

ETHICAL AND LEGAL ASPECTS OF SURROGACY IN UKRAINE AND IN THE WORLD

Viktoriia Shchyrskya, Odessa State University of Internal Affairs
Viktor Konopelskyi, Odessa State University of Internal Affairs
Yana Popovych, National University of Zaporizhzhia politechnic
Nataliia Bilianska, National Academy of Internal Affairs.
Olena Lepei, National Academy of Internal Affairs

ABSTRACT

The article deals with ethical and legal aspects of surrogacy in Ukraine and in the world. It is established that approaches of different countries to legalization of surrogate motherhood are different; accordingly, in some countries the law allows altruistic and commercial surrogate motherhood, while in others it is prohibited and could lead to imprisonment. It is noted that in spite of a number of normative acts in Ukraine there is no legal definition of surrogacy and an approved form of arrangement for surrogate motherhood. It is concluded that a surrogacy contract has characteristic features of a civil contract, while exposure to increased risk and other specific conditions make it necessary to distinguish a separate special type of surrogacy contract. Requirements for surrogate mothers and individuals who intend to become parents of a child in Ukraine and India have been clarified. Emphasis is placed on the need for social protection of women who have given birth to a surrogate child. It is summarized that a special law should be adopted in Ukraine that would take into account the specifics of surrogate motherhood and regulate its proper implementation, and at the regional and international level, respectively, it is necessary to develop a unified position on surrogate motherhood, which will minimize the shadow surrogacy and surrogate motherhood tourism.

Keywords: Assisted Reproductive Technology, Surrogacy, Health Care, Legal Regulation, Contract.

INTRODUCTION

As of 2017, surrogate motherhood has become a global baby business, estimated in India alone at between \$500 million and \$2 billion. Such indicators only testify that in the current era of assisted reproductive technology, the issue of starting a family is no longer a prerogative of individual choice of two people, but rather a matter of availability of financial resources (Krause, 2018). Cottingame cites an even more impressive figure, but this time the cost of commercial surrogacy as a worldwide industry-\$2.3 billion (Cottingame, 2018). However, one cannot but agree with those scientists who support the idea of surrogate motherhood, emphasizing that surrogacy is the only way out for couples who cannot have children through infertility. Nevertheless, experience of some countries shows that each of them has its own position on the legal regulation of surrogate motherhood, based on certain arguments that are ethically decisive in this situation. Considering this, there are countries where surrogacy is illegal; there are

countries where altruistic surrogate motherhood is allowed and countries where there is neither prohibition on surrogacy nor legal regulation of the procedure for proper registration and provision of such services. At the same time, in Ukraine the situation in the field of surrogate motherhood is complicated not only by the fact that the demand for such services, especially by foreign couples, is growing significantly, but also by the fact that this issue is not regulated at the legislative level and accordingly leads to a number of conflict situations.

Availability of the assisted reproductive technologies and a lack of a single approach to legal regulation of surrogate motherhood in the world causes a number of problems related to a person's right to use reproductive technologies, social protection of women – surrogate mothers and interests of children born in such a way that cannot but draw attention of the world community, governments to this issue. Therefore, it is an urgent problem to search for ethical and legal compromises to provide surrogacy services and to protect all subjects of legal relations that emerge in this context or to declare surrogacy illegal and impose legal sanctions against breaching such prohibition at the legislative level.

LITERATURE REVIEW

The lack of a coordinated position of the countries of the world on surrogate motherhood causes discussion among scientists. In view of this, we suggest paying attention at some of them. In particular, Abdullah emphasizes that surrogate motherhood is one of the negative manifestations of progressive development of society. Surrogate motherhood breaks the bond between mother and child, which causes children to become a commercial property that can be bought and sold. And this situation undoubtedly leads to a number of abuses (Abdullah, 2019).

This position is obviously supported by the government of Mexico for, as stated Olavarría a law prohibiting surrogacy was enacted in 2016, and in the event of violation of the aforementioned legislative provision, legal liability in the form of imprisonment of up to 17 years is envisaged (Olavarría, 2018). That is, it is obvious that the maximum sentence for surrogate motherhood should restrain individuals from violating requirements of the law. Kristinsson notes that surrogate motherhood has also been banned in Iceland since 1996, but couples who want to have a child go abroad in search of surrogacy maternity services, increasing the trend for reproductive tourism in the world and provoking a series of conflicts related to human rights (Kristinsson, 2016).

Surrogacy is also prohibited in Bulgaria, but there are frequent cases of shadow surrogate motherhood (Nayana, 2018). This raises the question of developing a legal field for surrogate motherhood. Bakova et al. emphasize that despite positive attitude of Bulgarian citizens to surrogacy, the parliament of the country cannot declare it legal due to a number of restrictions enshrined in the international agreements signed by the country, including with the European Union. So, if this happens, Bulgaria will automatically violate provisions of the European Convention on Human Rights, the Convention on the Rights of the Child, the Convention on the Rights of Women and other international obligations (Bakova et al., 2018).

METHODOLOGY

The research of ethical and legal aspects of surrogate motherhood in Ukraine and in the world was conducted using dogmatic, comparative-legal and system-structural methods. In this way, the dogmatic method has revealed general approaches to understanding surrogacy and its

types. Comparison of the experience of foreign countries and Ukraine on legal regulation of surrogate motherhood was made using the comparative legal method. Analysis of the latest scientific publications devoted to the study of surrogate motherhood, generalization and presentation of the results of the study were made possible due to the system-structural method.

FINDINGS AND DISCUSSIONS

In the United States, citizens are entitled to use reproductive technology under the American Convention on Human Rights (Hevia, 2018). Ukrainian citizens may also benefit from assisted reproductive technologies. To date, the national legislation does not yet contain a specific regulatory act, and for that reason definition of the assisted reproductive technology is given in the Order of the Ministry of Health of Ukraine of 09.09.2013 No.787 as a method of infertility treatment according to which reproductive cell manipulation, some or all stages of reproductive cell preparation, the processes of fertilization and embryos development before transferring to the patient's uterus are carried out *in vitro*.

Ukrainian legislation on health care of 19.11.1992 states that the use of *in vitro* fertilization, embryo implantation is carried out according to the health conditions of an adult woman who undergoes the procedure, provided there is a written consent of the couple, ensuring anonymity of the donor and medical confidentiality (Article 48). In addition, the Family Code of Ukraine provides for the principle of determining the origin of a child born in the result of assisted reproductive technology act (Article 123). It is obvious that surrogate motherhood is a kind of assisted reproductive technology that is not prohibited in Ukraine, as evidenced by a number of provisions of health care regulations and the family law. There is no definition of "*surrogate motherhood*" in Ukrainian law, whereas the Indian law defines it as a practice whereby a woman bears and gives birth to a child for a couple who intends to have children, in order to hand over such a child to them as parents (Regulation, 2018).

In order to better understand the specifics of surrogate motherhood in Ukraine and the world, we should pay attention to its types. Walker and Van-Zyl, L. indicates that there are two types of surrogate motherhood: an altruistic, free-of-charge, and a commercial, which envisages remuneration for surrogate maternity services. However, scientists propose to specify a third type of surrogate motherhood – professional, when surrogacy services are provided by persons with professional experience in the field of child care, school education, social work, which allows them not only to be good surrogate mothers, but also, after giving birth to a child, to provide comprehensive support to its parents in child caring and upbringing (Walker & Van-Zyl, 2017). It should be noted that altruistic surrogate motherhood is legal in Belgium, the United Kingdom, Denmark, Greece, the Netherlands, the United States (except Arizona, Washington, New York, New Jersey and Indiana), Canada and Australia (Vodo, 2016). At that, both altruistic and commercial surrogacy is practiced in Ukraine. Besides, according to the rules for application of the assisted reproductive technology in Ukraine of 09.09.2013 the only legitimate surrogacy method in Ukraine is gestational surrogate motherhood, for which the surrogate mother has no genetic relation to the child, and only bears an embryo conceived by other couple through the use of assisted reproductive technologies.

Although the legislation of Ukraine does not contain any guidance on the contractual regulation of such relations, Maydanik believes that surrogate motherhood should be arranged as follows: 1) consent of biological parents for embryo implantation; 2) concluding a contract for

bearing a child with a surrogate mother; 3) applying appropriate procedures to the surrogate mother; 4) handing over the child to its biological parents after birth of a child (Maydanik, 2013). If considering separately the surrogacy contract, it should be emphasized that it belongs to civil law jurisdiction and should meet the requirements of such contracts, under which a surrogate mother is obliged to undergo implantation of a human embryo conceived by genetic parents, to bear, give birth and hand over the child to the latter, who are obliged to reimburse the costs necessary to perform the contract and to pay a sum of money, unless otherwise provided by the contract. Although it is difficult to agree with this position, since the surrogacy agreement itself differs significantly from civil agreements by the degree of its risks, since the use of assisted reproductive technologies does not always have the desired result, and therefore it is advisable to regulate issues related to such contracts separately at the legislative level, stating its obligatory conditions, which is a guarantee for the parties in the event of unforeseen circumstances or consequences.

It is worth noting that in Israel, in addition to the fact that a written surrogacy agreement should be signed by the parties, it is also subject to approval of a committee composed of social workers, doctors and religious figures. In Greece, a contract concluded between the parties for provision of surrogacy services is invalid without a court's approval, only in this case the parties will be considered as protected.

Regulation of relationships arising over surrogate motherhood is one of the most controversial issues today. And absence of a special regulatory act in Ukrainian legislation necessitates different approaches to understanding not only the nature of the agreement concluded between the parties to such relations, but also the subject matter of the contract, the rights, obligations and responsibilities of the parties. In the scientific community, the majority supports the position that the subject of a surrogacy contract is to provide child birth services. Although in the case of *A, B and C vs Ireland*, which was reviewed before the European Court of Human Rights, it was stated that fulfillment of a surrogacy agreement may result in birth of a child (birth of a new person at law), but a child or a person at law cannot be the subject of an agreement because trade of humans is prohibited worldwide, the parties to the agreement cannot influence the legal status of the other entity by their agreements, and the surrogate mother cannot commit to deliver a healthy baby. This not only emphasizes the risky nature of the surrogacy agreement, but also the fact that its subject matter is intangible. This is what makes it difficult to develop a surrogate motherhood agreement template for everyone and to fix it at a legislative level.

It is also interesting that in Ukraine and India there are different requirements for surrogate mothers and persons seeking to become parents of a child. For example, in India, a surrogate mother may be a woman who is from 25 to 35 years old on the day of implantation and has at least one child born by her; who is a close relative of the child's future parents; who has a certificate of medical and psychological fitness for surrogate motherhood. At the same time, the child's future parents should meet the following criteria: age from 23 to 50 years old for women and 26 to 55 years for men; married for at least 5 years; nationals of India; absence of own (born through surrogate motherhood, adopted) children; a medical certificate about psychological fitness to fulfill duties and responsibilities of parents. Moreover, in India, a woman can be legally a surrogate mother only once in her life (Regulation, 2018). As for Ukraine, currently an attempt has been made to regulate these issues. So, a project on assisted reproductive technology was registered in the Parliament, which proposes that a surrogate mother should be a woman of 18-55

(inclusive) years old, who has no medical constraints for pregnancy, childbirth and has a healthy child of her own born without congenital disorders. Also, future parents of a child can only be an officially registered married couple (a man and a woman) who are nationals of Ukraine (Law of Ukraine, 2018). However, this law has not been passed yet. At the same time, there are obvious differences in the experience of India and Ukraine in determining requirements to individuals which are subjects of surrogacy.

Considering surrogate motherhood, it is necessary to note quite a reasonable idea of Barancová who points out that the current model of social protection of maternity and parenthood covers only the most common cases when a woman becomes pregnant naturally, gives birth to a child and cares for the child until it reaches a certain age. But quite often there are situations where a woman who is a surrogate mother gives birth to a child and then takes care of it under a civil contract with the genetic parents, but legislation of most countries of the world provides no social protection of motherhood in such cases which is a significant drawback in the legal regulation of surrogacy (Barancová, 2017). That is why the law should regulate partial social protection of motherhood for a woman who is a surrogate mother during pregnancy, childbirth and during certain time after childbirth, and for a woman who acquires the status of a mother after childbirth.

RECCOMENDATIONS

Surrogate motherhood, as a phenomenon that is gaining popularity in the context of social development, requires that Ukraine and several other countries of the world take measures to legally regulate its implementation. In particular, Ukraine is recommended to adopt a special legal act that would define the basic concepts, rights and obligations of persons, guarantee their protection and legal liability, conditions of the contract on surrogacy, etc. At the same time, it would be advisable at regional and international levels to reach a common position on the ethical and legal issues of surrogate motherhood, which would allow solving the problems of shadow surrogacy and surrogacy tourism.

CONCLUSIONS

The experience of foreign countries and Ukraine testifies to various approaches to legalization of surrogate motherhood and its regulation within the country, which causes a number of negative phenomena, such as shadow surrogacy and surrogacy tourism. Today, for Ukraine and most other countries, the issue of determining the form, subject and other mandatory terms of a surrogacy agreement, establishing adequate requirements for both surrogate mothers and future parents, providing social protection for women - surrogate mothers, etc. remains relevant. Only a comprehensive solution to these issues at the national, regional, and international levels will allow the use of surrogate motherhood as a kind of assisted reproductive technology methods within the framework of ethics and law.

REFERENCES

Abdullah, F.M. (2019). Legal and ethical aspects beyond commercial surrogacy: Modern form of human trafficking. *Journal of Legal, Ethical and Regulatory Issues*, 22(1), 1-7.

- Bakova, D., Davcheva, D., Mihaylova, A., Petleshkova, P., Dragusheva, S., Torniyova, B., & Semerdjieva, M. (2018). Study of the attitude of Bulgarian society towards surrogacy. *Biomedical Research*, 20(21), 3835–3841.
- Barancová, H. (2017). New technologies and the existing model of protection of motherhood and parenthood. *Lawyer Quarterly*, 7(4), 231–242.
- Cottingham J. (2018) Babies, Borders and Big Business. *An international journal on sexual and reproductive health and rights*. DOI: <https://doi.org/10.1080/09688080.2017.1360603>.
- Hevia, M. (2018). Surrogacy, privacy, and the American Convention on Human Rights. *Journal of Law and the Biosciences*, 5(2), 375–397.
- Krause, F. (2018) *Caring relationships: Commercial surrogacy and the ethical relevance of the other*. Care in Healthcare.
- Kristinsson, S. (2016). Legalizing altruistic surrogacy in response to evasive travel? An Icelandic proposal. *Reproductive Biomedicine and Society Online*, 3(1), 109-119.
- Law of Ukraine. (2018). *On Additional Reproductive Technology*. URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=64477
- Maydanik, R.A. (2013). *Reproductive rights: Surrogate motherhood*. Kiev: Alert.
- Nayana, H.P. (2018). Insight into different aspects of surrogacy practices. *Journal on Human Reproductive Sciences*, 11(3), 212-218.
- Olavarría, M.E. (2018). *Brokers and donors: Surrogacy motherhood in Mexico*. Revista de Antropología Social.
- Regulation. (2018). *The Surrogacy Bill*. Retrieved from URL: http://164.100.47.4/billstexts/lbilltextsPassedLokSabha/257-C%20_2016_Eng.pdf
- Vodo, T. (2016). *Altruistic surrogacy*. Why to oppose empathetic gestures?
- Walker, R., & Van-Zyl, L. (2017). *Towards a professional model of surrogate motherhood*.