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Some aspects of legal regulation of surrogate motherhood in Europe

Abstract: The article deals with the problematic aspects of surrogate motherhood and the ways of its regulation in European states as well as ethical issues arising from this phenomenon. In article European countries' legislations and case-law of European Court of Human Rights are examined concerning surrogate motherhood and its consequences

Keywords: surrogate motherhood, legal regulation, reproductive rights, in vitro fertilisation.

Reproductive rights are the inalienable, fundamental rights of every human being, regardless of national and social distinctions, property status and health status. The phenomenon of surrogate motherhood is known to people for ages. The best-known examples come from The Bible, where in the Old Testament, Sarah, the wife of Abraham, enlisted the help of Hagar, an Egyptian slave, who bore them a son, Ishmael. Later, Isaac and his barren wife Rachel relied on Rachel's servant Bilhah to enable them to have a child (Genesis, Chapter 30) [1].

That biblical stories are the first mention of the so-called traditional surrogate motherhood, in which the natural fertilisation of a female donor takes place. An opportunity to have children not from a legal wife, in the case of her long-lasting infertility, was also enshrined in the Code of Hammurabi (Art. 144–146 of the Code) [2]. Later, in the history of mankind, such relations arose quite often because until the twentieth-century medicine did not know how to deal with infertility.

In the 1970s and 1980s, some infertile couples, to become legal parents, called on the services of 'surrogate mothers', who agreed to be inseminated by the spouse's sperm, to carry the baby to the term of the pregnancy and to hand over the child at birth.

Gestational surrogacy has become a booming, global business [3].

On 25 of June 1978 at Oldham General Hospital, Oldham (Lancashire, UK) by planned Caesarian section was born Louise Brown – the first child ever conceived by *in vitro fertilisation* (from now on IVF). IVF has changed the perception of people about surrogate motherhood in particular and reproductive medicine in general. It is necessary to take into account an array of ethical, biomedical, religious, social and strictly legal problems that surrogate motherhood creates both for persons directly involved in this process and for society as a whole. This article is devoted to the peculiarities of legal regulation of surrogate motherhood in the European states.

Gestation and the birth by a surrogate mother of a stranger in blood baby (a baby who is not genetically hers) through IVF (the so-called gestational surrogate motherhood) for the first time took place in 1986 in the USA. In medical terms, surrogate motherhood is a therapeutic method in which embryos obtained in the cycle of IVF are transferred for gestation into the uterus of a woman not genetically associated with these embryos.

Commercialization and commodification of gametes and commercial gestational agreements

offend many ethical precepts including respect for human integrity and dignity [4]. Surrogate motherhood is a commodification of the human person. The child becomes an object of a contract, while the surrogate mother is exploited as an incubator. Such contracts are called gestational arrangements. What do we know about these arrangements?

Gestational arrangements — are contracts, under provisions of which intending parents, who desire to have children conclude an agreement with a woman who agrees to carry the baby to the term for them. This baby may be either conceived of their genetic material or the third parties' genetic material. Gestational arrangement contradicts the general opinion of the unacceptability of trading human bodily parts, tissues, substances and processes. They also violate the child's right to know his or her origin and identity, as guaranteed in Article 7 of the Convention on the Rights of the Child [5]. Opponents of such arrangements in particular and surrogate motherhood, in general, emphasise that egg donors and surrogate mothers represent economically disadvantaged and socially excluded groups, which turns the whole process into an immoral use of the plight of these women for the benefit of the commissioning parents.

Furthermore, nature of the relations between parties of surrogate motherhood is quite complicated, and a number of the individuals can vary up to six persons [6]:

- the genetic mother (egg donor);
- the genetic father (sperm donor);
- the surrogate mother – the woman who agrees to carry a child (or children) for the intending parents (s) and relinquishes her parental rights following the birth.
- the couple of the surrogate mother;
- the commissioning mother and father (also known as intending parents) – the persons 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.

The equally complex can be the relationship between them and the offspring, who is born as a result of the application of reproductive medicine.

Relations in the world community to surrogate motherhood are different, and the legal regulation of this issue is also different. There are three positions: for surrogate motherhood, against surrogate motherhood and neutral.

According to Art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, everyone has the right to respect for his or her private and family life [7]. In the case of a woman signing a gestational arrangement voluntarily her freedom to make decisions regarding her body is protected by the right to privacy and reproductive autonomy. Attempts to limit these rights are to have reasonable reasons. Rights and safeguards of a pregnant woman by the Convention on the Elimination of All Forms of Discrimination Against Women do not conflict with the surrogate motherhood [8]. At the same time recognition of motherhood as a «social function» rather than a commercial one 's hard to reconcile with commercial surrogate motherhood. From the standpoint of international human rights law, surrogate transnational commercial motherhood needs to be prohibited, because there are the risks of exploitation of disadvantaged women, especially in developing countries, and these risks assist gender inequality on a large scale [9].

In European countries, the legislation regulating surrogate motherhood, as well as the rights and duties of the surrogate mother and those to whom she carries a child, are different. Let us make clear the situation with surrogate motherhood in European countries:

- surrogate motherhood is completely banned in Austria, Germany, France, Norway, Sweden, Spain, Iceland, Estonia, Moldova, Montenegro, Slovenia, Serbia, Turkey, France, Sweden and Switzerland;
- surrogate motherhood is explicitly permitted in Albania, United Kingdom, Greece, Georgia, Denmark, the Netherlands, Ukraine, the Russian Federation;

– Surrogate motherhood occurs but not regulated in Andorra, Bosnia-Herzegovina, Hungary, Ireland, Lithuania, Malta, Monaco, Romania, San Marino.

One should note that couples from European countries, where surrogate motherhood is prohibited, often go for other countries where surrogate motherhood is allowed, and there become parents.

The prohibition or restriction on surrogate motherhood established by the national authorities put citizens of these countries in an unequal position compared to citizens of neighbouring countries belonging to the European Union.

Particular attention should be paid to the standpoint of the European Court of Human Rights, in particular, its decision in the case of *Mennesson v. France* of June 26, 2014. In that decision, there was a violation of Article 8 of the European Convention for the Protection of Rights and Fundamental Freedoms (the right to respect for private and family life). That case was about non-recognition by the legislation of France paternity of intending (commissioning) couple, whose children were born as a result of prohibited reproductive technologies (surrogate motherhood) [10]. This decision should have triggered the legalisation of surrogate motherhood in the EEC member states, and also have had some effect on such countries as France, Spain, Germany, Ireland and Italy, but as far as France is concerned, there are some implications. On 21 July 2016, the European Court of Human Rights delivered a judgment in the cases of *Foulon v. France* and *Bouvet v. France*, which concerned the non-recognition in France of the acknowledgement of paternity of intending (biological) fathers of children born to surrogates in India. Despite the change in French case-law since the *Mennesson & Labassee v. France* judgments, legal parentage had not been established (with Mr Foulon having exhausted all legal options and remedies). The Court thus came to the same conclusion as in *Mennesson & Labassee v. France*: France violated the right to respect for the children's privacy and each child was awarded 5 000 EUROS

for non-pecuniary damage. It is important to note that all these judgments against France find no violation of Article 8 of the Convention (right to respect for their family life) of the applicant parents, only of the surrogate-born children. One further case against France is currently still pending before the European Court of Human Rights: *Laborie v. France* concerns the non-recognition of Ukrainian birth certificates in France on two children born through a surrogate motherhood [11].

Thus, in European countries, the legislation regulating surrogate motherhood, as well as the rights and duties of the surrogate mother and intending parents varies. So, in some European countries, surrogate motherhood is completely prohibited, in some non-commercial surrogacy is allowed and in some jurisdictions issues of surrogate motherhood is not regulated by law. The prohibition or restriction on surrogate motherhood established by the national authorities puts citizens of these countries in an unequal position in comparison with their neighbours. Therefore, further development of legislation in this area and its unification within the European Union and Council of Europe is necessary.

In addition to the many problematic issues discussed above, assisted reproduction creates a number of additional social aspects. Most controversial of them are postmortem fertilisation (the birth of a child many years after the death of one or both of the genetic parents), postmenopausal pregnancies, multiple parents, anonymous genetic parents, and also children conceived simultaneously but born in different periods. The complexity of surrogate motherhood and subsidiary reproduction, in general, is that, as bioethical problems, they extend far beyond medicine and law, and are influenced by religious, cultural and social factors. The role of national and international law should be to gradually, cautiously and reasonably intervene in these relations, to protect the rights of all persons involved in these complex relationships, their honour and human dignity. However, the rights of the child should always be a priority of the state and protected in any case.

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