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Modern Surrogacy: Quick Review

Abstract:

Since the mid-1970's, but mainly in last two decades, gestational surrogacy has attracted attention of couples and individuals, who cannot or do not want to have the children of their own. Although from the medical point of view the procedure is not complicated, there are many ethical and legal reasons, that make the surrogacy practice strictly prohibited in numerous countries. Also, the impact of no legislation is considered, as there still exist countries, where surrogacy law is not regulated. This paper presents underlying motivation and consequences of certain legal solutions to discuss surrogate motherhood practice and surrounding problems and to raise the question of the development model that should be promoted at global level.

Key words: gestational surrogacy, family law, civil law, penal law,
European Convention on Human Rights

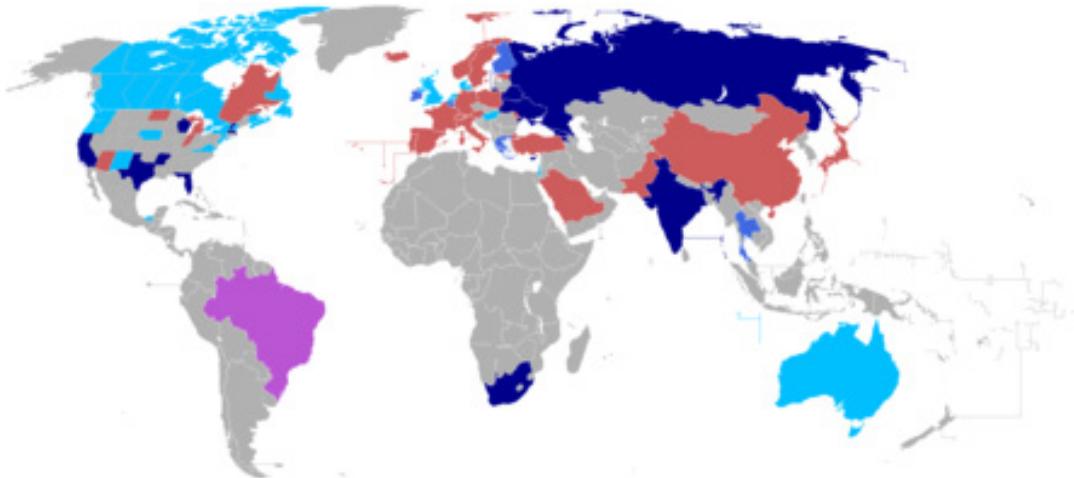
Introduction

Since the mid-1970's, but mainly in last two decades, gestational surrogacy has attracted attention of couples and individuals, who cannot or do not want to have the children of their own. Although from the medical point of view the procedure is not complicated, there are many ethical and legal reasons that make the surrogacy practice strictly prohibited in numerous countries. Let us alone mention Germany or France. Nevertheless, there exist several legal systems, like the Ukrainian one, that approve surrogacy, both commercial and altruistic arrangements. There are also countries (e.g. Canada) that recognize only a non-commercial form of surrogacy. Moreover, there is a bunch of countries or states, which allow also brokering agencies to act in this field.

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This paper presents underlying motivation and consequences of certain legal solutions. Three different approaches to surrogacy are outlined: a complete ban, the legality of commercial arrangements and a moderate approach. Advantages and disadvantages of each approach are discussed. Also the impact of no legislation is considered, as there still exist countries, where surrogacy law is not regulated.

FIGURE 1. LEGAL REGULATION OF SURROGACY IN THE WORLD



- Both gainful and altruistic forms are legal
- No legal regulation
- Only altruistic is legal
- Allowed between relatives up to second degree of consanguinity
- Banned
- Unregulated / uncertain situation

Reference: <https://en.wikipedia.org/wiki/Surrogacy>

Although surrogate motherhood is often considered as a highly advanced technological process, it has been practiced in ancient times. See for instance infertile Sarai's or Rachel's cases². Moreover, for many years it has been a commonly accepted praxis in Arabic culture, as the consequence of the priority of particular family's interests³.

Over the years, surrogate motherhood became more approachable in Western societies. The reasons why public authorities allow contracts between surrogate mothers and intended parents, are quite similar to the ancient ones. People want to have their own offspring. Without strict regulations, desperate mothers and fathers aim for having

² Genesis 16:1–16, 30:10–12. New American Standard Bible.

³ F. Rahman, *A Survey on Modernization of Muslim Family Law*, International Journal of Middle East Studies 1980, Vol. 11, No 4 (Jul.), p. 451–465, <http://www.jstor.org/stable/163177>, 06.12.2015.

children with illegal means. Consequently, the need for appropriate legal control is crucial to avoid the spread of black market practices, e.g. unlawful adoptions.

The aim of this paper is to discuss surrogate motherhood practice and surrounding problems, taking into consideration worldwide regulations.

Firstly, the objective scope of surrogacy is specified. In this paper the surrogacy contract is regarded as an agreement between host (a surrogate mother) and intended parent(s). A surrogate mother agrees to get pregnant and, after childbirth, she delivers the child to the couple (or to an individual), who want to become legal parents of the child. Basically, there exist two types of surrogacy: gestational surrogacy and traditional one. Gestational surrogacy means that intended parents decide to undergo an in vitro fertilization procedure or create an embryo (still with IVF) from cells of anonymous donors. In the effect, child is genetically unrelated to surrogate mother. In traditional surrogacy, a surrogate is genetic mother of a child, as host is egg donor.

In every configuration there exists a major problem of the child's family status. There are numerous cases considered by the European Court of Human Rights that issues guidelines for asserting the child's rights. The most significant Court's judgements (e.g. *Paradiso and Campanelli v. Italy*⁴, *Wagner and J.M.W.L. v. Luxembourg*⁵, *Mennesson v. France*⁶) are discussed. Also, the most influential cases from U.S. jurisdiction are analyzed. Let us alone mention *Baby M.* case⁷ or *Johnson v. Calvert*⁸.

The paper focuses on the child's best interest, as the leading factor that is always mentioned in every decision in „surrogacy cases”. Ethical background of the issue is presented, and medical and sociological factors, that can be decisive for infertile couples or individuals, are described.

Human embryo status is discussed with the reference to the idea of surrogacy. Description of the host's and intended parents' terms in surrogate contracts is given, including the right to privacy and the subjectivity of the child.

The work is finished with conclusion, that not only evaluates each statutory approach, but also raises the question of the development model that should be promoted at the global level.

⁴ Case of *Paradiso and Campanelli v. Italy* (Application no. 25358/12), 27th Jan 2015, [http://hudoc.echr.coe.int/eng?i=001-150770#{%22fulltext%22:\[%22paradiso%22\],%22itemid%22:\[%22001-151056%22\]}](http://hudoc.echr.coe.int/eng?i=001-150770#{%22fulltext%22:[%22paradiso%22],%22itemid%22:[%22001-151056%22]}), 26.06.2016.

⁵ Case of *Wagner and J.M.W.L. v. Luxembourg* (Application no. 76240/01), 28th June 2007, [http://hudoc.echr.coe.int/eng?i=001-150770#{%22fulltext%22:\[%22wagner%22\],%22itemid%22:\[%22001-81328%22\]}](http://hudoc.echr.coe.int/eng?i=001-150770#{%22fulltext%22:[%22wagner%22],%22itemid%22:[%22001-81328%22]}), 26.06.2016.

⁶ Case of *Mennesson v. France* (Application no. 65192/11), 26th June 2014, [http://hudoc.echr.coe.int/eng?i=001-150770#{%22fulltext%22:\[%22mennesson%22\],%22itemid%22:\[%22001-145389%22\]}](http://hudoc.echr.coe.int/eng?i=001-150770#{%22fulltext%22:[%22mennesson%22],%22itemid%22:[%22001-145389%22]}), 26.06.2016.

⁷ *In Re Baby M.* 537 A.2d 1227, 109 N.J. 396 (N.J. 1988), http://wps.prenhall.com/wps/media/objects/3956/4051565/law_cases/ch_16/In_re_Baby_M.pdf, 26.06.2016.

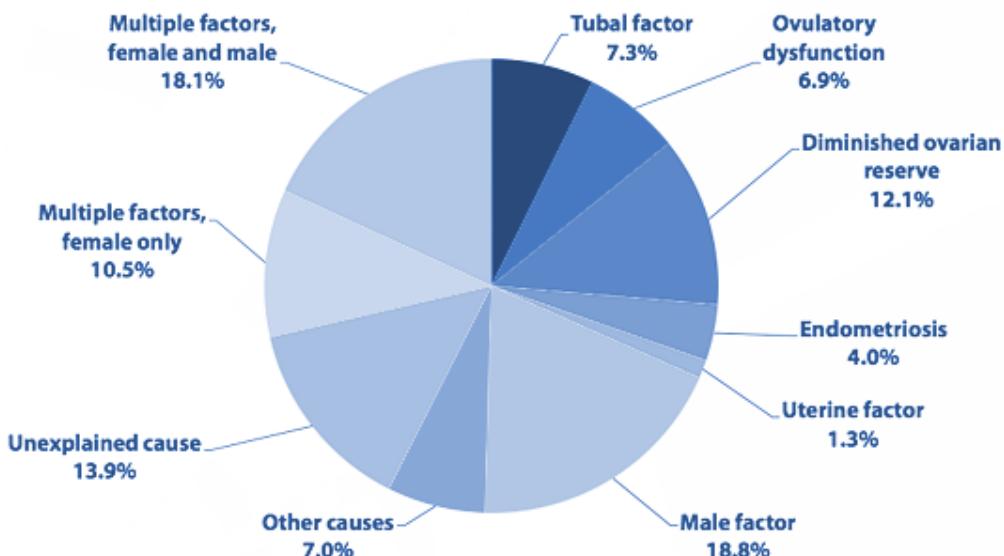
⁸ Case of *Johnson v. Calvert*. Cal. Sup. Ct., 5 Cal4th 84, 851 P.2d 776 (1993), <http://law.justia.com/cases/california/supreme-court/4th/5/84.html>, 26.06.2016.

Surrogate motherhood – reasons of practice

Although surrogate motherhood was differently practiced in ancient times (a childbirth on intended mother's knees compared to Assisted Reproductive Technologies [ART] in the 21st century), the aim of this practice remained the same throughout history. People tend to have genetically related offspring of their own. The reasons why they make arrangements with surrogate mothers, are mainly medical conditions. Inability to reproduce in a natural way is caused by male, female or combined infertility. There are also cases of unexplained infertility (20% of the matter⁹).

FIGURE 2. INFERTILITY DIAGNOSES AMONG PATIENTS WHO HAD ART CYCLES USING FRESH NONDONOR EGGS OR EMBRYOS, 2010

Infertility Diagnoses Among Patients Who Had ART Cycles Using Fresh Nondonor Eggs or Embryos*, 2010



* Total does not equal 100% due to rounding.



Reference: <http://www.fertility-docs.com/patient-resources/art-assisted-reproductive-technology-success-rates.php>

Sterility differentiates from infertility. The first one mentioned is a medical condition of being absolutely unable to have a child, while the other one can be treated effectively. There exist various infertility therapies (pharmacological, surgery, ART, including IVF),

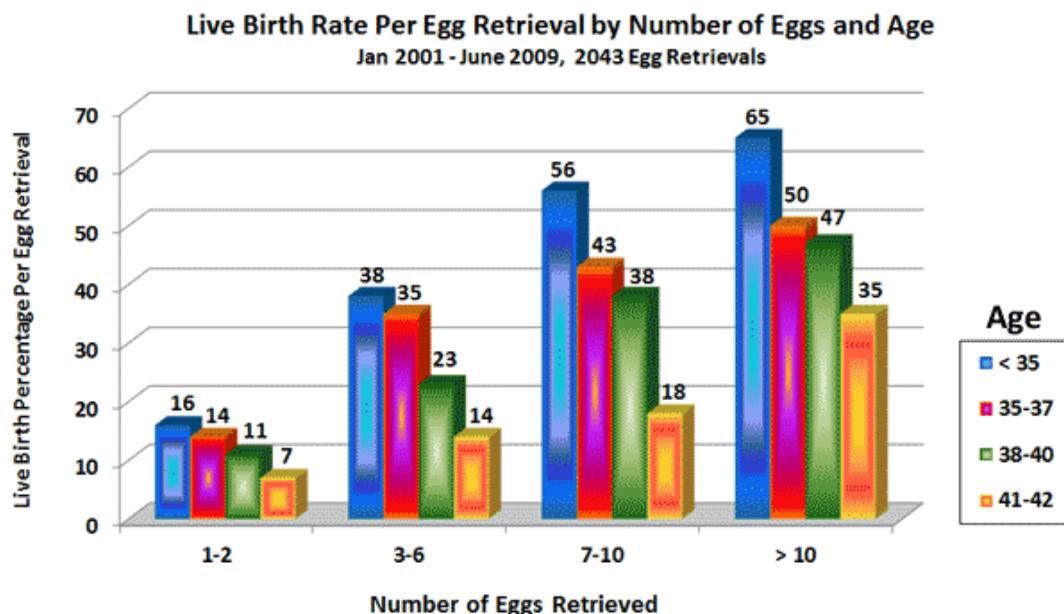
⁹ W. Kuczyński, R. Kurzawa, P. Oszukowski, L. Pawełczyk, R. Poręba, S. Radowicki, M. Szamatowicz, S. Wołczyński, *Rekomendacje dotyczące diagnostyki i leczenia niepłodności*, <http://spin.org.pl/wp-content/uploads/Post%C4%99powanie-z-niep%C5%82odn%C4%85-par%C4%851.pdf>, 26.06.2016.

but they are not always effective. In that point a couple or an individual can end their efforts, adopt a child or find a surrogate mother. The similar solution is often encountered by women who do not want to bear a child for different reasons than medical ones. There is a number of individuals that do not attempt to have a break in their career, are afraid of pregnancy or a childbirth, or simply wish to stay in shape (e.g. Sarah Jessica Parker and her twins). Despite their distinct motivation, there is a growing number of people, who decide to have a baby with a host's help.

If one decides to become a surrogate mother or intended parent, they should acknowledge the health risk of certain medical procedures. In gestational surrogacy it is usually necessary to undergo IVF. For women, it is more perplexing sequence, that requires going through fertility drug therapies to accumulate substantial amount of egg cells. To avoid aggressive pharmacological stimulation, intended parents can use (usually anonymous) donors' reproductive cells. Third party reproduction is also required when individuals cannot produce gametes of their own. Nevertheless, the ovum is fertilized by partner's or donor's sperm. Then embryo transfer is processed to establish pregnancy.

In traditional surrogacy (also known as partial surrogacy), only partner's (homologous insemination) or donor's (heterologous insemination) reproductive cells are transferred to surrogate mother, who is a genetic mother as well.

FIGURE 3. LIVE BIRTH RATE PER EGG RETRIEVAL BY NUMBER OF EGGS AND AGE



Reference: <http://www.advancedfertility.com/eggspregnancyrates.htm>

Family Law – references, family status, the right to know one's own identity

Until now, the roman principle *mater semper certa est* have been as valid as in ancient times. However, the progress of assisted reproductive technology made it no longer

in use. Therefore, some countries effectuated new regulations. So, the principle *mater est quam gestatio demonstrat* is still valid in Poland, Australia or Canada (Quebec).

The Convention for the Protection of Human Rights and Fundamental Freedoms (widely known as The European Convention on Human Rights – ECHR) in Article 8.1. states a right to respect „private and family life”. However, Article 8.2. allows the parties (public authorities) to interfere with the exercise of this right „in accordance with law” and „necessary in a democratic society”, for example „for the protection of health or morals”. It means that every ECHR signatory may decide whereas IVF procedures or surrogacy contracts are permitted in its country. Both of them, IVF and surrogacy procedures, enhance the right to family life. But due to the morals protection or public interests, they can be limited by public authority of each country. That is why France banned every form of surrogacy practice. In this point, the case of *Mennesson v. France* is worth mentioning. Mrs. Sylvie Mennesson was infertile, therefore she went to California. After successful embryo transfer (Mr. Dominique Mennesson, the husband of Mrs. Mennesson was the sperm donor) and their children's births, they came back to France. The children, Valentina and Fiorella were registered, but then the registration was cancelled. Mr. and Mrs. Mennesson appealed several times unsuccessfully. The negative decisions were based on bypassing French legal system by the couple. Twins' registration would have meant the permission for surrogacy practice, courts argued. French authorities mentioned that the lack of registration had not violated family relations in the case; the children stayed with their parents, etc. The Mennessons appealed to ECtHR due to the violation of Articles 8 and 14 of Convention. The daughters did not have French citizenship, that should have been given if one of parents had it. In this case, legal parenthood was not legitimate, thus the citizenship was not conferred. Moreover, their legal situation was unclear, they faced numerous problems with state offices. Without legitimate parenthood, less benign inheritance model would be considered. Furthermore, the complainants accused France of their children discrimination (in comparison with other children in France). ECtHR stated that, similarly to the case of *X, Y, Z v. United Kingdom*, state cannot deny the parenthood of the couple, that actually raise the child, conceived by IVF. Besides, likewise to the case of *Wagner and J. M. W. L. v. Luxembourg*, judges pointed out the existence of the actual family relationship. Due to this long-lasting relationship between the Mennesson couple and their daughters, ECtHR could have considered the violation of Article 8. The Court stated that there was public authorities' interference in Mennesson family law, though it was legal and served for reasonable public interests. Surrogacy practice is a delicate issue and there is no consensus among European countries. ECtHR emphasized that members of The Council of Europe had political autonomy in the range of surrogate motherhood practice and ensuing filial relationship. Notwithstanding, European court stressed that country's autonomy could be restricted when it affected the right of one's own identity. Therefore, the Court emphasized the separations of complainants' claims. There is a difference between the violation of parents' and children's rights. ECtHR did not recognize parents' rights violation. However, the judges deemed the children's claims valid. In the Strasbourg Court's view, the barriers erected by French parliament

limited Mennessons' rights in a reasonable way. Nevertheless, the limitation of children's rights violated Article 8. The respect for personal integrity means that everyone should have the right to know their own identity. The lack of French birth certificates made Valentina and Fiorella insecure about the sense of own identity. On the one side, children were registered in the USA, while in France their family status was unsure. It meant that French authorities had breached the right to know their own identity (in French society), the Court concluded. ECtHR pointed out the children had French father. Therefore, according to his country law, it was enough to obtain French birth certificate. The lack of certificates infringed the paragraph 1 of Article 8. Although this regulation does not guarantee the citizenship for every European, it includes a nationality as the part of the identity of every person. Strasbourg Court stressed that it is obvious why country's law inhibited the recognizance of foreign birth certificates. If French legislator was against the surrogacy practice, then it should have brought the consequences of the ban. This is why the French courts' decisions should have affected the Mennesson couple. French attitude towards the parents was appropriate, the Court summarized. On the other hand, the same attitude towards the children (even though they had been born by a surrogate mother) was unacceptable, the Court concluded. The best interest of the child was not considered as the greater good. The violation of children's private and family life was intensified, as Dominique Mennesson was their biological father. The negation of biological filiation deprives the sisters of their rights. Not only did France deny Californian birth certificates, but also refused the adoption and acknowledgement of paternity. This case showed that the rights' limitation was exaggerated. Although adjudged compensation was relatively small, the sentence opened the possibility of surrogate children recognition. The similar judgement was given in case of *Labassee v. France*¹⁰. Furthermore, in cases *Odièvre v. France*¹¹ or *Jäggi v. Switzerland*¹² the Court signalized that the children born after ART have the right to find personal identity and it is more essential than the autonomy of anonymous cell donors. There are also medical reasons for this assertion. The prohibition of incestuous dealings must be supported by the possibility of knowing one's identity.

However, personal identity and civil status cannot be confused with its emanation in vital record. Civil status is a person's legal condition. It includes the one's name, filiation and marital status. Civil status is indivisible, non-negotiable, non-transferable and non-heritable. Civil status belongs to family law and has two aspects. One of them concerns marital status, the other one – filial status. As long as civil status is indivisible, it cannot be divided by surrogate mother and intended one, even if the last mentioned is genetic mother as well. Civil status can be obtained *ex lege* and it is forbidden

¹⁰ Case of *Labassee v. France* (Application no. 65941/11), 26th Jun 2014, [http://hudoc.echr.coe.int/eng#%22itemid%22:\[%22001-145180%22\]}](http://hudoc.echr.coe.int/eng#%22itemid%22:[%22001-145180%22]}), 26.06.2016.

¹¹ Case of *Odièvre v. France* (Application no. 2326/98), 13th Feb 2003, <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-698999-707368&filename=003-698999-707368.pdf>, 26.06.2016.

¹² Case of *Jäggi v. Switzerland* (Application no. 58757/00), 13th Jul 2006, <https://wcd.coe.int/ViewDoc.jsp?id=1019533&Site=COE>, 26.06.2016.

[in continental legal system] to modify one's filial status in a contract way. Even if the blood bonds are „transferred” with DNA, intended mother's genetic filiation does not make her a legal mother of a surrogate mother's child. Filial relationship is intertwined with one's birth. Therefore, commissioning mother does not have the right to have a parental responsibility over born child.

At that point, best interests of a child as decisive factors in ethical disagreements and in „surrogacy” litigations should be discussed. To excogitate all aspects of the issue, case *Paradiso and Campanelli v. Italy*¹³ is worth mentioning. In this case ECtHR decided that all regulations and decisions shall consider the best interest of a child. Although a child of Paradiso and Campanelli couple stayed with a different family (the baby was under their care for 2 years), the Court concluded that there was an Article 8 violation. Removing the child from the Italian intended parents violated their right for the family life. The Court's reasoning left opened a possibility of adopting „surrogate” children.

The ECtHR decision is even more ground-breaking, as the international law does not pertain to the exact ways of setting the parental affiliation. However, the European Convention on the Legal Status of Children Born out of Wedlock relate to paternal and maternal affiliation, recognition, denial and contesting of paternity. Pursuant to Article 2 of the Convention maternity shall be established only on the fact of the birth. The maternal affiliation allows parties to establish a paternal affiliation. This guideline proves that biological bond reasserts family ties. To reinforce these regulations, Article 7 of the Convention on the Rights of the Child demands the registration of all the newborns. According to this norm everyone has right to know their own identity.

Similarly, International Covenant on Civil and Political Rights (Article 24) also requires the registration of every child. Similarly, it establishes the right to have a name. To sum up, all international conventions express the importance of the child's right to know their own identity. The right outweighs general family's interest. This statutory approach however cannot be adequately supervised and controlled. It should be noticed that there is not many prosecution action for breaches of such laws¹⁴.

Subject of the contract

It is hard to precise the subject of a surrogacy contract. There are several theories that say the subject is a gestational service or an adoption. Due to the counter theory, a child comprises the subject. Based on this statement, surrogacy contract should be illegal. No human being can be a subject of contract. Otherwise surrogacy would lead to human trafficking. According to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children or Council Framework Decision 2002/629/

¹³ Case of *Paradiso and Campanelli v. Italy* (Application no. 25358/12), 27th Jan 2015.

¹⁴ See also: Family Law Council (Australia), *Report on Parentage and the Family Law Act*, Dec 2013, p. 86, <https://www.ag.gov.au/FamiliesAndMarriage/FamilyLawCouncil/Documents/family-law-council-report-on-parentage-and-the-family-law-act-december2013.pdf>.

JHA of 19 July 2002 on combating trafficking in human beings, such actions are considered as crimes. However, surrogacy cannot be considered as a criminal act against freedom. Otherwise than dignity, this legal good applies only to persons. International law does not view a human embryo as a person. Even if an embryo does have a dignity, it does not have freedom.

On the grounds of The Catholic Church definition: „Freedom is the power, rooted in reason and will, to act or not to act, to do this or that, and so to perform deliberate actions on one's own responsibility. By free will one shapes one's own life”¹⁵. It is clear that a human embryo does not have will nor reason. That is why it cannot have the power to decide to act.

Let us recall the subject of the contract; the gestational service should be discussed. The last one is impossible without the delivery of the child to the intended parents. Redefining the object, the specified pregnancy and the labor can comprise the objective scope of the contract. This definition makes the contract legal in line with international law.

At this point the surrogate mother's obligations and her right to privacy should be considered. As a matter of principle, every woman has a sole right over what to do with her own body. In consequence, she can receive gametes or zygotes, but it does not mean that she can be obliged to gestational service afterwards. However, a question arises: when the pregnancy contract is valid?

Some countries banned those indentures completely. Let us alone mention France (e.g. *Mennesson v. France*), Spain or Germany. The last one delegalized the contract due to the possible surrogate mothers' exploitation. It is true that people in bad economic condition are sometimes forced to take certain job offers. They would not have accepted them if not their financial standing. It is well known that some women decide to become surrogate mothers because of their economic position. Sometimes young mothers cannot provide for their own children. To support financially their families, they choose to be paid for bearing a child for someone else.

Nevertheless, during pregnancy, maternal bond between child and mother often develops. Sometimes it is so strong that surrogate mother refuses to pass the child to intended parents. Even if baby is unrelated genetically to surrogate mother, she sometimes changes her decision. It is not expected that surrogate will not have any feelings for the child she carries. The decision made at the beginning of the pregnancy may change. The latter delivery of the child may affect the woman's sanity¹⁶. That is why the surrogate mother's obligation should not be unconditional.

For instance, in some US states (e.g. Illinois) surrogacy contracts are not typical agreements. A good example that illustrates the problem is *The Baby M.* case¹⁷.

Mary Beth Whitehead was artificially inseminated with semen of the intended father, Mr. David Stern. For fee of \$10,000 she got pregnant and become biological and genetic mother of a child. Mrs. Whitehead agreed to surrender the baby for his father and be separated from the child. When she carried to term, she turned the child

¹⁵ Article 3 of the Catechism of the Catholic Church.

¹⁶ R. Ali, R. Kelley, *Matki nie swoich dzieci*, Newsweek Polska 2008, nr 16, p. 84–85.

¹⁷ In Re Baby M. 537 A.2d 1227, 109 N.J. 396 (N.J. 1988).

over to the Sterns. However, Mrs. Whitehead started to feel terribly sad and desperate. Surrogate mother came to intended parents' house and threatened them with a suicide, unless they give her the daughter. She escaped with the infant and refused to give her back. David Stern filed a complaint seeking enforcement of the surrogacy contract. He also wanted to obtain a custody over the child. Finally, with the Police's help, he found Mrs. Whitehead and took the daughter. After a long trial with many interlocutory appeals, the Court came to the following conclusion:

We invalidate the surrogacy contract because it conflicts with the law and public policy of this State. 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. We remand the issue of the natural mother's visitation rights to the trial court, since that issue was not reached below and the record before us is not sufficient to permit us to decide it *de novo* (...). We find no offense to our present laws where a woman voluntarily and without payment agrees to act as a „surrogate” mother, provided that she is not subject to a binding agreement to surrender her child. Moreover, our holding today does not preclude the Legislature from altering the current statutory scheme, within constitutional limits, so as to permit surrogacy contracts. Under current law, however, the surrogacy agreement before us is illegal and invalid.

The *Baby M.* case received worldwide attention. The best interest of the child's analysis and the decision of the Supreme Court to keep the child with the Sterns has aroused universal controversy. The Court granted the custody to the parents who were in a better financial condition. Better economic standing does not guarantee the protection of child's best interests.

The case *Johnson v. Calvert*¹⁸ also remain controversial. Ms. Anna Johnson, Mrs. Crispina and Mr. Mark Calvert signed a contract. Ms. Johnson agreed to get pregnant with the transplantation of an embryo, created from the Calverts' gametes. During the pregnancy, the surrogate mother decided not to relinquish her parental rights. Therefore, the intended parents took a legal action against Mrs. Johnson. So did she and the lawsuits were consolidated. After a long trial, the Supreme Court of California came to the following conclusion:

It is arguable that, while gestation may demonstrate maternal status, it is not the sine qua non of motherhood. Rather, it is possible that the common law viewed genetic consanguinity as the basis for maternal rights. Under this latter interpretation, gestation [5 Cal. 4th 93] simply would be irrefutable evidence of the more fundamental genetic relationship (...). We conclude that although the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is,

¹⁸ Case *Johnson v. Calvert*. 5 Cal.4th 84, 851 P.2d 776.

she who intended to bring about the birth of a child that she intended to raise as her own- is the natural mother under California LA.

The case before us proves that parenthood was allocated to the couple who were genetic gametes donors rather than the woman who bore a child. The contract's enforcement led to surrogate mother's abuse. The rigors of the indenture had not been mitigated, although they should have.

While the cases of *Baby M.* and *Johnson v. Calvert* were controversial, both sides were willing to take responsibility for the baby. On the contrary, in the case of *Buzzanca v. Buzzanca*¹⁹, there was no claim to the child.

Luanne and John Buzzanca agreed to have an anonymous donor's egg fertilized with anonymous donor's sperm. The embryo was transferred to a surrogate and successfully implanted. During established pregnancy, intended father decided to get divorced. Neither he did not want be a lawful parent of the child, nor did he want to take any financial responsibility for his earlier decision. After child's birth, the surrogate relinquished her parental rights. The next problem was that intended mother was not the biological mother. She did not give a birth nor she was an egg donor. Under those circumstances, the trial court concluded that the infant had no legal parents. However, the Court of Appeals changed that decision. Similarly, as in *People v. Sorensen*, the Supreme Court stated: „A reasonable man who (...) actively participates and consents to his wife's artificial insemination in the hope that a child will be produced whom they will treat as their own, knows that such behavior carries with it the legal responsibilities of fatherhood and criminal responsibility for nonsupport”.

The Court of Appeals concluded:

Even though neither Luanne nor John are biologically related to Jaycee, they are still her lawful parents given their initiating role as the intended parents in her conception and birth. And, while the absence of a biological connection is what makes this case extraordinary, this court is hardly without statutory basis and legal precedent in so deciding. Indeed, in both the most famous child custody case of all time, and in our Supreme Court's *Johnson v. Calvert* decision, the court looked to intent to parent as the ultimate basis of its decision. Fortunately, as the *Johnson* court also noted, intent to parent "correlate[s] significantly" „with a child's best interests. (*Johnson v. Calvert*, *supra*, 5 Cal.4th at p. 94, quoting *Schultz*, *op.cit. supra*, Wis. L. Rev., at p. 397.) That is far more than can be said for a model of the law that renders a child a legal orphan.

The present case shows that the best interests of a child can be endangered by its parents' irresponsible behavior. The surrogacy contracts increase the probability of rendering children legal and actual orphans.

Similar situation took place in the case of *Stiver v. Parker*²⁰. In this case Judy Stiver, the surrogate mother, agreed to be artificially inseminated with Alexander Malahoff's

¹⁹ In re: *Marriage of John A. and Luanne H. Buzzanca*. 61 Cal.App.4th 1410, 72 Cal.Rptr.2d 280, <http://law.justia.com/cases/california/court-of-appeal/4th/61/1410.html>, 12.07.2016.

²⁰ Case *Stiver v. Parker*. United States Court of Appeals, Sixth Circuit, 975 F.2d 261, <http://openjurist.org/975/f2d/261/stiver-v-j-parker-md>, 12.07.2016.

gametes. Within nine months, a disabled baby, infected with cytomegalovirus (CMV) was born. Therefore, the blood tests were followed. In the effect, the parties learned that the baby was the Stiever's child. However, no one wanted to take responsibility for the infant. The surrogate argued that she had not been warned not to have unprotected sexual intercourse. The Stivers also claimed that Mr. Malahoff had not exercised a high degree of diligence and had been responsible for the infection with CMV. Intended father argued that he was not the genetic father of the child. He wanted to withdraw of the contract without making any payments for Judy Stiver. In his opinion there had been no adequate due diligence by the other party. The Sterns did not want to return the money. They claimed that the payment was made for the gestational service, not for the baby itself. After a trial, US Court of Appeals came to the following conclusion:

The contracting parties may change their minds due to changed circumstances and abandon the child, as Malahoff appears to have done in this case after Christopher was born with birth defects, even before it was discovered that Malahoff was not Christopher's father. This may lead to child abuse. Such arrangements may lead to the monetization of a surrogate mother's attributes like race, intelligence, beauty and social standing, or the child may be of the wrong gender. There is more at stake here than simply the values of the marketplace and freedom to contract which prevail in ordinary commercial activities. 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.

It is clear that surrogacy contracts may lead to child abuse. The cases shown above prove that surrogacy may cause several social, psychological and legal problems. Surrogate motherhood may overcome medical difficulties and make a lot of infertile couples become happy parents. However, it should be noticed that assisted reproductive technology results in new intractable problems. „Providing” parenthood to intended parents may lead to surrogate mother's abuse. There are many children waiting for adoption. Nevertheless, people decide to arrange surrogacy contract that, in effect, creates a new life. A child becomes the subject-matter and as a consequence, one of the mothers is separated from the child.

Conclusion

The aim of this paper was to outline and investigate the issues arising from the surrogacy contracts. This work focused on on civil law regulations, however, penal law was also taken into consideration, as those two areas are correlated. Due to the biotechnological development, surrogacy agreements are more available and popular among infertile couples or singles. The subject of this paper concerned the admissibility and validity of surrogacy practice in several countries and states. The work was also focused on possible execution regarding surrogacy contracts. International or country law cannot resolve all the problems caused by new institutions. Still, the current legal status of surrogacy is unclear. Some European Union countries' approach were described. The research was based on the case-law of the European Court of Human Rights,

the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine and European Convention on Human Rights. Child's best interest and possible child abuse were also discussed. Several ethical aspects of the complex problem were presented. Social and medical background of surrogacy was studied.

It must be noticed that it is up to public authorities to create adequate regulations that cater for social demands. Nowadays, in many countries, public policy regarding surrogacy is failing. In states, where surrogate motherhood is strictly prohibited, citizens go abroad to achieve their goals. Public authorities may prevent its citizens from surrogate motherhood or other ART practices. Notwithstanding, this approach leads only to „fertility tourism”. Countries with more permissive regulations often benefit from the taxes and general turnover regarding surrogacy practices. According to dr Liz Bishop, „The Confederation of Indian Industry estimates its annual contribution to the Indian economy to be \$2 billion, an important market for all those with vested interests but one that is unregulated”²¹.

In some countries (e.g. England) only altruistic form of surrogacy is allowed. The agreement is authorized by courts, that control payments (made for reasonable expenses) and allows parental order. However, that supervision is executed *ex-post* and often leads to sidestepping English restrictions. Although surrogate motherhood was meant to be an altruistic offering, a gift for infertile couples, now it remains a commercial contract, that often is a source of host's income. The High Court of Justice (Family Division) in England concluded: „The reality is there is a legal commercial framework which is driven by supply and demand”²². As Claire Flenton-Glynn argues: „Couple has little difficulty circumventing the law, and commercial surrogacy is permitted through the back door (...) domestic prohibitive laws are not operating effectively to prevent commercial surrogacy”²³. Registration through Parental Order is not executed effectively. About 50% surrogate births were registered officially²⁴. It means that ineffective bans can be easily avoided²⁵ without protecting surrogate mothers.

Even if surrogate mother is given legal advice and has sufficient support, she is not always in control of situation. Basing on Pamela Laufer-Ukeles's research, any form of commercial surrogacy, even with surrogate's informed consent, is „inherently moral suspect”²⁶.

²¹ L. Bishop, *India's new surrogacy laws are only part of the equation*, <https://www.monash.edu/news/opinions/indias-new-surrogacy-laws-are-only-part-of-the-equation>, 26.06.2016 [in:] C. Flenton-Glynn, *Outsourcing ethical dilemmas: regulating international surrogacy arrangements*, Medical Law Review, Vol. 24, No. 1, p. 66.

²² Re P-M (2013) EWHC 2328 (Fam).

²³ C. Flenton-Glynn, *op.cit.*, p. 63–64.

²⁴ M. Crawshaw, E. Blyth, O. van den Akker, *The Changing Profile of Surrogacy in the UK – Implications for National and International Policy and Practice* (2013) 34 JSWFL, 1, 3 [in:] C. Flenton-Glynn, *op.cit.*, p. 75.

²⁵ C. Flenton-Glynn, *op.cit.*, p. 75.

²⁶ P. Laufer-Ukeles *Mothering for Money: Regulating Commercial Intimacy*, Indiana Law Journal 2013, 1223.

Other authors demand judicial authorization to protect hosts' exploitation and children's commodification. In Greece, courts have the power to control and supervise surrogacy arrangements *ex ante*. The compensation given to surrogate is determined by domestic law and it is not up the parties to change the payment amount²⁷. The similar situation takes place in South Africa. Pursuant to the Children Act, all surrogacy agreements must be approved by the High Court. The Court controls surrogate mother's financial standing; the compensation from the commissioning parents cannot be the source of surrogate's income²⁸. Also Israeli law fights against commercial surrogacy. Every arrangement must be confirmed by ethics committee²⁹. The South African, Israeli and Greek regulations prevent surrogacy to be a form of child sale.

Due to the growing trend of surrogacy arrangements, there is a need to reinforce legislation that protects surrogate mothers and children. The third-party activity must be restricted. No brokering agencies should gain from the arrangements between hosts and commissioning parents. That is the only way to avoid the hosts' exploitation and children's commodification. Also domestic supervision and control must be exercised *ex-ante*. Surrogacy contracts must be transparent and easily accessible³⁰ for everyone to avoid problems encountered nowadays.

Surrogate agreements must be unenforceable. Hosts should have the possibility to keep the child without paying any penalties for non-compliance. Only the compensation and the payment should be returned.

Concluding, no one should be deprived from the right to have a child that is genetically related to him. Nonetheless, it is a matter of individual conscience to decide whereas surrogacy practice is ethical. The Warnock Committee stated: „that people should treat others as a means to their own ends, however desirable the consequences, must always be liable to moral objection. Such treatment of one person by another becomes positively exploitative when financial interests are involved”³¹.

* * *

Współczesne regulacje rodzicielstwa zastępczego

Od połowy lat 70. XX w., ale przede wszystkim w przeciągu ostatnich 20 lat, rodzicielstwo zastępcze spotyka się z rosnącym zainteresowaniem, zarówno par, jak i osób indywidual-

²⁷ L. Brunet, D. King, J. Carruthers, C. Marzo, K. Davaki, J. McCandless, *Comparative study on the regime of surrogacy in the EU member states*, http://eprints.lse.ac.uk/51063/1/_libfile_REPOSITORY_Content_Davaki,%20K_Comparative%20study%20regime%20surrogacy_Davaki_Comparative_study_regime_surrogacy_2013.pdf, 25.07.2016.

²⁸ *Ibidem*, p. 339–350.

²⁹ *Ibidem*, p. 33.

³⁰ C. Flenton-Glynn, *op.cit.*, p. 74.

³¹ The Warnock Report (1984): *Report of the Committee of Enquiry into Human Fertilisation and Embryology*, p. 46, http://www.hfea.gov.uk/docs/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fertilisation_and_Embryology_1984.pdf, 25.07.2016.

nych, które nie mogą mieć własnych dzieci. Mimo iż z medycznego punktu widzenia procedura ta nie jest skomplikowana, to można zauważać wiele powodów, zarówno prawnych, jak i etycznych, które sprawiają, że procedura macierzyństwa zastępczego wciąż spotyka się z prawnymi ograniczeniami w wielu krajach na świecie. Pomimo faktu, iż wpływ braku regulacji prawnej w tym zakresie jest doskonale znany, wciąż w niektórych krajach na świecie nie wprowadzono jakiejkolwiek regulacji prawnej w tym zakresie. Artykuł prezentuje zarówno motywacje, jak i konsekwencje wiążące się z konkretnymi modelami regulacji prawnej w tym zakresie, by przeprowadzić dyskusję na temat praktyki macierzyństwa zastępczego i związanych z nim problemów, a także poszukiwać modelu rozwoju macierzyństwa zastępczego, który wart jest promowania na szczeblu globalnym.

Słowa kluczowe: rodzicielstwo zastępcze, prawo rodzinne, prawo cywilne, prawo karne, Europejska Konwencja Praw Człowieka