

Legal Regulation of Surrogacy in Poland and Ukraine: A Comparative Analysis


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Abstract: The paper focuses on surrogacy regulation, which is diverse across European countries. Four categories of rules can be identified, namely: absence of regulation, regulations allowing surrogacy, regulations that do not allow it with ongoing discussion about allowing it, and regulations under which surrogacy is strictly forbidden. Poland and Ukraine are neighboring countries with radically different regulations on surrogacy. There is no direct regulation on surrogacy in Poland and it can be stated that surrogacy agreements are not valid. IVF procedure is strictly forbidden for surrogacy. Ukraine is an example of the most liberal country when it comes to surrogacy regulation. Surrogacy agreements are regulated and requirements are formulated for surrogate mothers. Ukrainian regulation allows remuneration for surrogate mothers. After the Russian invasion, Ukrainian surrogate mothers came to Poland looking for safety. The Polish state provided extensive support for the Ukrainian people, including specific legal regulation on the right to access health care and employment opportunities. Yet, the Ukrainian surrogacy agreements are not valid in Poland, and the surrogate mothers will be approved as legal mothers.

1. Introduction

Depending on biotechnological and social considerations, surrogate pregnancy can be classified based on various factors such as the origin of gametes and its onerous or altruistic character.¹

When it comes to the first factor, five options are possible:

- (1) A surrogate mother is only lending out her uterus to host an embryo which is transferred via in-vitro fertilization, but gametes (eggs and spermatozooids) are taken from a couple requesting the surrogate pregnancy;
- (2) The egg belongs to the woman requesting surrogate pregnancy and the sperm comes from her partner or from a donor;
- (3) The egg belongs to a surrogate mother who is fertilized by insemination with spermatozooids from the requesting male;
- (4) The couple requesting the surrogate pregnancy has no biological link with the future child, with the embryo originating from donors or the surrogate mother;
- (5) Three women are involved: one requesting surrogate pregnancy, one being the egg donor, and one who receives, hosts, and gives birth to the baby, while the sperm comes from the husband of the first woman or from a donor.²

The classification based on financial considerations distinguishes two options. On these grounds surrogacy can be defined as:

- (1) commercial (monetary compensation is provided for a surrogate mother from those requesting her services in order to compensate for the days she may be absent from work because of the pregnancy and/or a period after birth, and medical examinations to which she will be subjected)³;
- (2) altruistic (the surrogate mother gets involved on altruistic grounds. This situation usually occurs in cases where family ties or friendship

¹ Aitziber Emaldi Cirion, "Surrogacy in Spain. Medical, Legal and Ethical Perspective," *International Physical Medicine & Rehabilitation Journal* 2, no. 7 (2022): 82–9.

² Cirion, "Surrogacy," 82.

³ Ibid.; Maria-Jose Cabezudo Bajo, "Avances hacia una regulacion de la gestacion por sustitucion en Espana en base al modelo regulado en el Estado de California," *Law and the Human Genome Review*, no. 46 (2017): 61–122.

exists between the surrogate mother and the intended parents.⁴ Some jurisdictions allow the intended parents to compensate the surrogate's mother expenses⁵).

The purpose of this paper is to analyze the legal status of the Ukrainian surrogate mothers and the children they give birth to on the territory of the Republic of Poland after Russia's invasion of Ukraine. The research covers the following issues: comparative legal analysis of Polish and Ukrainian legislation on surrogacy and, in the event of differences, the question of whether the Polish legislator has provided temporary solutions in response to the differences in regulations.

The key issue analyzed in the paper is a comparison of the legislative experience of Poland and Ukraine on the subject of surrogacy in the context of the legal solutions adopted in various European countries. Although the legislations considered in this text belong to neighboring countries, it turns out that the solutions adopted in those countries are fundamentally different. Furthermore, Russia's invasion of Ukraine, launched on February 24, 2022, triggered a large wave of migration of the Ukrainian population to the territory of the neighboring country. Poland faced a huge logistic challenge of admitting a large number of migrants in a very short time. The differences in domestic regulations, especially in the area of biomedical law, have raised many questions concerning the legal situation of Ukrainian women in Poland.

While domestic regulations have already been the subject of legal discourses by representatives of the legal professions of both countries, comparing the laws and relating them to the regulations adopted in selected European countries has not been the subject of analysis and discussion so far. Moreover, the legal situation of Ukrainian surrogate mothers giving birth in Poland has not yet been studied. Therefore, the considerations presented in this paper fill this gap and provide a response to current legal questions.

This research cannot be conducted without answering the question of the necessity of comparing the domestic legislations of Poland and

⁴ Cirion, "Surrogacy," 82; Bajo, "Avances," 46.

⁵ Roman Maydanyk and Kateryna Moskalenko, "Towards Creation of Unified Regulation on Surrogacy in Europe: Recent Trends and Future Perspectives," *Wiadomości Lekarskie* 73, no. 12 (2020): 2865–70.

Ukraine. As it was pointed out by Van Hoecke, since the end of the 19th century, comparative law has been seen as an instrument for improving domestic law and legal doctrine, a way of renovating the Exegetic School to the Civil Code. Now, for many legal scholars in Europe, comparative law is considered the necessary instrument in the process of harmonization of law among European Union member states.⁶

This analysis is divided into three parts. The first part covers the analysis of domestic regulations on surrogacy in selected European countries. It presents the problem of cross-border surrogacy and some examples of it that have occurred in recent years. The second part of the paper focuses on the Polish and Ukrainian domestic legislations on this subject matter. The third part focuses on the legal situation of Ukrainian surrogate mothers staying in Poland during pregnancy and childbirth; specifically, on the question whether the Polish legislator provided temporary solutions to address the differences in the regulations of both countries.

The following questions are crucial for the matter presented: Which of the women would be entered on the child's birth certificate as its mother – the genetic mother or the surrogate mother? Would the genetic parents be able to claim any “rights to the child” born of the surrogate mother in Poland? Furthermore, problems related to the Ukrainian surrogate mother's access to health services related to pregnancy and childbirth are raised in the article.

The main goal of the research, including legal research, is to collect and analyze facts and their interpretation to ascertain or refute existing information or to add new information to it. The following legal research methods can be distinguished: evolutive and evaluative, identificatory and impact studies, projective and predictive, collative, historical, and comparative.⁷ According to the doctrine, there are six methodological tools distinguished in the comparative law: the functional method (looking at the current societal problem and how it is resolved in different jurisdictions; presenting similar or different roads and results), the analytical

⁶ Mark Van Hoecke, “Methodology of Comparative Legal Research,” *Law and Method* (Dec 2015): 2, <https://doi.org/10.5553/REM/.000010>.

⁷ Khushal Vibhute and Filipos Aynalem, *Legal Research Methods. Teaching Material*, Justice and Legal System Research Institute (2009), 110, accessed March 3, 2024, <https://chilot.wordpress.com/wp-content/uploads/2011/06/legal-research-methods.pdf>.

method (analyzing different concepts and rules in different legal systems; considering what similarities and differences are detected), the structural method (focused on the legal framework or the elements reconstructed through an analytical approach), historical method (showing differences and similarities between legal systems and the extent in which they belong to a tradition or historical events), the law-in-context method (focused on the law's current societal context, e.g. psychological, economic, religious, cultural).⁸

The presented considerations are based on the following research methods: collative method and comparative method (analytical and functional methods). The comparative legal method was used to analyze the national legislations of Poland, Ukraine, and selected European countries.

2. Surrogacy in Selected European Countries

Analyzing the legal regulations on surrogacy in European countries, one can notice their considerable diversity.⁹ For instance, surrogacy regulation in European countries may fall within four categories: (1) no regulation for surrogacy is provided, however in practice surrogacy contracts are signed and enforced; (2) surrogacy is not allowed, however, the discussion on allowing it in the future is taking place; (3) surrogacy is allowed, and there are regulations on surrogacy; (4) surrogacy is strictly forbidden by the law.¹⁰

Almost all European countries prohibit any form of commercial surrogacy. Some of the countries have decided on regulations completely prohibiting the actions in question. France, Germany, Italy, and Spain have been chosen as examples illustrating the wide variety of regulations existing in Europe.

Article 16–7 of the French Civil Code states that “All agreements relating to procreation or gestation on account of a third party are void.”¹¹

⁸ Van Hoecke, “Methodology,” 28–9.

⁹ Valeria Piersanti et al., “Surrogacy and ‘Procreative Tourism.’ What Does the Future Hold from the Ethical and Legal Perspectives?” *Medicina* 57, no. 1 (2021): 47, <https://doi.org/10.3390/medicina57010047>.

¹⁰ Maydanyk, “Towards,” 2865.

¹¹ Available online: <https://www.fd.ulisboa.pt/wp-content/uploads/2014/12/Codigo-Civil-Frances-French-Civil-Code-english-version.pdf>, accessed March 3, 2024; more: Piersanti, “Surrogacy,” 47.

In Germany prohibition of surrogate motherhood is regulated by the Act for Protection of Embryos (The Embryo Protection Act). Section 1, paragraph 1, number 7 states that:

Anyone will be punished with up to three years imprisonment or a fine, who attempts to carry out an artificial fertilisation of a woman who is prepared to give up her child permanently after birth (surrogate mother) or to transfer a human embryo into her.

However, paragraph 3, number 2 includes the exception, that “in the case of paragraph 1, number 7, the surrogate mother and likewise the person who wishes to take long-term care of the child, will not be punished.”¹²

In Italy, according to Law 40 of 2004 on Assisted reproduction, surrogate motherhood is prohibited. What is more, all surrogacy contracts are void under the Italian Civil Code of 1942¹³ and “the gamete donor does not acquire any legal parental relationship with the child and cannot claim any right or be the holder of obligations against him.”¹⁴ It is worth mentioning that recently in Italy there has been a heated discussion of a case involving a married couple, who, due to infertility problems (the woman had hysterectomy, while the man suffers from oligospermia), decided to turn to surrogate motherhood and heterologous insemination in a medical clinic in

¹² Available online: https://www.rki.de/SharedDocs/Gesetzestexte/Embryonenschutzgesetz_englisch.pdf?__blob=publicationFile, accessed March 3, 2024; more: Piersant, “Surrogacy,” 47.

¹³ More: Andrea Boggio, “Italy Enacts New Law on Medically Assisted Reproduction,” *Human Reproduction* 20, no. 5 (2005): 1153–7, <https://doi.org/10.1093/humrep/deh871>; Alfio Guido Grasso, “A Critical View on the Italian Ban of Surrogacy: Constitutional Limits and Altruistic Values,” *The Italian Law Journal* 6, no. 2 (2020): 401–29.

¹⁴ Piersanti, “Surrogacy,” 47; more: Gianluca Montanari Vergallo et al., “How the Legislation on Medically Assisted Procreation Has Evolved in Italy,” *Medical Law* 36, no. 2 (2017): 5–28; Nicola Carone, Roberto Baiocco, and Vittorio Lingiardi, “Italian Gay Fathers’ Experiences of Transnational Surrogacy and Their Relationship with the Surrogate Pre- And Post-birth,” *Reproductive Biomedicine. Online* 34, no. 2 (2017): 181–90, <https://doi.org/10.1016/j.rbmo.2016.10.010>; Fabrizio Buonaiti Marongiu, “Recognition in Italy of Filiation Established Abroad by Surrogate Motherhood, between Transnational Continuity of Personal Status and Public Policy,” *Cuadernos de Derecho Transnacional* 11, no. 2 (2019): 294–305, <http://dx.doi.org/10.20318/cdt.2019.4959>; Paola Frati et al., “Surrogate Motherhood: Where Italy Is Now and Where Europe Is Going? Can the Genetic Mother Be Considered the Legal Mother?,” *Journal of Forensic and Legal Medicine*, no. 30 (2015): 4–8, <https://doi.org/10.1016/j.jflm.2014.12.005>.

Ukraine. As mentioned, such a solution violates the Italian law. As a result, on January 17, 2013, The Juvenile Court of Brescia, ordered the removal and adoption of a newborn baby.¹⁵

Surrogacy is also strictly prohibited in Spain. According to Article 10 of Human Assisted Reproductive Technologies Act¹⁶:

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.¹⁷

3. Cross-Border Surrogacy – Ethical Dilemmas

According to the Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, commercial surrogacy (“for-profit” or “compensated” surrogacy) is focused

on the contractual and transactional — rather than gratuitous — relationship between the intending parent(s) and the surrogate mother, (...) commercial surrogacy exists where the surrogate mother agrees to provide gestational services and/or to legally and physically transfer the child, in exchange for remuneration or other consideration.¹⁸

Prohibition of some form of surrogacy based on the origin of gametes and almost total prohibition of commercial surrogacy leads to so-called cross-border surrogacy or reproductive tourism. There are multiple reasons for this practice, such as avoiding restrictions arising from national jurisdictions or financial considerations. Most European countries, Israel, and many US states do not allow commercial surrogacy. The opening of the

¹⁵ Ibid.

¹⁶ Ley 14/2006, de 26 de mayo, sobre Técnicas de Reproducción Humana Asistida.

¹⁷ English translation from the Spanish Bioethics Committee Report on the Ethical and Legal Aspects of Surrogacy published in Carlos Martínez de Aguirre, “Surrogate Motherhood in Spanish and Latin American Law” the Law and the Loophole,” in *Fundamental Legal Problems of Surrogate Motherhood. Global Perspective*, ed. Piotr Mostowik (Warsaw: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2019), 367–97.

¹⁸ Human Rights Council, 37. Session, Agenda item 3, United Nations A/HRC/37/60, p. 11.

borders and domestic legislations enabling commercial surrogacy has resulted in the emergence of cross-border surrogacy, which results in agreements worth hundreds of millions of dollars being concluded each year in countries such as Thailand, Russia, Georgia, and Ukraine.¹⁹ The cost of the procedure in Ukraine ranges from 40,000 to 65,000 euros.²⁰ For comparison, the cost of commercial surrogacy in the US ranges from \$100,000 to \$250,000, while in other countries from \$35,000 to \$100,000.²¹

Cross-border surrogacy takes place, when the intending parents are the nationals of one (or two) country (-ies), while the surrogacy itself is happening in another country, where, usually, the surrogate mother resides.²²

The United Nations Human Rights Council emphasizes that abusive practices in the context of surrogacy are well documented, mentioning the employment of surrogates from India and Thailand by convicted sex offenders, the employment of 11 surrogates by a Japanese millionaire to give birth to 16 children, and the abandonment of a surrogacy-born infant with a disability.²³ This part of the research will focus on ethical challenges in non-European countries to prove that the absence of precise regulations might cause international dilemmas.

A matter that has stirred up much debate about the safety of children born through surrogacy was the case of Baby Gammy. A married couple from Western Australia, 56-year-old David John Farnell and his wife Wendy used a broker in Thailand to engage a 21-year-old Pattharamon Janbua as a gestational carrier. Janbua became pregnant with twins. In the fourth month of pregnancy, tests showed that one of the twins (a boy) had Down's syndrome, so she was asked to terminate the pregnancy, to which she did not agree. The twins were born two months prematurely. Mr and Mrs

¹⁹ After: Leslie R. Schover, "Cross-Border Surrogacy: The Case of Baby Gammy Highlights the Need for Global Agreement on Protection for All Parties," *Fertility and Sterility* 102, no. 5 (2014): 1258–9.

²⁰ Susanna Marinelli et al., "The Armed Conflict in Ukraine and the Risks of Inter-County Surrogacy: The Unsolved Dilemma," *European Review for Medical and Pharmacological Sciences* 26, no. 16 (2022): 5646–50.

²¹ After: Schover, "Cross-border," 1258–9.

²² Maydanyk, "Towards," 2866.

²³ 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, General Assembly A/HRC/37/60, p. 9.

Farnell returned to Australia with a female twin, leaving Gammy, a seriously ill baby boy, with Ms. Janbua, who declared that she would raise him as her own son. The case gained considerable publicity when the twins were six months old and Ms Janbua was unable to cover the boy's medical expenses. It also turned out that the genetic father of the twins has been jailed twice over a 10-year period on more than 20 child abuse charges.²⁴ Pattharamon Janbua initiated legal proceedings to gain custody of Pipah (Gammy's twin sister) because she did not want the girl to stay with her father. In the opinion of Judge Stephen Thackray, the girl should have stayed with the Farnell family, however, safety measures were taken by the Child Protection Service to prohibit David Farnell from staying with the child by himself. The judge pointed out that the Farnells took some steps to take both children, but they thought that it had been Pattharamon Janbua who had decided to keep Gammy.²⁵

Another case that aroused much discussion was the case of Mitsutoki Shigeta ("baby-factory" case), a 24-year-old multimillionaire from Japan who became the father of 16 children born to surrogate mothers living in Thailand. In 2014, Mr. Shigeta was investigated by Interpol for human trafficking. After leaving Thailand he sued the Ministry of Social Development and Human Security to obtain custody of the children. In 2015, he was granted custody of three children and in 2018 he obtained custody of another 13 children. Bangkok's Central Juvenile Court said that "for the happiness and opportunities which the 13 children will receive from their biological father, who does not have a history of bad behaviour, the court rules that all 13 born from surrogacy to be legal children of the plaintiff."²⁶

²⁴ Schover, "Cross-border," 1258–9.

²⁵ "Surrogacy: Pipah, Gammy's twin sister, will stay with her intended father who has a criminal record," Genethique, May 2, 2016, accessed March 3, 2024, <https://www.genethique.org/surrogacy-pipah-gammys-twin-sister-will-stay-with-her-intended-father-who-has-a-criminal-record/?lang=en>.

²⁶ See more: "Mitsutoki Shigeta: 'Baby factory' dad wins paternity rights," BBC, February 20, 2018, accessed March 3, 2024, <https://www.bbc.com/news/world-asia-43123658>; Flora Carr, "Japanese Man Granted Sole Custody of 13 Children He Fathered With Thai Surrogate Mothers," Time, February 20, 2018, accessed March 3, 2024, <https://time.com/5166372/japan-thailand-surrogate-children-custody/>.

Mitsutoki Shigeta's case led to the enactment of the Protection for Children Born through Assisted Reproductive Technologies Act.²⁷

4. Surrogacy in Ukraine

Ukraine's legislation on surrogacy is considered to be liberal and rather fragmented. There were a few draft laws on assisted human reproduction submitted to the Ukrainian parliament at the end of 2021 and during 2022–2023.²⁸ None of these draft laws passed the appropriate legislative procedure in the parliament. Surrogacy issues and relations are mostly regulated by special agreements between parties, which can have a number of variations. Also, the country allows (1) surrogate mothers to receive financial benefits in exchange for services compliant with the law²⁹; (2) foreign nationals to enter into a surrogacy arrangement.

The core legal acts regulating the institution of surrogacy in Ukraine include the Civil Code of Ukraine, the Family Code of Ukraine, the Law of Ukraine Fundamentals of Healthcare legislation in Ukraine, the Order of the Ministry of Health No. 787 Procedure for the use of assisted reproductive technologies in Ukraine (with amendments), the Decree of the Ministry of Justice of Ukraine No. 52/5 dated October 18, 2000 (with amendments), Rules of State Registration of Civil Status Acts in Ukraine.³⁰

The Civil Code of Ukraine provides for the right of an adult woman or man, based on medical indications, to undergo treatment programs using assisted reproductive technologies in accordance with the procedure and conditions established by law (Article 281(7)). Also, an adult capable

²⁷ Alessandro Stasi, "Protection for Children Born Through Assisted Reproductive Technologies Act, B.E. 2558: The Changing Profile of Surrogacy in Thailand," *Clinical Medicine Insights: Reproductive Health*, no. 11 (2017): 1179558117749603, <https://doi.org/10.1177%2F1179558117749603>.

²⁸ Kateryna Moskalenko, "The Legal Framework on Surrogacy in Ukraine: Quo Vadis?," *International Comparative Jurisprudence* 9, no. 2 (2023): 209–25.

²⁹ After: O.L. Kuchma and L.M. Siniova, "Surohatne materynstvo yak sposib realizatsii demografichnoi funktsii prava sotsialnoho zabezpechennia" ["Surrogate Motherhood as a Way of Implementing the Demographic Function of Social Security Law"], *Comparative Analytical Law*, no. 3 (2019): 108–11, quoted by Oleg M. Reznik and Yuliia M. Yakushchenko, "Legal Consideration Surrounding Surrogacy in Ukraine," *Wiadomości Lekarskie* 73, no. 5 (2020): 1048–52, <http://dx.doi.org/10.36740/WLek.202005139>.

³⁰ Reznik, "Legal," 1049.

person has the right to be a donor of, among others, reproductive cells (Article 290(1)). The Civil Code of Ukraine lays down the foundations of reproductive rights. More detailed regulations are contained in special legislation. At the same time, relationships in the sphere of surrogacy are regulated by contracts. The Civil Code of Ukraine does not directly provide for a contract that would outline the legal features of surrogacy relationships, however, taking into account the principle of freedom of contract, it has the right to exist, provided that it complies with the general principles of civil legislation.

Surrogate motherhood is also regulated by contracts. Usually, such contract(s) involve the following parties: intended parents, surrogate mothers, clinics specializing in reproductive medicine, and agencies. The contract between the intended parents and the surrogate mother defines their rights and obligations taking into account considerations of both the spouses and the surrogate mother. As the law contains only general requirements, the parties can include and specify different aspects of the contract, such as the medical aspects (medical examination during pregnancy, amount of medical assistance that will be provided during pregnancy, healthy lifestyle, etc.), economic aspects (compensation for services provided to the surrogate mother and/or financial costs associated with carrying and giving birth to a child), and organizational aspects (the clinic which will perform the procedure, monitor the pregnancy, and provide care at childbirth).

The Family Code of Ukraine regulates establishing the origin of a child born as a result of the use of assisted reproductive technologies (Article 123(2,3)). There are two specific regulations: (1) If a human embryo conceived by the spouses (husband and wife) using assisted reproductive technologies, is implanted in another woman, the spouses shall be the parents of the child (part 2 of Article 123 of the Family Code of Ukraine). (2) The spouses are recognized as parents of the child, which had been delivered by the wife after transferring into her body a human embryo, conceived by the husband and another woman as a result of using assisted reproductive technologies (part 3 of Article 123 of the Family Code of Ukraine). Such strict regulation protects the interests of the child's parents (specifically, the persons who decided to use surrogacy). The clause therefore makes the surrogacy contract enforceable, although it restricts access to surrogacy to married heterosexual couples: the legal registration of the

child reflects the surrogacy agreement signed by the intended parents and the consent in writing by the surrogate.³¹

The Fundamentals of Healthcare legislation in Ukraine stipulates that the use of artificial insemination and embryo implantation is carried out in accordance with the conditions and procedure established by the Ministry of Health of Ukraine, according to the medical indications of an adult woman with whom such an operation is performed, subject to the written consent of the spouses, ensuring the anonymity of the donor and preservation of medical confidentiality (Article 48).

The procedure for the use of assisted reproductive technologies in Ukraine has a special section (VI. Surrogacy) dedicated to surrogacy. This section defines general requirements for surrogacy, medical indications, organizational, and legal issues. The provisions concerning the determination of the child's origin and state registration are the following: in the case of the birth of a child by a woman in whose body a human embryo conceived by a spouse as a result of the use of ART was transferred (surrogate mother), the state registration of the child's birth is carried out at the request of the couple who gave consent to such a transfer (intended parents). In this case, simultaneously with the document confirming the fact of the birth of the child by this woman (surrogate mother), a statement is submitted about her consent (approved by a notary) to register the couple (intended parents) as the child's parents. A certificate of the genetic relationship between the couple (mother or father) with the fetus is also submitted. An identical provision is made in the Rules of State Registration of Civil Status Acts in Ukraine.

In the "Notes" section of childbirth registration records, the following information is included: "According to the medical birth certificate, the child's mother is a citizen (surname, first name, patronymic)." (namely – information about surrogate mother). In addition, the name of the institution that issued the certificate, the date and number of its issue, the notary's data (surname and initials, notary district or state notary office), the date, as well as the registration number under which the authenticity of the woman's signature was certified on the statement of her consent to register the couple as the child's parents. The record about the surrogate mother is made

³¹ Marinelli, "The Armed," 5647.

precisely in childbirth registration records, and there is no such notice in the birth certificate. The birth certificate contains information about the biological parents only. This approach is adopted in order to protect the secrecy of birth using the method of surrogacy.

5. Surrogacy in Poland

According to The Family and Guardianship Code, the mother of a child is the woman who gave birth to it (Article 61⁹).

Even though Polish legislation contains no provisions directly regulating the issue of surrogacy, representatives of legal doctrine agree that surrogacy contracts should be considered void.³² In principle, the contract in question obliges the surrogate mother to consent to the implantation of the embryo, the delivery of the pregnancy, the birth of the child, and the relinquishment of parental rights to the child and the designation of the other party of the agreement as adoptive parents, while the other contracting party is obliged to take the child into care. According to Polish law, the provisions of the contract both requiring the child to be relinquished as well as releasing it to the genetic parents are void.³³

As already mentioned, the provisions of the surrogacy agreement would be void of legal effects in Poland. At this point, however, it is worth answering the question whether any actions taken by potential adoptive parents and a surrogate mother would be legal in the Republic of Poland or would each one of them constitute a prohibited act? The analysis of this issue will be conducted in three stages. Firstly, the answer to the question of whether, under the current legal state, the application of Assisted Reproductive Technologies (ART) to fertilize a surrogate mother is possible, will be provided. Secondly, a criminal law analysis of activities aimed at giving birth to a child by a surrogate mother will be undertaken. Thirdly, it will be considered whether the institution of “adoption with indication,” regulated

³² Marek Andrzej Lebsztein, “Macierzyństwo zastępcze – problemy etyczne i prawne,” *Miscellaneas Historico-Iuridica* 13, no. 2 (2014): 308; Marek Safjan, *Prawo wobec ingerencji w naturę ludzkiej prokreacji* (Warsaw: Uniwersytet Warszawski. Wydział Prawa i Administracji, 1990), 436; Mirosław Nestorowicz, *Prawo medyczne* (Toruń: Towarzystwo Naukowe Organizacji i Kierownictwa „Dom Organizatora”, 2005), 218.

³³ Krzysztof Pietrzykowski, *Kodeks rodzinny i opiekuńczy. Komentarz* (Warsaw: C.H. Beck, 2012), 639; Lebsztein, “Macierzyństwo,” 308.

by Article 119^{1a} of The Family and Guardianship Code, can be applied to a child born by a surrogate mother.

The procedure of Assisted Reproductive Technologies (ART) is regulated in the Act of 25 June 2015 on the treatment of infertility (The Act of Infertility Treatment) and defined as “actions leading to the acquisition and use of germ cells or embryos inside or outside the body of the recipient for the purpose of procreation; it covers the direct and non-direct use of germ cells and embryos” (Article 2(1)(21)). The Polish legislator has provided for the application of Assisted Reproductive Technologies (ART) in two, differently conditioned, circumstances; namely, partner donation and non-partner donation. The first involves the donation of germ cells by a male donor for the purpose of using them in Assisted Reproductive Technologies (ART) in the body of the recipient who is married to the donor or in cohabitation with him confirmed by a mutual declaration of the donor and the recipient; in partner donation, the recipient’s germ cells are used (Article 2(1)(8)).³⁴ Due to the requirement for the donor of male

³⁴ According to Article 29(1) the germ cells may be collected from a donor for partner donation only if all the following conditions are met: (1) the medical reasonableness of taking germ cells from a specific donor and using them for partner donation is determined by the doctor on the basis of the current state of medical knowledge; (2) based on the medical interview conducted with the donor candidate and the necessary medical and laboratory tests, it was concluded that: (a) the risk associated with collecting germ cells from a specific donor does not exceed the permissible limits for such treatments and will not significantly impair the donor’s health, (b) it is possible to reduce the risk of a relevant adverse event or a relevant adverse reaction in the donor, the recipient and in children who may be born as a result of the use of these germ cells in the Assisted Reproductive Technologies; (3) before giving his consent a candidate for a donor: (a) has been informed in an understandable and detailed manner, by a person prepared for this purpose, about the type of the procedure, its purpose and nature, the laboratory tests carried out for its performance and the right to obtain the results of these tests, the way in which his personal data are collected and protected, medical confidentiality, the risks associated with the procedure of collecting the germ cells, the foreseeable consequences for his health in the future, the security measures leading to the protection of the donor’s data and the scope and legal consequences of the use of the germ cells taken from him for the purpose of partner donation resulting from the provisions of the Act of 25 February 1964 – Family and Guardianship Code, including the legal situation of a child born as a result of the Assisted Reproductive Technologies, (b) has been given the opportunity to ask questions on the matters referred to in point (a) and receive comprehensive answers – which the candidate has confirmed by a written declaration; (4) the donor candidate has confirmed by submitting a written declaration that all information provided by him during the medical interview is true to the best of his knowledge; (5) the donor

germ cells and the recipient to be married³⁵ or in cohabitation, partner donation cannot be used for the purposes of surrogacy. The second type of donation occurs when there is no relationship between the germ cell donor or donors and the recipient. Without an in-depth analysis of the law in question, the wrong assumption that this type of donation would apply to surrogacy could be made. However, a reconstruction of the legal standard included in Article 20(1) of the Infertility Treatment Act indicates that donation other than partner donation is possible only if the recipient is married or in cohabitation with a man, because a necessary condition for the implantation of the embryo is the written consent of both the recipient and her husband (a consent to embryo transfer) or the man who is in cohabitation with her (acknowledgement of paternity by means of the Assisted Reproductive Technologies³⁶). It can therefore be demonstrated that the Polish legislator has not provided for the possibility of the Assisted Reproductive Technologies (ART) being accessed by a single person,³⁷

candidate has full legal capacity to perform legal acts and has voluntarily consented, in writing, before a doctor to the collection of germ cells and using them for partner donation; (6) the recipient, prior to giving her consent, has been provided with the information regulated by the Act; (7) the recipient has full legal capacity to perform legal acts and has voluntarily consented, in writing, before a doctor to use of donor's germ cells in her body or to use them in the Assisted Reproductive Technologies.

³⁵ It should be noted that in Poland marriage is the union of a man and a woman, which can be concluded before the head of the Register Office or a cleric. Same-sex unions are not subject to legal regulation.

³⁶ According to Article 751(1) of the Family and Guardianship Code the acknowledgement of paternity (AOP) takes place from the date of birth of the child, even then, when, prior to the transfer into the woman's body of the germ cells originated from an anonymous donor or an embryo created from germ cells from an anonymous donor or from donation of an embryo, a man declares before the head of the Register Office that he will be the father of a child who will be born following the Assisted Reproductive Technologies using those cells or that embryo, and the woman, at the same time or within three months from the date of the man's declaration, confirms that the man will be the father of the child. The declaration in question would be effective only if the child is born via ART within two years of submitting the declaration.

³⁷ The legislation being in force since 2015 not only excluded the use of the Assisted Reproductive Technologies by single persons, but also resolved the legal situation of single women who had participated in such procedure before this Act entered into force. Embryos created in this way cannot be implemented into the body of a single woman, and 20 years after the Act entered into force, they should be transferred to so-called embryo donation. See: Rafał Łukasiewicz, "Implementacja zarodków utworzonych z komórek rozrodczych samotnych

a person remaining in a durable partnership with a person of the same sex, and a woman planning to become a surrogate mother. The considerations in question lead to the conclusion that it is impossible to use Assisted Reproductive Technologies (ART) in surrogacy.

It is also worth pointing out that behaviors violating the provisions of the analyzed Act are penalized. This is regulated in Article 78(1). The subject matter of the crime specified therein covers the use and transfer of germ cells taken from the donor, transfer of embryos into the recipient's body, and storage of embryos which have not been used in an Assisted Reproductive Technologies (ART) – the ones not being in accordance with the regulated procedure.³⁸

To conclude, the Polish legislator not only ruled out the possibility of using Assisted Reproductive Technologies (ART) for the purpose of surrogacy, but also provided for criminal liability (fine, penalty of restriction of liberty, or imprisonment up to one year) for the actions in question.

As already mentioned, it would not be possible to use IVF for surrogacy in Poland, however, this does not imply that potential parents and surrogate mothers could not access the procedure in another country where it is permitted. Domestic legislation also does not prohibit the use of the natural conception by a surrogate mother and a genetic father, whilst assuming that a potential surrogacy agreement would be void of legal effects. While practice indicates that such a method is not used, it is worth considering how the legal status of the biological and genetic father would develop in such a hypothetical situation in both of the above cases. For one thing, it is possible to recognize both a child already conceived, in accordance with Article 75(1) of The Family and Guardianship Code,³⁹ and a child after the

kobiet – propozycje przepisów przejściowych,” *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 83, no. 1 (2021): 74.

³⁸ See: Katarzyna Nazar, “Aspekty prawne procedur medycznych w zakresie postępowania z komórkami rozrodczymi i zarodkami w kontekście art. 78 ustawy z dnia 25 czerwca 2015 r. o leczeniu niepłodności,” *Prokuratura i Prawo*, no. 10 (2021): 46.

³⁹ An interesting issue, although beyond the scope of this discussion, is the question of the discrepancy between terminology used in various legal acts – the child already conceived and the conceived child. The first term was used by the Polish legislator when enacting that it could be an heir (Article 927(2) of the Civil Code) and it is possible to acknowledge paternity before the birth of a “child already conceived” (Article 75(1) of The Family and Guardianship Code). Whereas the term “conceived child” occurs i.e. in Criminal Code (aggravated crimes

delivery (Article 75(1) of The Family and Guardianship Code). In both circumstances, the legislator requires the declaration from the man from whom the child originates and, at the same time or within three months, from the child's mother, submitted to the head of the Registry Office.⁴⁰ The legislation in question does not require genetic tests to confirm the veracity of the declaration in question, but the head of the Registry Office is obliged to refuse the acknowledgement of paternity (AOP) if it is inadmissible or if he has any doubts as to the origin of the child (Article 73(3) of The Family and Guardianship Code). The issue is different in the case of a request for rescission of the parentage of a child submitted by the man who recognized the child and the child's mother – neither of them has the right to rescission of parentage on the grounds that the man is not the child's actual father. The only option provided by the Act is the defect of the applicant's statement of intent.⁴¹ According to Polish jurisprudence, the recognition of the child is declaratory and works retroactively, which results from its declaratory nature. The *ex tunc* effects of it extend only to the family-law relationship between the recognizer and the recognized.⁴²

Secondly, the so-called adoption with indication⁴³ (Article 119^{1a} of the Family and Guardianship Code) is possible, which allows the parents to

of terminating pregnancy: with woman's consent – Article 152(3) and without her consent – Article 153(2), non-conviction clause for the conceived child's mother, who caused bodily harm to a conceived child or its health disorder threatening of its life – Article 157a(3)) and in Medical and Dentist Profession Act of 5 December 1996 (participating in the therapeutic experiment of a pregnant women requires a particularly thorough assessment of the associated risks for the mother and conceived child – Article 26 section 1). See: Filip Cieply, "Prawne określenia człowieka w prenatalnej fazie rozwoju," *Ius novum* 9, no. 4 (2015): 79–82.

⁴⁰ The declaration in question could also be submitted outside the territory of Republic of Poland to the Polish consul or a person designated to perform his/her functions, if at least one of the parents is a Polish citizen (Article 75§1 of The Family and Guardianship Code).

⁴¹ See: Polish Supreme Court, Judgment of 8 December 1972, Ref. No. I CR 353/72.

⁴² Provincial Administrative Court in Warsaw, Judgment of 13 May 2004, Ref. No. II SA/Wa 77/04.

⁴³ According to Article 119^{1a} Polish Family and Guardianship Code, the parents may, before the guardianship court, indicate the adopter, who may be exclusively the relative of the parents of the child with the consent of that person lodged before that court. The spouse of one of the parents may also be indicated. The institution of the designation of an adopter (adoption with indication) has been in force since September 18, 2015. Prior regulation allowed natural parents to indicate the adopter without limiting the category of persons. The amendment of the Act was primarily aimed at the reducing of so-called adoption underground and at

nominate the adopter, who can only be a relative of the child's parents with his/her consent, which was given to the court, or the spouse of one of the parents. Therefore, if there is a kinship between the surrogate mother and the future parents of the child, this institution could be used. Furthermore, acknowledgement of paternity makes it possible for the child to be adopted by the wife. Adoption with indication is an intrafamily adoption – it assures the parents that their child goes to a person they have designated and whom they know.⁴⁴

To summarize the above considerations, it should be noted that the Polish law, while not providing for the validity of a surrogacy agreement, entails legal solutions that, in practice, could enable potential parents to obtain parental authority over a child born to a surrogate mother. The first situation would occur when the IVF takes place outside the Republic of Poland, and during pregnancy or after birth, the child is recognized by its father before the head of the Registry Office. The second situation would be the case of a relationship between the surrogate mother and one of the sociological parents, in which case a so-called adoption with indication would be possible. The third, and the only one that does not require the use of Assisted Reproductive Technologies (ART) outside the territory of the Republic of Poland, is when conception occurs naturally.

6. Legal Status of Ukrainian Surrogate Mothers Residing in the Territory of the Republic of Poland after the Russian Invasion of Ukraine

Another problem to be addressed by this analysis is the issue of the legal situation of Ukrainian surrogate mothers who, due to the armed conflict taking place in their country, gave birth on the territory of the Republic of Poland. Two questions arise in this context; namely, which woman would be

introducing statutory terminology of adoption with indication, which: would allow to maintain the full adoption as the basic form of adoption; would convince that a child from a particular family should remain in that very family; would prevent the transfer of children to adoptive persons for a fee and would protect children from being raised up by people without the appropriate qualifications and personal or moral aptitude. After: Anna Chciałowska, "Adopcja ze wskazaniem zgodnie z nowym uregulowaniem prawnym," *Zeszyty Prawnicze* 18, no. 4 (2018): 92.

⁴⁴ Ibid., 89–107; Ewa Płonka, *Przysposobienie całkowite w prawie polskim* (Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 1986), 97–8.

entered on the child's birth certificate as its mother – the surrogate or the genetic mother; and whether the Polish legislator has provided for regulations different from those that are in force for Polish citizens?

Before proceeding with the analysis, it is necessary to explain why the situation of Ukrainian surrogate mothers giving birth in Poland requires consideration at all. As stated above, Ukraine has the most liberal legislation on surrogacy. Global Families, a non-profit organization working with couples interested in surrogacy, reports that every year approximately 2,000–2,500 children are born in Ukraine through surrogacy, with at least 1,500 surrogate parent couples coming from the US, UK, Ireland, or Australia.⁴⁵ A report of the Warsaw Enterprise Institute, published in September 2023, entitled “Migration – Poland's missed (so far) opportunity” indicated that 2.5–3 million Ukrainians were probably staying in Poland. Analyzing data from the Border Guard, the authors of the report indicated that between February 24, 2022, and September 4, 2023, 15.2 million Ukrainians crossed the Polish-Ukrainian border, while 13.5 million Ukrainian citizens returned to their country.⁴⁶ It should be remarked here that since martial law was introduced in Ukraine, men cannot leave the country. We do not have data on how many pregnant Ukrainian women arrived in Poland after the war broke out. There is also no data on how many of the women are/were surrogate mothers.

7. Discussion

As already mentioned, after Russia's invasion of Ukraine, Poland faced a huge logistic challenge of admitting a large number of refugees and providing them with appropriate health and social care. In order to regulate the legal situation of Ukrainians, the legislator decided to introduce separate legislation for those who crossed the Polish border after the outbreak of

⁴⁵ Priyanka Vora, “Russia's Invasion Is Damaging Ukraine's Booming Surrogacy Industry,” Quartz, February 25, 2022, accessed September 9, 2023, <https://qz.com/2133797/russias-invasion-is-damaging-ukraines-booming-surrogacy-industry>.

⁴⁶ Jarema Piekutowski, “Migracje: niewykorzystana (na razie) szansa Polski,” Warsaw Enterprise Institute, September 2023, accessed September 11, 2023, <https://wei.org.pl/wp-content/uploads/2023/09/Migracje-niewykorzystana-na-razie-szansa-Polski-raport.pdf>.

the war.⁴⁷ From March 12, 2022, the Act on supporting Ukrainian citizens in connection with the armed conflict on the territory of this country has been in force.⁴⁸ The key issue regulated by the Act is defining the rules on obtaining and duration of legal residency in Poland. The Act does not apply to Ukrainian citizens who arrived on the Polish territory before the outbreak of the war, even if their arrival was due to warfare. Initially, the legal residency was to end after 18 months, but it has been extended until March 4, 2024.⁴⁹ The law in question allows Ukrainian citizens to access health services on the same terms that apply to persons covered by health insurance, with the exception of health resort treatment and resort rehabilitation (Article 37(1)). Therefore, answering the first question, it should be noted that the Polish legislator did not provide for a separate legislation aimed exclusively at pregnant women who are citizens of Ukraine. The Act does not mention surrogate mothers either.

It is crucial for the present analysis to establish which of the women would be entered on the child's birth certificate as its mother; the woman who gave birth to the child (surrogate mother) or the genetic mother?

As all relationships in the field of surrogacy are mostly regulated by contract(s), the place of birth of the future child is also indicated by the provisions of such contract(s). Should a surrogate mother remain in Ukraine to stay safe for herself and the baby? Should she seek refuge in a third country, such as Poland, Moldova, or Hungary, where parentage laws consign the intended parents to legal complications, or should she press on to a country such as the Czech Republic, where laws for parents are more accommodative?⁵⁰ Or should surrogate mothers even continue with their pregnancies?⁵¹ Do surrogate mothers' contract obligations prioritize the

⁴⁷ In the original wording, being in force until March 26, 2022, the legislation applied only to Ukrainians who came to Poland directly from the territory of Ukraine. The amendment was intended to extend the new arrangements also to persons who crossed the Polish border through another country.

⁴⁸ Consolidated text: Journal of Laws 2003, item 103, as amended.

⁴⁹ Amendment being in force since August 1, 2023.

⁵⁰ Eszter Kismödi and Emma Pitchforth, "Sexual and Reproductive Health, Rights and Justice in the War against Ukraine 2022," *Sexual and Reproductive Health Matters* 30, no. 1 (2022): 1, <https://doi.org/10.1080/26410397.2022.2052459>.

⁵¹ André G. Dias Pereira, Radmyla Hrevtsova, and Thais N. Cesa e Silva, "Gestational Surrogacy: Legal Dilemmas and Experiences in Brazil, Portugal and Ukraine," *Global Health Law Journal* 1, no. 1 (2023): 15–40.

welfare of the unborn child? Surrogate mothers have clear obligations and are accountable to intended parents and, sometimes, agencies and clinics. On the other hand, however, the need to protect one's own and the unborn child's life and health should be recognized as a sufficient reason to flee to another region or country (in the case of our discussion, Poland). There are three possible scenarios here: (1) The surrogate mother moves to a safer region and gives birth to a child in a clinic in another region of Ukraine. In this case, there will not be any significant problems involved. Although the clinic that will accept the birth will change, the registration of the newborn child will be carried out according to the provisions of the Family Code of Ukraine and Rules of State Registration of Acts of Civil Status in Ukraine. (2) The surrogate mother will temporarily move to another country (Poland, for instance), but come back to Ukraine for the birth of the child. The result would be the same as in the first scenario. (3) The surrogate mother moves to Poland, and gives birth to the child in a Polish clinic. In this case, the registration of the newborn child will be carried out in accordance with the Polish Family and Guardianship Code.

As already mentioned, the provisions of the surrogacy agreement would be void of legal effects in Poland, and, under Polish law, the woman who gave birth to a child shall be deemed the mother of that child. The consequence of the above is indicating the adoptive mother as the child's legal mother and entering her data on the birth certificate. The Polish legislator has not provided separate regulations on this matter.

Based on the goals of this article, we offer one of the possible ways to address the situation of surrogate mothers from Ukraine, who have a child in Poland.

In 1993, Poland and Ukraine signed the Bilateral Agreement between the Republic of Poland and Ukraine on legal assistance and legal relations in civil and criminal matters.⁵² This Agreement has section II "Family Law issues." Article 28(2) stipulates that "Establishing and disputing the origin of a child from a certain person is governed by the legislation of the

⁵² Agreement between the Republic of Poland and Ukraine on legal assistance and legal relations in civil and criminal matters, accessed March 3, 2024, <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002805c4784>.

Contracting Party whose citizen is the child's mother at the time of the child's birth.”

Despite the generality of this provision, it is obvious that the legislation of the surrogate mother should be the legislation of Ukraine, namely, the provisions of Article 123 of the Family Code of Ukraine, where the intended parents must be recognized as parents.

8. Conclusion

In conclusion, it should be stated that surrogacy is an important issue that requires regulation at the national level. In the paper, it was demonstrated that selected countries chose different approaches to the matter; ranging from regulations forbidding surrogacy to liberal laws providing for regulated agreements with financial compensation.

The ethical dilemmas presented in the paper proved that the absence of safety regulation leads to a lack of safety for surrogate mothers and their children, which cannot be accepted in the modern democratic state of law.

Although Poland and Ukraine are neighbors, they chose opposite regulatory approaches to surrogacy. Poland has no direct regulation, but in the Family Code it is stated that the mother is the woman who delivered a baby. Surrogacy agreements are not legally binding. Ukraine, in contrast, is known as the most liberal country, where surrogacy agreements are regulated, and surrogate mothers can receive remuneration.

The differences in regulation in Poland and Ukraine were not a practical problem before the Russian invasion. However, the new situation in which Ukrainian surrogates came to Poland looking for a safe place showed that these issues should be discussed again. Unfortunately, it should be emphasized that the Polish legislators did not provide the necessary legal protection to Ukrainian surrogate mothers. What is more, no jurisprudential action was taken in this regard.

Despite the ongoing war, surrogacy is still practiced in Ukraine. Intended parents, surrogate mothers, agencies, and clinics have to make more complicated contracts. The lack of response from Polish authorities makes it necessary for surrogate mothers to seek shelter in countries with more favorable national regulations (Georgia and Cyprus become an option) to avoid complications that could arise from the Polish national regulation.

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