

THE LEGAL FRAMEWORK ON SURROGACY IN UKRAINE: QUO VADIS?

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Abstract. Ukraine is one of the few countries in Europe that allows surrogacy for both its own citizens and foreigners. It is a very attractive destination for reproductive tourism because of its convenient geographical position, good level of medical services and moderate prices; moreover, legal regulation on surrogacy in Ukraine is fragmentary as no special law on human reproduction has yet been adopted.

This paper aims to uncover the conditions for surrogacy in Ukraine alongside the gaps in the current Ukrainian legislation and to compare the Ukrainian legislation on surrogacy with the legislation of European countries. The author also aspires to analyze the recent draft laws on assisted human reproduction that have been submitted for consideration to the Ukrainian parliament. Another purpose of the article is to formulate the legal problems of the surrogacy industry in the early wartime.

The principal result of the paper is that the need for detailed regulation surrounding surrogacy is pressing, and the adoption of special laws on assisted human reproduction by the Ukrainian parliament would be a significant step forward.

The author concludes that the regulation of surrogacy in Ukraine is very liberal in comparison with the rules of most of the countries of Western Europe, where surrogacy is banned. At the end of 2021 and during 2022–2023, four different draft laws dedicated to assisted human reproduction were considered by the Ukrainian parliament. Despite the fact that the legislative work calendar of the Ukrainian parliament provided that the relevant law should be adopted in 2023, on May 3, 2023, the Ukrainian parliament rejected all of the abovementioned drafts. It is expected that other drafts will be elaborated and submitted in the nearest future.

The war initiated by the Russian Federation against Ukraine, which began on February 24, 2022, has greatly affected the reality of surrogacy. The emergency evacuation of surrogates and difficulties in obtaining transportation documents and birth certificates for children born after surrogacy are just some of the problems faced by both intended parents and agencies. These problems will not cease until the war is over.

Keywords: surrogacy, surrogate, reproductive rights, assisted human reproduction.

Introduction

In the global press, Ukraine is seen as a world leader on surrogacy, with very liberal and fragmentary legal regulation (Coles, 2022). Several draft laws have recently been submitted to the Ukrainian parliament, and their adoption could begin to influence the surrogacy industry and medical tourism. Therefore, this paper aims to set out the current rules on surrogacy in Ukraine and discuss how these drafts could impact on the surrogacy industry.

The term *surrogacy* is defined by the Oxford Advanced Learner's Dictionary as the practice of giving birth to a baby for another person or couple, usually because they are unable to have babies themselves (Oxford

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Learner's Dictionaries, 2023). Surrogacy is a method of alternative human reproduction, which is as strongly supported as it is widely criticized.

Surrogacy can either be traditional, where the surrogate mother is also an egg donor of the child, or gestational, where the surrogate mother does not have any genetic connection with the child. Depending on the remuneration of the surrogate foreseen in the surrogacy contract, commercial and altruistic surrogacy can be differentiated.

Ukraine has some of the most liberal legal regulation surrounding surrogacy, as it permits commercial surrogacy and does not ban foreigners from benefiting from this procedure. Many other advantages, such as the convenient geographical location of the country, relatively low living costs and good medical services, have attracted foreign couples toward using surrogacy in Ukraine, resulting in Ukraine becoming a large surrogacy market for medical tourists. There exist no official state statistics on surrogacy contracts in Ukraine. However, according to the data provided by the Ministry of Healthcare of Ukraine, surrogacy was used 2,500 times as a method of assisted human reproduction in the country in 2020 (Centre of Medical Statistics, 2022).

The current regulation of surrogacy is criticized by feminist organizations in Ukraine. The main argument against surrogacy is the potential exploitation of women, who use their bodies as instruments to earn a living. Some feminist movements support the opinion that the surrogate should be protected under labor law, especially given that surrogates themselves consider the obligation to carry and give birth to a child as their work. Although the labor legislation does not currently regulate surrogacy at all, feminists are fighting to foresee guarantees for surrogates as employees (Gilevych, 2021). There are also sociological studies that show that in many cases surrogates opt for surrogacy because of financial reasons. In one survey of surrogates and egg donors, most of the 70 respondents appeared to be young mothers with small children that used surrogacy as means to improve their quality of life, pay rent, pay back loans, etc. (Stepaniv, 2019). Religious organizations in Ukraine are also against the use of surrogacy and any other in vitro fertilization technologies (Strebkova, 2020).

A number of foreign legal authors have studied different problems of surrogacy, including P. Rinda, who revealed legal and Islamic perspectives of surrogacy; K. O'Byrne, who researched surrogacy law and human rights; K. Burešová, who looked at surrogacy in the UK and the Czech Republic; H. Kaur, who researched comparative insights on surrogacy from India; C. Gracia, who studied the ethical and legal context of surrogacy in Ireland; G. Deharo, who analyzed surrogacy and COVID-19, and other authors.

The legal problems of surrogacy have also attracted the attention of a number of Ukrainian scholars, such as R. Maydanyk, A. Chernobaeva, O. Danchenko, Yu. Korenga, T. Kondrych, K. Grudieva, S. Mykytyuk, Yu. Remzhyna, A. Bugaiets, etc. These authors studied selected problems of the surrogacy contract, the legal status of the parties to surrogacy contract, private international aspects of surrogacy, etc. In the meantime, there are very few studies that consider the draft laws on assisted human reproduction submitted to the Ukrainian parliament at the end of 2021 and during 2022–2023 and the main trends of surrogacy in the early wartime. An analysis of the Ukrainian legislation in the broader context of the European legal framework is also in demand.

This article aims to uncover the conditions for surrogacy in Ukraine alongside the gaps in the current Ukrainian legislation and to compare the Ukrainian legislation on surrogacy with the legislation of European countries. The author also aspires to analyze the recent draft laws on assisted human reproduction that have been submitted for consideration to the Ukrainian parliament. Another purpose of the article is to formulate the legal problems of the surrogacy industry in early wartime.

The methodology used by the author includes dialectical, formal logical methods, methods of synthesis and analysis, the comparative legal method and the method of modelling. Dialectical, formal logical methods and methods of synthesis and analysis were used to study the draft laws on assisted human reproduction submitted to the Ukrainian parliament at the end of 2021 and during 2022–2023 alongside Ukrainian court practice. The comparative legal method was used to analyze the national legislation of European countries and Ukraine. The method of modelling was used to formulate the gaps in the current Ukrainian legislation and the legal problems faced by the surrogacy industry at the beginning of the war.

1. Surrogacy in Europe: No consensus

The Ukrainian legislation is part of the European landscape, which is why it is very interesting to view the entire picture of surrogacy regulation in Europe, where there is no consensus.

Most European legislators prohibit any form of surrogacy, whether commercial or altruistic. This is the case in Finland, France, Germany, Iceland, Italy, Spain, Switzerland and Sweden.

In *Finland*, there is no special regulation on surrogacy. However, following Section 7 of the Act on Assisted Fertility Treatments (1237/2006), assisted fertility treatment may not be provided if there is reason to presume that the child will be given up for adoption. Art. 16–7 of the *French* Civil Code states that any agreement to procreate or gestate for the benefit of others is void (Civil Code of France, 1803). Surrogacy is considered “improper use of reproduction technology” following para. 1 (7) of Art. 1 of the *German* Act for the Protection of Embryos (The Embryo Protection Act) (1990). This Act further details punishment of up to 3 years imprisonment or a fine for those who attempt to carry out the artificial fertilization of a woman who is prepared to give up her child permanently after birth (surrogate mother) or to transfer a human embryo into her. Section 5 of the Act on Artificial Fertilisation and the Use of Human Gametes and Embryos for Stem Cell Research No. 55/1996 of *Iceland* prohibits surrogacy. In *Italy*, para. 6, Art. 12 of Law 40/2004 on Medically Assisted Procreation punishes those who, in any form, produce, arrange or advertise the sale of gametes, embryos, or surrogacy, with imprisonment from 3 months to 2 years and a fine ranging from €600,000 to €1 million (Associazione Luca Coscioni et al., 2019). In *Spain*, the Law on Assisted Human Reproductive Techniques (section 10) prescribes that a paid or unpaid contract under which a woman waives maternal parentage in favor of a contractor or third party is null and void (LEY 14/2006, 2006). In *Switzerland*, surrogacy is banned by section 4 of the Federal Act of Medically Assisted Reproduction (1988) along with ovum and embryo donation. There is no direct prohibition of surrogacy in *Swedish* legislation, but “the rules of assisted reproduction state that it is not allowed to perform assisted reproduction within the Swedish health care system with the aim of implementing a surrogacy arrangement” (RFSL, 2019).

Such prohibition usually leads to reproductive tourism, a situation in which infertile couples go abroad to jurisdictions where surrogacy is allowed and come home with a newborn child. As a result, their home authorities refuse to recognize the child-parent relationship. Very often, such cases are heard by the European Court of Human Rights (ECtHR), which tends to recognize that the non-establishment of a legal child-parent connection when the two are biologically connected is a violation of the child’s right to respect for private and family life, as illustrated by the cases of *Mennesson v. France* (2014) and *Labassee v. France* (2014). However, if the couple and the child are not genetically connected, there is no violation of Art. 8 of the European Convention of Human Rights (the right to respect for private and family life) if the country refuses to recognize the child-parent relationship (see, e.g., *Paradiso and Campanelli v. Italy* (2017), *Valdis Fjölhnisdóttir and Others v. Iceland* (2021)).

Despite the existence of a trend towards prohibiting surrogacy, in some European jurisdictions surrogacy is allowed by law (for instance, in Greece, the Czech Republic, Georgia, the Netherlands, the United Kingdom, Ukraine, etc.).

In *Greece*, surrogacy is regulated by Art. 1458 of the Greek Civil Code, which allows altruistic gestational surrogacy for married couples and single women and requires court authorization for the procedure (Amoiridis Law Services, 2020). In the *Czech Republic*, surrogacy is unregulated but used in practice. Investigations show that single men and same-sex couples have used surrogacy in this jurisdiction (CNE News, 2022). In *Georgia*, surrogacy is permitted by Art. 143 of the Law of Georgia on Health Care; however, no detailed rules on surrogacy have been set out by the legislator. As a rule, commercial gestational surrogacy is practiced. In the *Netherlands*, only altruistic surrogacy is allowed, while the surrogate may only be reimbursed for her expenses (Government of the Netherlands, 2023). Surrogacy is allowed in *the United Kingdom* following the Surrogacy Arrangements Act (1985). It is unusual that the intended parents are not recognized as the legal parents of the child until a parental order is granted by the court, provided that: the surrogate consented to this; the application is filed between 6 weeks and 6 months after the child's birth; any payments to the surrogate did not exceed her reasonable expenses; the child must be living with the intended parents; and one or both of the intended parents must be domiciled in the United Kingdom (Nuffield Council on Bioethics, 2023).

While national legislators enjoy a wide margin of appreciation regarding the question of surrogacy, it is highly advisable to adopt an international instrument that protects the best interests of children born as a result of an international surrogacy arrangement. A possible convention covering the questions of legal parentage established as a result of any international surrogacy arrangement is now being drafted by the working group of the Hague Conference on Private International Law (2023).

2. The legal framework on surrogacy in Ukraine: General rules and existing problems

The main rules on surrogacy can be found in the Civil Code of Ukraine (2003), the Family Code of Ukraine (2002), the Law of Ukraine on "Fundamentals of the Legislation of Ukraine on Healthcare" (1992), the Law of Ukraine "On the State Registration of the Acts of Civil Status" (2010), the Order of the Ministry of Healthcare of Ukraine "On Adoption of the Order of Application of Assisted Reproductive Technologies in Ukraine" (2013), the Order of the Ministry of Justice of Ukraine "On Adoption of the Rules of the State Registration of the Civil Status in Ukraine" (2000), and other acts.

The Civil Code of Ukraine (2003) does not regulate surrogacy directly, but provides for the right of a woman and a man who have reached the age of majority to undergo medically assisted human reproduction programs if they have a medical condition as provided for in the legislation (para. 7 of Art. 281). The Civil Code also lays down freedom of contract as one of the general principles of Ukrainian civil law (para. 1 of Art. 3; Art. 627), although no mention is made of surrogacy contracts in the Civil Code.

Para. 2 of Art. 123 of the Family Code of Ukraine (2002) foresees that a child born as the result of assisted human reproduction by means of the transfer of an embryo conceived by a married couple is the fruit of said married couple.

In accordance with Art. 48 of the Ukrainian Law on "Fundamentals of the Legislation of Ukraine on Healthcare" (1992), the artificial insemination and implantation of an embryo is conducted in accordance with the procedure established by the central body of executive power that is in charge of forming the state policy in the sphere of healthcare. The relevant conditions applied are: the medical indications of the woman, her having reached the age of majority, the written approval of the married couple, donor anonymity, and the non-disclosure of medical secrets.

The order of the Ukrainian Ministry of Healthcare "On Approval of the Order on the Use of Assisted Reproductive Technologies in Ukraine" (2013) – hereinafter the ART Order – has direct norms on surrogacy and mainly provides for medical rules on surrogacy, general requirements for the intended parents and the surrogate, as well as general rules on the registration of the child. In line with the ART

Order, the necessary conditions for surrogacy are the following: *medical indications for surrogacy are present* (such as the absence of a womb; the deformation of the uterine cavity or neck as the result of a birth defect, surgery, or benign tumors, making pregnancy and delivery impossible; structural morphological or anatomical changes of the endometrium, leading to loss of receptivity; synechiae of the uterine cavity, which are not treatable; severe somatic diseases as a result of which pregnancy would threaten the further health or life of the recipient, but which would not affect the health of the unborn child; or repeated unsuccessful attempts at assisted human reproduction (four or more times) with the repeated production of high-quality embryos, the transfer of which did not lead to pregnancy); *the necessary documents for carrying out the program have been submitted by both the surrogate* (application form; copy of passport; copy of marriage certificate or divorce certificate (except for single women); copy of the child's birth certificate; if applicable, written consent of the husband of the surrogate to her participation in the surrogacy program) *and the intended parents* (application form of the patient/patients for the use of surrogacy; copies of passports for both parents; copy of their marriage certificate; notarized copy of the written common agreement between the surrogate and the woman (man) or couple); *the couple, or at least one of the intended parents, has a genetic connection with the future child; the surrogate has no direct genetic connection with the child* – a close relative of the intended parents (mother, sister, cousin, etc.) is permitted.

The ART Order also prescribes that a woman who has reached the age of majority can be a surrogate with the proviso that she has her own healthy child, she does not have medical contraindications, and she has given written voluntary consent to the procedure.

The ART Order also foresees the steps below for the procedure of surrogacy:

- 1) choice of the surrogate mother;
- 2) synchronization of the menstrual cycles of the recipient and the surrogate mother, preparation of the embryos, cryopreserved embryos;
- 3) procedure of transfer of the embryo into the womb of the surrogate;
- 4) cryopreservation of the non-used embryos;
- 5) diagnosis of the pregnancy;
- 6) observation of the surrogate's pregnancy;
- 7) agreement on the method and place of childbirth, and method of feeding of the newborn child.

Childbirth can be carried out in the presence of the intended parents. The ART Order provides that the information on the child borne by the surrogate is communicated to the child clinic at the child's place of residence by phone. If the intended parents are foreigners, they should provide the details of their temporary place of residence for patronage by the pediatrics specialists.

The ART Order and the rules on the child's registration can be found in the Rules on the State Registration of the Acts of Civil Status, adopted by the Ministry of Justice of Ukraine on October 18, 2000, which particularize the rules of the Law of Ukraine "On the State Registration of the Acts of the Civil Status" (2010). The Rules stipulate that, for the birth of a child as the result of the transfer of an embryo conceived by a couple into a surrogate, the state registration of the child has to be applied for by the couple that agreed to the transfer. In this case, in addition to the document that confirms the fact of the birth of the child, a notarized application of the surrogate that confirms her agreement to register the married couple as the parents of the child and a certificate of the genetic link of the parents (mother or father) with the child should be submitted.

Notably, the current Ukrainian legislation has very liberal and general regulation surrounding surrogacy, unsurprisingly creating such a fertile environment that it has attracted foreigners and Ukrainian couples to choose surrogacy in Ukraine for many years. Nonetheless, this regulation has a number of lacunas that should be outlined.

First of all, *there is no legislative definition of the participants of surrogacy relations. It is interesting that there are no requirements for intended parents provided by the current Ukrainian legislation*, even though, by analogy with adoption, the introduction of such requirements would be in the best interests of the future child. Art. 212 of the Family Code of Ukraine lays down the prohibition to adopt for persons that are medically incapable of taking care of a child, or, civilly, have perpetrated specific crimes, or whose interests contradict the interests of the child. Diseases that preclude adoption are included on a list of the central body of executive power that is in charge of forming state policy in the sphere of healthcare. Also excluded from adoption are those that require care because of a health condition. Finally, persons on the books of or being treated by the psychoneurological or drug abuse dispensary, or who have a drug or alcohol addiction, are also not permitted to adopt. Under the law, adoption is not allowed for persons that have limited civil capability; do not have civil capability; were deprived of parental rights when such rights were not granted again; had adopted (or were the legal representatives of) another child but the adoption was cancelled or recognized as invalid because of a fault on their part; do not have a permanent source of income or permanent residence; are unmarried foreigners, except in cases where they are relatives of the child; are married to a person that does not meet some criteria listed by this article; or are stateless. The conviction of the following crimes precludes adoption: crimes against life and health, will, honor and dignity, sexual freedom and sexual integrity, public safety, public order and morality; crimes related to the turnover of drugs, psychotropics, or their alternatives or precursors; and crimes foreseen by a number of articles of the Criminal Code of Ukraine (Arts. 148 (substitution of child); 150 (exploitation of children); 150-1 (usage of a minor for begging); 164 (defaulting on alimony payments); 166 (gross negligence in the care of the child or the person under guardianship); 167 (abuse of guardian rights); 169 (illegal actions related to adoption); 181 (violation of the health of other people, while pretending to carry out religious ceremony); 187 (robbery); 324 (inducing minors to stupefaction); 442 (genocide)). An outstanding conviction for other criminal offences also makes adoption impossible. Several Ukrainian legal scholars have proposed the introduction of the same criteria for intended parents (Korenga, 2015).

Another problem is that *LGBTQ+ couples are currently excluded from the possibility of using surrogacy*. However, in summer 2022 there was a petition submitted to the Ukrainian President which called for the legal recognition of same-sex partnerships. The president replied on August 2, 2022, by asking the government to analyze the petition and to inform him about their findings. Some Ukrainian legal scholars already dedicate their studies to the promotion of access to surrogacy for same-sex couples, recognizing its absence as discrimination (Pokalchuk, 2020). It seems that it is only a matter of time before lawmakers consider access to surrogacy for LGBTQ+ couples, especially following the recent judgement of the ECtHR in the case of *Maymulakhin and Markiv v. Ukraine* (2023; also Uda, 2022). In this case, the ECtHR concluded that “unjustifiable denial to the applicants as a same-sex couple of any form of legal recognition and protection as compared with different-sex couples, amounts to discrimination against the applicants on the grounds of their sexual orientation.”

Thirdly, *the current Ukrainian legislation establishes a mechanism in which the state registration of the birth of the future child depends upon the will of the surrogate*. As previously mentioned, the surrogate’s consent to register the intended parents as the parents of the child must be notarized. There is no guidance on what to do when the surrogate refuses to do so, or when the surrogate cannot grant consent due to their death or other reasons, as described in the legal doctrine (Danchenko, 2016). In practice, surrogacy contracts almost always contain the provision that the full sum of remuneration is paid to the surrogate after she has given the mentioned consent. It is suggested that, if the surrogate has agreed to surrogacy in the first place, her consent to register the intended parents as the parents of the child should be presumed and the submission of the copy of the surrogacy contract should be enough to achieve this.

Fourthly, the ART Order *contains only very vague regulation on the form of the surrogacy contract*: pursuant to para. 6.11, the married couple shall submit a notarized copy of the written contract with the surrogate. The current Ukrainian legislation provides for special rules in respect of storing the notarial

documents with the notary in line with the Order of the Ministry of Justice of Ukraine “On the Adoption of the Rules of Notarial Recordkeeping” (2010). Keeping a third copy of the contract at the notary’s office is intended to serve as a guarantee that the contract itself will not be lost and can be presented as evidence in case of potential court proceedings. At the time of writing, no special law on reproductive rights exists in Ukraine, however crucial its adoption would be for the due regulation of reproductive rights and the use of surrogacy in particular. In the opinion of a number of legal scholars in Ukraine, surrogacy contracts should be notarized (Danchenko, 2016), and mandatory notarization must be foreseen by a special law on reproductive rights.

Lastly, *no requirements on the contents of the surrogacy contract are laid down in the legislation, making freedom of contract very extensive*. This state of affairs fails to serve to protect the best interests of the child, as situations may arise in which the interests of the future child or the rights of the newborn child are violated, e.g., situations in which the surrogate does not follow all of the medical prescriptions during pregnancy or illegally keeps the child after birth. The subject of the surrogacy contract is defined as the surrogate’s duty to carry a child to term and give birth to it, to transfer the newborn child to the intended parents and give consent to the registration of the intended parents as the parents of the child, as well as the intended parents’ duty to register and take custody of the child, pay remuneration to the surrogate, and compensate her expenses. As a rule, the price of the surrogacy contract includes the remuneration of the surrogate and her expenses, an exact list of which is provided for in the contract (normally provided for are the expenses for medical examinations, buying medical products, renting a residence, using transportation, buying special clothes, etc.). Of course, surrogacy contracts can be unpaid in case of altruistic surrogacy. Other provisions of the contract can be added by mutual agreement of the parties and may include regulation of the provision of the surrogate’s medical information, as well as information on: the state of health of the future child; multifetal pregnancy; divorce of intended parents or death of one or both of them; birth of a disabled child; abortion; failure to become pregnant; confidentiality; parties’ liability for contract violation, etc. In the author’s view, all of these instances should be regulated by a special law to ensure the protection of all parties to surrogacy relations, especially the child.

3. Selected court cases on surrogacy heard by Ukrainian courts

Court cases on surrogacy do not occur often in Ukraine, yet there are some interesting examples that can be analyzed in order to show the practical problems arising in the surrogacy field.

The question of *the surrogate’s liability* was considered in Case No. 150/628-16-ц, where the intended parents had concluded a surrogacy contract with the surrogate in Kyiv on July 26, 2016. The intended parents had covered a number of expenses for the surrogate mother, including medical services, transportation expenses and meals in the amount of UAH 115,352.17 (approximately USD 4,500). The surrogate did not become pregnant and the couple decided to call her to civil liability and make her compensate them for damages and pay a fine of UAH 124,352.17 (approximately USD 4,700) in total, and pay moral damages in the amount of UAH 30,000 (approximately USD 1,220) to the intended mother and in the amount of UAH 20,000 (approximately USD 816) to the intended father. The intended parents claimed that the surrogate had missed appointments in clinics, had not taken the necessary medicine and, despite her obligation to reside in Kyiv, had moved out of the city.

The court of the first instance rejected the claim. However, the court of appeal partially granted the claim and obliged the surrogate to return expenses in the amount of UAH 21,835.66 (approximately USD 890) to the intended parents. The decision was based on provision 4.16 of the surrogacy contract, pursuant to which the surrogate had to return all of the costs and expenses occurred during the surrogacy program to the intended parents, and also had to pay a fine, if she decided or acted (or failed to act) in a way that was not agreed with the intended parents and/or the doctor, or chosen by the intended parents, resulting in the termination of the pregnancy, and/or if she underwent an abortion, and/or if she intentionally performed

actions to terminate the pregnancy without medical indications. In its ruling on November 5, 2019, the Supreme Court revoked the judgement of the court of appeal on the grounds that provision 4.16 of the surrogate contract could only be applied in case of successful pregnancy. The Supreme Court further observed that the surrogate could not be liable for missing an appointment in the clinics because the surrogacy contract did not contain a schedule for such visits, and no evidence was presented to suggest that the surrogate had been informed about any schedule. Moreover, the contract only prescribed the surrogate's duty to reside in Kyiv during the pregnancy period; since the pregnancy never occurred, the surrogate could not be held liable. The Supreme Court also failed to satisfy the demand for moral harm compensation (Ruling of the Supreme Court, case No. 150/628/16-II, 2019).

A situation *in which a surrogate tried to maintain custody over the child* has been decided on in other notable court cases. In the first, case No. 6-791cb13 (2013), the Higher Specialized Court of Ukraine on Civil and Criminal Cases (hereinafter – the Higher Specialized Court) considered an instance where the surrogate indicated herself as the mother and her husband as the father of twins born through a surrogacy program in November, 2010. The intended parents had filed a claim with the court, asking to have the information in the state register changed to recognize them as the parents of the child. The claimants submitted a copy of the surrogate's informed consent to participate in the surrogacy program, a written copy of the consent to the embryos' transfer, a certificate from the clinic that the embryos conceived by the genetic parents had been transferred to the surrogate, testimony from the chief doctor of the clinic and testimony from the clinic where the twins were born. The court of the first instance and the court of appeal satisfied the claim's demands. The Higher Specialized Court observed that regardless of the term spent with the surrogate, the children had an inalienable right to live with their biological parents and upheld the decisions of the previous court instances.

In another court case, case No. 6-7887cb14 (2014), the surrogate tried to have the surrogacy contract declared invalid because it had not been notarized and did not contain the date of its conclusion. The Higher Specialized Court ruled that Ukrainian legislation and the provisions of the surrogacy contract did not foresee its mandatory notarization and that the surrogate herself had never shown the will to notarize the contract. The surrogate had executed the contract by means of undergoing the pregnancy and thereby validated the conclusion of the contract. Mention should be made that the surrogacy in this case was carried out in accordance with the Order of the Ministry of Healthcare of Ukraine “On Adoption of the Instruction on the Order of Application of Assisted Reproductive Technologies,” dated December 23, 2008, No. 771, which is now invalid. The court of first instance, the court of appeal and the Higher Specialised Court rejected the claim (the final ruling of the Higher Specialised Court of Ukraine on Civil and Criminal Cases in case No. 6-7887cb14 was issued on July 2, 2014). It took almost 4 years until the case was decided in favor of the intended parents, causing suffering to the intended parents during the consideration of the case because of a lack of a legal connection between them and their biological children at the earliest stage of their development. The children had lived with the surrogate for almost 3 years. Such situations may be rare, but the possibility of the surrogate to register herself as the mother of the child should nevertheless be excluded by entering respective changes in the Ukrainian legislation.

4. Recent draft of laws on assisted human reproduction in Ukraine: Winds of change

In Ukrainian scholarship, advocacy for the necessity of the adoption of a special law on assisted human reproduction has been seen for many years (Moskalenko, 2018a, 2018b). Recent legislative initiatives were launched at the end of 2021 and the beginning of 2022 and 2023. A total of four draft laws on surrogacy were submitted to the Ukrainian parliament (Moskalenko, 2023), and it is interesting to study the legal ways to improve the legal regulation of surrogacy in Ukraine on this basis.

The first was presented by the Cabinet of Ministers of Ukraine on December 29, 2021: the draft Law “On Assisted Reproductive Technologies” No. 6475 (hereinafter – ART Draft No. 1). ART Draft No. 1 provides

the definitions of: *genetic parents, embryo, intermediary (agency), surrogate, and surrogacy*. It stipulates that the Cabinet of Ministers would adopt a number of sub-laws, including on the transportation of reproductive cells and embryos into, from, and within the Ukrainian territory, along with their storage. Currently, no detailed regulation of this sphere exists in Ukrainian legislation. ART Draft No. 1 prescribes that the Ministry of Healthcare of Ukraine shall adopt sub-laws on surrogacy, on the period of storage of reproductive cells and embryos, and on nutrition norms for surrogates.

The conditions for surrogacy are laid down in ART Draft No. 1 and are as follows: written application of the patient; informed consent of the husband of the surrogate if she is married; presence of a genetic connection of the future child with one or both of the intended parents; and absence of a direct genetic connection with the surrogate, with relatives of the genetic parents being allowed to carry the child. The intended parents have to be present at the clinics before the start of the surrogacy contract and at the signing of the surrogacy contract.

In order to protect the best interests of the future child, ART Draft No. 1 excludes some categories of citizens from becoming intended parents. For instance, surrogacy is not allowed for: persons deprived of parental rights, or persons who adopted a child previously and the adoption was recognized as invalid or was cancelled in a way precluded by the current Ukrainian legislation; persons who are incapable or have limited civil capacity; and persons who have committed serious or especially serious crimes and have outstanding convictions for these crimes. It is the author's firm belief that this list should be extended, taking the provisions of the Family Code of Ukraine for persons who cannot adopt as an example.

ART Draft No. 1 defines the status and requirements for the surrogate: it should always be a woman with full legal capacity, who has her own healthy child and has given informed consent to the medical treatment. Traditional surrogacy is outlawed in this draft. The rights and duties of the surrogate are also regulated. The surrogate has the following rights under ART Draft No. 1: to obtain alimony from the genetic parents during the pregnancy and labor, compensation for carrying and giving birth to a child, compensation of loss profit in the period of pregnancy, labor and post-labor period, and compensation of medical services in case of damage to her health; to obtain full and accurate information on her health and pregnancy state; to obtain information on the procedure of surrogacy (duration, risks, side effects, complications, medical and legal consequences and also alternative methods of medical service); and to terminate the pregnancy in case of threat to her life and if there are medical indications. Under ART Draft No. 1, the surrogate is obliged to: give full information on her physical, psychological and reproductive health; follow the instructions and recommendations of the doctor during pregnancy and labor; inform the intended parents on pregnancy and labor; transfer the newborn to its genetic parents within two hours of birth, if another term is not stipulated in the surrogacy contract; hand over notarized consent to register the child (children) to the genetic parents; and not disclose confidential information about the surrogacy contract and its details.

Additionally, the form and content of the surrogacy contract are foreseen, and the contract shall be notarized. Essential provisions of the surrogacy contract shall be: the contract holder; the quantity of embryos to be transferred; an indication of the clinic that will be used; the duty of the surrogate to follow the instructions of the doctor, provide information on her health and the health of the fetus, and hand over the child to the genetic parents after the birth; the actions of the parties to the surrogacy contract in case of the divorce of the genetic parents, annulment of the marriage of the genetic parents, death of the genetic parents (or one of them), death of the surrogate, or the antenatal, intranatal, or perinatal death of the child; the actions of the genetic parents and the surrogate in case of the birth of a child with a genetic disease, disabilities or other diseases; the compensation of the surrogate (except for altruistic surrogacy); the mechanism of compensation for expenses related to medical services, nutrition, and living expenses of the surrogate; the compensation of lost income during the period of pregnancy, labor and post-labor; the compensation of expenses in case of health damage of the surrogate; the indication of the owner of donor reproduction cells and embryos (although embryos cannot be defined as property objects, notwithstanding

the fact that such a position contradicts the practice of the ECtHR (see *Parillo v. Italy*, 2015); and defining the party covering additional expenses to the child (children) in case the child (children) will need medical aid after birth.

Finally, the rights and duties of the intermediary, who acts on the basis of the contract with the couple and the clinics, are stated. The intermediary is obliged: to help the patients to fulfil their rights and duties; to create the necessary conditions to perform the medical treatment on assisted human reproduction; to simplify exchanging information between participants of negotiations connected with the medical treatment on assisted human reproduction; to obtain informed consent from the patient to disclose the patient's medical information; to act solely in the interest of the patient; and to represent the patient for effective implementation of the medical treatment on assisted human reproduction in accordance with the contract.

ART Draft No. 1 has numerous disadvantages. Firstly, Art. 2 of ART Draft No. 1, with the title "Legislation on assisted reproductive technologies," lists the exact titles of the relevant laws and international acts, and as such this article would require amendments if any changes were entered into the respective acts. Moreover, Art. 2 contains links to international acts that have not been ratified by Ukraine (e.g., the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine; Convention on Human Rights and Biomedicine). Secondly, the maximum age for intended parents is to be established by the doctor on a case-by-case basis. As ART Draft No. 1 fails to provide any objective criteria, the doctor is given an excessive amount of freedom. Thirdly, ART Draft No. 1 includes provisions that discriminate against same-sex couples, making them ineligible for surrogacy. Lastly, ART Draft No. 1 treats embryos as property, disregarding the fact that such a position contradicts the practice of the ECtHR (e.g., *Parillo v. Italy*, 2015).

Another draft Law "On Application of Assisted Reproductive Technologies" No. 6475-1 (hereinafter – ART Draft No. 2) was submitted to the Ukrainian parliament by one of its members, Oleksandr Danutsa, on January 11, 2022. This law also provides a number of legal rules on surrogacy.

ART Draft No. 2 provides a list of definitions for the following terms: *genetic parents*, *surrogate*, and *surrogacy*. Furthermore, it establishes the conditions for surrogacy. The first pre-condition for using surrogacy is the notarized consent of the husband of the surrogate-to-be, if the surrogate is married. The second is that the child should have a genetic connection with the genetic parents (or at least with one of them) and cannot have a genetic connection with the surrogate. The carrying of a child by a family member of the child's genetic parents is allowed. The final condition is that surrogacy is only allowed on medical indications, the list of which shall be determined by the Ministry of Healthcare of Ukraine. A very positive change can be observed here, serving the best interests of the child – that is, the obligation of the genetic parents to pick up the child from the clinic after birth and to register the child in accordance with the legislation of Ukraine. However, this provision contradicts para. 3 of Art. 143 of the Family Code of Ukraine, which allows the child not to be taken from the clinic when the child has severe disabilities or in other relevant circumstances.

In accordance with ART Draft No. 2, the surrogate is to be a woman who is of age and has full civil capacity, has a healthy child and does not have medical contraindications to pregnancy. The rights and duties of the surrogate are also outlined. The surrogate has the right to: information on the procedure of application of assisted human reproduction; information on possible risks and complications; medical aid; abortion in case of threats to her life; compensation for carrying and giving birth to the child; and compensation for the costs for the clinic, in case it is foreseen by the contract. The surrogate is obliged: to provide full information on her physical, psychological and reproductive health and the results of her genetic testing; to follow the instructions of the doctor while carrying and during the birth of the child; to take care of her health; to inform the genetic parents about the pregnancy; not to prevent the genetic parents from taking the child after birth; not to disclose confidential information on the surrogacy program, including information about

the genetic parents and the fact that she has carried and given birth to their child; to hand over all the necessary documents to register the child; and to give notarized consent for the registration of the parents as the genetic parents of the child.

Another provision that is considered to be very positive is that the surrogate would no longer have the right to unilaterally withdraw from the contract after the transfer of the embryo, except when carrying the baby to term would put her life at risk. Such a rule is not provided in the current Ukrainian legislation, even though this absence could lead to the violation of the rights of the intended parents. ART Draft No. 2 also sets the requirements for the nature and content of the surrogacy contract. The surrogacy contract may be altruistic in nature or it may be commercial. The contract shall contain the following: the contract holder; the quantity of embryos to be transferred; the clinic; the place of residence of the surrogate when carrying the child; the actions to be taken by the parties in case of multifetal pregnancy; the duty of the genetic parents to take the child in case it is born with genetic disabilities or other diseases; the actions to be taken by the parties in case of the death of one or both spouses, or their divorce; the amount of compensation to be paid to the surrogate for carrying and giving birth to the child; and the mechanism of compensation for medical services, nutrition, and living expenses of the surrogate while carrying the child, during labor and in the post-labor period.

This introduces very important changes to the Law of Ukraine “On the State Registration of the Acts of Civil Status” (2010) concerning the state registration of the child. First of all, the genetic parents are allowed to perform the state registration of the child personally or through a representative. The amended provision of the latter law allows the surrogate or clinic to submit the application on the state registration in case the genetic parents fail to file it, or if they are dead or missing. In the latter cases, the relatives of the genetic parents may also file an application for the registration of the child.

ART Draft No. 2 also has some disadvantages. For example, the maximum age of the surrogate and the genetic parents able to use assisted human reproduction is established by the individual doctor. ART Draft No. 2 fails to provide any objective criteria, leaving the doctor an excessive amount of freedom. ART Draft No. 2 only allows married heterosexual couples to use surrogacy, which is clearly discriminative towards same-sex couples, and it does not require mandatory notarization of the surrogacy contract. Like ART Draft No. 1, it also treats embryos as property in spite of such a position contradicting the practice of the ECtHR (e.g., the case of *Parillo v. Italy*, 2015).

On January 13, 2022, the draft of Law “On Application of Assisted Reproductive Technologies and Surrogacy” No. 6475-2 (hereinafter – ART Draft No. 3) was submitted to the Ukrainian parliament. ART Draft No. 3 has a separate chapter dedicated to surrogacy. It has a number of advantages, for example that the terms *genetic parents*, *surrogate*, and *surrogacy* are defined.

It is unusual and new that ART Draft No. 3 states that the Ministry of Social Politics of Ukraine will keep records of the foreigners that want to use surrogacy in Ukraine, and that it will additionally check the documents and information submitted to them to review whether there are grounds to reject the application for surrogacy.

ART Draft No. 3 includes a list of reasons to reject the application of assisted reproductive technologies. The list includes the following cases, where a man or woman: has applied for assisted reproductive technologies before and left the child; has adopted a child before, but the adoption was cancelled due to a fault on their part; was deprived of parental rights and these rights have not been renewed; is being treated by the psychoneurological or drug abuse dispensary; has a drug or alcohol addiction; does not have a permanent place of residence and permanent income; or is stateless. A criminal past, or outstanding convictions, are other reasons to be denied surrogacy, such as convictions for crimes against life and health, will, honor and dignity, sexual freedom and sexual integrity, against public safety, public order and

morality, or in the sphere of drugs, psychotropics their analogues or precursors. The crimes foreseen by Arts. 148 (substitution of child); 149 (people trafficking); 150 (exploitation of children), 150-1 (use of a minor for begging); 164 (defaulting on alimony payments); 166 (gross non-fulfilment of the duties on taking care of the child or the person under guardianship); 167 (abuse of guardian rights); 169 (illegal actions related to adoption); 181 (infringement of the health of other people while pretending to carry out religious ceremony); 324 (inducement of minors to become stupefied) of the Criminal Code of Ukraine also prohibit the application of assisted reproductive technologies. ART Draft No. 3 also establishes that only married couples, where both have full legal capacity, can use surrogacy. Surrogacy is also only permitted if the couple has medical indications. ART Draft No. 3 also does not allow surrogacy if the couples' *lex personalis* outlaws surrogacy. If the couple does not have a common *lex personalis*, the law which is applied to the legal consequences of marriage should not outlaw surrogacy.

ART Draft No. 3 contains requirements for the surrogate, and defines the rights and duties of the surrogate. The surrogate should be between 21 and 35 years old, should not have medical indications against surrogacy, should have her own healthy child, and should have given informed consent to surrogacy. In case the surrogate is a close genetic relative of the genetic parents, age limits are not applicable. Traditional surrogacy is forbidden. Those not allowed to become surrogates are women that: have been recognized as incapable or having a limited civil capacity through court; have been deprived of, or limited in parental rights; have adopted a child, and the adoption was cancelled or recognized as invalid because of a fault on their part; have been convicted for crimes against the rights and freedoms of the child, or were called to liability for family abuse; are being treated by the psychoneurological or drug abuse dispensary; suffer from drug or alcohol abuse; or are suspected or convicted in criminal proceedings. The surrogate has the right to: alimantation from the genetic parents during the pregnancy and labor; compensation for carrying and giving birth to a child, for any health damage, for rehabilitation after the birth, and for psychological help if necessary; and abortion in case the pregnancy threatens her life or health, or she has medical indications for abortion in accordance with the legislation. The surrogate is obliged: to give full information on her physical, psychiatric and reproductive health; to follow the instructions of the doctor during pregnancy and labor; to constantly take care of her health and have a healthy lifestyle; to inform the genetic parents on how the pregnancy and labor are proceeding; to hand over the child after birth to the genetic parents within the term set in the contract; not to disclose the data that became known to her as a result of the surrogacy contract, including the information on the genetic parents and the fact of carrying and giving birth to the child as a result of surrogacy; to inform the clinic where the labor takes place that she is a participant of the surrogacy program; to provide written notarized consent to the genetic parents to register themselves as parents of the newborn child(ren) in the state organs registering civil status; and to provide the genetic parents with any medical documentation, in particular the medical certificate on the birth of the child(ren) and other documents necessary for the registration of the child(ren).

ART Draft No. 3 prescribes that surrogacy is a service that is provided under contract. This contract is concluded between the surrogate and the genetic parents, whether foreseeing remuneration or not. The surrogacy contract is defined as a contract under which one party (surrogate) is obliged to carry and give birth to the child which has a genetic connection with one or both of the genetic parents (married couple), and relinquish it to its genetic parents after birth, and the other party (genetic parents, married couple) is obliged to take the child from the surrogate after birth and pay compensation to the surrogate (except in cases where the surrogacy contract does not foresee remuneration). The surrogacy contract cannot be concluded by a representative and should be in writing and notarized. A necessary precondition to conclude a surrogacy contract shall be the consent of the surrogate's husband, given in writing and notarized.

Essential provisions of the surrogacy contract are also defined. Essential items of the surrogacy contract shall be: the contract holder; the quantity of embryos to be transferred; the conditions to ensure due prenatal screening; and the surrogate's place of residence during pregnancy. The duties of the surrogate include the duty to follow all the instructions of the doctor, to disclose information on her health and the health of the

future child, and to relinquish the child to its genetic parents after birth within the term prescribed by the contract. The contract will prescribe the actions to be taken by the parties in case of: the divorce of the genetic parents, the annulment of their marriage, the death of (one of) the spouse(s), or (one of) the spouse(s) being declared to require constant care by a third person; the surrogate's death; antenatal, intranatal, or perinatal death of the child; and the birth of a child with a genetic disease or disabilities. The contract further establishes: the scope of compensation of the surrogate for the carrying and birth of the child, except when the surrogacy contract does not foresee remuneration; the compensation of expenses for medical services, nutrition, and living costs of the surrogate; compensation for lost income during pregnancy, labor and the post-labor period; and material compensation in case of health damage caused by the surrogacy. For cases of non-compliance with or non-fulfilment of the contract, the contract will stipulate the responsibility of the parties under it: the actions of both the genetic parents and the surrogate in case of not carrying the baby or abortion. It establishes: the compensation paid to the surrogate in case of dissolution of the contract by the genetic parents, invalidation of the marriage of the genetic parents, or conclusion of a new marriage with another partner by them; the conditions for the rehabilitation of the surrogate in case her functioning in daily life is negatively affected as a result of providing a service under the surrogacy contract; and the actions of the parties in case of the birth of a child/children which will require immediate medical assistance due to a health condition. Advertising to offer to be a surrogate and to supply reproductive cells is prohibited.

The disadvantages of ART Draft No. 3 can be listed as follows. First of all, ART Draft No. 3 contains a discriminatory provision that the couple shall use surrogacy only if they have been married for no less than 2 years. It seems that the criterion of requiring 2 years of marriage was intended to ensure that future parents had a stable family union, which would be favorable for their future child. However, the couple could have lived together in a close relationship, not considering official marriage as an option and only marrying to participate in the surrogacy program. Why should such couples be denied the ability to conclude surrogacy contracts? The prohibition of discrimination is guaranteed by Art. 14 of the European Convention of Human Rights, and it seems that ART Draft No. 3 places couples who have been married for 2 years in a more favorable position than recently married couples, i.e., by discriminating against the latter.

Secondly, ART Draft No. 3 also treats embryos as property, notwithstanding the fact that such a position contradicts the practice of the ECtHR (e.g., the case of *Parillo v. Italy*, 2015). ART Draft No. 3 imposes many restrictions and requirements on the genetic parents, yet these restrictions serve the main aim, which is to protect the best interests of the child.

On April 11, 2023, the draft of Law “On Application of Assisted Reproductive Technologies and Surrogacy” No. 6475-д (hereinafter – ART Draft No. 4) was submitted to the Ukrainian parliament. This was based on ART Draft No. 3, which was updated as a result of public discussions. In the author's opinion, these changes are not significant. ART Draft No. 4 states that patients older than 50 years of age will have access to assisted human reproduction upon the decision of the medical consultation commission of the clinic. The list of contraindications for the surrogate is narrowed in comparison with ART Draft No. 3 (e.g., now women that suffer from drug or alcohol abuse or are suspected or convicted in criminal proceedings can become surrogates). The list of obligations of the surrogate has been enlarged. The surrogate now has the obligation to provide the clinics with information on her vulnerable state, criminal proceedings against her, on the cancellation of adoption or the deprivation of parental rights, on certain criminal convictions against her, and on her drug/alcohol abuse, mental illnesses and treating them. The Cabinet of Ministers of Ukraine will adopt a ruling on the typical form of a surrogacy contract. Genetic connection between the intended parents (or one of them) will now be established by genetic examination. ART Draft No. 4 has the same disadvantages as ART Draft No. 3.

The legislative activity calendar of the Ukrainian parliament provides that the Law of Ukraine “On Assisted Human Reproduction” should be adopted in 2023 (National Assembly of Ukraine, 2023). Nevertheless, on

May 3, 2023, the Ukrainian parliament rejected all of the abovementioned drafts, and it is expected that other drafts will be elaborated and submitted in the nearest future.

5. Surrogacy during the war: The current state of affairs and problems

Among other effects, the outbreak of war in Ukraine in early 2022 has also impacted on the procedure of surrogacy, with many standard procedures being negatively affected.

The first and most pressing problem was the evacuation of surrogates from the territories at risk, and clinics, agencies and intended parents used all possible means to ensure the safety of surrogates. Some surrogates stayed in Ukraine until the birth of the child, while most crossed the border and went to other countries. In the former case, it remained possible to obtain a birth certificate that would list the genetic parents as the legal parents of the child. However, if the surrogate gave birth in another Western European country that does not allow surrogacy, the intended parents may encounter substantial difficulties or even find it impossible to attain such a certificate.

The second problem for any foreign intended parents was the matter of obtaining travel documents for their children born as a result of surrogacy. Many embassies were evacuated out of Kyiv or even Ukraine before February 24, 2022, which caused substantial difficulties and changes in procedure for obtaining said documents. Some embassies gave out emergency travel documents for future children for which the intended parents could apply for online as a rule. For example, the British embassy introduced such a procedure.²

Some intended parents who had concluded a surrogacy contract just before the start of the war wished to withdraw from contractual obligations and demanded a return of payments made. The fact that not all surrogacy contracts foresaw such a mechanism is problematic, and this is expected to lead to a number of court claims (Danchenko, 2022).

Finally, a tendency has developed to export the reproductive cells and embryos to other countries, with Georgia being a popular destination. However, the legal rules do not sufficiently govern the transportation of reproductive cells and embryos outside the customs territory of Ukraine. A sub-law is needed, which must be adopted by the Cabinet of Ministers of Ukraine and must detail the contents of the agreements to be concluded with patients and clinics (from and to which embryos are transported). Rules ensuring the safety of embryos during transportation should also be laid down (Danchenko, 2022).

Conclusions

The current Ukrainian legislation does not provide for detailed regulation of surrogacy. The only legal act containing special rules on surrogacy is the sub-law of the Ministry of Healthcare of Ukraine “On Adoption of the Order of Application of Assisted Reproductive Technologies in Ukraine” (2013) which mainly contains medical rules on surrogacy. The remaining rules on surrogacy can be found in different legal acts. Overall, the regulation of surrogacy in Ukraine is very liberal in comparison with the rules of most of the countries of Western Europe, where surrogacy is banned. Both commercial and altruistic surrogacy are allowed in Ukraine, while traditional surrogacy is banned.

At the end of 2021 and during 2022–2023, legislative reform began in Ukraine. Four different draft laws dedicated to assisted human reproduction were considered by the Ukrainian parliament. Despite the fact that the legislative work calendar of the Ukrainian parliament provides that the Law of Ukraine “On Assisted Human Reproduction” should be adopted in 2023, on May 3, 2023, the Ukrainian parliament

² An emergency travel document could be applied for on this website: <https://www.gov.uk/emergency-travel-document>.

rejected all of the abovementioned drafts. It is expected that other drafts will be elaborated and submitted in the nearest future. The need for detailed regulation surrounding surrogacy is pressing, and the adoption of any of the draft laws by the Ukrainian parliament would be a big step forward.

The war of the Russian Federation against Ukraine, which started on February 24, 2022, has greatly affected the reality of surrogacy. The emergency evacuation of surrogates and difficulties in obtaining transportation documents and birth certificates for children born after surrogacy are just some of the problems faced by both intended parents and agencies. These problems will not cease until the war is over.

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