

Surrogacy: Legal and Moral Dimension of the Problem from the Perspective of Russian, Foreign and International Experience

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Abstract: The legal regulation of surrogacy in Russia shows several legal and moral problems. These problems predermine complexities in the enforcement of surrogacy legal rules. Russian law as a part of modern West-European legal systems follows in its development the foreign legal experience and international legal standards. The researchers determine perspectives of further development of Russian law in the field of legal regulation of surrogacy taking into account ethical, legal aspects of Russian realities, foreign and international legal experience.

Key words: Surrogacy, moral dimensions of surrogacy, reproductive techniques, foreign legal experience of surrogacy, surrogate motherhood, legal recognition of surrogate motherhood, legal regulation of *in vitro* fertilization

INTRODUCTION

Up to the year 2011 surrogacy, according to its bad spread and closeness of the Russian society to such questions in the period of Soviet law, failed to have any proper legal regulation. The fact that surrogacy as a legal institute correlates with a large number of serious moral aspects leads to non-recognition of this institute in many countries around the world. The questions of surrogacy, of legal preconditions of using assisted reproductive techniques in the Russian law and place of the Russian law in the international legal order become very actual.

ASSISTED REPRODUCTIVE TECHNIQUES: CONCEPT, LAW AND ETHICS

Not all the people have natural ability to give birth to children. Thanks to the methods of assisted reproductive techniques, the solution of this problem has been found. Assisted reproductive techniques are methods of infertility treatment, according to which some or all the stages of conception and early embryo development take place outside the mother's body (also using donor's and (or) cryopreserved reproductive cells, tissues of reproductive organs and embryos and also surrogacy). Assisted reproductive techniques should be treated as a positive phenomenon as they have a positive aim to give an opportunity to the infertile spouses to become parents. In October 2010, the British scientist-Robert Edwards was awarded a Nobel prize for the method of *in vitro* fertilization. His creation of the technology of *in vitro* fertilization helped to give birth to 4 million babies.

«Reproductive technologies are becoming more various, effective they penetrate deeper into the natural processes of gender relations and nowadays due to the discovery of animal cloning, it comes close to the point, beyond which unpredictable processes may appear (Lushnikov *et al.*, 2008). So, they give birth not only to the child but also to both: legal and ethic problems, connected with the artificial human reproduction (Joseph and Schenker, 2011).

INTERNATIONAL LAW: PRECONDITIONS OF RECOGNITION

The Universal declaration of human rights of 1948 strengthens the rights of every person to have a family: «men and women of full age, without any limitation due to the race, nationality or religion have the right to marry and to found a family... the family is the natural and fundamental group unit of society and is entitled to protection by society and the state» (Article 16) (UN, 1948). But «it is a birth of a child in contrast to the formal marriage or cohabitation that constitutes a real family, vertical construction which maintains a healthy society».

THE POSITION OF FORMAL LEGAL ORDERS (EXCEPT RUSSIA)

In some countries surrogacy is forbidden. These are such states as France, Germany, Austria, Norway, Sweden, some US states (Arizona, Michigan, New Jersey). For example, the French law about bioethics of 1994 entered into the Civil code such articles as

Article 16-7 which treats all the surrogacy agreements as void and Article 16-9 which makes this rule imperative (Madanamoothoo, 2013). In 2008, the State council of France preserved the prohibition of the surrogacy usage, due to the following arguments.

The interest of the child: Nowadays there are no serious researches about the impact of “splitting” of mother’s image, inevitable if using surrogacy on children.

The welfare of the surrogate mother and her family: Pregnancy always involves some danger to the health of a pregnant woman. Consequences of the surrogate motherhood including psychological, may appear and continue later.

The risk of exploitation of surrogate mother: Sociological researches show that more often surrogate mothers are women who have financial straits.

Contradiction to the public policy: In other countries surrogate motherhood is permitted only on non-commercial basis or with serious limitations. Among them: Australian state Victoria, United Kingdom (here only the operating costs are allowed to be payed), Kanada, Israel, the Netherlands (the advertisement of surrogacy, surrogate mother’s offers their selection are forbidden), Denmark, some USA states (New Hampshire, Virginia) (Garrity, 1999).

In particular in Great Britain, relations connected with surrogate motherhood are regulated by the Surrogacy arrangement act of 1985 and human fertilization and embryology act of 1990 (with additions of 2008). According to the Article 1(3) of the Surrogacy arrangement act, 1985 relations between surrogate mother and customers are based on the agreement. However, the legislation doesn’t connect the rise of rights and duties of the parties with the agreement and denies legal protection of such requirements (Article 36(1) Act 1990, Article 1 Act 1985). The Act of 1990 established in the Article 27(1) that a woman who carried a child and no other woman may be treated as the mother of the child. Moreover, this provision operates extraterritorially (Article 27). If she is married her husband is considered to be the father of the child, unless it is shown that he didn’t consent to her fertilization *in vitro* (Article 28 (2)).

Child’s parents can’t just transfer parental rights and duties (parental authority) to other people. The act of 1990 provided a special judicial procedure of issuing parental prescriptions (parental order) as a result of which customers become parents. The interests of the child are represented by the guardian-representative in the court

proceeding (*ad litem*) and the court must be sure that the following conditions are respected (Article 54 Act 2008): the consent of the surrogate mother and her «customers» should seek parental prescriptions in the period of 6 months after the birth of the child non-commercial surrogacy contract.

Court must be sure that no money or other benefits (except those required to cover the costs, connected with pregnancy) were given or got by the parties as a consideration. The average cost in connection with pregnancy ranges from 7,000-15,000 pounds. However, the court may approve additional payments retrospectively. For example, in the case *In Re X and another (Children) (Parental Order: Foreign Surrogacy)* the court issued the parental order, desperate the fact that the surrogate mother from Ukraine got compensation in amount of 25,000 euro. According to the words of the judge Hedley J. “It is practically impossible to imagine a situation in which at the moment of trial child’s interests (especially the child from another country) would not suffer... in case of the rejection of the court to issue the parental order” (Gilmore and Glennon, 2014).

In the third countries, the surrogate motherhood is conducted in the point of fact (Trimmings and Beaumont, 2013). In Belgium, Greece, Spain surrogate motherhood is not regulated but the law but it actually exists. Finally, there are countries where performing of assisted reproductive technologies including surrogacy, may be also on commercial basis-most USA states, South Africa, Ukraine and Kazakhstan.

THE POSITION OF THE RUSSIAN LAW

The Russian Federation is one of the states which allows different methods of assisted reproduction including surrogacy. Until recently, the Russian legislation in the sphere of assisted reproductive technologies has been very fragmentary and contradictory (Joseph and Schenker). In Russia, there was a certain legislative vacuum in the regulation of reproductive rights in general and in the sphere of application of the modern methods of assisted reproductive technologies. On the 21st of November, 2011 the Federal Law No. 43 “on the basis of the health secure of citizens of the Russian Federation” was adopted (here in after the Law No. 34).

For the 1st time at the legislative level the definition of the assisted reproductive technologies was fixed (p. 1 Article 55 law No. 43): these are therapies, methods of overcoming the infertility which may be used only for medical reasons. Herewith «surrogate motherhood is a gestation and the birth of a child (including prematurity) under a contract, conducted between the surrogate

mother (a woman who carries a fetus after the transfer of the donor embryo) and potential parents whose germ cells were used for fertilization or a single woman for whom the bearing and the child's birth is not possible for medical reasons (p. 9 Article 55 Law No. 43).

Law No. 43 has corrected the list of people who have an access to the assisted reproductive technologies they are men and women both married and unmarried in case they have mutual informed consent to the medical intervention and also a single woman (p. 3 Article 55 Law No. 43). Previous law clearly allowed surrogacy only to married couples. The right to be the father and the mother of the child, born as a result of the surrogate motherhood program, single men and women defended in court.

The legislative consolidation was given to the widely used in practice surrogacy contract as a basis and a model of relationship between the potential parents and surrogate mother. However the Law No. 43 does not contain any rules about the form of the contract, does not specify the content of the contract and does not regulate other aspects.

It is stated that the surrogate mother can't be at the same time the egg cell donor (p. 10 Art. 55 Law No. 43). The adoption of this prohibition can reduce the risk of non-fulfillment of giving the baby to the potential parents.

The new legislation now takes into account the interests of the surrogate mother's spouse. To take part in the reproductive technology as a surrogate mother, a married woman must have a written consent of her husband. Taking into account the priority of interests of surrogate mother who has got a right to keep the child she gave birth to with her and Russian family legislation presumption of paternity (the husband of the woman who gave birth to a child will be recognized as the father of this child) the adoption of this rule was more than appropriate.

LEGAL PROBLEMS OF RECOGNITION OF SURROGATE MOTHERHOOD IN RUSSIA

Despite the number of the positive changes in legal regulation of surrogacy it is not yet perfect. The legal regulation of assisted reproductive technologies is conducted only through the prism of subjective rights of prospective parents and surrogate mother. However, the rights and the interests of the child are not even mentioned. The question of the destiny of the child who can't be taken (due to the death) or is not wanted to be taken by potential parents is opened.

The Russian legislation doesn't provide any guarantees of realization of the rights and interests of potential parents, involved in the reproductive technology.

The question of the realization of the posthumous program of the gestational surrogacy, using germ cells of dead people which were cryopreserved when these people were alive. The law just provides the rights of people to cryopreservation and storage of their germ cells, tissues of reproductive organs and embryos for personal and other means (p. 10 of Article 55 Law No. 43).

RUSSIAN LEGAL PRACTICE AND VIEWS OF THE RUSSIAN SOCIETY. LAW AND ETHICS: FOR AND AGAINST

Positions of Russian courts are not unified (Gorbunova and Svitnev, 2011). Large public outcry followed the decision of the Russian courts to recognize the right of single men to use the technology of surrogate motherhood (the decisions made before the adoption of the Law No. 43).

Judicial practice before the adoption of the Law No. 34 gave rise to the broad public discussion. Thus, the well-known Russian writer Polina Dashkova pointed out: "a person who is not able to build relationship with a man, or a woman, create a family is unlikely to raise children. After all a family is mainly, the ability to build human relationship, a sense of partner, sense of another person, equal to you. And a person is not capable to it just from the beginning, even if he made some flat attempts he decided to live without a woman, ordered children, "bought" them and is going to bring them up. From the standpoint of ordinary morality it looks problematic". In continuation of the discussion Hieromonk Dimity (Pershin), the chairman of the commission of biomedical ethics and medical law at the Synodal department of youth affairs of the Moscow patriarchate, declared: "in this situation just born kids were traumatized twice: firstly, they were cut off from the mother who tragened them (motherhood can't be surrogate) secondly, they were deprived of mother's love and care for all their life". Speaking about the rights of single men, ordering children we've forgotten about the fact that children are not rabbits or guinea pigs. They need a complete family, communication with both parents, even in the period of intrauterine life. Instead of this they are being turned into a commodity, make them hostages of consumer attitude towards human life» (Gorbunova and Svitnev, 2011).

On the other hand as A. Dronova notes, the tendency analysis shows that the institution of surrogate motherhood develops regardless to the attitude of Church and society towards it «because man is naturally programmed to the procreation and «the own» child is psychologically always dearer and closer than the child I care» that is why men and women, deprived of normal

reproductive capabilities will look for other, essentially similar ways, rather than classic adaptive (adoption, foster care, protectorship, etc.).

The idea of using assisted reproductive technologies in the religious ethics is far from being absolute. So, Islam and Islamic law approve them only under strict set of requirements: only genetic material of husband and wife may be used for fertilization, the use of donor material is contradictory to the sanctity and integrity of the marriage bond, leads to the disruption of genealogy and genetic code of the family and to the unusual but yet adultery.

The opponents of considered technologies, especially surrogate motherhood are basic Christian doctrines including the orthodox church which claims that surrogacy violates the unique connection between the mother and the child in the period of pregnancy and in general the sacrament of marriage as a union of soul and body (Balashov, 1995).

CONCLUSION

Further development of the Russian legislation in this sphere is becoming more complicated because of the lack of moral and ethical grounds of using assisted reproductive technologies in the Russian society.

Underlined problems indicate the necessity of working out the systematic approach to the legal provision of using both: in the Russian law and on the level of other laws and orders. Such an approach should make a balance between the interests of people, taking part in reproductive programs and the interests of children, born as a result of using such programs and public interests.

Due to the lack of common approaches to the legal regulation of surrogacy in the national legislations and different views on this problem from the point of view of morality and religion, the existence of strategic challenges which are faced by the states and other factors, the special role in the development of surrogacy is given to separate laws and orders.

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