, its essence is that the law-applying body may refuse to apply foreign law if its application could lead to the effects contrary to fundamental public order principles which are in force at the seat of the law-applying body. Difference between the substance of the public policy clause in national and EU law is that the qualification of the potential contradiction of foreign law with the national legal order has to be more pronounced, because the premise for reaching the public policy clause is a clear contradiction between the foreign law and the public order of the forum.[76] In parts of the EU instruments on private

[73] See: B. Gnela, *Komentarz do art. 57 – 58*, [in:] *Prawo prywatne międzynarodowe. Komentarz*, ed. by J. Poczobut, Warszawa 2017, p. 903.

[74] See P. Rodziewicz, *Stwierdzenie…*, p. 146 and ff.

[75] Hereinafter called: "Law on common courts."

[76] See: A. Nowicka, "Klauzula porządku publicznego w prawie prywatnym międzynarodowym", [in:] *Współczesne wyzwania prawa prywatnego międzynarodowego*, ed. by. J. Poczobut, Warsaw 2013, p. 207.

international law, the public policy clause has also been linked to the EU Charter of Fundamental Rights, but this does not apply to acts relevant to this study.[77] As it is assumed in the doctrine of private international law, the scheme of referring to the public policy clause has a three – level form. First, court should determine the content of the relevant foreign law. Secondly, it should anticipate the existing fundamental principles of public order in force in its seat relating to the life situation regulated by foreign law and, thirdly, it should assess the effects of the application of foreign law from the perspective of the identified basic principles of public order.[78] Of course, the determination of the content of foreign law and the consequences of its application may take place only for the purpose of a particular case, as part of the process of applying the law.[79] However, it is possible to identify *in abstracto* the basic principles that should be taken into consideration in relation to the phenomenon of surrogate motherhood, which the law-applying body should also consider.

First, it is reasonable to refer to The Constitution of The Republic of Poland of 2nd April, 1997[80] as well as to basic principles of Polish family law, which follows from The Act of February 25, 1964 – the Family and Guardianship Code[81], in order to identify the basic principles of the legal order of the Republic of Poland, which have to be taken into consideration by the law-applying body in the context of surrogate motherhood.

According to Art. 18 Constitution, marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland. This provision protects four basic values related to the functioning of an individual in society: marriage – as a relationship between a woman and a man, a family, motherhood and parenthood. The high position of these values is evidenced by the fact that the legislator has a duty to provide them not only with protection, but also with care.[82] From the perspective of the conducted considerations, the protection provided to motherhood and parenthood is crucial. It should be noted that the legislator clearly distinguishes between motherhood and parenthood. Bearing in mind the principle of rationality of the legislator, it should be concluded that they have a different content scope.

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77 See: *ibidem*, p. 207.

78 See: *ibidem*, p. 207.

79 See: M. Zachariasiewicz, *Klauzula porządku publicznego jako instrument ochrony materialnoprawnych interesów i wartości fori*, Warsaw 2018, p. 192.

80 Hereinafter called: "Constitution."

81 Hereinafter called: "Family Code."

82 See: W. Borysiak, *Konstytucja RP. Tom I. Komentarz do art. 1–86*, Sip Legalis.

Nevertheless, the Constitution does not define these terms. As it is indicted in the doctrine of constitutional law, "*motherhood*" is undoubtedly connected with the concept of "*mother*" and means the relationship that exists between child and his biological mother from the beginning of pregnancy, through the puerperium period, to the death of one of them.[83] Only motherhood related to the fact of pregnancy is protected under this provision.[84] This interpretation is justified by the purpose of this provision, which is the functional protection of the mother, especially during pregnancy and the youngest years of the child.[85] An analogous understanding of the term "maternity" also results from two rulings of the CJEU:

> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that a refusal to provide paid leave equivalent to maternity leave or adoptive leave to a female worker who is unable to bear a child and who has availed of a surrogacy arrangement does not constitute discrimination on the ground of disability.

According to this court decision, motherhood is a relationship between a child and a mother who has given birth to it, not the child and the woman who is a mother on basis of surrogacy agreement. A similar view has been presented in CJEU decision C-167/12, according to which:

> Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breast-feeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) must be interpreted as meaning that Member States are not required to provide maternity leave pursuant to Article 8 of that directive to a female worker who as a commissioning mother has had a baby through a surrogacy arrangement, even in circumstances where she may breastfeed the baby following the birth or where she does breastfeed the baby.

[83] See: *ibidem*.
[84] See: *ibidem*.
[85] See: *ibidem*.

Having the above in mind, motherhood is a special relationship between the biological mother and the child, and this relationship is subject to special constitutional protection. As indicated in the ruling of the Polish Constitutional Tribunal:

> the concept of motherhood expresses the necessary relationship between the mother and the child, and this relationship takes place on many levels – biological, emotional, social and legal. The function of this relationship is the proper development of human life, in its initial period, in which requires special care.[86]

Bearing this in mind, it would be worth considering whether the term motherhood and parenthood overlap. While in the case of motherhood, the element that characterizes it is the birth of a child by a woman in the case of parenthood, this element is not a *differentia specifica* of the term in question. However, it should be noted that in the case of parenthood, as in the case of motherhood, they are characterized by emotional, social and legal ties. It should be concluded that while parenthood applies to both women and men, maternity is a unique bond between the child and women resulting from the biological fact of the birth of a child by woman. The basic principle of Polish family law is that the mother of a child is the woman who gave birth to it. As such, the principle follows from Art. 61^9 Family Code and correlates with the constitutional principle on maternity discussed above. The application of foreign law that could provide for a different way of determining motherhood may in a specific situation lead to a contradiction between foreign law and the basic principles of Polish public order, which follows from Art. 18 Constitution and Art. 61^9 Family Code. Therefore, Polish law specifies who in its understanding is a mother and father, and also that parents are people of different sexes.[87] It is not apparent from Polish law that the mother with reservation to the effects of full adoption may be a woman other than the one that gave birth to the child.[88] Nor does it state that the second parent in the legal sense may be the same sex as the first parent. In connection with the above, it must be pointed out that the natural (biological) legal concept of parenthood referred to above is the basic principle of the Polish legal

[86] Decision of the Constitutional Tribunal (28 May 1997), file No. K 26/96, published OTK 1997, No. 2, pos. 19.

[87] See: P. Mostowik, *O problemach…*, *op. cit.*

[88] See: *ibidem*.

order.[89] Therefore, in case when consequences of application of foreign law are in contradiction with this basic principle, then the public policy clause may be applied. It gives an assumption that contracts for surrogacy, except that they may add the mother's attribute to someone other than the person who gave birth to the child, which is *per se* inconsistent with Polish legal order, they may lead to a violation of natural (biological) concept of parentage and in consequence it may give rise to the application of public policy clause.

Moreover, contracts regarding surrogate motherhood may lead to the violation of the provisions regarding adoption or deliberate circumvention of the provisions which may consist of elements of crime under Art. 211a The Act of June 6, 1997 – the Criminal Code.[90] According to this provision, who, in order to gain financial benefits, deals with the organization of adoption of children against the provisions of the act, is subject to imprisonment from 3 months to 5 years. If in a specific situation a surrogate motherhood contract were subject to foreign law, it would lead to a situation in which adoption would take place in violation of the provisions of the act. In such a case, it would, in my opinion, be possible to resort to the public order clause and refuse to apply provisions of foreign law. The above is justified in the general conclusion that every case of the application of foreign law leading to the occurrence of effects contrary to the orders or prohibitions resulting from the norms of Polish criminal law will imply the existence of contradictions between foreign law and the basic principles of the public order. As a consequence, it will justify the application of the public policy clause.[91]

The grounds for admitting that surrogate motherhood is prohibited and, consequently, that the provisions of foreign law concerning it should not be applied on the territory of the Republic of Poland, may bring the principle of natural (biological) parenthood as well as criminal law to the above-mentioned extent and, with respect to that, penalization of human trafficking. It is not a study on criminal law, therefore, it is not possible to decide unambiguously whether surrogate motherhood exhausts the traits of human trafficking. Nevertheless, based on the statements of the representatives of the criminal law doctrine, opposing views can be found in this regard. On the one hand, there are authors who claim that surrogate motherhood may exhaust the features of the crime of human trafficking under Art. 189a the Criminal

[89] See: and cf. *ibidem*.

[90] Hereinafter called: "Criminal Code."

[91] See: P. Rodziewicz, *Stwierdzenie…*, p. 237.

Code in conjunction with Art. 115 § 22 the Criminal Code[92]; on the other hand, however, some authors claim that there are no convincing reasons for accepting that surrogate motherhood is within the scope of human trafficking, if we take into account relation between biological mother and social parents.[93] They indicate that it should be assumed that the subject of the executive action of human trafficking is not a child transferred immediately after the birth of the second person in the performance of the surrogate contract. If the contract actually concerns surrogate motherhood, and is not a way to obtain, for example, organs, tissues or cells, then Art. 211a Criminal Code, rather than Art. 189a Criminal Code, shall apply. However, it follows from the above that a contract for surrogacy, although not a form of human trafficking, may lead to the exhaustion of the features of a crime that amounts to the adoption of a violation of the requirements of the act.[94] It should be noted that from the perspective of criminal law, specific behaviors of entities related to the conclusion and implementation or performance of a contract for surrogate motherhood would exhaust the character of the crime described above. In such a situation, there are grounds for refusing to apply provisions of foreign law regulating contract for surrogate motherhood or provisions of foreign law that may have specific effects on parental responsibility, adoption or determination of parentage.

Summing up, the analysis of the regulations leads to the conclusion that the phenomenon of surrogate motherhood is not directly prohibited and this prohibition cannot be derived directly from the provisions of the Constitution and the Family Code. Nevertheless, surrogate motherhood is not uniformly assessed through the prism of criminal law. In connection with the above, the acceptance that specific behavior related to surrogate motherhood may constitute a crime leads to the conclusion that even if these behaviors are allowed under foreign law, this law may not be applied in Poland with reference to the public policy clause. Moreover, contracts for surrogacy may lead to the violation of the basic principle of Polish legal order which is the principle of natural (biological) parenthood. It should be emphasized,

[92] See: M. Kramska, "Problematyka prawna macierzyństwa zastępczego – regulacje prawnomiędzynarodowe i krajowe", *Prawo i medycyna* available at: http://www.prawoimedycyna.pl/?str=artykul&id=688 (last accessed: 12 August 2018).

[93] See: W. Wróbel, *Kodeks karny. Część szczególna. Tom II. Część I. Komentarz do art. 117–211a*, ed. by A. Zoll, System of Legal Information LEX; W. Górowski, "Zastępcze macierzyństwo a prawo karne – ocena obecnego stanu prawnego", *Czasopismo Prawa Karnego i Nauk Penalnych,* No. 1, 2011, p. 13.

[94] See: W. Wróbel, *Kodeks karny. Część szczególna. Tom II. Część I. Komentarz do art. 117–211a*, ed. by A. Zoll, System of Legal Information LEX.

however, that possible administration of the public policy clause takes place in a specific case, after prior anticipating the effects of the application of foreign law from the perspective of the legal order of the forum. As indicated above, the only principles of public policy, which could possibly serve as the grounds for refusal to enforce foreign law, are rules related to the prohibition of trafficking in human beings and adoptions contrary to the act, which is the subject of a criminal law response as well as the principle of natural (biological) parenthood.

4.2. Overriding mandatory rules

Overriding mandatory rules can play a significant role in regard to surrogate arrangements. According to PIL as well as EU legal instruments on private international law, even if law applicable is foreign law its application does not exclude application of overriding mandatory rules which are in force at the seat of the law applying authority. In addition to the regulations applicable at the seat of the body that applies the law, the regulations of a third country may also be taken into account, such as the provisions of the country of the place of performance of the surrogacy contract. Irrespective of the legal instrument in which the regulation of overriding mandatory rules is contained, it is assumed that these are rules that compliance is considered by the state to be such an important element in protecting its public interests, such as political, social or economic organization, that they are applicable to factual situations falling within their scope irrespective of the law applicable to the given life situation.

Evaluation of whether a given provision is an overriding mandatory provision must take into account the purpose and function of the provision, as well as the scope of its application.[95] The analysis of the provisions of Polish law does not allow for the single formulation of the conclusion that it is possible to identify the provision of Family Code, which have the character of an overriding mandatory provisions. Of course, provisions of Family Code that are essential from the point of view of surrogate motherhood are undoubtedly of imperative nature, but nevertheless, they are not overriding mandatory provisions. Regarding overriding mandatory rules, it is allowed to refer to legal systems which contain strict and express prohibition

[95] See: M. Mataczyński, *Przepisy wymuszające swoje zastosowanie w prawie prywatnym międzynarodowym*, Kraków 2005, p. 50 and ff.

of surrogacy arrangements. The analysis of these provisions may lead to the conclusion that they perform the function of overriding mandatory provisions, as to their purpose and functions, however, it is not so obvious in regard to their scope of application and these provisions shall be assed independently for specific cases.

4.3. Circumvention of law in private international law

Refusal to apply foreign law may also take place when the law-applying body finds that parties to a given legal relationship artificially created as law applicable law of a given state in order to avoid the application of the law applicable in the normal course of events.[96] In the doctrine of private international law, it is pointed out that in order to accept that we are dealing with a circumvention of law in private international law, the following four elements must be fulfilled:

1. there is a rule whose use has been avoided;
2. there is another rule that has been applied;
3. there was an act of circumvention of the law, which is a factual or legal act, which in turn interferes with the effects of the conflict of (a) laws rule(s);
4. the parties intended to circumvent the law: the parties' awareness of the intended effect.[97]

Existing diversity among states and the same regulatory competition between the legal systems as regard to the admissibility of the surrogate arrangement make it important to consider whether potentially possible, and if so to what extent, that the surrogate arrangement parties can undertake actions in order to circumvent the law, from the private international law point of view. It seems that taking action to circumvent law applicable can have a practical significance on two sides. First, in the area of contractual relations between intending parents and surrogate, as well as intending parents and gamete donors. Secondly, it may take place in regard to conflict of laws rules applicable to adoption. From the surrogate motherhood point of view, as it has been already underlined, the legal relationship between intending parents and the surrogate, which is the basis of the whole phenomenon, as well as issues related to the subsequent adoption of a child after birth seem to be crucial. In this regard, there is also a significant diversity among states. It has already been

[96] See: *M. Sośniak*, *Prawo prywatne międzynarodowe*, 3rd ed., Katowice 1991, p. 83.

[97] See: W. Ludwiczak, *Międzynarodowe prawo prywatne*, revised 3rd edition, Warsaw 1979, p. 94.

mentioned that there are states, whose law allows to conclude a contract for surrogacy, as well as states in which adoption procedures are simpler than in others from the perspective of parties to the surrogacy contract. Finally, one cannot forget the realities, that is, the fact that in some less-developed countries corruption and abuse are more frequent, which can be an incentive to conduct the process of adoption in such a country, for the next move through intending parents with a child with a regulated legal status in terms of their relations.[98] Nevertheless, the main issue from the point of view of the legal concept in question and the surrogate motherhood is whether activities consisting of relocating the surrogate during period of pregnancy or changing by intending parents' place of residence for the procedure of surrogate arrangement can be qualified as circumvention of law in private international law. Considering the problem purely theoretically, it would give an assumption to an affirmative answer, but from a practical point of view it may not be easy to state undoubtedly the above. In addition, this relates to another issue from the point of view of private international law, namely, the recognition of situations shaped under the rules of previously law applicable. As an example, if the law of Ukraine allows adoption on a different basis than the Polish law, then why the substantive effects of adoption which took place in Ukraine would not later be recognized on the territory of Poland? There is also no basis to refer to public policy clause as it operates only at the stage of application of foreign law by Polish law-applying bodies; therefore, it seems that the scope of its application does not cover closed legal situations shaped under the rule of law previously applied in another state. If the effects of the closed legal situation arise from a decision, judgement or any other public document constituting an act of applying the law, then there are grounds for the application of the public policy clause, however, regulated on international civil proceedings, and not in private international law. As regards the consequences of a law-applying body declaring a circumvention of the law under private international law, it is pointed out that the law-applying body should refuse to apply artificially applicable law instead of the law that should be applied in the normal course of action. At the same time, it should be pointed out that resorting to the institution of circumvention of the law by the law-applying body should be exceptionally prudent in cases of undoubted and deliberate action of the parties, aimed at influencing the law.[99] It should be stressed

[98] Cf. I. Glenn Cohen, *Patients with Passports: Medical Tourism, Law, and Ethics*, Oxford 2015, p. 2015.

[99] See: P. Rodziewicz, *Stwierdzenie*…, p. 245 and ff.

that according to the view adopted in present doctrine of private international law, the law-applying body should examine whether there was a circumvention of the law in a particular case. Nevertheless, as it has been emphasised, the above-mentioned legal concept can constitute a legal instrument in order to avoid the application of artificially created law by the parties as law applicable to surrogate motherhood at the stage of its application, but in a situation when the artificially crated law has been applied and decision, judgement or other act of law applying is based on it, then the institution of circumventing of law in private international law does not seem to apply.

5. Selected procedural problems from the perspective of international civil proceedings regarding surrogate motherhood

5.1. Preliminary issues

Surrogate motherhood is an important issue from the point of view of the application of many institutions of international civil procedure. As indicated above, the phenomenon of surrogate motherhood consists of several legal relationships for which, in addition to determining the law applicable in a situation where it is necessary to resolve the dispute and grant legal protection, the court having jurisdiction should be determined. Moreover, surrogate motherhood phenomenon may involve law-applying bodies to render decision concerning the child's origin, adoption or parental responsibility, it causes the surrogate motherhood perspective to play a crucial role in the legal regulation on recognition and enforcement of foreign judgements, court decisions as well as public documents. Due to the limited scope of this paper, there will be presented only basic considerations concerning jurisdiction in matters relating to surrogate motherhood, as well as regulations regarding recognition and enforcement of foreign judgments and official documents.

5.2. Jurisdiction

The basis of jurisdiction regarding matters concerning issues within the scope of surrogate motherhood is divided into five groups:

1. jurisdiction on matters concerning a contract between surrogate and intending parents, a contract between intending parents and gamete donors;

2. matters regarding settlement between parties if mentioned contracts are null and void;
3. jurisdiction in parental responsibility matters;
4. jurisdiction in adoption matters;
5. jurisdiction in child's origin matters.

What is important, jurisdiction in each of the specified categories is determined by different legal instrument. The existing situation may lead in specific factual backgrounds to the situation in which the courts of one state will not have jurisdiction over all issues within surrogate arrangements.

5.2.1. Jurisdiction on matters concerning contract between surrogate and intending parents, contract between intending parents and gamete donors

Jurisdictional rules on contracts connected with surrogate arrangements are contained both in national law as well as EU and international legal instruments. Jurisdiction concerning matters of contractual nature connected with surrogacy arrangements is indicated by Art. 4, Art. 7 (1) as well as Art. 25 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter: "Brussels I bis"). According to Art. 4 Brussels I bis, persons domiciled in a EU member state shall, whatever their nationality, be sued in the courts of that EU member state. Depending on who will be filing a claim: surrogate, intending parents or gamete donors, the courts competent to hear a case brought by those persons will be a court of EU member state in which the other party to dispute has domicile. If a defendant does not have domicile in EU member state jurisdiction of the courts of each EU member state shall be determined by the law of that EU member state. In such a situation in Poland, depending on which state the case is related to, there will be a need to refer to the Act on 17th of November 1964 – Code of Civil Procedure (hereinafter: "Code of Civil Procedure"), Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters signed on 30th of October 2007 in Lugano (hereinafter: "the New Lugano Convention"), or one of the bilateral agreements to which Poland is contracting party. However, if there are grounds for designation jurisdiction based on the provisions of Brussels I bis, it should be remembered that alternate jurisdiction has been provided for in matters relating to contracts. As stated in Art. 7 (1) Brussels I bis, in matters relating to a contract jurisdiction case, except courts generally competent to hear a case, the courts of the place of the contract

performance of the obligation in question have precedence. Parties to a contractual relation are also able to conclude agreement concerning competent courts to settle any disputes which have arisen or which may arise in connection with their legal relationship. In such a situation that a court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of the EU member state in question. Jurisdiction which follows from an agreement shall be exclusive unless the parties have agreed otherwise.

5.2.2. Jurisdiction regarding matters on settlement between parties if contracts on surrogacy arrangements are null and void

Jurisdiction in matters concerning settlement in case when contracts between a surrogate and intending parents or intending parents and gamete donors are null and void shall be determined according to provisions of Brussels I bis, if only a defendant holds residence in a EU member state. Then the general principle on jurisdiction from Art. 4 (1) Brussels I bis is applicable. If a defendant does not hold residence in a EU member state, then jurisdiction of the EU member state is determined by its law. Parties to dispute are able, as in the case of disputes concerning contracts, to conclude agreement on jurisdiction in accordance with Article 25 Brussels I bis.

5.2.3. Jurisdiction in parental responsibility matters

Jurisdiction in parental responsibility matters shall be determined according to the Hague Convention. In accordance with the Hague Convention, jurisdiction over parental responsibility is as a rule vested in the courts of the habitual residence of the child.[100] There is therefore no possibility of concluding any agreement on jurisdiction in matters concerning parental responsibility.

5.2.4. Jurisdiction in adoption matters

Jurisdiction in adoption matters is not governed by EU or international legal instruments, therefore it is indicated by Art. 1103, Art. 1103^2 and Art. 1106^4 Code of Civil Procedure. Jurisdiction in these provisions is based on habitual residence or domicile.[101] The general rule is that Polish court have jurisdiction if a defendant has place of habitual residence or domicile in Poland. Moreover, Polish courts are

[100] For more, see: O. Bobrzyńska, P. Mostowik, "Zwykły pobyt dziecka jako podstawa jurysdykcji krajowej oraz łącznik kolizyjny", *Zeszytu Naukowe Uniwersytetu Szczecińskiego*, No. 821 2014, p. 520; P. Mostowik, *Władza rodzicielska…*, p. 150 and ff.

[101] For more, see: P. Mostowik, *Władza…*, p. 185.

competent to hear cases if the adopter and/or the adopting child have their place of habitual residence or domicile in Poland. If the matter of adoption shall be solved in non-contentious mode of proceedings, then jurisdiction covers adoption cases if the person to be adopted is a Polish citizen or, being a foreigner, has a place of domicile or habitual residence in Poland. Cases of adoption belong to national jurisdiction also when the adopter is a Polish citizen and has a domicile or place of habitual residence in the Republic of Poland. In the event of joint adoption by the spouses, it is sufficient that one of the spouses is a Polish citizen and has a place of habitual residence or domicile in the Republic of Poland. The jurisdiction is exclusive if the adopter, and in the case of adoption of a joint – each of the adopting spouses, and the person to be adopted, are Polish citizens, having their domicile or place of habitual residence in the Republic of Poland.

5.2.5. Jurisdiction in child's origin cases

Jurisdiction in matters concerning child's origin is determined by Art. 1103^2 Code of Civil Procedure. According to this provision, matters concerning relations between parents and children belong to Polish jurisdiction, except general jurisdictional rule based on the defendant's place of residence or habitual residence, when a child has a domicile or has its place of habitual residence in the Poland or the plaintiff, if s/he is not a child, has a domicile or a place of habitual residence in Poland for at least one year immediately before the commencement of the proceedings, or the plaintiff, who is not a child, is a Polish citizen and has a domicile or place of habitual residence in Poland for at least six months immediately before the commencement of the proceedings, or plaintiff and the defendant are Polish citizens. Nevertheless, jurisdiction is exclusive if all persons appearing as parties are Polish citizens and have a domicile or a place of habitual residence in Poland.

5.3. Recognition and enforcement of foreign judgments and public documents

Recognition and enforcement seems to be the most important issue form a surrogate motherhood phenomenon in terms of international civil procedure. Legal concepts concerning recognition and enforcement of foreign judgments allow the extension of the effects of law application acts on the territory of other countries than they have been rendered. In other words, if a Ukrainian court renders a decision on adoption

connected with surrogacy arrangement[102], which has a certain impact also on parental responsibility, and later intending parents want to extend legal consequences of this decision on the territory of Poland, then this decision shall be recognized in Poland according to proper rules of international civil procedure. In fact, recognition and enforcement of foreign court decisions and public documents may be part of the process which boils down to tourism regarding surrogate arrangements. This institution allows for extension of the effects of the decisions issued abroad, based on different laws, even those that prohibit surrogacy agreements or prohibit adoptions in connection with surrogacy. In this way, it may come to a situation where the consequences of the abroad legalized surrogacy effects would have been extended to a state (country) that formally prohibits surrogacy arrangements.

Not unlike the case of jurisdiction, the recognition and enforcement of foreign judgments is not regulated by a single normative act. However, it is important that in regard to recognition of foreign judgments, acts implement the principle of automatic recognition. On the other hand, considering the enforceability of judgments in the discussed matters, these acts are non-uniform and, for instance, one of them may provide automatic enforcement of judgments, while rest of them may provide special proceedings on enforcement of foreign judgments. Regarding recognition and enforcement judgments concerning surrogacy arrangement contracts as well as settlements concerning null and void contracts, Brussels I bis is applicable. It stipulates that both recognition and enforcement of judgments should take place automatically by virtue of law. The Hague Convention is applicable with regard to recognition and enforcement judgments on parental responsibility. Last but not least, recognition and enforcement of foreign judgments and other court decisions on adoption and child's origin is governed by Code of Civil Procedure. The Hague Convention as well as Code of Civil Procedure govern and guarantee that foreign judgments are recognized automatically by virtue of law; enforcement of judgments is possible only in special proceedings, however.

All the afore-mentioned legal instruments provide a listed basis for non-recognition and non-enforcement of foreign court decisions. Nevertheless, from the perspective of this paper all of them provide one common basis. The possibility of non-recognition or non-enforcement of a foreign court decision arises, if it is inconsistent with the basic principles of Polish legal order (public policy clause). Public policy clause is not only an institution of private international law but also

[102] See: https://mfa.gov.ua/en/consular-affairs/adoption.

an international civil procedure. However, the scope of its application in these two branches of law is different. According to private international law, it is possible to deny application of foreign law on the basis of this concept, while in international civil procedure its application leads to non-recognition and non-enforcement of foreign court decisions. In this place, it is allowed to refer to the above-mentioned considerations regarding the basic principles of the Polish legal order, which, if any, would justify refusal of recognition and enforcement of foreign courts decisions. It has already been mentioned that in fact the very assumption that surrogacy arrangement is a form of human trafficking may justify application of public policy clause. Similarly, grounds for such an action are justified in a situation in which foreign rules on adoption do not take into account the rights and opinion of the person who is entitled to parental responsibility. Public policy clause may be also applied if foreign court decisions or public documents are inconsistent with the principle of natural (biological) parenthood. In other situations, it seems to be difficult to find any basis for application of public policy clause in international civil procedure in regard to surrogacy arrangements.

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Remarks on Polish penal law and *de lege ferenda* postulates[1]

1. Introduction

In the context of the practice of the so-called "surrogate motherhood" there are many controversies – not only of the moral and ethical, but also of legal nature. This fact should not surprise anyone – after all, this kind of behavior resembles an illegal practice called human trafficking, especially when a surrogate mother gains a material benefit in the form of money for giving away a new-born child. Because of that, what should be considered is the analysis of the mentioned behavior (that is the behavior within the limits of the so-called "surrogate motherhood") and establishing whether it is prohibited within the Polish Penal Law. And if not – is it legitimate to make it a criminal offence.

2. "Surrogate motherhood" and human trafficking

We should start with an assertion that some of the behaviors within the practice of "surrogate motherhood" could fall under the Article 189a of the Polish Criminal Code concerning "human trafficking." However, this article could only apply in certain circumstances. Specifically in cases, where there are acts of recruiting, transporting,

[1] This text is an abbreviated version of the following publication: Ł. Pohl, K. Burdziak, *Tzw. macierzyństwo zastępcze („surrogate motherhood") w świetle polskiego prawa karnego. Uwagi „de lege lata" i postulaty „de lege ferenda"*. The present English summary contains the main theses of the full-length study originally written in Polish.

delivering, transferring, storing or accepting the girl/woman (future surrogate mother) with the use of: 1) violence or unlawful threat; 2) kidnapping; 3) deceit; 4) misleading or taking advantage of a mistake or an inability to properly understand the action undertaken; 5) abusing a relationship of dependency, or manipulating a critical situation or state of helplessness; 6) giving or receiving a financial or personal benefit, or its promise to a person taking care of, or supervising her[2] – for using her, even with her consent, in "other forms" of degrading human dignity, for which in this case – because of indicated behavior of the perpetrator and his/her measures/methods (potentially due to age of the aggrieved party), and also because of the perpetrators' purpose of taking advantage of the aggrieved party – it should also apply to the practice of keeping the pregnancy for another woman (married couple, partners).[3] In every afore-mentioned case, the woman is treated as an object instead of an entity, which in effect violates the aspect protected by law, the main subject of protection specified in Article 189a section 1 of the Polish Criminal Code, which is human dignity.

As a consequence, making preparations to commit a crime of human trafficking, understood in such a way, remains indictable (it clearly derives, after all, from Article 189a, section 2 of the Polish Criminal Code), as well as attempting (see Article 13 of the Polish Criminal Code) and supervising, ordering, instigating, aiding, and abetting said offence (see Article 18 of the Polish Criminal Code).

However, when it comes to the child that is given away (within the practice called "surrogate motherhood") by one person to another, Article 189a, section 1 of the Polish Criminal Code applies only if that child is subjected to acts involving transporting, delivering, transferring, storing or accepting to take advantage of, particularly, with regard to prostitution, pornography or other forms of sexual

[2] In a case of a minor (a future surrogate mother), the usage of methods/measures from points 1–6 would not be, naturally, necessary.

[3] Assertion of this kind seems justified. It should be indicated that on the grounds of Article 189a, section 1 of the Polish Criminal Code in relation to Article 115, section 22 of the Polish Criminal Code, the character of an action as a form of degrading human dignity is not determined by its nature, but – mainly – using by the perpetrator specified methods/measures and his purpose for taking advantage of the victim. Can we determine if taking part in recording a pornographic material or in begging degrades human dignity per se? In that case, can we talk about objectifying a human being? Well, it seems we cannot. Consequently, on the grounds of Article 189a, section 1 of the Polish Criminal Code in relation to Article 115, section 22 of the Polish Criminal Code, what determines the character of those actions is specified behavior of the perpetrator and the methods and measures used by him (possibly the age of the victim) and his purpose for taking advantage of the victim.

exploitation, forced work or services, begging, slavery or other forms of degrading human dignity, or obtaining cells, tissues or organs contrary to the provisions of law.

Let's add that the "other forms of degrading human dignity", mentioned in Article 189a, section 1 of the Polish Criminal Code, can even include having a child solely to fulfill the needs of people other than the child itself, as, for example, having a child by "parents" only for the sake of having it, fulfilling their need to follow the fashion, or allowing them to get financial benefits. Also, the criminal liability on these grounds could be attributed to intended parents of the child and to the woman that gave birth to it alike (and, of course, to other people deemed complicit as well).

Some of behaviors related to the practice of "surrogate motherhood" (probably the most appalling part) will therefore make grounds for criminal liability for the perpetrator under Article 189a, section 1 of the Polish Criminal Code, whilst it would be possible – and it has to be emphasized– to attribute that liability to Polish citizens as well as citizens of other countries and stateless persons, and not only for criminal offences committed while in the Republic of Poland, but also in other countries. Of course, all safety requirements of the Polish Criminal Code in effect must be met.

Other (than the afore-mentioned) behaviors related to the practice of "surrogate motherhood" in the context of the analyzed Articles will remain unpunished. The latter case more specifically concerns situations, where: 1) the girl/woman will not be "forced" to become a surrogate mother; 2) the child would be transferred to its "new" parents for a purpose other than take advantage of it in a way that degrades human dignity or obtaining cells, tissues or organs contrary to the provisions of law.

3. "Surrogate motherhood" and illegal adoption

Some of the afore-mentioned behaviors (not covered by the regulations of Article 189a of the Polish Criminal Code) could be, of course, qualified under Article 221a of the Polish Criminal Code (an equivalent of former Article 253, section 2 of the Polish Criminal Code) according to which: "Anyone who, in order to gain material benefits, organizes the adoption of children in violation of the law, is liable to imprisonment from three months to five years." It has to be emphasized that said Article – contrary to the arguments made by some representatives of the doctrine – will apply solely in a situation when an individual who, in order to gain a material benefit, professionally (with the wording "takes care of organizing" and not simply "organizes"), when there are children involved (with the word "children", not just one

"child"; with the wording "takes care of organizing" and not simply "organizes"), takes care of organizing the adoption of children in violation of the law. Thus, the type of the prohibited act specified in Article 211a of the Polish Criminal Code should be considered an example of a criminal offence, which for it to be committed once needs multiple offences of any type from said Article and is committed altogether on the specified subject.

The wording "in violation of the law" in Article 211a of the Polish Criminal Code should be described as a violation of a legislation/legislations from the Republic of Poland or foreign ones, depending on the place of taking care of organizing the adoption by the perpetrator (if it is the Republic of Poland, then the legislation will be Polish; if it is foreign, then the legislation will be foreign accordingly), whereas it needs to be considered that for recognizing a place as the place of adoption, at least one act of the whole process of "taking care of organizing the adoption of children" has to be carried out there. Because it seems that only then the scope of the criminalization in Article 211a of the Polish Criminal Code will neither be too wide nor too narrow, and the welfare of the child/children (the main subject of protection in Article 211a of the Polish Criminal Code) will be properly protected. This type of the interpretation will not form an expanded interpretation, for its proposed definition falls within the linguistic meaning of the wording "in violation of the law." Moreover, the interpretation will remain in accordance with Article 11, item 1 of Convention on the Rights of the Child, according to which: "States Parties shall take measures to combat the illicit transfer and non-return of children abroad."

Thus, the scope of the legally sanctioned norm described in Article 211a of the Polish Criminal Code will cover a rather narrow group of behaviors related to the practice of "surrogate motherhood", but, at the same time, said part is characterized by the highest risk of objectifying the child and the woman/surrogate mother, which seems fully justified. Moreover, similarly to Article 189a of the Polish Criminal Law, it will be possible to, on these grounds, hold Polish citizens as well as foreign and stateless ones criminally responsible (on the grounds of Article 211a of the Polish Criminal Code), and not only for the crimes committed in the Republic of Poland, but also in other countries. Of course, given that all requirements of the Polish Criminal Code in effect are met.

4. Doubts about a possible amendment to the Criminal Code

Naturally, there still will be behaviors, relevant to our problem, which cannot be considered prohibited under law in effect, which in turn updates the need to answer the question, if establishing an Article on the sanctioning of norm/norms prohibiting that kind of behaviors would be legitimate – in particular, concerning: 1) behavior of the surrogate mother and intended parents from the start of their "cooperation" until it is over, where the intended parents' purpose would not be/is not exploiting the child in the form of degrading human dignity; 2) taking care of organizing the adoption in violation of the law, where the perpetrator's purpose is neither exploiting the child (nor the woman-surrogate mother) in the form of degrading human dignity, nor gaining any material benefit; 3) taking part in organizing the adoption in violation of the law, where the perpetrator's purpose is not exploiting the child (nor the woman-surrogate mother) in the form of degrading human dignity, but the intended purpose consists of at least gaining some form of material benefit.

Obviously, one cannot answer the above question in a comprehensive manner, but according to the authors of the present paper a prohibition of this kind would be highly questionable, and even more questionable would be fulfilling the requirements provided for in Article 31, item 3 of the Constitution of Poland through a prohibition like that. However, if we consider that a new possible penal prohibition of behaviors related to "surrogate motherhood" is not only in accordance with the requirements from Article 31, item 3 of the Constitution of Poland, but is also necessary from the point of view of the protection of the child and the woman-surrogate mother, it could have (for example) the following form: "Article 211a, section 1: Anyone who organizes the adoption of a child in violation of the law, is liable for…; section 2: Anyone who adopts a child in violation of the law, is liable for…". In other words, one can (possibly) propose proper changes to Article 211a of the Polish Criminal Code in effect, proposing at the same time this kind of regulations in other countries with a similar outlook on the practice called "surrogate motherhood" (also, it would be important to reach a common interpretation of those regulations). That way we could, in fact, create quite an effective – at least at first glance – and a looking-good-on-paper measure for combating the practice called "surrogate motherhood". Yet, the indicated measure would be – as we mentioned – effective only at the first glance. The penal prohibition of behaviors related to "surrogate motherhood" could turn out to be not only ineffective, but also downright counterproductive, leading to the significant expansion of the "grey

area", and therefore to an even bigger danger for the welfare of the child and the woman-surrogate mother. Anetta Breczko rightly indicates that "[i]t seems there are always people who, at all cost, will want to fulfill their parental needs, and those who, for different reasons, mostly selfish ones, will be ready to help them"[4], and, citing Malwina Mikluszka, "in the case of the absolute prohibition of concluding surrogate motherhood agreements, this practice would get out of control and the whole occurrence would 'go underground', eliminating any possibility of public control. It would create a fertile ground for abuse and real children trafficking. After all, a formal prohibition will not eliminate the reasons pushing people towards surrogate motherhood. Especially as making use of it in recent years has allowed many childless couples to fulfill their dream of having a child."[5]

5. "Surrogate motherhood" and practice

No matter what problems there are related to the interpretation of particular Articles of the substantive section of the Polish Criminal Code or the lack of proper legal regulations of this nature and the effectiveness (or lack thereof) of existing regulations, it needs to be indicated that there could be considerable doubt as to the capability of the Polish (and other) authorities within the scope of detecting the practices related to "surrogate motherhood." Because of that, there is a concern that, just like in the context of human trafficking and forced labor, the efficiency of the authorities in this case will be minor, if not non-existent. When it comes to human trafficking and forced labor, a small number of detected criminal offences arises from: 1) general difficulty detecting human trafficking; 2) lack of competent officers within mentioned authorities to detect human trafficking; 3) lack of said officers' proper commitment to detect human trafficking; 4) lack of proper equipment and measures to detect human trafficking; 5) said officers not using the measures that could help detect human trafficking.

In the context of two last points it has to be considered that the analysis made by the staff members of the Institute of Justice as part of research project "Human

[4] A. Breczko, *Podmiotowość prawna człowieka w warunkach postępu biotechnomedycznego*, Białystok 2011, p. 226.

[5] M. Mikluszka, "Czy można kupić dziecko, czyli problemy prawne i etyczne związane z macierzyństwem zastępczym", [in:] *Współczesne wyzwania bioetyczne*, eds. L. Bosek, M. Królikowski, Warszawa 2010, pp. 329–330.

trafficking offence – interpretation of the term 'human trafficking', the method of conducting interrogations and examinations of the evidence to gather material confirming the committing of the crime, and to determine the characteristics of its victims and perpetrators" (2016), which encompasses cases involving human trafficking from years 2010–2015, indicates that the police activity during operational and reconnaissance procedures (which here means entrapment, discreet surveillance, operational control, etc.) in case of criminal offences of this nature is minor, or even that this kind of procedures are not conducted at all.

In most of the cases analyzed as part of the research project, the grounds for instituting criminal proceedings were, in consequence, nothing other than a notice of the possibility of committing a crime. This kind of notice provided the grounds for instituting criminal proceedings in as many as 15 out of 25 cases (60% of all cases).

Moreover, in none of the cases analyzed were the institutes prescribed in Chapter 26 of the Polish Code of Criminal Procedure used, namely: a) the institutions that control and record conversations prescribed in Article 237, section 1 of the Polish Code of Criminal Procedure, according to which: "After instituting proceedings, the court can, at the request of the prosecutor, order an inspection and recording of the contents of phone calls for detecting and gathering the evidence for ongoing proceedings or preventing a new crime from being committed"; b) the institutions from Article 241 of the Polish Code of Criminal Procedure, according to which: "Articles of this chapter apply to controlling and recording with technical equipment the contents of other conversations or transfers of information, including electronic correspondence."

Still, according to Article 237 of the Polish Code of Criminal Procedure – controlling and recording the contents of phone calls is permissible (among others) when the ongoing proceedings or a well-founded fear of new crime involving human trafficking being committed.[6]

Similar problems could appear, or maybe even will certainly appear, in the context of detecting the practice of "surrogate motherhood." This calls into question the

[6] See more in: K. Burdziak, P. Banaszak, "Przestępstwo handlu ludźmi w świetle wyników badań aktowych", *Prawo w Działaniu*, 2016, No. 28, pp. 220–247; Ł. Pohl, K. Burdziak, P. Banaszak, "Stosunek polskiego prawa karnego do zjawiska pracy przymusowej (aspekty interpretacyjne, zarys orzecznictwa oraz problematyka wykrywczej działalności służb)", https://iws.gov.pl/wp-content/uploads/2018/10/IWS-Pohl-Ł.-Burdziak-K.-Banaszak-P.Stosunek-polskiego-prawa-karnego-do-zjawiska-pracy-przymusowej.pdf.

legitimacy of that wide, as it was proposed earlier, criminalization of these kinds of behaviors.

To sum up, it should be pointed out that from the analysis made by the staff members of the Institute of Justice as part of the research project "Human trafficking offence – the interpretation of the term 'human trafficking', the method of conducting interrogations and examinations of the evidence to gather material confirming the committing of the crime, and to determine the characteristics of its victims and perpetrators" (2016) indicates that in the 2010–2015 period there were at least two cases where a new-born baby was the subject of the transaction. It is also worth giving some thought to those cases for they may help to establish the position of judicature in the context of carrying out the money-for-child, child-for-money transaction within the practice of "surrogate motherhood."

1. In the former case, the accused transferred her child to another woman in exchange for the coverage of the costs related to the pregnancy and childbirth, necessary, at that period, medical care (8.000 PLN) and payment of approximately 5.000 PLN.[7] The District Court concluded that in this case there were signs of human trafficking since: "there was the occurrence of the transaction involving transferring the child in exchange for financial help for the accused during the pregnancy and after giving the child away. The accused was a stranger to the mother of the child, and there were no factual or legal grounds for transferring the specified amounts of money to her. The sole purpose of transferring the money was getting the child. For that, it cannot be perceived differently than as the transaction involving transferring the child, as defined in Article 189a, section 1 of the Polish Criminal Code. In a state governed by the rule of law, there is a comprehensive method to adopt children and every citizen should abide by the law. It cannot be that a person, who does not want to submit to adoption procedures, can offer their child on the Internet and, at the same time, gain a specified amount of money for giving their child away. (…) If the transfer of the child occurs without any legal protection, in every case it forms child trafficking. (…) Human (child) trafficking is a trade that transfers ownership of a human being as an object combined with an intention to dedicate it for purposes contradictory to human subjectivity, harmful to a human being. Exchanging the child for money also involves trading the child regardless of the will of the child, even if the child can express it. (…) Every form of trade of the

[7] See: K. Burdziak, P. Banaszak, *Przestępstwo*, p. 224.

child with the exploitation in mind or conducted outside any institutional control is penalized in accordance with Article 189a, section 1 of the Polish Criminal Code. (…) Every trade of the child without judicial control is synonymous to committing the crime of human trafficking. (…) Transferring the child by the accused party was its exploitation, because due to the whim of the accused it involved depriving the child of its identity, and possibility of the opportunity of growing up in a safe environment. (…). If the accused did not want to try for adoption of the child, and she decided to break the law to illegally get herself the child to satisfy her ambitions of having children, then this means that she exploited the child to fulfill her own needs regardless of the child's right to a decent life."[8]

Yet the Court of Appeal in Wrocław in the judgement dated 11 December 2013, reference number II AKa 393/13, judged that acquittal is necessary due to the fact that the features of the crime of human trafficking were not met.[9] In the justification, the Court indicated that

> [t]he Court of the First Instance reasonably recognizes that for determining the crime of human trafficking it is necessary to establish the purpose of the perpetrators as the exploitation of the victim. That is why it is confusing to conclude that, at the same time, 'every trade of the child without judicial control is synonymous to committing the crime of human trafficking. (…) if the transferring of the child occurs without any legal protection, in every case it forms child trafficking (…) so every transferring of the child for the specified amount of money forms the crime described in Article 189a, section 1 of the Polish Criminal Code.' That kind of recognition is contradictory with Article 189a, section 1 of the Polish Criminal Code. (…) The defenders rightly contend that Article 115, section 22 of the Polish Criminal Code describes the unjust, unrighteous purpose that fulfills objective features of the criminal offence (…) The purpose of the transferring the victim of human trafficking under the will of the perpetrator is exploiting it in a way that is contradicts the dignity, sense of self-worth, subjectivity and freedom in making choices about one's own life. The exploitation understood in such a way involves,

[8] Judgement of the Regional Court in Wrocław, 21 March 2013, III K 215/12. As cited in: K. Burdziak, P. Banaszak, *Przestępstwo*, pp. 224–225.

[9] See: K. Burdziak, P. Banaszak, *Przestępstwo*, p. 225.

> in particular, objectively harmful exploitation of the person remaining in such a deep state of dependence so that person can be used as an object.[10]

2. In the latter case, the accused gave away her child to another woman in exchange for the compensation for 14.000 PLN. With the decision dated 5 July 2013, reference number XIV K 78/13, the Regional Court in Gdańsk dismissed the proceedings, indicating that "[i]n the Court's view, actions of the accused party did not meet the features of the prohibited act. Excluding specified purposes of the party accused of human trafficking, the behavior of the accused party did not involve other purposes degrading human dignity. In the Court's view, the meaning of this description should be understood with relation to other forms of exploitation indicated in the Article (…). The purpose of the accused party was providing care for the child, temporarily ensuring for the child a more prosperous life by the person able to provide such care and living conditions. The biological mother was in an unstable personal and material situation. There was no indication that the accused endangered the child's welfare in any way."[11]

Based on the afore-mentioned cases, it can be concluded that, maybe, in the context of the problem of "surrogate motherhood" there can be a concern that it constitutes the features of the crime of "human trafficking", in particular, when it involves transferring the child to other persons in exchange for material benefits. However, the aforementioned judgements confirm the previously presented proposal, according to which if the purpose of the "accused party" (surrogate mother/intended parents) is not taking advantage of the child, particularly with regard to prostitution, pornography or other forms of sexual exploitation, forced labor or services, begging, slavery or other forms of degrading human dignity, or obtaining cells, tissues or organs contrary to the provisions of law, then it will not be possible to hold them liable for the criminal offences defined in Article 189a of the Polish Criminal Code.

[10] As cited in: K. Burdziak, P. Banaszak, *Przestępstwo*, p. 225.

[11] As cited in: K. Burdziak, P. Banaszak, *Przestępstwo*, pp. 225–226.

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Surrogate motherhood in Polish criminal law – *de lege lata*[1]

1. Introductory remarks

The phenomenon of surrogate motherhood arrangement is characterized by an interdisciplinary dimension. It may be researched from many perspectives. As early as at the initial attempts at its description and analysis, it was argued that it is connected to technological development and, consequently, to the development of medicine and the possibilities of facilitating procreation. At the moment, technological development is moving ahead so fast and rapidly that it is difficult to predict what new issues related to surrogacy arrangements will appear in the subsequent years.

Before analyzing specific types of crimes or offenses, it is crucial to call to mind two functions of criminal law: justice and protection in the context of the phenomenon of penal populism. For a dozen or so years now, changes made to the penal code in Poland have been an expression of this phenomenon. They are not well-thought-out, rather they are related to ad hoc desire to gain political support. Subsequent amendments have not been based on analyses or empirical[2] studies (e.g. criminological research), hence they exhibit an increasingly lower legislative level. Politicians very often propose or facilitate criminalization of ethically or morally controversial phenomena. It is obvious that the phenomenon of motherhood is typified by such a feature. Meanwhile, the protective function is based on the fact

[1] The present essay is a summary of the full-length study originally written in Polish.

[2] A glorious exception is the introduction of penalties for stalking, which took place pursuant to that Act of 25 February 2011 amending the Criminal Code (Journal of Laws 2011, item 72, No. 381). Cf. the legislative process: http://orka.sejm.gov.pl/proc6.nsf/opisy/3553.htm.

that criminal law, by means of sanctioning standard penalty provisions, protects important legal rights.[3] The scope of this protection may differ depending on a given right.[4] On the other hand, the function of justice means that punishment should be fair, should be a signal (also of a symbolic nature) to society that a given behavior is reprehensible.[5] This function involves division of crimes into *small per seimala prohibita*. It is impossible to classify surrogacy motherhood arrangement into behaviors that are explicitly morally or axiologically condemned.[6] Hence, criminal law must continue to remain *ultima ratio*.

The Criminal Code, as well as any other law, does not explicitly contain a provision introducing punishment of surrogate birth. The term surrogacy, which was otherwise defined as the practice of a woman being pregnant for another woman with the intention of handing over her child after childbirth, appeared in the original Anglo-Saxon literature.[7] This definition is one of the first ones that were created and, basically, subsequent ones were created based on it. It was based on research conducted in the United Kingdom by Mary Warnock.[8] There have been many attempts at modifying this definition in a different direction, e.g., by adding to it, for example, the criterion of renouncing parental rights by the woman giving birth or transferring these right to a specific person.[9] It is important to imagine all the stages

[3] W. Wróbel, A. Zoll, *Op. cit.*, pp. 39–46.

[4] For example, human life is protected from conception to death, howeve, with varying intensity. There is a different punishment for each of the following: damage to the embryo, its destruction, abortion, and, finally, for murder of a human being. See the justification of the judgment of the Constitutional Tribunal of 28.05.1997, CT of 26/96, Z.U. 1997, No. 2 item 19.

[5] W. Wróbel, A. Zoll, *op. cit.*, pp. 39–46.

[6] Cf. a survey of issues in question: M. Soniewicka, "*Dylematy zastępczego macierzyństwa*" (available at: http://www.ptb.org.pl/pdf/soniewicka_macierzynstwo_1.pdf) as well as a scholarly discussion in this regard: W. Galewicz, "O Macierzyństwie zastępczym, etyczniej niewłaściwości i prokreacyjnej odpowiedzialności" (available at: http://www.ptb.org.pl/pdf/galewicz_macierzynstwo_1.pdf); J. Holocher, "W odpowiedzi na głos Pana Profesora Galewicza" (available at: http://www.ptb.org.pl/pdf/holocher_macierzynstwo_1.pdf); M. Olejniczak, "Godność dziecka a macierzyństwo zastępcze" (available at: http://www.ptb.org.pl/pdf/olejniczak_macierzynstwo_1.pdf).

[7] "Surrogacy is the practice whereby one woman carries a child for another with the intention that the child should be handed over after birth"; source: *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, Her Majesty's Stationery Office, London 1984, p. 42, http://www.hfea.gov.uk/docs/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fertilisation_and_Embryology_1984.pdf.

[8] M. Wałachowska, "Macierzyństwo zastępcze w systemie common law", *Państwo i Prawo*, 2003, No. 8, p. 99.

[9] Cf. e.g. J. Holocher, M. Soniewicka, "Analiza prawna umowy o zastępcze macierzyństwo", *Prawo i Medycyna*, 2009, No. 3, p. 44; M. Safian, [w:] ed., W. Lang, *Prawne problemy ludzkiej prokreacji*, Toruń 2000, pp. 292–305, p. 292.

of this process and to consider whether the action undertaken within it constitutes (*in genere*, of course)elements of criminal or disciplinary offense. It is particularly important to highlight that the point is that a decision is made, at the latest, during pregnancy, and that the child after birth will be transferred to sociological parents.

Existing Polish literature is modest.[10] There is no monographic elaboration on the problem from the point of view of criminal law. For this reason, therefore, in the absence of publicly available jurisprudence[11], the previous statements and the outlined way of interpreting the features of some crimes in the context of surrogacy will be cited. In particular, crimes of trafficking in human beings (Article 189a of the Criminal Code) and organization of adoptions contrary to the provisions of the Law (Article 211a of the Criminal Code). Attention should also be paid to the penal provisions of the Act on treatment of infertility, which, in principle, had not been analyzed so far in the context of the discussed problem[12], and are of significant importance for some behaviors described as process of surrogate birth.

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[10] M. Gałązka, "Prawo karne wobec zastępczego macierzyństwa", [in:] *Ius et Lex. Księga Jubileuszowa ku czci Profesora Adama Strzembosza*, Lublin 2002, pp. 117–131; S. Tarapata, "Problematyka zawierania i wykonywania umów o tzw. macierzyństwo zastępcze w kontekście zastosowania normy sankcjonującej wynikającej z przepisu art. 253 § 1 k.k. – penalizującej handel ludźmi" [conference paper], presented on 28 March 2009 in Kraków at a conference entitled "Handel ludźmi na tle regulacji krajowych i międzynarodowych prawa karnego materialnego i procesowego" [*Trafficking in human beings against the background of national and international regulation of substantive criminal and procedural law*]; M. Gałązka, *Prawo karne wobec prokreacji pozaustrojowej*, Lublin 2005, in particular chapter VII, pp. 319–384; W. Górowski, *Zastępcze Zastępcze macierzyństwo, a prawo karne – ocena obecnego stanu prawnego*, „Czasopismo Prawa Karnego i Nauk Penalnych" 2011, Issue 1., pp. 5–24; M. Romanowski, "Handel dziećmi w polskim systemie prawnym", [in:] *Handel ludźmi. Przestrzeń prawnokarna o kryminalistyczno-kryminologiczna*, eds. P. Łabuz, I. Malinowska, M. Michalski, T. Safjański, Warszawa 2017, pp. 123–134; J. Postulski, *Dziecko jako przedmiot czynu zabronionego*, Gdańsk 2007, p. 234; V. Konarska-Wrzosek, *Ochrona dziecka w polskim prawie karnym*, Toruń 1999, p. 140. However, it should be noted that the two the two authors, i.e., Postulski and Konarska-Wrzosek, do not write about surrogate birth, but only consider penalizing the action of organizing adoption before the birth of a child in the perspective of Article 253 § 2 of the Criminal Code in force until September 8, 2010. Cf. also in the perspective of: R. Krajewski, "Przestępstwo nielegalnego organizowania adopcji", *Prokuratura i Prawo*, 2009, No. 10, pp. 18–19. The issue of criminal responsibility in the perspective of surrogate birth is noticeable in several comments to the Criminal Code, although there is no analysis in them: A. Zoll, *Komentarz* [Commentary], [in:] eds., W. Wróbel, A. Zoll, *Kodeks karny. Część szczególna. T. II. Komentarz do art. 117–211a*, Warszawa 2017, p. 581. J. Majewski, *Komentarz* [Commentary], [in:] eds., W. Wróbel, A. Zoll, *Kodeks karny. Część ogólna. T. I Komentarz do art. 53–116*, Warszawa 2016, p. 1071. During the time when Article 253 of the Criminal Code was in force, none of the commentators considered the possibility of penalizing surrogate motherhood based on this provision.

[11] The sources of such a state of affairs are discussed later in the present study.

[12] The Act of 25 June 2015 on the treatment of infertility (abridged text: Official Journal of Laws of 2017, item 865).

The analysis will be based on imaginable behaviors that constitute the surrogate birth phenomenon. For the sake of simplicity of the deduction, I have identified three time periods which, intuitively, can be assessed similarly in the perspective of criminal law. The first of these periods is pre-pregnancy assessed from two perspectives: biological (creation of the embryo and its transfer to the recipient's body, relatively fertilization in vivo) and sociological (activities aimed at conclusion of agreement on surrogacy arrangement). The second is the period of pregnancy and transfer of the child to the sociological parents, and the third is the time in which the civil status of the born child is established. The division is related to the intuitive distinction of a potentially infringed legal right in the given periods.[13]

Within each of them, it is possible to point out many activities and omissions that may be analyzed. Thus, in the first period, it could be connected with an advertisement of the service of sale / donation of reproductive cells, their collection, donation, creation of an embryo and its transfer to the recipient's body, the advertisement of pregnancy, advertisement of mediation in the conclusion of agreement, looking for parties to an agreement (biological mother, and genetic and sociological genetic parents), preimplantation diagnosis, embryonic stem cell collection, destruction of embryos, conclusion of "agreement" on surrogacy arrangement (although it may exist, in principle, up to the moment of delivery). In the second period, it is possible to analyze failure to comply by such an agreement, transfer of the child to the sociological parents, payment of the agreement, termination of parental rights by the biological parental (this also can occur at any time). Finally, in the third period, the following could take place: such actions as sociological parents submitting application for adoption, decision by the court on child adoption by social parents, biological mother's declaration of termination of parental rights, statement of the sociological father on recognition of the child, preparation of civil status files and submission of declarations required to draft them, or using drafted files.[14]

[13] In the previous text on this topic I indicated it as a separate period of pregnancy. At present, it seems to me that this procedure is of less entitlement than the distinction of the time related to the establishment of a child's civil status, which, as a rule, takes place after its birth. The very period of pregnancy in the perspective of criminal law and surrogacy does not help in the analysis of the phenomenon, as it is not specific enough to protect pregnancy, when a woman does not want to give her child after delivery. See: W. Górowski, *Zastępcze,* p. 8; Cf. also M. Romanowski, *op. cit.,* pp. 125–126.

[14] W. Górowski, *Zastępcze*, pp. 7–8.

2. Surrogacy in the light of the definition of human trafficking

Analyzing behaviors consisting in actual transfer of the child after birth by the surrogate mother to the sociological parents (or other persons), my opinion is that this action does not fulfill the definition of trafficking in human beings. In principle, this view is uniformly accepted in Polish literature and any opposing views constitute a hypothesis that has no justification.[15] As it would seem, the above hypothesis is supported by case law – there is no record of conviction under Article 189a of the Criminal Code for behavior constituting an element of surrogacy in the available legal databases and the portal of rulings of common courts. None of the available comments to Article 189a of the Criminal Code and to Article 115 § 22 of the Criminal Code quotes a judicature indicating the implementation of denotations.[16]

[15] M. Pomarańska-Bielecka, M. Wiśniewski, "Analiza przepisów prawa definiujących i penalizujących handel dziećmi", *Dziecko Krzywdzone. Teoria Badania Praktyka*, 2010, No. 4, pp. 18–21, M. Pomarańska-Bielecka, M. Wiśniewski, "Handel ludźmi – nowelizacja k.k. Część II", *Edukacja Prawnicza*, 2011, No. 1, p. 3 (Still, the authors write about giving the child up for adoption without reference to the phenomenon of surrogacy); M. Pomarańska-Bielecka, "Nielegalne pośrednictwo adopcyjne – kontrowersje związane z warunkami odpowiedzialności karnej z artykułu 211a kodeksu karnego", *Dziecko Krzywdzone. Teoria Badania Praktyka*, 2014, No. 4, pp. 14–15; M. Mikluszka, *Zagraniczne procedury tzw. macierzyństwa zastępczego w świetle zasady handlu ludźmi – zagadnienia węzłowe*, Warszawa 2017, pp. 18–19; W. Górowski, *Zastępcze*, pp. 12–16; J. Haberko, [in:] L. Bosek (ed.) *System Prawa Medycznego, T. 2. Szczególne świadczenia zdrowotne*. Warszawa 2018, p. 197; [in:] A. Zoll, *Kodeks karny. Część szczególna*, p. 581; J. Majewski, [in:] *Kodeks karny. Cześć ogólna*. p. 1071. Magdalena Kramska recognizes surrogate mother's surrender of a child to its sociological parents as punishable trafficking in human beings. However, she does not justify her position, apart from raising the wrong argument that penalization is based on Article 189a § 1 of the Criminal Code, and this was possible due to due to change of verb denotation in comparison with the repealed Article 253 § 1 of the Criminal Code. This change, that is, the replacement of the word "authorize" with the verb "is allowed", and this means that only and solely individual actions constituting human trafficking are subject to criminal penalties, while previously in this regard there existed contradictions in the literature and jurisprudence. However, due to existence of the definition of legal trafficking in human beings, the change of this denotation does not in any way affect the determination of causative actions that are described in Articles 115 § 22 of the Criminal Code. M. Kramska, "Problematyka prawna macierzyństwa zastępczego-regulacje prawnomiędzynarodowe i krajowe"; the text is available at: http://www.prawoimedycyna.pl/index.php?str=artykul&id=688&PHPSESSID=953e1236366cc8bdaefc6a3857440b6c. M. Romanowski points out that the liability under Article 189a § 1 of the Criminal Code, though highly unlikely, is theoretically possible. Unfortunately, he does not give any argument for such a hypothesis: M. Romanowski, *op. cit.*, pp. 133–134.

[16] The only available information on the verdict which considered the surrender of a child born by a surrogate mother for trafficking in human beings is the justification of the Appeal Court in Wroclaw of 11/12/2013, II AKa 393/13, which shows that the Court of first instance (District Court in Wroclaw in III K 215/12 case) sentenced the accused, available at: SIP LEX No. 1416490, also at: http://orzeczenia.

Maciej Romanowski directly points to this state of affairs, writing in the years 1999–2014 that there was not one conviction handed down for child trafficking in this regard.[17] The only available rulings are judgments acquitting persons from charges of trafficking in human beings in situations involving surrogate motherhood.

The introduction of the definition of trafficking in human beings in the Polish Criminal Code seems to solve the problem of qualification of handing over a child as part of implementation of an agreement on surrogacy motherhood as trafficking in human beings. The mention of the purpose of the offender is the deciding issue in the regard. The law speaks of the purpose of exploitation and goes on to enumerate examples of such attitudes (all forms of sexual exploitation, at work or in delivery of services of a forced nature, begging, slavery, or in any other form, if it violates human dignity, or collecting cells, tissues, or organs contrary to the provisions of the law).[18] Bearing in mind that the legislature did not mention here the possession of offspring or adoption, it does not seem possible to interpret that the aim of such an act could be for human exploitation. The above listing, though of course it is not possible to give it a character of an enumerate listing, corresponds to the intentions of the legislator who, in the justification of the law, explicitly points to the instruments of international law that formed the basis for the amendment of the Code. Neither of them, however, speaks on the problems related to adoption nor precisely on surrogate motherhood arrangement.

It is also impossible to interpret the provisions contained in Article 115 § 22 of the Criminal Code with the wording "or otherwise an exploitation degrading human dignity" in such a way as to recognize that the surrender of a child in the surrogacy motherhood arrangement constitutes violation of the dignity of the child. This expression directly refers to forced labor, begging, and slavery. It is only after this expression that the legislator puts the word "or" and further indicates that such

wroclaw.sa.gov.pl/details/$N/155000000001006_II_AKa_000393_2013_Uz_2013-12-11_001; in addition, only media information on allegations of trafficking in human beings under such situations is available: https://www.tvp.info/36753113/polska/matka-chciala-sprzedac-dziecko-za-30-tys-zl/; https://kurierlubelski.pl/probowala-sprzedac-dziecko-chcialam-dobrze-dla-niuni/ar/384934; temporary arrest was even used in one of the cases.

[17] M. Romanowski, *op. cit.*, pp. 133–134, though the author does not quote the source for his claim.

[18] There is no doubt that crime of trafficking in human beings can only be committed in connection with direct intent. Nevertheless, during the period article 253 § 1 of the Criminal Code was in force, it was pointed that designation of a human being as a subject of trade for purposes that are contrary to human subjectivity constituted an imminent element of trafficking in human beings. Cf. decision of the court of appeal in Bialystok of 24 May 2004, II AKa 66.04, KZS 2004, Issue 9, item 63; also, the decision of the court of appeal in Krakow of 8 March 2001, II AKa 33/01, KZS 2001, Issue 5, item 29.

an action aimed at obtaining cells, tissues, or organs against the provisions of the law also constitute trafficking in human beings. The Gdańsk Court of Appeal also came to the same conclusion pointing out that "Although the catalog of forms of use degrading human dignity, described in Article 115 § 22 of the Criminal Code has not been exhausted, this fact may not be interpreted to mean complete arbitrariness of interpretation. Thus, the meaning of the term "other forms of exploitation" should be interpreted in relation to the forms specified by the legislator in the said provision. Penalization of human trafficking is aimed at protecting against use (exploitation) associated with very widely understood provision of services – especially work and services of a sexual nature – and use of a human being as an organ donor.[19]

3. Penalization of surrogate birth under provisions of the Infertility Treatment Act

In my opinion, the entry into force of the Act penalized a part of behaviors treated as elements of surrogate motherhood and, in fact, caused a lack of legal possibility of conducting such practices in Poland. The Act contains Chapter 12 Criminal Provisions, in which several types of crimes have been listed.

The law introduces criminalization of embryo formation outside the medically assisted procreation procedure.[20] This constitutes penalty provisions for the prohibition described in Article 25.1. In this respect, there is no doubt that it is of a general nature and, although it may be contrary to the literal content of Article 1 of the Act, it applies in the entire legal system. Therefore, it is punishable to create an embryo in the process of surrogacy if it is done outside the procedures described in the Act on the treatment of infertility. In addition, the Act itself extracts the definition of an embryo from procedures for the medical support of reproduction. According to Article 2.1.28, an embryo is a group of cells resulting from the extracorporeal bringing together of the female and male reproductive cells, from the end of the process of joining the nuclei of the reproductive cells (karyogamy) to the time of implantation in the endometrium. Thus, the legislator (unlike in the definition of reproductive cells) did not link the existence of the embryo under the Act with its use in the procedures specified by the Act in question. Therefore, in fact, since it is

[19] Ruling of court of appeal in Gdansk of 13/08/2013, IV AKz 475/13, SIP LEX.

[20] This constitutes an offense punishable by imprisonment from 6 months to 5 years.

punishable to create an embryo, it cannot come to a surrogacy through transferring the embryo into the surrogate's body.

The law also introduces punishment of paid disposal, acquisition, or mediation in such activities in relation to reproductive cells and embryos as well as participating in their use if they have been obtained contrary to the provisions of the law and dissemination of advertisements in this regard. However, it is necessary to distinguish between the advertisements and the sale of embryos from reproductive cells. Any sale and advertisement covering the embryo is punishable. However, in my opinion, it is doubtful whether such behaviors are always punishable with respect to reproductive cells. Since there is no prohibition of collecting them outside the procedures of the law and, in addition, the law itself defines them in conjunction with the procedure of medically assisted procreation, hence any advertisement on the sale of cells as part of the framework of surrogacy may remain unpunished.

4. Offenses regarding official documents (birth records) and illegality of adoption

The Polish law does not provide for the possibility of concluding agreement on surrogacy motherhood arrangement nor does it provide for possibility of establishing a child's civil status as related to sociological parents.[21] Obviously, this would cause a desire on the part of sociological parents to illegally regulate a child's civil status. However, this does not imply that such behaviors automatically constitute a crime of illegal organization of adoption of children.

In principle, there is no doubt that organizing adoptions consist in search for children for adoption, placement of advertisements about facilitating contacts between children to be adopted and the adopting families, and providing for exchange of contacts.[22] They can be punishable if they are undertaken to gain material benefits.[23]

[21] The only exception is, of course, in the case of surrogate birth where the biological father is the sociological father.

[22] Cf. e.g. J. Jodłowski, M. Szewczyk, *op. cit.* p. 958; S. Hypś, [in:] ed. M. Królikowski, S. Zawłocki, *Kodeks karny. Cześć Szczególna. Vol. I. Komentarz do art. 117–221,* Warszawa 2017.

[23] Incidentally, I will leave this denotation. Its interpretation has been described very broadly in penal law, and it is of little importance from the point of view of his argument. On this subject, Cf. M. Iwański, *Odpowiedzialność karna za przestępstwa korupcyjne*, Kraków 2016, pp. 45–103. Here, the only contentious issue could be the fact whether paying for the woman's medical care during pregnancy constitutes an act undertaken to obtain a financial gain. Nevertheless, due to the fact that

Therefore, does an action undertaken to find a surrogate or pregnant woman, as well as to persuade her by offering money or even making payment, and not just covering expenses during pregnancy, constitute an act of organization of illegal adoption? In my opinion, no. For several reasons: First, before a child is born, there is no child as a denotation described in Article 211a of the Criminal Code, so it is not possible to engage in organizing for its adoption. Secondly, it is not organizing adoption because designation of adoption is nothing else but adoption of a child, and in protecting the child's well-being, the provision of Article 211a of the Criminal Code in a certain way also protects the adoption procedures. Thirdly, ultimately any circumstances that preclude criminal liability regardless of violation of the procedural rules related to the adoption could constitute the best interest of a child. In addition, engaging in organization of adoption of one's "own" child does not fulfill the denotation of engaging in organizing adoption.

The most important issue in the perspective of possible criminal liability of surrogate birth on the basis of Article 211a of the Criminal Code is to interpret the normative clause "contrary to the provisions of the Law." In the literature, one can find views to the effect that any adoption carried out contrary to the provisions of the Family and Guardianship Code, Civil Procedure Code or other Acts constitute a crime even if carried out for the good of the child.[24] It is impossible to agree with this view. In my judgment, the conclusion consists in an incorrect interpretation of the clause contrary to the provisions of the Act, and ignores the wording of Article 114 of the Family and Guardianship Code according to which a minor may be adopted only if it is for their own good.[25] It is easy to see that in situations of surrogate birth, there is high probability that principle of the child's best interests will often collide with other procedural rules that prevent adoption. In the criminal law, there is no doubt that for an offense to occur it is necessary to violate protected legal right. Meanwhile, the clause of the best interests of the child limits the unlawfulness of actions undertaken as part of surrogate motherhood practice.

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it is not possible during this period to organize adoption, as there is no child to adopt as yet, this anticipation is of no significance for criminal responsibility.

[24] A. Księżopolska-Breś, "Uwagi na temat przestępstwa z art. 211a k.k.", *Prokurator*, 2011, Nos 3–4, pp. 62–63; Z. Ćwiąkalski, [in:] ed., A. Zoll, *Kodek karny. Część szczególna. Komentarz. Tom II. Komentarz do art. 117–277 k.k.*, Warszawa 2008, p. 1158; S. Hypś, [in:] ed., M. Królikowski, S. Zawłocki, *op. cit.*

[25] V. Konarska-Wrzosek, M. Szewczyk, *op. cit.*, chpt. V, § 40, Nb 247.

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International police cooperation against child trafficking and illegal adoption[1]

Introduction

Surrogate motherhood transpires when a woman (surrogate) agrees to the pregnancy resulting from the implantation of a biologically foreign embryo or insemination with the seed of a future father or donor, in order to give a child to the couple who "ordered" the child.[2] Therefore, a surrogate gets pregnant for the purpose of passing on a newborn child to other people (regardless of whether she is a biological mother of a child). Due to the fact that surrogate motherhood is treated in different ways in the legislation of individual states[3] and also the costs of surrogacy services vary significantly, the market for cross-border reproduction services has developed and a kind of "tourism" associated with surrogate has been created. It is hard not to notice that in the case of commercial surrogacy a child is treated as a product at a specified price that can be ordered and collected after nine months – provided that a child is free from defect (e.g. disability). Such a transactional approach to surrogacy contracts brings associations with child trafficking which is a form of

[1] The present essay is a summary of the full-length study originally written in Polish.

[2] B. Chyrowicz, "Etyka a możliwości współczesnej medycyny", [in:] *Instytucje prawa medycznego. System prawa medycznego. Vol. 1*, eds. M. Safjan, L. Bosek, Warszawa 2018, p. 160.

[3] For more information about national legislation in various states, see: P. Witczak, "Prawna sytuacja matek zastępczych", *Iustitia* 2016, No. 2, pp. 91–92; M. Mikluszka, *Zagraniczne procedury tzw. macierzyństwa zastępczego (surrogacy motherhood) w świetle zasady handlu ludźmi – zagadnienia węzłowe*, Warszawa 2017, pp. 5–9, https://www.iws.org.pl/analizy-i-raporty/raporty (last accessed: 10 July 2018); D. Hacker, *Legalized Families in the Era of Bordered Globalization*, Cambridge 2017, pp. 133–146.

human trafficking. It is human trafficking that is based on the belief that a human being can be owned by another person, the consequence of which is treating a human being as a commodity that can be transferred from a place where there is supply to a place where there is a demand. Nowadays, such behavior in most societies is considered immoral and for that reason alone human trafficking is prohibited by international law and national legal systems.

Under international law, human trafficking is a violation of human rights related to human dignity.[4] Treating a child as an object of property violates his/her dignity and violates the rights of children under the Convention on the Rights of the Child adopted by the General Assembly of the United Nations in New York on 20 November 1989 (UNCRC).[5] According to the UNCRC state parties are obliged to take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.[6]

Children are particularly vulnerable to being used by other members of society and therefore require special legal protection. According to the estimates of the International Labour Organization (ILO), in 2016 the number of victims of human trafficking in the world was 40.3 million people.[7] According to the United Nations Office on Drugs and Crime (UNODC)[8], 25–30% of victims of trafficking are

[4] Articles 4–5 of the Universal Declaration of Human Rights proclaimed by the United Nations General Assembly in Paris on 10 December 1948, http://www.un.org/en/universal-declaration-human-rights/ (last accessed: 15 November 2018); Articles 3–4 of Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, https://www.echr.coe.int/Documents/Convention_ENG.pdf (last accessed: 15 November 2018), Articles 7–8 of International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations on 19 December 1966, https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (last accessed: 15 November 2018), Articles 4–5, items 1–2 of the Charter of Fundamental Rights of the European Union of 12 December 2007, http://www.europarl.europa.eu/charter/pdf/text_en.pdf (last accessed: 15 November 2018).

[5] Art. 8 (1) – right to preserve his or her identity; 28 (1) – right to education; 24 (1) – right of access to health care services; 31 (1) – right to rest and leisure; 37 (a), 32 (1) – right to be protected from economic exploitation.

[6] Art. 35.

[7] ILO, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, Geneva 2017, pp. 5, 9–11; https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf (last accessed: 25 July 2018).

[8] An institution supporting the United Nations (UN) and member states, *inter alia*, in the fight against human trafficking.

children[9], of which 20% are girls and 8% boys.[10] It means that one in four victims of human trafficking were children. In some parts of the world, the majority of victims of trafficking are children (Sub-Saharan Africa – 64%, Central America and the Caribbean – 62%). In the countries of North America, Europe and the Middle East the share of children among victims of trafficking is lower (20–25%).[11] This is not surprising because trafficking in children is more common in these parts of the world where it is poverty, unemployment, lack of education, discrimination. The detection rate for this type of crime does not look good when we compare it with the data mentioned above. In 2016, all over the world were 14 897 prosecutions in cases of human trafficking, 9 071 people were convicted, 66 520 victims have been identified.[12]

Human trafficking is "attractive" to criminals – it brings high profits and the risk of punishment is low (human trafficking is safer and more profitable than the trafficking in weapons or drugs).

1. Definition of child trafficking

International agreements recognize trafficking in adults and trafficking of children as a crime. Child trafficking is defined by:

1. Art. 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000 (Palermo Protocol)[13];

[9] Data for the years 2012–2014. UNODC, *Global Report on Trafficking in Persons 2016*, New York 2016, pp. 25–26; https://www.unodc.org/documents/data-and-analysis/glotip/2016_Global_Report_on_Trafficking_in_Persons.pdf (last accessed: 15 November 2018).

[10] Data valid as of the year 2014. *Ibidem.*

[11] *Ibidem*.

[12] The United States of America. Department of State, *Trafficking in Persons Report. June 2017*, p. 34; https://www.state.gov/documents/organization/271339.pdf (last accessed: 15 November 2018).

[13] The Protocol supplements the United Nations Convention against Transnational Organized Crime adopted and opened for signature, ratification and accession by General Assembly resolution of 25 May 2000. The text of both agreements is available at: https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf (last accessed: 15 November 2018).

2. Art. 4 of the Council of Europe Convention on Action against Trafficking in Human Beings opened for signature in Warsaw on 16 May 2005 (Warsaw Convention)[14];
3. Art. 2 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (Directive 2011/36/EU).[15]

The most widely accepted definition of child trafficking is found in the Palermo Protocol.[16] It defines child trafficking as the recruitment, transportation, transfer, harboring, or receipt of children for the purpose of exploitation. Exploitation includes, at a minimum, the exploitation of the prostitution or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs. The definition of child trafficking, therefore, involves two constituent elements: the act (what is done) and the purpose (why it is done).[17] Using improper means (such as threat, force, other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, giving or receiving of payments or benefits to achieve the consent of a person having control over another person) is irrelevant and the recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation is trafficking in children even if this does not involve any of the improper means. The consent of the child to the exploitation is also irrelevant.

Definitions given in the Warsaw Convention and in the Directive 2011/36/EU refer to the Palermo Protocol and improve the protection which it affords. The Warsaw Convention repeats the definition of child trafficking laid down in the Palermo

[14] The text of the Convention is available at: https://rm.coe.int/168008371d (last accessed: 15 November 2018).

[15] The text of the Directive is available at: https://ec.europa.eu/anti-trafficking/legislation-and-case-law-eu-legislation-criminal-law/directive-201136eu_en (last accessed: 15 November 2018).

[16] 173 states are party to the Palermo Protocol. It means it is a universal agreement and one of the most accepted international agreements in the world. The Warsaw Convention and the Directive 2011/36/EU are regional acts, which means that – in comparison – their scope of application involves a fewer number of countries; source texts: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=_en (last accessed: 15 November 2018), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&clang=_en (last accessed: 15 November 2018).

[17] It is different from the definition of trafficking in adults, which consists of three elements, the third one being the means (how it is done).

Protocol. Moreover, it states that the act of trafficking can be transnational as well as internal and it does not need the involvement of organized criminal organization to be recognized as child trafficking. It is an important provision because the Palermo Protocol provides that its provisions shall apply where child trafficking is transnational in nature and involve an organized criminal group (Art. 4)[18]. Directive 2011/36/EU repeats (in slightly different words) the definition from both acts – the Palermo Protocol and the Warsaw Convention. It also extends the list of example purposes of child exploitation by adding to this list "begging" and "the exploitation of criminal activities" (the list is still by no means exhaustive[19]).

According to the Palermo Protocol, the Warsaw Convention and Directive 2011/36/EU child means any person under eighteen years of age. There is one more international agreement which refers to trafficking in children, although it does not use the word "trafficking." It is Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography adopted and opened for signature, ratification and accession by General Assembly resolution of 25 May 2000 (Optional Protocol to the Child's Rights Convention).[20] Art. 1 of the Protocol prohibits the sale of children, child prostitution and child pornography.

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[18] The Palermo Protocol limits the scope of its application to the international child trafficking which takes places with the involvement of organized crime groups. Legal definitions of the terms "international criminal group" and "international character of the crime" are given in Art. 2 (a) and Art. 3 (2) of the Convention against Transnational Organized Crime of 25 May 2000. According to *Travaux Préparatoires*, states should punish every case of child trafficking; see: *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions (A/55/383/Add.1)*, Art. 34, notice 59, p. 11; https://www.unodc.org/pdf/crime/final_instruments/383a1e.pdf (last accessed: 15 November 2018).

[19] Yet another, though not mentioned, purpose of exploitation of the child is, e.g., recruitment of children under the age of 18 and sending them to the battlefield referred to in Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict; adopted and opened for signature, ratification and accession by General Assembly resolution of 25 May 2000. The text of this agreement is available at: https://childrenandarmedconflict.un.org/tools-for-action/optional-protocol/ (last accessed: 15 November 2018).

[20] 174 states are party to the Optional Protocol to the Child's Rights Convention and 173 states are parties to the Palermo Protocol, making them not only universal agreements but also one of the most accepted international agreements in the world. Warsaw Convention and the Directive 2011/36/EU are regional acts which means that their scope of application involves fewer number of countries; source texts: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=_en (last accessed: 15 November 2018), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&clang=_en (last accessed: 15 November 2018). The text of the Protocol is available at: https://www.ohchr.org/en/professionalinterest/pages/opsccrc.aspx (last accessed: 15 November 2018).

According to Art. 2 (a), "[the] 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. Therefore, Optional Protocol to the Convention on the Rights of the Child requires receiving financial or non-financial benefits by the perpetrator, the purpose of the perpetrator's action is irrelevant what means that acting with the purpose of the exploitation of the child is not necessary.[21] As a crime should be also considered, in the context of a sale of children, improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption. Therefore, organizing of illegal adoption is recognized as a specific form of child trafficking.

It should be emphasized that all forms of child exploitation (children's prostitution, slavery, illegal adoption, etc.), although closely related to trafficking in children, cannot be perceived – in the legal sense – only as the purpose for which the child is subject to the transaction. At the same time, these forms are offences separate from the trafficking of children, prohibited by international treaties and therefore should be considered as crimes in the internal legislation of states.[22] According to the abovementioned provisions, not always illegal adoption constitutes a child trafficking. We deal with trafficking in children when the adoption takes place as a result of criminal activity. It can be assumed that the transfer of the child in exchange for financial gain beyond adoption procedure would constitute an offence of child trafficking. Furthermore, an act of adoption, legal as well as illegal, could constitute a child trafficking if it is made with the intention of exploiting the child.[23]

Child trafficking is a complicated crime. Combating it is therefore difficult not only due to issues related to proving the prerequisites of this crime, the identification of victims[24] but also due to numerous links with other crimes.

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[21] E. Zielińska, "O zgodności polskiego ustawodawstwa karnego z Protokołem Dodatkowym do Konwencji o Prawach Dziecka w sprawie handlu dziećmi, dziecięcej prostytucji i dziecięcej pornografii", *Dziecko krzywdzone. Teoria, badania, praktyka*, 2005, No. 12, p. 3.

[22] J. Markiewicz-Stanny, "Międzynarodowe zobowiązania Polski w zakresie zakazu niewolnictwa, poddaństwa i handlu istotami ludzkimi", *Prokuratura i Prawo*, 2012, No. 7, p. 12.

[23] See: M. Pomarańska-Bielecka, M. Wiśniewski, "Analiza przepisów prawa definiujących i penalizujących handel dziećmi", *Dziecko krzywdzone. Teoria, badania, praktyka*, 2010, No. 4, pp. 18–27.

[24] Identification of trafficking victims, difficult as it is for adults, is a serious problem for children. Due to the immature psyche and reliance on adults, children are easily influenced and manipulated by other people, and the youngest ones are usually not even aware of the situation in which they found themselves. That is why education is so important, both officers of relevant services (e.g. they should pay attention to children travelling with adults) and society (e.g. not to ignore some behaviors,

Trafficking in children belongs to the treaty crimes, i.e., acts defined as crimes by international agreements, the perpetrators of which state-parties are obliged to prosecute and punish regardless of their citizenship and regardless of the laws binding at the place where the crime was committed. However, the culpability of perpetrators does not result from the international agreements but from national laws to which states introduce relevant provisions that allow prosecute and punish their own citizens as well as foreigners regardless of whether the crime was committed on the territory of the state or anywhere abroad.[25] Moreover, the state has a duty to prosecute criminals guilty of child trafficking.[26]

2. International police cooperation

The above-mentioned international agreements not only recognize trafficking in children as a crime but also determine penalties and establish a framework for cooperation, including the combating these crimes[27] and preventing them, they also form the basis of the victim support system. The international police cooperation is an important part of this system.

International police cooperation in the field of trafficking in children refers to all aspects of activities of the police authorities so it includes activities aimed at detecting perpetrators of crimes and defining the scale of threat related to this type

such as foreign children begging; instead such situations should to be reported to the appropriate authorities).

[25] V. Konarska-Wrzosek, Commentary on Art. 113, [in:] *Kodeks karny. Komentarz*, ed. V. Konarska-Wrzosek, Warszawa 2016, pp. 560–561.

[26] In the case of *Rantsev v. Cyprus and Russia*, the European Court of Human Rights stated that Art. 4 of the Warsaw Convention imposes on the state an obligation to conduct a national investigation in the case of the human trafficking that occurred on its territory, and – in a case concerning cross-border trafficking in human beings – it has a duty to cooperate with the relevant authorities of other countries in investigating a crime that took place outside its territory. Judgement of 7 January 2010 (application no. 25965/04), item 289, p. 71, https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/rantsev_vs_russia_cyprus_en_4.pdf (last accessed: 15 November 2018).

[27] In order to combat child trafficking effectively such offences should also be punished: participation in an organized criminal group, laundering of proceeds of crime, corruption, acts against the justice system (i.e. affecting the investigation or legal proceedings in child trafficking cases such as intimidation of a witness, bribing a judge). These acts often accompany trafficking in children and are intended to facilitate this kind of criminality.

of criminality.[28] The effectiveness of combating child trafficking requires coordinated law enforcement actions in the countries of origin, of transit (countries through victims are transported) and of the destination of victims. The basis for cross-border police cooperation in the area of prosecuting and preventing child trafficking is established in multilateral and bilateral agreements and within the EU (as provided by Articles 87–89 of the Treaty on the Functioning and other EU acts of law).

Police authorities use various forms and instruments to prevent and combat child trafficking. International police cooperation is based mainly on the exchange of information. Collecting of information and data belongs to the basic activities of police authorities and it serves both prevention and prosecution of crimes.[29] When states deal with serious cross-border and organized crime the exchange and comparison of information is an essential element of effective counteracting and detecting crimes as well as prosecuting and punishing perpetrators.[30] That is why fast access to the police databases and quick exchange of information between police authorities from different countries are so important. The international exchange of criminal information between EU member states takes place mainly through two police organizations – Interpol and Europol.

3. International exchange of information and data

The International Criminal Police Organization – Interpol constitutes the world's largest international police organization, with 192 member countries. Each Interpol member country is linked to the Interpol's global network. Interpol's General Secretariat operates 24 hours a day, 7 days a week. Crimes against children and child trafficking belong to Interpol's area of interest. Interpol provides the police authorities with tools and services which are useful in the fight against these forms of crimes.

[28] Discussing the issue of international police cooperation, it should be noted that tasks aimed at preventing and combating crime are carried out not only by police authorities. Art. 87 (1) of the Treaty on the Functioning of the European Union provides that police cooperation in EU involves all the Member States' competent authorities, including police, customs and other specialized law enforcement services in relation to the prevention, detection and investigation of criminal offences; the text of the Treaty available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/TXT&from=EN (last accessed: 15 November 2018).

[29] A. Gruszczak, *Współpraca policyjna w Unii Europejskiej w wymiarze transgranicznym. Aspekty polityczne i prawne*, Kraków 2009, p. 41.

[30] *Ibidem*, pp. 142–143.

The most important are: 1) Interpol's notices and diffusions system which enables global cooperation between member countries in tracking criminals and suspects as well as locating missing persons or collecting information; 2) Interpol's databases (e.g. *Nominal Data*, *Stolen and Lost Travel Documents*, *Child Sexual Exploitation Images Database*, *DNA Profiles*, *Fingerprints Database*), easily accessible to police authorities from member states through a restricted-access Internet portal (I-24/7).[31]

The European Union Agency for Law Enforcement Cooperation (Europol) provides a platform for the exchange of criminal information and intelligence as well as a criminal analysis center. *Europol Information System – EIS* is the central Europol database containing criminal information and intelligence on all offences covered by Europol's scope. One of the crimes Europol is focused on is child trafficking. Access to EIS is available from law enforcement agencies in the member states 24 hours, 7 days a week. An important part of Europol's work is preparing a different kind of analysis on various crime areas.[32]

EU member states have at their disposal two other databases supporting international police cooperation: 1) Schengen Information System (SIS II) which contains information about persons and objects, including information on missing persons, in particular children or other vulnerable individuals who are in need of protection, and provides information on individuals who are sought in relation to criminal

[31] See: https://www.interpol.int/About-INTERPOL/Overview (last accessed: 15 November 2018); *Interpol Fact Sheet: Databases* (COM/FS/2017–02/GI-04), https://www.interpol.int/News-and-media/Publications2/Fact-sheets2 (last accessed: 15 November 2018); *Interpol Fact Sheet: Crimes against Children* (COM/FS/2015–11/THB-03), https://www.interpol.int/News-and-media/Publications2/Fact-sheets2 (last accessed: 15 November 2018); *Interpol Fact Sheet: International Notices System*, COM/FS/2017–02/GI-02, https://www.interpol.int/News-and-media/Publications2/Fact-sheets2 (last accessed: 15 November 2018); *Interpol: Trafficking in Human Beings* (COM/FS/2017–02/THB-02), https://www.interpol.int/News-and-media/Publications2/Fact-sheets2 (last accessed: 15 November 2018). The legal basis of Interpol's activity is the Constitution of 13 June 1956, https://www.interpol.int/About-INTERPOL/Legal-materials (last accessed: 15 November 2018).

[32] https://www.europol.europa.eu (last accessed: 15 November 2018); Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA (regulation 2016/794 on Europol), https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1537151569508&uri=CELEX:32016R0794 (last accessed: 15 November 2018).

activities[33]; 2) Eurodac (European Asylum Dactyloscopy Database) which contains fingerprints gathered for asylum purposes and allows to compare them.[34]

The institution of a liaison officer is an important and long-used element of international police cooperation, not only within EU. Liaison officers facilitate the direct exchange of information and cooperation in criminal matters between police authorities from different states.[35]

4. Methods of police operational work in cross-border cooperation

Police authorities to combat trafficking in children may also use such cooperation instruments as cross-border observation, hot pursuit, undercover operation, controlled delivery, hearing in the form of video conferencing, joint investigation teams. In the cases of child trafficking EU member states most frequently use: cross-border observation, hot pursuit and joint investigation teams.

The cross-border observation allows police officers of one state who, as part of a criminal investigation, are keeping under surveillance in their state a person who is presumed to have participated in a criminal offence to continue their surveillance

[33] Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II) and Regulation (EC) No. 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32007D0533 (last accessed: 15 November 2018); https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1537144509806&uri=CELEX:32006R1987 (last accessed: 15 November 2018).

[34] Regulation (EU) No. 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of Eurodac for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No. 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice; https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1537144740669&uri=CELEX:32013R0603 (last accessed: 15 November 2018).

[35] The basis for the appointment of liaison officers is a bilateral agreement. See also: 2003/170/JHA, Council Decision 2003/170/JHA of 27 February 2003 on the common use of liaison officers posted abroad by the law enforcement agencies of the Member States; https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1537146806565&uri=CELEX:32003D0170 (last accessed: 15 November 2018).

in the territory of another state. It is generally required to obtain earlier the consent of the state.[36]

The hot pursuit allows police officers from one state to continue pursuit in the territory of another state without the latter's prior authorization where, given the particular urgency of the situation, it is not possible to notify the competent authorities of the other state prior to entry into that territory or where these authorities are unable to reach the scene in time to take over the pursuit. The same applies where the person being pursued has escaped from provisional custody or while serving a sentence involving deprivation of liberty.[37]

A joint investigation team is an international cooperation tool based on an agreement between competent authorities – both judicial and law enforcement – of two or more States, established for a limited duration and for a specific purpose, to carry out criminal investigations in one or more of the involved states.[38]

Police authorities also participate in gathering evidence as part of international cooperation. Legal assistance may, in particular, include the interrogation of persons as witnesses, accused persons and experts; inspection and search of rooms, other places and people; classes of objects and issuing these items abroad.[39] In detecting child trafficking, less common forms of cooperation may also be helpful, such as joint patrols, which are a form of legal aid applied only in the border area.

The European Union Agency for Law Enforcement Training (CEPOL) supports EU member states in preventing and combating child trafficking by providing training for law enforcement officials of the EU member states and to some extent, from the third countries.[40] The program of training includes child trafficking.

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[36] Art. 40 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (Schengen Convention); https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:42000A0922(02)&from=EN (last accessed: 15 November 2018).

[37] Art. 41 of the Schengen Convention.

[38] https://www.europol.europa.eu/activities-services/joint-investigation-teams (last accessed: 15 November 2018); Council Framework Decision of 13 June 2002 on joint investigation teams (2002/465/JHA); https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32002F0465&qid=1537149098449 (last accessed: 15 November 2018).

[39] M. Kusak, *Postępowanie karne w sprawach międzynarodowych .Podręcznik praktyczny*, Warszawa 2017, p. 117.

[40] Regulation (EU) 2015/2219 of the European Parliament and of the Council of 25 November 2015 on the European Union Agency for Law Enforcement Training (CEPOL) and replacing and repealing Council Decision 2005/681/JHA; https://eur-lex.europa.eu/legal-content/EN/

In the aspect of combating child trafficking, the above-mentioned forms of cooperation are of the greatest importance.

Conclusions

Can we make use of experience gained in the fight against this crime in combating and preventing surrogate motherhood (under condition that some acts from the scope of the term of surrogacy motherhood are considered as crimes)?

There are no obstacles to not use methods and forms of police cooperation used in combating and preventing child trafficking in combating and preventing crime of surrogacy motherhood or offences connected with surrogacy motherhood. The features of the surrogate motherhood make all the methods potentially appropriate to use (those related to exchange of information as well as methods of operational work). The problem is whether they all can be used according to law. Because of it the best basis for international police cooperation is bilateral agreements. The scope of such cooperation is defined by states so police authorities can cooperate on the basis of bilateral agreements regardless of whether the penalization of some acts covered by the concept of surrogate motherhood is considered as a crime in the EU law. It means that police authorities from EU member states can cooperate on the grounds of bilateral agreements with other member states or third states even if no agreement referring to the criminality of surrogate motherhood is reached.

Correspondingly, liaison officers are a form of police cooperation which seems appropriate to use in combating and preventing surrogate motherhood. Regardless of whether the penalization of some acts referring to surrogate motherhood is recognized as a crime in the EU law, the liaison officers delegated directly to the member states can cooperate in a broad way and exchange information referring to surrogate motherhood. They are also entitled to use Europol's infrastructure in their activities, in accordance with national law, for such bilateral exchanges also to cover crimes falling outside the scope of the objectives of Europol.[41] Europol can support police authorities of the member states and their cooperation by all its means in preventing and combating crimes when a specific crime affects two or

TXT/?qid=1537145524657&uri=CELEX:32015R2219 (last accessed: 15 November 2018). For further information, see: https://www.cepol.europa.eu/ (last accessed: 15 November 2018).

[41] Art. 8 (4) of the 2016/794 Regulation on Europol.

more member states and it affects a common interest covered by a Union policy, as listed in Annex I to the regulation 2016/794 on Europol. It means that in order to "use" all potential of Europol surrogate motherhood should be listed in Annex I (as a crime). It seems that Interpol infrastructure also can be used in bilateral, direct contacts between the states.

International police cooperation in the field of child trafficking has proved how important for combating and preventing this form of crime is cooperation not only of police authorities but also other authorities as well as non-governmental organizations. It is a conclusion that should be taken into consideration when creating law combating and preventing some acts related to surrogate motherhood.

Surrogacy is another crime that may be connected with human trafficking in specific circumstances. A woman who does not take a decision about being a surrogate freely but is forced to being a surrogate or who is held in a clinic or in another way "exploited" should be treated as a victim of human trafficking. If she is under eighteen years of age, she is a victim of child trafficking. It means that some acts referring to surrogacy can be treated as child trafficking and therefore prosecuted and covered by police cooperation now, without any changes in law.

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International criminal law aspects of surrogate motherhood

The present study[1] constitutes an analysis of international criminal law regulations regarding the surrogacy and connected with it child trafficking.[2]

The phenomenon of the so-called surrogacy is complex. There is no one behavior which can be identified as the central element of the procedure. It is possible to indicate a multitude of social situations or behaviors that make up the phenomenon.[3] There are also many regulators (individual states, EU, UN) interested in setting norms. All of this complicate the possibility of presenting a coherent system of norms, constituting the basis for the finding of unlawfulness[4] and punishability

[1] The article is an English-language summary of the study titled "Surrogate motherhood (tzw. urodzenie zastępcze) i handel dziećmi w ujęciu prawa karnego międzynarodowego", which was originally written in Polish.

[2] The problem of "classic" trafficking of children (e.g. forcing children to prostitution) is beyond the scope of considerations. These issues are not related to the problem of surrogacy.

[3] W. Górowski indicates, among others, such activities as: announcement of the sale/donation of gametes, announcement of pregnancy (both when it concerns a biological child, and the transfer of an embryo to a womb of a woman genetically alien), announcement of mediation in concluding a contract, seeking parties to a contract (biological mother), genetic and sociological parents), creation of the human embryo, embryo transfer, embryo pre-harvest, embryo freezing, destruction of supernumerary embryos, renunciation of biological parental rights by the parents, handing over to the sociological parents, sociological parents' application for adoption, the adoption of sociological parents' adoption by the court, the sociological father's statement on the recognition of the child, payment of remuneration to the intermediary/organization of surrogate motherhood; see: W. Górowski, *Zastępcze…*, p. 8.

[4] The term "unlawfulness" should be understood as the contradiction of behavior with the legal norm, binding the perpetrator. See: Z. Jędrzejewski, *Bezprawność…*, p. 325.; A. Zoll, *Komentarz…*, p. 26.

(culpability)[5] of specific behaviors (conducts). Due to the complexity of the subject matter and the multifaceted nature of the discussed social problem, it seems necessary at the very beginning of the deliberations to separate two groups of issues for which dogmatic considerations will be conducted.

First, the problem of surrogacy, understood as contracting[6] and carrying out medical procedures aimed at childbirth by a surrogate mother, is discussed in detail. It is so as only some issues related to the social phenomenon of such understood surrogacy have been described in the law.

Second, the present work discusses the issue of child trafficking, understood as the transmission of children born to those concerned, in exchange for remuneration and with violation of adoption procedures. Although it is not directly related to the problem of surrogacy, it constitutes a different social phenomenon, described in international law in an autonomous manner. In this respect, the most important aspects of the social problem have been described by law.

Further discussion is divided into three parts. The first one presents the characteristics of penal norms, taking into account the international context. The second contains an analysis of regulatory norms of international law and their impact on national legal systems. The third discusses the content of international penal obligations and points to possible problems in their implementation on the example of Polish criminal law.

1. Norms of criminal law in international context

International law significantly affects the shape of domestic legal systems. By concluding international agreements, states declare to make certain changes in internal laws. At the same time, international law does not specify directives of conduct directed to individuals – it only stipulates bonds between states. International regulations remain only in the sphere of declarations, unless individual countries decide to implement them into national legal systems.

[5] The term "criminality" should be understood as the order to impose a penalty by the court in the situation of finding that the person has broken the law. Not every violation of the law by the body is associated with the obligation of sentencing the perpetrator to punishment. See: S. Tarapata, *Dobro prawne w strukturze…*, p. 380; P. Kardas, O *relacjach pomiędzy strukturą…*, p. 60.

[6] M. Soniewicka, *Dylematy …*, pp. 13–24.

International law affects national criminal law on two levels: First, it defines the customary principles of criminal[7] and legislative[8] jurisdiction. In this way, it helps to determine the boundaries of state power. Thanks to this, it is known whether the given behavior can be regulated or punished by the authorities of a given state. Second, it indicates which kind of behaviors should be treated as a crime by national criminal law.[9] In the case of criminal law, this usually means that certain categories of behavior acquire the status of conventional crimes[10], penalized under the principle of universal jurisdiction. Simplifying – it means that the national court does not has to verify whether the act is also a crime in a place (country / state) of its performance (perpetration). In both cases, international law affects the shape of national penal norms.

Penal norms have two basic functions. On the one hand, they determine what behaviors are prohibited under the threat of punishment. They are therefore directed to the individual, modeling its future behavior. On the other hand, they form the basis for the court's decision on imposition of punishment on an individual. Due to this duality of addressees, the dogmatic of criminal law distinguishes two types of penal norms: sanctioned norms and sanctioning norms.[11] **Sanctioned norms** specify the ways of conduct the violation of which is subject to penalty (punishment). They tell the individual how to behave in a given social situation. The standard of this category will include, for example, provisions specifying the conditions for the adoption procedures. The content and scope of the special effectivity of the norms of this type have to be recognizable as of the moment of the perpetrator's action or omission.[12] Only through such means are they able to influence perpetrator's behavior. For example, let us assume that the state X, under the threat of punishment, prohibits the adoption of a child in exchange for payment. A person committing such an act (behavior) must be able to predict that it is bound by the law of state X.

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[7] See, inter alia: C. Ryngaert, *Jurisdiction in International…*, p. 106; The Princeton Project on Universal…, p. 28.

[8] W. L. M. Reese, *Legislative Jurisdiction…*, p. 1587; M. Wasiński, *Jurysdykcja legislacyjna państwa…*, p. 57.

[9] L. Gardocki, *Zarys prawa karnego…*, pp. 118–119; A. Wąsek, [in:], A. Wąsek, *Kodeks karny. Komentarz. Tom* 1. Ar*tykuły* 1–116…, p. 773; B. Kunicka-Michalska, [in:] *Kodeks karny. Część ogólna…*, p. 1374.

[10] L. Gardocki, *Zarys prawa karnego…*, pp. 118–119.

[11] M. Dąbrowska-Kardas, *Analiza dyrektywalna…*, pp. 171–184; P. Kardas, *Zbieg przepisów ustawy…*, pp. 269–270; W. Wróbel, *Zmiana normatywna i zasady…*, pp. 28–29.

[12] D. Zając, *Odpowiedzialność…*, p. 79 et seq.

The validity of a sanctioned norm cannot therefore depend on a future and uncertain situation, for instance, on the child's future appearance within the territory of state X.

Violating the sanctioned norm may entail activation of the **sanctioning norm**. Its addressee is the court. The norm specifies the order to impose a penalty on an individual who violated the norm of conduct (sanctioned) in particular circumstances. In the greatest simplification, it can be stated that the imposition of a punishment is not in response to the perpetrator's behavior, but to his act, which is unlawful (contrary to the sanctioned norm). Only if it is proven that the perpetrator violated the law binding him during behavior (behaved in a different way than the prescribed standard), it will be possible to punish him. The punishment has a subsequent character to the act of omission. It depends on many factors detached from the behavior itself, as a result. All of them, however, are known to the court at the time of the verdict.[13]

2. Sanctioned norms and the phenomenon of surrogacy and trafficking of children

Further considerations include an analysis of those provisions of international conventions[14] that impose on the state an obligation to regulate specific behaviors

[13] D. Zając, *Odpowiedzialność*…, p. 310 et seq.

[14] The most important international agreements referring to the problems related to surrogacy are: European Convention on the Exercise of Children's Rights, ETS No. 160, Strasbourg, 25/01/1996; Convention of 25 October 1980 on the Civil Aspects of International Child Abduction; European Convention on the Legal Status of Children Born out of Wedlock Strasbourg, 15 October 1975; Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children; The United Nations Convention on the Rights of the Child (CRC) Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entered into force on 2 September 1990; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 entered into force on 18 January 2002; Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime New York, 15 November 2000; Declaration of the Rights of the Child, Proclaimed by General Assembly Resolution 1386 (XIV) of 20 November 1959; European Convention on the Adoption of Children, Strasbourg, 24 April 1967; Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and

of individuals, connected with surrogacy. Both the content of international commitments themselves and their impact on national law are assessed below.

2.1. International law

International law very sparingly refers to the phenomenon of surrogacy. It does not introduce – apart from a few exceptions related to child trafficking – any detailed directives in this field. There are no direct effect regulations that could serve as a point of reference for assessing the unlawfulness of specific behaviors of individuals. International norms require implementation into national legal systems. In order to reconstruct the content of the particular sanctioned norm, it will be necessary to determine the content of the domestic law that is binding in a given situation. It should also be remembered that the conventional norms are in force only between the parties to the contract and they do not have "universal" binding power.[15]

The analysis of conventional regulations allows one to distinguish three leading threads connected with the problem of surrogacy motherhood and the related problem of child trafficking.

First, some of the acts of international law draw attention to the need to respect the rights of the family and the child, giving legal status to social values. In this respect, precise norms, suitable for implementation are not described. International law creates only some kind of "horizon" for the interpretation of specific provisions. This is the role, for example, of the Article 3 of the Convention on the Rights of the Child, 20 November 1989, the Preamble to the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption[16] or the Article 8 of the the Convention for the Protection of Human Rights and Fundamental Freedoms. The European Court of Human Rights, referring to the content

Biomedicine, Oviedo, 4 April 1997; Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4 November 1950. See also: L. E. Teitz, *Children* …, pp. 524–529.

[15] On the regulation of international law and its impact on Polish law see: E. Zielińska, *O potrzebie…*, *op. cit.*

[16] Ratifying the Convention involves "[r]ecognising that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding; Recalling that each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin; Recognising that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin."

of the latter act, has developed a stable line of jurisprudence, according to which the starting point for all judicial decision in a field of adoption should be to protect the biological family bond that exists from the moment of giving birth, and not legal guarantee of the possibility of a hypothetical adoption bond in the future.[17]

Second, acts of international law guarantee the individual specific rights that may be violated under the procedure of surrogate motherhood. In accordance with the Article 2 of the European Convention on the Legal Status of Children born out of Wedlock: "Maternal affiliation of every child born out of wedlock shall be based solely on the fact of the birth of the child." The Declaration of the Rights of the Child, 1959 in Principle 3 stipulates that "[t]he child shall be entitled from his birth to a name and a nationality." This group also includes regulations regulating issues related to the modification of the human genome. The key is here Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, 4 April 1997, Oviedo (the so-called "Biomedical Convention"). The convention introduces significant limitations in the possibility of modifying the features of the human genome.

Third, international law requires in a certain way to regulate the process of adoption understood as the acquisition of the right to care for a child. In this regard, it refers to both the need of protection of the child's well-being and also the biological family. International standards significantly limit the possibility of profiting from the organization of adoption. Such limitation was included, among others in the Article 32 of the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption and in the Article 15 of the European Convention on the Adoption of Children. The adoption procedures, functioning at the national level, should, first of all, safeguard the child's interest and have his or her interest in high regard. (see also: Articles 9 and 21 of the Convention on the Rights of the Child, 20 November 1989). International law also requires that an appropriate period of time passes between childbirth and the mother's consent to the adoption of her child. In accordance with the Article 5.4 of the European Convention on the Adoption of Children. Strasbourg, 24 April 1967,

> [a] mother's consent to the adoption of her child shall not be accepted unless it is given at such time after the birth of the child, not being less than six

[17] E.B. v. France, No. 43546/02, ETPC 2008. See also: *Surrogate Motherhood: A Violation…*, p. 18.

> weeks, as may be prescribed by law, or if no such time has been prescribed, at such a time as, in the opinion of the competent authority, will have enabled her to recover sufficiently from the effects of giving birth to the child.

Correspondingly, infringements of adoption regulations may constitute a crime in the light of international law.

2.2. Domestic law – a model approach

The regulations cited above specify the boundaries in which the national legislator has to operate. Apart from the few "hard" restrictions (e.g. the obligation to keep a six-week deadline when consenting to adoption), the indications of international law are general in nature. Many important issues have been left to the free settlement by the laws of individual countries. International law does not, for example, determine whether the so-called "pregnancy service contracts" should be banned, or whether parental rights can be granted to people who are in same-sex relationships.[18] All these issues have been left to be decided at the level of individual countries. It results in a series of significant differences between domestic legal solutions.[19] There are also no instruments forcing harmonization at the international level. Meanwhile, it is against this background that the greatest tensions arise and conflicts of jurisdiction appear. Individual states strive to maximize the scope of the effectiveness of their national law. In doing so, they refer to the existence of connections between a given state and the social situation. These associations are derived from various circumstances, referred to as jurisdictional links (nexuses).

[18] See: B. Stark, *Transnational…*, pp. 380–385. This problem was also recognized at the EU level; see: C. Chetau, *Adoption…*, p. 4.

[19] See: in the field of British law – *Inter-country surrogacy*, *op. cit.*; in the field of American law – C. Spivack, *The Law…*, pp. 97–114; in the field of German law – E. Przyśliwska-Urbanek, *Macierzyństwo zastępcze z perspektywy prawa Niemiec*, Warszawa 2017; in the field of Italian law – L. Lai, *Macierzyństwo zastępcze w prawie włoskim*, Warszawa 2017; in the field of Israeli law – M. Fras, D. Abłażewicz, *Reżim…*, pp. 37–41; in the field of Serbian law – G. K. Stanic, *State…*, pp. 50–57; in the field of Croatian law – Pp. Vidlicka, D. Hrstic, Z. Kirin, *Bioethical…*, pp. 37–65; in the field of Greek law – E. Kounougeri-Manoledaki, *Surrogate…*, p. 267 et seq.

This leads to jurisdictional disputes, which must be resolved using general solutions based on weighing jurisdictional links using the rule of reason.[20]

To illustrate the complexity of the above situation, it is worth using the following example. A Polish citizen (link of citizenship) and a citizen of the United Kingdom (link of citizenship) go to Thailand[21] (link of territory) to enter into an agreement to mediate in the procedure of surrogate motherhood with the enterprise organizing this type of activity (link of place of registration). The child's biological mother in this case is to be a Vietnamese citizen (link of citizenship). The semen comes from an anonymous donor, whose identity is in practice impossible to determine. The egg cell is supposed to come from a British citizen. After the birth of the child, a British citizen and a Polish citizen will ultimately gain parental rights towards him.

Each of the actors in the above case may be bound by a different legal regime. The behavior of a Polish citizen can be assessed from the perspective of Polish or Thai law. British behavior – from the perspective of English or Thai law. In the case of other entities, it will also be possible to indicate a larger number of jurisdictional links. They all intersect with each other, strengthening or weakening the competence of a particular state to regulate a given behavior. It must be remembered that the aim of the norm is to regulate the behavior of a particular person, not the phenomenon or social events as such. This approach leads to further complications. If a multi-person configuration occurs in a given situation, it may turn out that different norms will have to be used to assess the unlawfulness of particular behavior of individuals.[22]

By determining what norm involved the perpetrator at the time of his behavior, it is possible to determine whether the perpetrator acted unlawfully (violated the sanctioned norm). This is one of the conditions that activate the sanctioning norm, which obliges the court to impose a penalty.

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[20] From the perspective of international public law, the theoretical basis for resolving such conflicts may be the rule of reason. It is a general principle of international law, interpreted from four general principles: the principle of non-intervention, principles of equity, the principle of proportionality and the prohibition of abuse of law. Using the rule of reason, it is possible to weigh the significance of connectors and show which state has the right to regulate a given social situation, and thus which norm applies. See: M. Płachta, *Jurysdykcja państwa w sprawach*…, pp. 116–122; C. Ryngaert, *Jurisdiction in International*…, p. 143.

[21] Until recently, Thailand was one of the most popular directions for surrogate tourism, due to very liberal regulations; however, they were changed in 2015; see: J. Caamano, *International*…, p. 571 et seq.

[22] D. Zając, *Odpowiedzialność*…, p. 374 et seq.

3. Sanctioning norms and the phenomenon of surrogacy and trafficking of children

From the perspective of criminal law, the above-described norms of a regulative nature are of interest only to the extent to which they are connected with criminal sanctions. Further considerations concern these regulations of international law, which impose on the state the obligation to penalize acts related to surrogacy. Within these pages also the method of their implementation – on the example of Polish criminal law – is discussed.

3.1. Surrogacy and child trafficking and international obligations in a field of criminal law

To a very limited extent international law obliges states to penalize behaviors related to surrogacy. The duty of prosecution actually applies only to specifically understood child trafficking. One of the key elements of the surrogacy procedure is the transfer of parental rights to the child. In accordance with the requirements of international law, this must always be done within the limits of the procedure determined by law. There is a very high risk of treating a child like a commodity[23], which is subject to market laws.

Penalization of broadly understood human trafficking[24] is provided for by international law. Bearing in mind the subject of this study, special attention should be paid to the Optional Protocol to the Convention on Children's Rights, Child Prostitution and Child Pornography. Other acts of international law refer to classical human trafficking, and trade in children is separated only by the method of obtaining power over a person. The Optional Protocol introduces special solutions that are crucial for penalizing the behaviors that make up the surrogacy procedure. The Article 3 of the Optional Protocol stipulates: "1. Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether such offences are committed domestically or transnationally or on an

[23] See: B. Lewis, "*You Belong…*, pp. 652–656; C. A. Choudhury, *The Political…*, pp. 12–16.

[24] For information on human trafficking from the perspective of international and Polish law, see: *Handel ludźmi. Przestrzeń prawnokarna i kryminalistyczno-kryminologiczna*, eds. P. Łabuz, I. Malinowska, M. Michalski, T. Safjański, Warszawa 2017; *Handel dziećmi. Wybrane problemy*, eds. Z. Lasocik, M. Koss, Ł. Wieczorek, Warszawa 2007, A. Sakowicz, *Przestępstwo…*, p. 63 et seq.

individual or organized basis: (ii) Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption." An example of such behavior will be, for instance, urging the child's biological mother to waive her parental rights before the expiration of the above six-week period.

Other behaviors that constitute a form of a surrogacy are not covered by the obligation to criminalize any of the parties involved. This also applies to those behaviors that have been described as forbidden, but they have not been subjected to punishment (e.g. acts described on the basis of the Biomedical Convention). If they are found to be crimes under domestic law, they will not be of a conventional nature.

3.2. Domestic regulations specifying prohibited acts, connected with surrogacy and child trafficking

The scope of criminal jurisdiction is shaped by reference to the customary principles of international law.[25] Each country introduces here, however, some modifications, which discussion is not possible here. Bearing in mind the above, the reference point for further considerations will be the Polish criminal law standards, in so far as they are the effect of implementation of penal obligations.

The Polish legislator did not introduce separate criminal provisions that would apply directly to the phenomenon of surrogate motherhood. This does not mean, however, that individual behaviors that constitute the subject matter cannot be subject to criminal liability. The most important meaning here are three provisions: the Article 211a[26] of the Polish Criminal Code, the Article 189a[27] of the Polish Criminal Code and Article 82[28] of the Act on the Treatment of Infertility. The crime can be

[25] D. Zając, *Odpowiedzialność*…, p. 151 et seq.

[26] Article 211a of The Act of June 6, 1997 -– the Penal Code, Dz.U. 1997 No. 88 item 553 – stipulates as follows: "Whoever, with the purpose of gaining a material benefit, organises adoption of children against the statutory provisions, is subject to the penalty of deprivation of liberty for between 3 months and 5 years."

[27] Article 189a of the The Act of 6 June 1997 – the Penal Code, Dz.U. 1997 No. 88 item 553 – stipulates as follows: "§ 1. Whoever traffics in humans, is subject to the penalty of deprivation of liberty for no less than 3 years. § 2. Whoever makes preparations to commit the crime provided for in § 1, is subject to the penalty of deprivation of liberty for between 3 months and 5 years."

[28] Article 82 of the The Act of June 25, 2015 on Infertility Treatment, Dz.U. 2017, item 865 – stipulates as follows: "Whoever uses preimplantation genetic diagnosis in the procedure of medically assisted procreation for non-medical indications, including the selection of a future child's sex, except

perpetrated, for example, by the signing of a surrogacy agreement, provided that its provisions oblige the parties to unlawful conduct (for example, when the contract obliges a surrogate to carry out an act of abortion of the fetus upon the decision of a potential social mother[29]).

From the perspective of this work, the most important question is whether the above crime has a conventional character. If this is indeed so, then the Polish domestic court does not have to consider any foreign law – in case of the crime committed abroad. If the national law transfers international norms into the domestic legal system in a proper way, the infringement of the domestic norm will also constitute an act of infringement of the international norm. In this way, the act of the perpetrator can be described as an example of an international crime and be duly prosecuted under the principle of universal jurisdiction.

Without analyzing the above types in detail (this issue is the subject of a separate study), it should be pointed out that the scope of penalization described in the above-mentioned provisions of the Polish Criminal Code does not coincide with the scope of obligations of penalization, described by international law.

Such a flawed implementation of the provisions of international law in fact gives the false "conventional" nature of the "domestic" offense. It has important consequences for the use of norms in practice. Recognizing that a given offense is of a conventional nature, it is possible to invoke the principle of universal jurisdiction as the basis for prosecution. In the case of many national legal systems, this means exemption from the obligation to demonstrate double criminality.[30] In the case of the above-mentioned Polish criminal provisions, this "conventionality" of crimes will serve as their focal point. For example, Article 211a of the Polish Criminal Code stipulates as follows: "Whoever, with the purpose of gaining a material benefit, organizes adoption of children against the statutory provisions, is subject to the penalty of deprivation of liberty for between 3 months and 5 years." Optional Protocol, which is an international base for the above article, mentioned only "an intermediary" who "improperly induces consent." Such differences between the

when such a choice avoids a serious, incurable hereditary disease, is subject to a fine, imprisonment or imprisonment freedom up to 2 years old."

[29] This approach was presented by the Supreme Court of Poland in the judgment of November 20, 2014, reference number of case: IV KK 257/14; source: http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/IV%20KK%20257–14.pdf (last accessed: access: 22 July .07.2018). See also: the judgment of the Court of Appeal in Krakow of 22 April 2014, reference number of case: II AKa 37/14, KZS 2014/5/62; J. Kędzierski, *Glosa do wyroku*…, pp. 159–163; R. Walker, L. Van Zyl, *Towards*…, p. 136.

[30] See: O. Lagodny, *Possible Ways to Reduce*…, p. 2.

international obligation and the domestic provision create complication for courts. It is possible that someone may commit the crime described in Article 211a of the Polish Criminal Code, but it will not constitute a conventional crime. To interpret the norm, judges have to take into account not only the provisions of domestic law, but also the content of international agreements. Only in this way will the court be able to establish which principle of jurisdiction provides the basis for punishments in a particular case.

4. Summary

The considerations presented above allow for making the following final conclusions:

1. international law refers to the problem of surrogacy in a fragmented way;
2. the lack of direct applicability of international norms transfers the burden of regulation and penalization to national legislation; it produces the scarcity of uniformity of solutions;
3. the lack of uniformity in this extent often excludes the possibility of punishing the perpetrators, because of the requirement of double criminality;
4. it seems necessary to take steps towards a more complete harmonization of individual national laws; however, such a harmonization ought to first and foremost include norms of a regulatory nature.

Addendum

I. Activities of international organizations

1. European Union. Criticism in EU Parliament annual report on human rights and democracy in the world 2014 and the EU policy on the matter (17 December 2015)

"**The European Parliament (…) 115. Condemns the practice of surrogacy**, which undermines the human dignity of the woman since her body and its reproductive functions are used as a commodity; considers that the practice of gestational surrogacy which involves reproductive exploitation and use of the human body for financial or other gain, in particular in the case of vulnerable women in developing countries, shall be prohibited and treated as a matter of urgency in human rights instruments;"

http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2015–0470&language=EN&ring=A8–2015–0344

2. Council of Europe

A. Criticism in report by P. De Sutter of 2016

Children's rights related to surrogacy (Doc. 14140, 23 September 2016)

"(…) 31. **In conclusion, I thus propose that the Assembly recommend that:**

- **member States prohibit all forms of for-profit surrogacy in the best interest of the child;**
- member States and the Committee of Ministers collaborate with the HCCH with a view to including, as a minimum requirement, a restriction of access to surrogacy arrangements to resident nationals of their own State and country in any multilateral instrument that may result from the HCCH's parentage/ surrogacy project;
- member States take care not to violate children's rights when taking measures to uphold public order and discourage recourse to surrogacy arrangements;
- the Committee of Ministers explore the desirability and feasibility of drawing up European guidelines to safeguard children's rights in relation to for-profit surrogacy arrangements.

32. Finally, there are many ways in which most of our member States could make adoption a more viable alternative to surrogacy, thus providing a child in need with loving parents and fulfilling infertile couples' desire for a child – the best outcome for all (p. 11)."

http://assembly.coe.int/nw/xml/Votes/DB-VotesResults-EN.asp?VoteID=36189&DocID=16001&MemberID=

B. ECHR Opinion of 10.4.2019

Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, requested by the French Court of Cassation, 10 April 2019, request no. P16–2018–001.

1. In a letter of 12 October 2018 sent to the Registrar of the European Court of Human Rights ("the Court"), the French Court of Cassation requested the Court, under Article 1 of Protocol No. 16 to the Convention for the Protection of Human

Rights and Fundamental Freedoms ("Protocol No. 16"), to give an advisory opinion on the questions set out at paragraph 9 below. (…)

THE QUESTIONS ASKED

9. The questions asked by the Court of Cassation in its request for an advisory opinion are worded as follows:

"1. By refusing to enter in the register of births, marriages and deaths the details of the birth certificate of a child born abroad as the result of a gestational surrogacy arrangement, in so far as the certificate designates the 'intended mother' as the 'legal mother', while accepting registration in so far as the certificate designates the 'intended father', who is the child's biological father, is a State Party overstepping its margin of appreciation under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms? In this connection should a distinction be drawn according to whether or not the child was conceived using the eggs of the 'intended mother'?

2. In the event of an answer in the affirmative to either of the two questions above, would the possibility for the intended mother to adopt the child of her spouse, the biological father, this being a means of establishing the legal mother-child relationship, ensure compliance with the requirements of Article 8 of the Convention?"

THE BACKGROUND AND THE DOMESTIC PROCEEDINGS UNDERLYING THE REQUEST FOR AN OPINION

10. In its judgment in Mennesson v. France (no. 65192/11, ECHR 2014 (extracts)) the Court examined, from the standpoint of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms

("the Convention"), the inability of two children born in California through gestational surrogacy arrangement, and their intended parents, to obtain recognition in France of the parent-child relationship legally established between them in the United States. The applicants specified that, in accordance with Californian law, the surrogate mother had not been remunerated but had merely received expenses (see paragraph 8 of the judgment). (…)

1. The Court held that there had been no violation of the right of the children and the intended parents to respect for their family life, but that there had been a violation of the children's right to respect for their private life.

14. In its request for an advisory opinion the Court of Cassation pointed out that its case-law had evolved in the wake of the Mennesson judgment. Registration of

the details of the birth certificate of a child born through surrogacy abroad was now possible in so far as the certificate designated the intended father as the child's father where he was the biological father. It continued to be impossible with regard to the intended mother. Where the intended mother was married to the father, however, she now had the option of adopting the child if the statutory conditions were met and the adoption was in the child's interests; this resulted in the creation of a legal mother-child relationship. French law also facilitated adoption by one spouse of the other spouse's child.

RELEVANT INTERNATIONAL LAW AND INSTRUMENTS

19. The Court refers in particular to Articles 2, 3, 7, 8, 9 and 18 of the United Nations Convention on the Rights of the Child of 20 November 1989, and to Articles 1 and 2 of the Optional Protocol on the sale of children, child prostitution and child pornography.

20. The Court has also taken into account the activities of the Hague Conference on Private International Law.

21. It has likewise considered, among other materials, the report of 15 January 2018 by the United Nations Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material (A/HRC/37/60).

COMPARATIVE-LAW MATERIALS

22. The Court undertook a comparative-law survey covering forty-three States Parties to the Convention not including France: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, the Czech Republic, Estonia, Finland, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, the Netherlands, the Republic of North Macedonia, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Sweden, Turkey, Ukraine and the United Kingdom. (…)

THE COURT'S OPINION

I. PRELIMINARY CONSIDERATIONS

25. The Court observes that, as stated in the Preamble to Protocol No. 16, the aim of the advisory-opinion procedure is to further enhance the interaction between the Court and national authorities and thereby reinforce implementation of the

Convention, in accordance with the principle of subsidiarity, by allowing the designated national courts and tribunals to request the Court to give an opinion on "questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto" (Article 1 § 1 of Protocol No. 16) arising "in the context of a case pending before [them]" (Article 1 § 2 of Protocol No. 16). The aim of the procedure is not to transfer the dispute to the Court, but rather to give the requesting court or tribunal guidance on Convention issues when determining the case before it (see paragraph 11 of the Explanatory Report). The Court has no jurisdiction either to assess the facts of a case or to evaluate the merits of the parties' views on the interpretation of domestic law in the light of Convention law, or to rule on the outcome of the proceedings. Its role is limited to furnishing an opinion in relation to the questions submitted to it. It is for the requesting court or tribunal to resolve the issues raised by the case and to draw, as appropriate, the conclusions which flow from the opinion delivered by the Court for the provisions of national law invoked in the case and for the outcome of the case. (…)

31. Accordingly, the Court's opinion will deal with two issues.

32. Firstly, it will address the question whether the right to respect for private life, within the meaning of Article 8 of the Convention, of a child born abroad through a gestational surrogacy arrangement, which requires the legal relationship between the child and the intended father, where he is the biological father, to be recognised in domestic law, also requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, who is designated in the birth certificate legally established abroad as the "legal mother", in a situation where the child was conceived using the eggs of a third-party donor and where the legal parent-child relationship with the intended father has been recognised in domestic law.

33. Secondly, if the first question is answered in the affirmative, it will address the question whether the child's right to respect for his or her private life within the meaning of Article 8 of the Convention requires such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad, or whether it might allow other means to be used, such as adoption of the child by the intended mother.

II. THE FIRST ISSUE

35. According to the Court's case-law, Article 8 of the Convention requires that domestic law provide a possibility of recognition of the legal relationship between a child born through a surrogacy arrangement abroad and the intended father where he is the biological father. (…)

36. In connection with the foregoing the Court notes that, to date, it has placed some emphasis in its case-law on the existence of a biological link with at least one of the intended parents (see the judgments cited above, and also the judgment in Paradiso and Campanelli v. Italy ([GC], no. 25358/12, § 195, 24 January 2017)). (…)

37. In order to determine in the context of the present request for an advisory opinion (see paragraphs 32, 34 and 36 above) whether Article 8 of the Convention requires domestic law to provide a possibility of recognition of the relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, two factors will carry particular weight: the child's best interests and the scope of the margin of appreciation available to the States Parties. (…)

40. The lack of recognition of a legal relationship between a child born through a surrogacy arrangement carried out abroad and the intended mother thus has a negative impact on several aspects of that child's right to respect for its private life. In general terms, as observed by the Court in Mennesson and Labassee, cited above, the non-recognition in domestic law of the relationship between the child and the intended mother is disadvantageous to the child, as it places him or her in a position of legal uncertainty regarding his or her identity within society (§§ 96 and 75 respectively). (…)

42. Nevertheless, in view of the considerations outlined at paragraph 40 above and the fact that the child's best interests also entail the legal identification of the persons responsible for raising him or her, meeting his or her needs and ensuring his or her welfare, as well as the possibility for the child to live and develop in a stable environment, the Court considers that the general and absolute impossibility of obtaining recognition of the relationship between a child born through a surrogacy arrangement entered into abroad and the intended mother is incompatible with the child's best interests, which require at a minimum that each situation be examined in the light of the particular circumstances of the case.

43. As regards the second factor, and as observed by the Court in Mennesson (cited above, § 77) and Labassee (cited above, § 57), the scope of the States' margin of appreciation will vary according to the circumstances, the subject matter and the context; in this respect one of the relevant factors may be the existence or

non-existence of common ground between the laws of the Contracting States. Thus, where there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin of appreciation will be wide. (…)

46. In sum, given the requirements of the child's best interests and the reduced margin of appreciation, the Court is of the opinion that, in a situation such as that referred to by the Court of Cassation in its questions (see paragraphs 9 and 32 above) and as delimited by the Court in paragraph 36 above, the right to respect for private life, within the meaning of Article 8 of the Convention, of a child born abroad through a gestational surrogacy arrangement requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the "legal mother". (…)

III. THE SECOND ISSUE

48. The second issue concerns the question whether the right to respect for private life of a child born through a gestational surrogacy arrangement abroad, in a situation where he or she was conceived using the eggs of a third-party donor, requires such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad, or whether it might allow other means to be used, such as adoption of the child by the intended mother.

49. It is in the child's interests in such a situation for the uncertainty surrounding the legal relationship with his or her intended mother to be as short-lived as possible. As stated previously, unless and until that relationship is recognised in domestic law, the child is in a vulnerable position as regards several aspects of his or her right to respect for private life (see paragraph 40 above).

50. However, it cannot be inferred from this that the States Parties are obliged to opt for registration of the details of the birth certificates legally established abroad.

51. The Court notes that there is no consensus in Europe on this issue: where the establishment or recognition of a legal relationship between the child and the intended parent is possible, the procedure varies from one State to another (see paragraph 24 above). (…) Accordingly, the Court considers that the choice of means by which to permit recognition of the legal relationship between the child and the intended parents falls within the States' margin of appreciation.

52. In addition to this finding regarding the margin of appreciation, the Court considers that Article 8 of the Convention does not impose a general obligation on States to recognise ab initio a parent-child relationship between the child and the intended mother. What the child's best interests – which must be assessed primarily in concreto rather than in abstracto – require is for recognition of that relationship, legally established abroad, to be possible at the latest when it has become a practical reality. (…)

53. The child's best interests, thus construed, cannot be taken to mean that recognition of the legal parent-child relationship between the child and the intended mother, required in order to secure the child's right to respect for private life within the meaning of Article 8 of the Convention, entails an obligation for States to register the details of the foreign birth certificate in so far as it designates the intended mother as the legal mother. Depending on the circumstances of each case, other means may also serve those best interests in a suitable manner, including adoption, which, with regard to the recognition of that relationship, produces similar effects to registration of the foreign birth details.

54. What is important is that at the latest when, according to the assessment of the circumstances of each case, the relationship between the child and the intended mother has become a practical reality (see paragraph 52 above), an effective mechanism should exist enabling that relationship to be recognised. (…)

55. In sum, given the margin of appreciation available to States as regards the choice of means, alternatives to registration, notably adoption by the intended mother, may be acceptable in so far as the procedure laid down by domestic law ensures that they can be implemented promptly and effectively, in accordance with the child's best interests.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

Delivers the following opinion:

In a situation where, as in the scenario outlined in the questions put by the Court of Cassation, a child was born abroad through a gestational surrogacy arrangement and was conceived using the gametes of the intended father and a third-party donor, and where the legal parent-child relationship with the intended father has been recognised in domestic law:

1. the child's right to respect for private life within the meaning of Article 8 of the Convention requires that domestic law provide a possibility of recognition of

a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the "legal mother";

2. the child's right to respect for private life within the meaning of Article 8 of the Convention does not require such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad; another means, such as adoption of the child by the intended mother, may be used provided that the procedure laid down by domestic law ensures that it can be implemented promptly and effectively, in accordance with the child's best interests.

https://hudoc.echr.coe.int/eng?i=003-6380464-8364383

3. United Nations. Report on the sale and exploitation of children of 15.1.2018

Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material (15 January 2018):

"B. Recommendations

1. At the national level

77. The Special Rapporteur invites all States to:

(a) Ratify the Convention on the Rights of the Child and its three Optional Protocols;

(b) Adopt clear and comprehensive legislation that prohibits the sale of children, as defined by the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, in the context of surrogacy;

(c) Create safeguards to prevent the sale of children in the context of commercial surrogacy, which should include either the prohibition of commercial surrogacy until and unless properly regulated systems are put in place to ensure that the prohibition on sale of children is upheld, or strict regulation of commercial surrogacy which ensures that the surrogate mother retains parentage and parental responsibility at birth and that all payments made to the surrogate mother are made prior to any legal or physical transfer of the child and are

non-reimbursable (except in cases of fraud) and which rejects the enforceability of contractual provisions regarding parentage, parental responsibility, or restricting the rights (e.g. to health and freedom of movement) of the surrogate mother;

(d) Create safeguards to prevent the sale of children in the context of altruistic surrogacy, which should include, where altruistic surrogacy is permitted, proper regulation of altruistic surrogacy (e.g. to ensure that all reimbursements and payments to surrogate mothers and intermediaries are reasonable and itemized and are subject to oversight by a court or other competent authority, and that the surrogate mother retains parentage and parental responsibility at birth);

(e) Ensure that in all parentage and parental responsibility decisions involving a surrogacy arrangement, a court or competent authority makes a post-birth best interests of the child determination, which should be the paramount consideration;

(f) Ensure that in all parentage and parental responsibility decisions involving a surrogacy arrangement, a court or competent authority conducts an appropriate and non-discriminatory suitability review of the intending parent(s), either prior to or after the birth or both;

(g) Closely regulate, monitor and limit the financial aspects of all surrogacy arrangements, with a requirement for full disclosure of the financial aspects of all surrogacy arrangements to the court or competent authority reviewing the surrogacy arrangement;

(h) Regulate all intermediaries involved in surrogacy arrangements, in regard to the financial aspects, relevant competencies, use of contractual arrangements, and ethical standards;

(i) Regulate the medical aspects of surrogacy arrangements to ensure the health and safety of the surrogate mother and child, including by placing appropriate limits on the number of embryos transferred to a woman at one time;

(j) Protect the rights of all surrogate-born children, regardless of the legal status of the surrogacy arrangement under national or international law, including by protecting the best interests of the child, protecting rights to identity and to access to origins, and cooperating internationally to avoid statelessness;

(k) Focus any criminal or civil penalties for illegal surrogacy arrangements primarily upon the intermediaries;

(l) Collect, analyse and share comprehensive and reliable data, and conduct qualitative and quantitative research studies, on surrogacy arrangements and their

impact on human rights, to ensure that accurate information is available, and facilitate the monitoring and evaluation of surrogacy systems, services and outcomes in order to develop appropriate human rights-compliant measures.

2. At the international level

78. The Special Rapporteur invites the international community to:

(a) Support the work of the Hague Conference on Private International Law, in particular in relation to its study of private international law issues related to the legal parentage of children, including in the context of international surrogacy arrangements;

(b) Ensure that any international regulation developed in regard to surrogacy, or in regard to legal recognition of parentage in international surrogacy arrangements, focuses on both private international law and public international law, providing in particular for the protection of the rights of the child, of surrogate mothers and of intending parents, and recognizing that there is no "right to a child" in international law;

(c) Ensure that any international regulation addressing recognition of parentage in international surrogacy arrangements, or addressing recognition of foreign judicial decisions on parentage, or other foreign determinations on parentage, also includes appropriate public policy exceptions barring recognition where the foreign legal system does not adequately protect the rights of the child or the surrogate mother, and provide appropriate post-birth review in cross-border commercial surrogacies in order to prevent the sale of children;

(d) Support the work of the International Social Service in developing international principles and standards governing surrogacy arrangements that are in accordance with human rights norms and standards and particularly with the rights of the child;

(e) Work cooperatively to ensure the protection of the rights of surrogateborn children, regardless of the legal status of the surrogacy arrangement under national or international law, which should include protection of the best interests of the child and prevention of statelessness;

(f) Encourage other human rights mechanisms, such as the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women, and United Nations entities to contribute, with further research, to discussions on surrogacy and its impact on the human rights of women and

other stakeholders concerned, in order to develop human rights-based norms and standards and prevent abuses and violations."

http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/37/60

II. Opinions of bioethics committees

1. France. Comité Consultatif National d'Ethique pour les sciences de la vie et de la santé

A. Criticism in opinion No 126 of 15.6.2017

CCNE Opinion on Societal Requests for Medically Assisted Reproduction (MAR)

"(...) Recommendations

- CCNE is in favour of drafting an international convention for the prohibition of GS and is particularly attracted by a diplomatic approach to this end. Along the same lines as in the information report on GS submitted to the President of the French Senate on 17 February 2016, CCNE recommends the launch of multilateral international negotiations.
- Concerning the recognition of the filiation of a child born of GS outside France, when a probative civil status record establishes biological filiation with at least one of the French parents, CCNE supports a delegation of parental authority to the intended parent who has no biological connection to the child, since this procedure is true to the reality of the conditions of the child's birth.
- The Committee recommends, in cases where the reality of biological filiation of a child born of GS outside France is open to doubt, that verification of genetic filiation by means of a DNA test be ordered before a foreign civil status record is transcribed as a French civil status document, so as to verify that there is indeed a biological link with at least one of the intended parents. The result and the situation should be open to examination. In the event of confirmation of child trafficking, the child could be proposed for adoption.
- The Committee further recommends that children's civil status records durably include the names and particulars of all those participating in the gestation agreement and that children are given access to the agreement which led to their birth so that they can "construct their identity" and reconstitute their full personal history." (pp. 39-40)

https://www.ccne-ethique.fr/sites/default/files/publications/ccne_avis_ndeg126_amp_version-def.pdf

B. Criticism in opinion No 129 of 18.9.2018

Contribution of the Comité Consultatif National d'Éthique to the Revision of the Bioethics Law (translated by Olga Bobrzyńska)

"(...) Finally, the CCNE remains attached to the principles that justify the prohibition of gestational surrogacy (GS), principles invoked by the legislator: respect for the human person, refusal of the exploitation of the woman, refusal of the reification of the child, inalienability of the human body and the human person. Assuming that there is no ethical form of GS, the CCNE wishes to maintain and reinforce prohibition of GS, notwithstanding the motivation, medical or societal, of the applicants. The CCNE is therefore in favor of drawing up a convention on prohibition of GS and recommended, in Opinion 126, the launch of international, multilateral negotiations on this issue." (p. 124)

https://www.ccne-ethique.fr/sites/default/files/avis_129_vf.pdf

2. Spain. Comité de Bioética de España. Criticism in report on the ethical and legal aspects of surrogacy of 19.5.2017

"Conclusion.

Throughout this Report, we have seen that there are solid reasons for rejecting surrogacy. The desire of a person to have a child, no matter how noble that may be, cannot be realised at the cost of the rights of others. The majority of the Committee deems that every gestational surrogacy agreement entails exploitation of the woman and harm to the best interests of the child and, as such, cannot be accepted in principle.

Other Committee members, while accepting in principle that this practice could be regulated in a manner that combined the satisfaction of the desire of some to have a child with the guarantee of the rights and interests of others, are unable to discern a way of achieving this in the current context. The regulatory proposals mooted-altruistic and commercial surrogacy in its various formats- are clearly wanting in terms of safeguarding the dignity and rights of the surrogate mother and child, for the reasons outlined above. Spain, along with many other countries in our cultural milieu and in the rest of the world, has consistently rejected this practice. It did so when it passed the first law on assisted human reproduction in

1988 and ratified it both in the 2003 reform and in the new 2006 law on assisted human reproduction.

However, the experience of recent years has shown that the prevailing law is not sufficiently effective to attain the goal it pursues, namely, the nullity of surrogacy agreements. Taking advantage of the permissive laws of some countries, Spanish citizens enter into these types of agreements abroad and then succeed in registering the parentage of children so obtained at the Civil Registry in Spain. These types of agreements and registrations fly in the face of the considered opinion of the Supreme Court, which ruled on the matter in 2014 and 2015, declaring them and any effects flowing therefrom to be null and void.

In view of the fact that we are neither lawmakers nor a body created for technical legal counselling, we feel it is not our place to set forth the proposed reform of the prevailing Act, which we see as being necessary to ensure the continued achievement of the goal for which it was created. At all events, we feel that said reform should be guided by three fundamental criteria:

- Minimum intervention principle. The Act in force establishes the nullity of gestational surrogacy arrangements; it does not penalise those who seek to carry them out. The reform of the law should be geared to ensuring that the nullity of such agreements is also applicable to those concluded abroad. To contribute to the effectiveness of the measure, consideration should be given to the possibility of penalising the agencies that engage in this activity. Only in the event that such measures prove inadequate to stop gestational surrogacy abroad, should the possibility of resorting to other legal compliance-strengthening measures be considered.
- Towards a universal ban on international surrogacy. The unfortunate experiences of countries in which this practice has crudely highlighted the exploitation to which surrogate mothers are subjected, is a strong reason for Spain to go before the international community and advocate the adoption of measures targeted at banning the conclusion of gestational surrogacy arrangements at an international level.
- Safe transition. The fact cannot be ignore that at this point in time, an indefinite number of Spanish people are involved in international surrogacy processes. It is important that the transition to a more effective regulation should not produce the collateral effect of leaving children who are born through these processes, unprotected. To this end, there will be a guarantee that registration

of their parentage abroad shall be done in accordance with the doctrine established by the Supreme Court."

http://assets.comitedebioetica.es/files/documentacion/en/spanish_bioethics_committee_report_on_the_ethical_and_legal_aspects_of_surrogacy.pdf

III. The reality. Review of press and e-resources (ed. Karolina Sęk)*

3.1. Introduction

Surrogacy (surrogate birth, surrogate motherhood) is an inconceivably complex phenomenon whose different aspects ethical, legal or sociological ought to be taken into consideration. There are numerous scientific publications devoted to the topic in question. However, what cannot be ignored is the powerful impact on the public opinion of the non-scholarly publications in the press and on the Internet, whose coverage is worldwide. The text presented below is a compilation of press releases, reportages, interviews etc., and as such it aims to reflect diversity of the opinions and emotions accompanying surrogacy in countries included in the research: the United States of America, the United Kingdom, France, Germany, Spain, Russia, Ukraine, and India. A range of topics covered by the materials depend clearly on the question of legality, i.e., whether surrogacy is permissible or not in a particular country.

3.2. India

Nowadays, there is a heated debate on commercial surrogacy in India. For now, it is legal so there are a lot of agencies offering the procedure, but it will probably be restricted or even banned. Low prices cause that India is a country often chosen by the Americans. If the new act passes the legislative process, then commercial surrogacy will be outlawed.

India is a very popular country – it offers surrogacy at bargain basement prices by paying surrogate mothers less. They offer preterm childbirth through Caesarean section in order to accommodate the clients' availability to take time off from work.

* Compiled based on materials researched and conference papers delivered by the author of the present review as well as by Adrianna Biernacka and Marta Śledź, students of the Jagiellonian University in Kraków, and by Katarzyna Różaniecka and Piotr Wójcik, students of the University of Warsaw.

The surrogacy business has created barriers between surrogate mothers and clients to minimize the emotional costs for clients.

A ban on commercial surrogacy will not, however, put paid to the baby trade. Instead, infertility clinics will jump through legal loopholes by moving surrogate mothers across borders. It is not unusual for the procedure to be even happening at present. Such an under-the-counter practice exposes surrogate mothers to great risks.

Actually, under these circumstances, women are far more vulnerable than ever before. They are wholly dependent on agencies that have brought them into countries where they are strangers and unfamiliar with the language, culture, and existing social norms. Surrogacy agencies provide them with housing and food in these foreign countries. And they control the money flow. As a result, the women are powerless to terminate their contracts, or go back home if they choose to do so. They are isolated from friends and family and have no legal recourse to address financial abuses or medical malpractice.

Last but not least, as the case of baby Manjhi shows, also children born via surrogacy are exposed to serious risks.

https://www.youtube.com/watch?v=N9FPiNc6-dI
http://www.atimes.com/article/indias-surrogacy-bill-violation-personal-choice/
https://www.youtube.com/watch?v=qYVRovXEdn8
https://scroll.in/pulse/855535/loopholes-in-india-surrogacy-ban-leave-surrogates-far-more-vulnerable-than-before
https://www.youtube.com/watch?v=qYVRovXEdn8
https://www.youtube.com/watch?v=kqFj_dW5pqM

3.3. France

a. Basic information

In France, surrogacy is prohibited by both civil (the Civil Code, the Bioethics Act) and criminal law (the Penal Code). There are two questions to be resolved: reproductive tourism (to *inter alia* the USA, Canada, the UK, Greece, Ukraine, Russia, Belgium, India, and Bulgaria) and transcription of civil status certificates. There is no reliable public data which would allow to estimate the scale of that cross-border practice. Officially, there were 44 cases between 2008 and 2011, but other estimates claim that the practice affects about 100–200 children each year.

http://www.europe1.fr/france/combien-y-a-t-il-d-enfants-nes-d-une-gpa-1400809

http://www.leparisien.fr/espace-premium/air-du-temps/l-etonnant-rapport-sur-les-meres-porteuses-09-07-2013-2966989.php
https://www.lemonde.fr/les-decodeurs/article/2015/05/20/gpa-pour-y-voir-clair_4636991_4355770.html

b. Intended parents, surrogate mothers, children – personal experience

There are two significant groups of people who decide to enter into surrogacy contracts as intended parents: couples suffering from infertility (and other medical problems) and same-sex couples (mostly male ones). As far as the financial aspect of the procedure is concerned, it is also covered by websites specialized in informing about surrogacy (e.g. "calculator of [surrogacies'] costs"). Regarding surrogate mothers, they can be divided into two groups depending on a country of their origin. Firstly, a group of women from the broadly defined West – with altruistic motivation, wanting to help other couples and to have contact with a child (the case of the Mennesson family). Secondly, women from non-Western countries, who seem to have mainly economic motivation (earnings are a chance to give a better life to their families).

https://www.youtube.com/watch?v=LELRXDNiG74
https://www.huffingtonpost.fr/2014/11/02/temoignage-couple-homo-gpa-societe-pas-choix_n_6035536.html
http://www.lefigaro.fr/actualite-france/2015/06/25/01016–20150625ARTFIG00059-deux-ados-nees-par-gpa-temoignent-pour-la-premiere-fois.php
http://leplus.nouvelobs.com/contribution/1393048-gpa-j-ai-ete-mere-porteuse-c-est-la-plus-incroyable-experience-que-j-ai-vecue.html
https://youtu.be/dhbcNppGI9E
https://youtu.be/nQfGQNCC6Z4
https://youtu.be/WH6EqfjXWwU
http://leplus.nouvelobs.com/contribution/1676781-les-enfants-nes-d-une-gpa-comme-moi-ne-sont-pas-des-objets-qu-on-achete.html
http://www.magicmaman.com/j-ai-choisi-d-etre-une-mere-porteuse-et-ce-n-est-pas-pour-l-argent,3578975.asp

c. Foreign clinics

Surrogacy clinics' sites are the specific sources of knowledge about surrogacy as they have both the informing and advertising function. They build a purely positive image of surrogacy using emotionally charged phrases and aim to make a potential client trust them and feel safe ("Your surrogacy in circumstances 100% ethical; Giving

life / happiness, to which every human being is entitled in Mexico; (…) We respect life as an incomparable gift.").

http://kenyaivf.com/surrogacy-cost-kenya/
https://www.youtube.com/watch?v=L6ASY4m4ta4
http://www.ilayaclinic.fr
https://www.cefamgpamexique.com
https://babygest.com/

d. Opinions

The current debate about surrogacy in France involves numerous groups and institutions. The main question is whether to maintain the prohibition of surrogacy or to legalize it, introducing a strict, detailed regulation. Generally, it can be observed that acceptance for surrogacy is growing. Nevertheless, the judgment of the National Consultative Commission on Ethics (CCNE) is just the opposite of the public opinion, as it recommends reinforcing the prohibition.

http://www.ccne-ethique.fr/sites/default/files/publications/avis_110.pdf
http://www.ccne-ethique.fr/sites/default/files/publications/ccne_avis_n126_amp.eng_.pdf
http://www.regards.fr/acces-payant/archives-web/faut-il-autoriser-la-gestation,5344
http://www.lefigaro.fr/vox/societe/2015/06/25/31003–20150625ARTFIG00087-bernard-debre-gpa-vers-un-esclavage-moderne-des-femmes.php
https://www.youtube.com/watch?v=cnnE_Je4x0Y
https://international.la-croix.com/news/the-french-church-fears-legalization-of-surrogacy/548
https://international.la-croix.com/news/good-of-the-child-ignored-in-assistance-for-female-couples/5430
https://international.la-croix.com/news/a-legitimate-concern-over-the-rights-of-children/5428
https://www.francetvinfo.fr/societe/loi-sur-la-famille/gestation-pour-autrui/gestation-pour-autrui-une-quarantaine-de-personnalites-signent-une-tribune-pour-dire-non_2569845.html
http://www.liberation.fr/france/2018/04/29/pma-les-reacs-cornaquent-l-ethique_1646747
https://www.reussirmavie.net/Meres-porteuses-pour-ou-contre-la-GPA_a1642.html
http://maia-asso.org/gpa.html
https://adfh.net/parentalites/la-gestation-pour-autrui/

3.4. Germany

a. Basic information

In Germany, a visible disagreement which dominated the public debate ten years ago is now being questioned and the ethics of unacceptability are constantly changing. Nevertheless, the *mater semper certa est* rule remains in force. What is more, establishing surrogate motherhood agency is prohibited (§ 13c AdVermiG), and so are conducting artificial insemination of a surrogate mother (§ 1 EschG) and child trafficking (§ 236 StGB). Thereby, surrogacy in Germany has a cross-border character and figures in the form of surrogacy tourism (main destinations include: the USA, Russia, Ukraine, India, Greece, Cyprus, and the Czech Republic).

b. Intended parents, surrogates – relationships

In most cases, it is foreign women that become surrogate mothers, but there are clinics abroad, i.e., in Cyprus, where the nationality of the donor mother or the surrogate mother is optional and where the German descent is preferred. Social parents are characterized by a large age bracket; there are known cases of parents already of post-working age (both parents aged 50 and above). In accordance with principal surrogacy tourism destinations, there are different types of parent models. In fully developed countries, i.e., USA, Cyprus, well-to-do couples dominate as social parents, as they have an economically stable life. In contrast, in Eastern Europe older couples, who spend their own life savings as payment, constitute main customers. In addition, couples who cannot have children for biological reasons (WHO definition of infertility) opt for surrogacy procedures, but also the concept of "social infertility" makes its presence known, referring to the inability of having children by same-sex couples.

https://programm.ard.de/tv/themenschwerpunkte/dokus--reportagen/alle-dokumentationen/startseite/?sendung=2811117238846632
https://www.youtube.com/watch?v=jPhSo64IJuQ
https://rtlnext.rtl.de/cms/leihmutterschaft-so-intensiv-erlebt-kim-overton-die-geburt-ihres-sohnes-im-kreissaal-2871053.html?c=doba

c. Public debate

The public debate about surrogacy abounds in different views. LSVD published a statement about same-sex parenthood, especially surrogacy, in which it stressed a need for a clear regulation and opted for the legalization of altruistic surrogacy.

Moreover, LSVD organizes Children Desire Days, a market-driven fair dedicated to fatherhood in male homosexual relationships, where specialists from US clinics related to medically assisted fertilization present their services.

The German Ethics Council did not take an unambiguous position on the matter of surrogacy. On 22.05.2014, the Council issued an information brochure in the form of a map of thoughts expressing pro and contra arguments regarding the admissibility of surrogacy in Germany.

During the symposium entitled "Marriage opening – consequences for everyone", German journalist and feminist Birgit Kelle delivered a speech "Surrogate motherhood: how human trafficking becomes again socially acceptable?", expressing criticism of the idea of surrogacy in Germany.

https://www.kinderwunsch-tage.de/
https://demofueralle.blog/2017/12/21/symposium-oeffnung-der-ehe-folgen-fuer-alle-am--samstag-den-20-januar-2018-in-frankfurt-main
https://www.youtube.com/watchv=gtEUt6p_qyc&index=1&list=PLtoU2vGw4WS_be189x-IvU6evmViiwhj7S

d. Conclusions

Surrogate motherhood has a cross-border character in Germany. German press articles more often criticize the idea of surrogate motherhood than approve of it. Public statements about surrogacy are not deeply justified. Comments expressed by infertile families are not frequently enough observable.

3.5. Spain

a. Basic facts

In Spain surrogate motherhood is a fact: every year approximately 1000 Spanish kids are born to surrogate mothers (about 300 in Ukraine). Simultaneously, the number of international adoptions is drastically dropping. Domestic registration of a child born to a surrogate mother abroad is possible. The most important requirement boils down to showing the documents which prove the legality of the procedure, officially issued by the country where the surrogacy procedure had taken place.

http://www.elmundo.es/sociedad/2017/05/19/591ed27122601d986d8b460e.html
https://www.mibebeyyo.com/quedar-embarazada/quiero-tener-un-hijo/vientre-alquiler-espana

http://www.consumer.es/web/es/solidaridad/derechos_humanos/2017/02/14/224966.php
https://www.elespanol.com/reportajes/20180519/industria-vientres-alquiler-ucrania-derecho-espanoles-nacidos/308469719_0.html

b. Bill proposal and public opinion

As surrogate motherhood turned into a lucrative domain of business, the bill proposal regulating its altruistic model was introduced by the Ciudadanos Party. The society's response was not homogenous. The left-wing party Podemos opposed the legalization of surrogate motherhood and the Secretary of Intersectional Feminism and LGBTI community within the party itself formed a manifest regarding the bill proposal. The Bioethics Committee of Spain also delivered a critical statement concerning surrogacy. Moreover, there are Spanish organizations acting against it, e.g., Stop Vientres de Alquiler and No Somos Vasijas. However, opinion polls show marked social acceptance for surrogacy, whose level depends on who an intended parent would be. There are also domestic organizations supporting surrogate motherhood, such as Son Nuestros Hijos and Gestacion Subrogada en España.

http://www.elmundo.es/sociedad/2017/06/27/5952211cca474178418b45e1.html
http://www.europapress.es/sociedad/noticia-ciudadanos-presenta-ley-gestacion-subrogada-exige-gestantes-ser-madres-tener-renta-minima-20170627132735.html
https://podemos.info/postura-podemos-acerca-gestacion-sustitucion/
https://www.youtube.com/watch?v=S30iDE65KJ8
http://www.elmundo.es/sociedad/2017/05/19/591ed27122601d986d8b460e.html
http://assets.comitedebioetica.es/files/documentacion/es/informe_comite_bioetica_aspectos_eticos_juridicos_maternidad_subrogada.002.pdf
http://assets.comitedebioetica.es/files/noticias/CBE_nota_prensa_aspectos_eticos_juridicos_maternidad_subrogada.pdf
http://cadenaser.com/ser/2017/07/17/sociedad/1500269478_668618.html
https://www.youtube.com/watch?v=rTJt6pI_gqw
http://xn--gestacionsubrogadaenespaa-woc.es/
http://www.sonnuestroshijos.com/
https://stopvientresdealquiler.wordpress.com/
http://nosomosvasijas.eu/

3.6. Russia and Ukraine

a. Basic information

Surrogacy is a relatively recent social phenomenon in Russia and Ukraine. In Russia, the first recorded example dates to 1995. Commercial surrogacy is legal (in Russia, it

is qualified as infertility treatment). Intended parents are recognized as legal parents and a child gets their citizenship. The availability of that special market encourages foreigners to visit both countries and proceed with all the required legalities, especially if surrogacy remains forbidden or too expensive in their own homeland.

https://medicalbioethics.wordpress.com/tag/us-surrogacy/
https://www.youtube.com/watch?v=yXpX6sXyvbc
https://wearesurrogacy.com/surrogacy-abroad/characteristics-of-surrogacy-in-russia/

b. Clinics and agencies

The websites aiming at promoting surrogacy show happy couples with smiling babies, treat the process as if it was a form of infertility treatment ("There is no absolute infertility!") and try to set guarantees of positive results. They often use slogans, e.g., "Multiple IVF attempts till the baby is born at a most affordable price. $56,000 gets you the baby for sure!", "We assist in the conception of a new life; We protect what is most precious; We give you the joy of motherhood."

http://www.spbivf.com/en/surrogatnoe-materinstvo/
https://www.youtube.com/watch?v=yXpX6sXyvbc
http://www.surrogatebaby.com/services/#packages|1
http://www.spbivf.com/en/the-price-and-cost-for-surrogate-mother-program/
https://www.youtube.com/watch?v=1HSY_HnJw_A
https://twitter.com/svitnev/status/738719279391100929

c. A portrait of surrogates and intended parents

Surrogates are young women of lower or lower-middle class with no higher education. They generally do not have enough money to support their family and no education to find a good job. They are typically single, divorced or widowed women from small towns. It would be ideal if the surrogates treated their pregnancy as a job, but – according to interviews – in reality, they do not, which sometimes leads to unexpected problems, such as medical complications or even miscarriage.

The social portrait of potential parents is more difficult to ascertain. There are many variants, including single parents of both sexes, couples who need a sperm or egg donor and couples who can conceive but cannot carry a child. Foreign couples tend to get more involved in liaison with surrogates while Russian ones are more likely to limit their first-hand contact to a single, cursory meeting.

https://themoscowtimes.com/articles/russian-surrogate-moms-attract-foreigners-18051

https://www.rbth.com/society/2014/06/24/surrogacy_in_russia_what_are_the_options_for_childless_couples_37671.html
https://themoscowtimes.com/articles/russian-surrogate-moms-attract-foreigners-18051

3.7. United States of America and the United Kingdom

a. Basic information

In the USA, the legal process concerning surrogacy varies from state to state. As the popularity of gestational surrogacy is growing, multibillion-dollar fertility industry is booming (at least 2,200 children were born via surrogacy in 2014, but there is no reliable and precise up-to-date data). Acting as go-betweens, agencies constitute an important element of the system. The cost of the full procedure varies between 80,000 and 150,000 dollars.

http://www.bbc.com/news/world-28679020
http://www.sensiblesurrogacy.com/surrogacy-in-the-united-states/
http://www.rlcsd.com/surrogacy_faqs.html
https://www.webmd.com/infertility-and-reproduction/guide/using-surrogate-mother#1

In the United Kingdom, surrogacy is regulated by law: its altruistic model is permissible, while paying a surrogate more than the sum that would cover her basic expenses, i.e., paying a fee for her service, is illegal. However, the total cost of surrogacy in the UK can surpass 50,000 pounds. What is more, looking for a surrogate mother or willing to act as a surrogate mother by advertising is a criminal offence. In the last decade, it can be observed that the number of parental order applications for surrogacy is growing (from 55 in 2007 to 316 in 2016).

https://www.sensiblesurrogacy.com/surrogacy-uk/
https://www.gov.uk/legal-rights-when-using-surrogates-and-donors
http://www.britishsurrogacycentre.com/surrogacy-laws/#1517935055974-ebfb7ad2–7678

b. Surrogacy – intended parents, surrogate mothers, children

There are different motivations to enter into a surrogacy contract. For intended parents, it is infertility of one or both spouses, inability to get pregnant, being single or in a homosexual relationship, not being able to adopt a child because of couple's age or marital status and, last but not least, unwillingness to be pregnant. From the perspective of a surrogate mother, what is important is enjoyment of pregnancy, a chance for extra earnings (in states where commercial surrogacy is allowed),

desire to help a childless couple or to help a family have a sibling as a companion for an existing child, and having previous positive experiences of surrogacy. In their confessions, surrogates emphasize that from the psychological point of view they have experienced the joy of making others happy and they have had no emotional ties with the baby. However, there are different questions raised by antagonists of surrogacy, as the risk of the exploitation of poor and low-income women, the ethical and practical ramifications of the further commodification of women's bodies, transforming a normal biological function of a woman's body into a commercial transaction, creating a class of women as breeders and commodifying children. Surrogacy results in the lack of respect for rights of the children: single intended parents intentionally deny a relationship with at least one biological parent; there is a lack of ability to get accurate information about potential siblings of the child.

https://www.independent.co.uk/news/world/americas/surrogate-mother-pregnant-twins-ownbaby-jessica-allen-omega-family-global-san-diego-a8034901.html
https://surrosarah.wordpress.com/2017/10/25/was-it-hard-to-give-the-baby-up/
https://www.parents.com/parenting/celebrity-parents/moms-dads/celebrities-who-used-surrogates/
https://www.huffingtonpost.com/entry/being-a-surrogate-mother-broke-myheart_us_5b56346ae4b0de86f48fb2df
http://www.rbmojournal.com/article/S1472–6483(14)00353–8/fulltext
https://www.vogue.co.uk/article/surrogacy-in-the-uk

c. Problematic issues – the dark side of surrogacy

The current state may entail numerous potential legal and moral problems and dilemmas connected with frozen eggs (e.g. their ownership), advanced gene-editing tools allowing parents to choose or "correct for" certain preferred characteristics, techniques to produce "three-parent" babies who share genetic material from more than two people, posthumous conception, and surrogacy tourism. Cases challenging jurisprudence, such as Melissa Cook's case, also come to the forefront as a result.

https://en.wikipedia.org/wiki/A.G.R._v._D.R.H
http://cbc-network.org/pdfs/
https://pdfs.semanticscholar.org/5c37/3b587c667ab575f063a656f27b43b149ea10.pdf
https://www.theguardian.com/lifeandstyle/2017/mar/18/late-husbands-children-posthumousconception
https://www.sensiblesurrogacy.com/surrogacy-agreements-now-enforceable-in-the-us/
https://www.christianpost.com/news/child-advocates-say-men-using-surrogacy-becomes-ingle-dads-is-unthinkably-cruel-225145/

3.8. Summary

The present overview is mainly based on articles and films (reports, interviews) which are widely accessible since they have been published by the biggest news services and portals, including youtube.com. In consequence, they can be simply checked and evaluated individually. They were included considering both their content and their Google search rankings. Articles behind the paywall were not included as they are aimed at the narrower group of readers.

Most of the articles present an unambiguous attitude towards surrogacy: positive or negative; however, some materials are neutral and have a rather informative than opinion-forming function. Their character is journalistic; there is no purely scientific text. As a result, language is simple, with no sophisticated medical or legal terms; instead there are a lot of emotive phrases. However, they precisely show inter alia the reality of "law in action" and progressive surrogacy business and, as such, can serve as an additional factor that assists in evaluating legal solutions and their practical effects.

https://collectifcorp.files.wordpress.com/2015/01/surrogacy_hcch_feminists_english.pdf
https://collectif-corp.com/2018/02/05/hague-conference-press-release/

It can be expected that the issue of introducing into domestic law (or 'only' recognition of the effects of procedures organized abroad) will soon be the subject of a number of statements published in media, including electronic ones, because such postulates are announced on international organizations' forums and are regularly discussed. For example, the voice of several European feminist organizations has been expressed with far-reaching criticism (based mainly on the principle of dignity of a woman) in relation to the recent initiative of the Hague Conference on Private International Law to consider concluding an international agreement on recognizing the effects of foreign legal solutions on legal parentage, inter alia these called surrogate motherhood (de facto – surrogate birth, not motherhood).

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Photos from conference in Warsaw,
27–28th of September 2018

Surrogate motherhood
– fundamental and legal problems

Warsaw, 27–28th of September 2018

photo Krzysztof Wilczyński / National Museum in Warsaw

Motherhood. A portrait of the artist's wife Teofilia with son Staś (1902), a painting by Stanisław Wyspiański (1869–1907)


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Surrogate motherhood
– fundamental and legal problems


1. Discursive context of reproductive ethics and surrogacy
2. Debates concerning the recognition of the filiation of children born via international surrogacy arrangements


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The observation that *mater semper certa est* remains accurate under most legal systems in the world. Maternity is defined as the personal relationship (filiation) between the child and a woman who gave birth to it. It is typically combined with the paternity of the man from whom the child biologically originates (often *quem nuptiae demonstrant*). However, in some states, a kind of competitive way of acquiring the legal status of mother and father (or "homosexual parents A and B") has been introduced *via* concluding a contract with a surrogate mother. Usually with a woman coming from poorer societies and with the assistance of professional intermediaries and organizers. The postulates to change substantive family law, or at least to recognize the effects of foreign law and procedures (a kind of "procreative tourism"), appear nowadays also in states generally prohibiting surrogate motherhood.

The issues discussed in the present volume concern both national law and international court cases. Recent examples include the opinion of the European Court of Human Rights of 10 April 2019 initiated by the French *Cour de cassation*, the judgement of the German *Bundesgerichtshof* of 20 March 2019, and dilemmas of Polish administrative courts.

Focusing on the international perspective, the present volume as well as an accompanying book in Polish are the results of the international cooperation of over 30 experts from both member states and observer states of the Council of Europe. The monograph is structured "from the general to the detail" and includes a comprehensive view as well: from the issues of philosophy and sociology of law, to human rights standards of national constitutions and international agreements, to principles of *ordre public* of forum and their protection with measures of private, public, and penal law. This allows readers, including legislators and judges, the better understanding of the fundamental legal problems that surrogate motherhood brings, both in states where law creates them in a narrower or wider extent, and in other countries of the world, to which these problems can be imported with the movement of people and with *de lege lata* and *de lege ferenda* postulates.

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