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The issue of surrogate motherhood in Poland: a coherent analysis of the branches of Polish law

ABSTRACT: *The article was devoted to the analysis of the surrogacy phenomenon in Polish law. The author evaluates the regulation of the phenomenon from the perspective of various legal branches. The analysis is directed at identifying problems with the regulation of the surrogacy phenomenon. For the Polish legislator has not yet attempted to regulate surrogacy. Thus, following one path of interpretation, it can be assumed that everything that is not forbidden is allowed. However, the situation becomes more complicated at the level of surrogacy contracting. The analysis is intended to polemicize over the interlocking fields that, if regulation is made, will also require amendment.*

KEYWORDS: *surrogate motherhood, surrogate, maternity, surrogacy contracts, child*

1. Introduction

Society is increasingly reaping the benefits of scientific advances. Assisted fertilisation procedures are regularly used these days. The process of procreation can be divided into two independent stages: fertilisation and pregnancy. This makes it possible to distinguish motherhood into genetic and biological. The biological mother of a child is the woman who becomes pregnant and gives birth to that child. The woman's role here is reduced, so to speak, to the function of an 'incubator'. Genetic motherhood is closely related to the very moment of conception. It relies on the identity of the genetic material of the child and the mother. Surrogate motherhood is gaining more popularity due to social and biological considerations. It is important to note the significant impact of international trade on the number of surrogacy contracts. The freedom of movement of people across borders has meant that despite the fact that surrogacy contracts cannot be successfully claimed in Poland, nothing prevents one from entering into such a contract abroad in countries where such a contract is legal,

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such as Russia, India, the United Kingdom, Israel, and Ukraine¹. In the case of the latter country, it is also worth noting that it is a popular destination for the so-called 'exit surrogacy' phenomenon. As Ukraine and Poland are in close proximity, Ukraine is a destination for 'legitimate' surrogacy arrangements. The phenomenon can be compared to that of the so-called 'abortion tourism' in the Czech Republic. There is a high demand for the use of surrogate mothers due to not only the civilisation's infertility issues but also a change in life priorities. Naturally, these aspects will be addressed and developed later in the article, but it is worth noting at the outset that many complications with the status of the legality of surrogacy in Poland boil down to the lack of sufficient regulations in the law. This lack of regulation leads to the resolution of cases of surrogacy *ad casum*. Albeit there are no official statistics as to the extent of the annual 'demand' for surrogacy services, this does not mean that the phenomenon does not exist in Poland. Surrogacy agreements are concluded even though they are not due. Thus, the problem can also transfer to the field of criminal law; here, as a rule, the most frequently addressed direction of the criminal act is human trafficking. As it is impossible to determine the object of the agreement, and the effect is the transfer of parental rights to another person for a fee, this can be interpreted as a criminal act.

2. Definitional issues

In proceeding to analyse the current legal status of surrogacy in the Polish legal order, first, the meaning of the term '*surrogate*' should be clarified, as the analysis conducted so far allows us to note that the issue of investigating maternity is not only a legal, social, and moral problem but also one that induces doubts of a definitional nature. A '*surrogate*' is a woman who adapts into her uterus an *in vitro* fertilised egg cell of another woman, who, after the child is born, gives it back to the parents. The development of effective methods of transferring human embryos, created either *in vivo* or *in vitro*, into the uterus of a woman from whom the genetic material did not originate, and with whose participation the embryo was created, meant that the Roman paremia *mater semper certa est*, at least on a factual level, no longer had a categorical character. This is because of the a break in the rule that the biological mother of the child (the woman who was pregnant and gave birth to the child) is always at the same time the child's genetic mother (the person from whom the genetic material originated). According to Article 61 of the Family and Guardianship Code², maternity is to be understood as a legal relationship linking a woman to a child through the

1 Mikluszka, 2017, pp. 5-9.

2 Family and Guardianship Code Act of February 25, 1964 (Journal of Laws 1964 No. 9 item 59).

birth certificate. This legal relationship arises at the time of the child's birth³. The moment of birth should be considered the beginning of the parental relationship, although there are doubts in the science of the subject as to whether this moment is not the moment of conception. The issue has been resolved with the repeal of Article 8 Paragraph 2 of the Civil Code, which states that '*a conceived child also has legal capacity; however, he or she acquires property rights and obligations on the condition that he or she is born alive*'. With the repeal of this article, it has been prejudged that the *nasciturus* does not have full legal capacity; thus, the maternal relationship should be considered to arise from the moment the child is born. This also coincides with European standards. Depending on the intentions, simply 'buying' a child can raise many moral questions. Agencies brokering surrogacy offer procurers the right to choose the sex, race, and hair colour of the child. This phenomenon is therefore discriminatory and violates basic human rights. Sometimes, buyers abandon the purchase after the birth of the child, with the most common reason being the child's illness. In such cases, newborns end up in orphanages. It also happens that mothers do not want to give up the child because of their attachment to it. Purchasers then often seek to take the minor by force, against the will of the mother.

3. Issues of regulation in Polish law

The first Polish normative act of a general, abstract, universally binding nature, touching on the subject of in vitro fertilisation, appeared only on 1.11.2015, when the Law on Infertility Treatment came into force. Until the Infertility Treatment Law came into effect, the issue of human reproduction under conditions of medically assisted procreation remained completely outside the ambit of the law. The first child born from a pregnancy induced by in vitro fertilization in Poland was born in November 1987. The current Law on Infertility Treatment is a piece of legislation that represents an ethical consensus on matters of medically assisted procreation⁴. The situation in which a woman becomes pregnant and gives birth to a child without the will to raise it, becoming a kind of incubator for the life developing inside her, is something unknown and unsolved by Polish law. In the current legal situation, the lack of a genetic connection between the child and the woman giving birth does not prevent the Polish authorities from recognising her as a mother under the law, which definitely raises very serious legal questions. The maternity status of a particular woman is determined by the fact of the child's birth. The Polish government has not yet dealt with the issue of surrogate motherhood; therefore, no position has been

³ See Śledzińska-Simon, 2022, pp. 74-90.

⁴ Witczak-Bruś, 2021, pp. 38-50.

developed on this issue. Usually, the person or persons initiating the conception of the child is the ordering party of the contract. In general, the practice is contractual in nature between the ordering parties and the woman carrying and delivering the child. There are two main types of surrogacy: full and partial⁵. The former involves the surrogate being both the egg donor and the woman carrying and delivering the child. The second is one whereby the surrogate is only responsible for carrying and giving birth to the child—an embryonic transfer into her uterus is performed, and the embryo is the result of a combination of third-party gametes or the ordering party. Some bioethicists consider the first option morally problematic, while the second option is no longer regarded as such (assuming that carrying and giving birth to a child is similar to any other activity of caring for a young child). However, we can delve further into the divisions and distinguish between the two configurations in the case of natural insemination: the sperm of the future target father and the egg cell of the surrogate, or the sperm of another donor and the egg cell of the surrogate. However, in the case of *in vitro* insemination, these configurations can include an egg cell and sperm from the target parents, an egg cell from the target mother and sperm from another man, or an egg cell from another woman and sperm from the target father⁶. As has already been established, surrogacy involves the conclusion of a contract. The first of the grave ethical problems lies in defining the object of the contract. According to many assumptions, this can be a procreative service, a child, rights to a child, or a parental relationship. First, a child can absolutely not be the subject of a contract because it is not a thing. If the object of surrogacy contracts were a reproductive service, then the contracting party would be obliged to pay for the birth of the child, even if the woman giving birth did not choose to relinquish her rights to the child. For these reasons, it is emphasised that the transfer of rights to the child is the real object of the contract, but then the charge of commodification of the child arises again. However, no one has ownership of the child, not even the mother, so it is impossible to transfer ownership of the child to another person, as no one can transfer more rights than he himself has. Another question is whether the parent-child relationship, which generates rights and obligations, can be subject to choice and trading. In the case of recognising the reproductive service as the subject of the contract, it is necessary to consider the problem of the prohibition of commercialisation of the body commonly accepted in European legal systems⁷ and justified by the principle of human dignity, which is the most important element protected by the Polish Constitution. When considering the subject matter of a surrogacy agreement, it should be recognised that the conclusion of a surrogacy agreement does not

5 Fras & Abłazewicz, 2008, p. 35.

6 Holocher, 2019, pp. 163-170.

7 See Wedeł-Domaradzka, 2021, pp. 64-83.

have the child as its object, but the creation of an opportunity for the child to come into the world. It is therefore incorrect to confuse commercial, paid adoption with child trafficking, as these are two separately defined crimes.

4. Surrogacy and criminal law in Poland

Turning to criminal law, it should be noted that at the moment, the only criminal law provision dealing with the broader crime of procreation from the perspective of the aggressive development of the surrogacy underworld seems to be Article 211a of the Criminal Code and, in extreme cases, Article 189a of the Criminal Code⁸. Article 189a criminalises human trafficking. The introduced Article 189a § 2 of the Criminal Code provides for the criminalisation of persons making preparations for the crime of human trafficking, such as preparing a plan of action, obtaining appropriate means/tools, and entering into an agreement with other persons. Persons entering into an agreement to give birth to a child cannot violate the child's dignity because the child's dignity cannot be said to have been compromised prior to conception. This article criminalises preparation for the crime of human trafficking, which is dictated by the high degree of social harmfulness of the crime in question. Prior to the 2010 amendments to the Criminal Code, the article did not criminalise activities related to making preparations to commit the crime of human trafficking. Article 211a, however, deals with illegal adoption. It stipulates that imprisonment is punishable by 'whoever, for the purpose of financial gain, is engaged in arranging the adoption of children in violation of the law'. In the context of surrogacy, § 2 of the same article is particularly noteworthy here, according to which one 'who, being a person with parental authority over a child, consents to the adoption of that child by another person, with the purpose of achieving a pecuniary or personal benefit, concealing this purpose from the court ruling in the adoption proceedings'. Human trafficking can be linked to surrogacy in the context of obtaining financial benefits in exchange for the transfer of parental rights to a newborn child. Embryo donation is possible under the law, but it must meet the conditions set forth in Article 36(1) of the Law on Infertility Treatment⁹. These conditions must be met together, and they exclude

⁸ Criminal Code Act of June 6, 1997 (Journal of Laws 1997 No. 88 item 553).

⁹ Infertility Treatment Act of June 25, 2015 (Journal of Laws 2015 item 1087). The Act implemented: Directive 2004/23/EC of the European Parliament and of the Council of March 31, 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells (Official Journal of the EU L 102 of 07.04.2004, p. 48); Commission Directive 2006/17/EC of February 8, 2006 implementing Directive 2004/23/EC of the European Parliament and of the Council as regards certain technical requirements technical requirements for the donation, procurement and testing of human tissues and cells (OJ. EU L 38 of 09.02.2006, p. 40); Commission Directive 2006/86/EC of

surrogacy because, for example, the transfer of an embryo must be to an anonymous recipient. This regulation demonstrates the legislature's desire to prevent embryo trafficking, which can be attributed to surrogacy¹⁰. The very definition of the concept of human trafficking in Polish law was regulated only with the amendment of the Criminal Code by the power of the Act of 20.05.2010. This change was dictated by the need to align the Polish legal order with European standards and Poland's international obligations. This obligation, in particular, resulted from the Act of 18.08.2003 ratified by Poland. The Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime of 15.11.2000 (The Palermo Protocol)¹¹ includes a definition of trafficking in persons in Article 3, while Article 5 requires state parties to criminalise acts in accordance with the stated definition of trafficking. In the Criminal Code, we find a definition of human trafficking in Article 115 § 22. According to it, human trafficking is the recruitment, transportation, delivery, transfer, storage, or reception of a person using: (1) violence or unlawful threat; (2) abduction; (3) deception; (4) misrepresentation or exploitation of a mistake or incapacity to grasp; (5) abuse of a relationship of dependence, exploitation of a critical position or a state of helplessness; (6) giving or accepting a pecuniary or personal benefit or the promise thereof to a person having custody or supervision of another person – for the purpose of exploiting him or her, even with his or her consent, in particular in prostitution, pornography or other forms of sexual exploitation, forced labour or services, begging, slavery or other forms of exploitation degrading human dignity, or for the purpose of obtaining cells, tissues or organs in violation of the law. If the perpetrator's behaviour involves a minor, it constitutes human trafficking, even if the methods or means listed in items 1–6 are not used.

Protection against unwanted actions under the guise of surrogacy or surrogacy conducted for purely commercial purposes can be provided by international law. One such act may be the Convention for the Protection of Human Rights and Dignity of

October 24, 2006 implementing Directive 2004/23/EC of the European Parliament and of the Council as regards requirements for traceability, notification of serious and adverse reactions and events, and certain technical requirements for the coding, processing, preservation, storage and distribution of human tissues and cells (Official Journal of the EU L 294, 25.10.2006, p. 32); Commission Directive 2012/39/EU of November 26, 2012 amending Directive 2006/17/EC as regards certain technical requirements for the examination of human tissues and human cells (Official Journal of the EU L 327 of 27.11.2012, p. 24).

¹⁰ Ciulkin-Sarnocińska, 2019, pp. 247-259.

¹¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted by the United Nations General Assembly on November 15, 2000 (Journal of Laws. 2005 No. 18 item 160) [Online]. Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-prevent-suppress-and-punish-trafficking-persons> (Accessed: 1 January 2023).

the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine¹². The Convention attempts to set minimum legal standards in the field of biomedicine. Undoubtedly, the development of biomedicine may contribute to actions that harm human beings and their dignity. Emerging ethical concerns regarding the possible application or testing of new knowledge on an individual have prompted the development of certain standards for the protection of life. Despite this, the Convention has not yet been ratified by all countries that are signatories to it: an example is Poland, which signed the Convention in 1999; however, it has still not been ratified. From the perspective of the issue under analysis, it is worth noting the emphasis in the content of the Convention on the importance of human dignity, which is inherent and inalienable. Dignity is the essence of humanity and determines human subjectivity. The Convention refers to dignity in both the preamble and normative part. It is already clear from Article 1 of the Convention that the parties protect the dignity and identity of the essential human being. According to Article 2, the interests and well-being of the human being prevail over the exclusive interests of society and science. According to some, this may indicate that surrogacy will be considered an illegal practice under these regulations, as the phenomenon can be analysed in relation to a child treated as an object or a surrogate mother who is only a means of production. Article 21 of the Convention, according to which 'The human body and its parts shall not, of themselves, be a source of profit', is difficult to judge unequivocally, as one must keep in mind the purpose of such practices and good faith, as well as surrogacy of a non-material nature. European Union law does not directly address the issue of surrogacy. Nevertheless, the issue has appeared in the case law of the Court of Justice of the European Union. In the judgment of the Grand Chamber of the Court of 18 March 2014 in the case of *Z. v. A Government Department, the Board of Management of a Community School*, ref. C-363/12, it was stated that Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, and in particular, Articles 4 and 14, must be interpreted as meaning that the refusal to grant paid leave equivalent to maternity leave to a worker as a contracting mother whose child was born through a surrogacy arrangement does not constitute discrimination on the basis of sex, and the situation of such a contracting mother with regard to the granting of adoption leave is not covered by the directive. The next act that can be pointed to is the Declaration of the Rights of the Child¹³. This was adopted by the UN

12 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, April 4, 1997, done in Oviedo.

13 Declaration of the Rights of the Child, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959).

General Assembly on 20 November 1959. It is not binding but nevertheless provides an important point of reference for the interpretation of those acts of international law that create binding obligations for states concerning the rights of the child. According to the second sentence of Principle 9 of the Declaration, the child should not be trafficked in any form. Moreover, Principle 6, which prohibits, among other things, the separation of a child from its mother in the first few years of life, except in exceptional situations, indicates the desire to exclude the phenomenon of surrogacy from society. Indeed, due to the medical possibilities of the time, there was no problem at the time related to the implementation of the conceived child (fertilised ovum) to another woman than the 'genetic mother'. Neither is the issue of surrogacy explicitly addressed in the 1989 Convention on the Rights of the Child. Nevertheless, some of the Convention's provisions address various phenomena related to surrogacy (transfer of children outside the country of their birth and violation of adoption laws). Under Article 11 of the Convention, state parties undertake steps to combat the illegal transfer of children and their illegal export abroad. This provision may be of particular relevance in countries where surrogacy is not permitted by law. Article 21(4) of the Convention, however, stipulates that state parties recognising and/or permitting the adoption system shall ensure that the welfare of the child is the supreme objective and shall take all appropriate steps to ensure that, in the event of adoption to another country, those involved do not receive an improper financial benefit from it. This should exclude the permissibility of commercial surrogacy in countries that have ratified the Convention on the Rights of the Child. However, despite the fact that the Convention has been ratified by 196 countries (and therefore, all UN member states except the United States, which are signatories to the Convention but have not ratified it, as well as some countries that are not UN members), this has not resulted in the complete outlawing of surrogacy (even commercial surrogacy). In addition to the provisions of the Convention, when reconstructing the standard of child protection against surrogacy, in light of the system of binding UN documents, it is necessary to consider the content of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography of 2000. According to Article 2(c), for the purposes of the Protocol, child trafficking means any act or transaction by which a child is transferred by any person or group of persons to another person or group for remuneration or any other compensation. Undoubtedly, the cited legal definition of child trafficking also includes commercial (paid) surrogacy and even surrogacy undertaken for altruistic reasons combined with the reimbursement of various expenses incurred by the pregnant woman (generally related to medical care). Similarly, the Committee on the Rights of the Child has explicitly stated that surrogacy can constitute the sale of a child. It should also be noted that pursuant to Article 3(1)(a)(ii) of the Protocol, each state party is required to ensure, at a minimum, that its criminal or criminal laws fully cover solicitation in an improper

manner, as an intermediary, of consent to the adoption of a child, in violation of the relevant international legal instruments on adoption, regardless of whether the crime is committed at home or abroad, by individuals, or in an organised manner. In this context, the Committee on the Rights of the Child, as an advisory body with no authority to make binding recommendations, encourages state parties to take all necessary steps to eliminate the sale of children following surrogacy agreements.

5. Motherhood in the letter of Polish law

Under Polish law, on the one hand, the mother of a child is the woman who becomes pregnant and gives birth to that child¹⁴. On the other hand, the father of the child according to the law is presumed to be a man if the child was born during the marriage or before 300 days after its cessation or annulment¹⁵. This presumption does not apply if the child was born more than 300 days after the decree of separation¹⁶. However, if a child is born before the expiration of 300 days after the cessation or annulment of the marriage but after the mother has entered into a second marriage, the child is presumed to be from the second husband. In the case of the use of assisted reproductive techniques, after obtaining consent from the mother's first husband, the presumption described above does not apply¹⁷. Legislators, when regulating the issue of determining the origin of the child, undoubtedly had in mind only the natural method of fertilisation; however, with the development of procreative techniques, the catalogue of fertilisation possibilities has expanded and continues to expand. To date, the issue of the origin of the child after the implantation of the embryo into the womb of the surrogate mother (or genetically unrelated recipient) has not been regulated in Polish law, and the child cannot be denied the right to know its genetic origin. It should also be borne in mind that the semen used to perform the procedure described above may also be obtained from a sperm bank, in which case the donor is assured of relative anonymity; however, this issue is not the subject of this paper. Legislators should take appropriate steps to ensure that such important social phenomena as maternity, paternity, parenthood, and the right of everyone to know their genetic ancestry are not left outside the scope of legal regulations. In the light of the Preamble to the Polish Constitution, the Republic of Poland is obliged to guarantee the development of future generations and the possibility of passing on the nation's traditions to them. In this context, it can be considered that motherhood, in conjunction with the family, plays a key role. Indeed, Article 18 of the Constitution

14 Art. 619 of the Family and Guardianship Code.

15 Art. 62 § 1 of the Family and Guardianship Code.

16 See Skorupka, 2021, pp. 174-178.

17 Art. 62 § 2 of the Family and Guardianship Code.

of the Republic of Poland mandates the protection and care of certain subjects when they perform certain 'social roles'. According to it, marriage as a union between a man and a woman, family, maternity, and parenthood are under the protection and guardianship of the Republic of Poland¹⁸. This article thus protects the four fundamental values (marriage, family, maternity, and parenthood) associated with the functioning of individuals in society. The Polish Constitution does not define the term *motherhood*. It is undoubtedly related to the concept of *mother* and denotes the relationship that exists between a child and its mother from the beginning of pregnancy through the postpartum period until the death of one of them. The concept of motherhood expresses the necessary relationship between mother and child, with this relationship occurring on many levels, including biological, emotional, social, and legal. The function of this relationship is the proper development of a person's life in its early stages, in which it requires special care. Therefore, we have the term of *sociological (social) mother*, which refers to a woman who enters into a contract of maternity with a so-called surrogate mother and plans to form emotional and family ties with the child that will be born. Sometimes as many as three women are involved in the process of bringing a child into existence using the institution of surrogacy: the genetic mother (the oocyte donor), the biological mother (the surrogate mother expected to give birth to the child), and the social mother (the woman expecting the child, who will later raise it). Until recently, a relatively straightforward way for potential 'parents' (even without a genetic bond linking either of them to the child) to introduce a born child into their birth records and acquire full rights to the child was adoption by indication. This form of legal adoption was severely criticised in its previous formulation by adoption centres. This procedure differs from the form of ordinary adoption in that it takes place outside the procedures of the adoption centres and the child is immediately placed with an adoptive family. Based on Article 1191 § 1 of the Family and Guardianship Code, parents (in the classical, biological sense) could consent to the adoption of their child by a couple they had designated. The court examined only whether the prospective adopters were competent and whether the adoption procedure was in line with the broad interests of the adoptee. This is because the court primarily examines whether the adoption is consistent with the welfare of the child, which it must follow. However, by the 2015 Law on Amendments to the Family and Guardianship Code, the Civil Procedure Code Law, and the Law on Family Support and the Foster Care System, 89 Article 1191a of the Family and Guardianship Code was added, limiting parents' ability to name adopters. Currently, parents before the guardianship court can only designate a relative of either of them, as well as their spouse. Until the aforementioned change, the catalogue of persons who could be designated for adoption remained open; the contenders for parents, if they met certain

18 Constitution of the Republic of Poland of April 2 (Journal of Laws 1997 No. 78, item 483).

qualifications in the opinion of the family court, could be strangers who ordered the child from the birth mother. Thus, the number of indicated adoptions carried out by the adoption underworld will remain unknown. Polish legislation does not use the term 'surrogacy'. Article 109 § 2 of the Family Code only provides for a *surrogate family*; however, it does so in a different context, with no connection to the use of similar terminology in the case of assisted procreation surgery. The Constitutional Court has repeatedly interpreted the terms *maternity*, *paternity*, or *parenthood*¹⁹, most often in the course of examining the constitutionality of various laws regulating them; however, it has never addressed the values protected by Article 18 of the Constitution in the context of medically assisted procreation and surrogacy.

6. Surrogacy contracts

Considering the legal permissibility of so-called surrogacy contracts, the starting point should therefore be a reference to the concept of an individual's procreative freedom, which is an emanation of peoples' right to privacy. In the most general terms, in the positive aspect, procreative freedom means primarily the freedom to decide whether or not to have offspring and the ability to decide on one's own reproductive capacity. The negative aspect of this freedom, however, essentially boils down to a prohibition on state and private entities to encroach on the sphere of human procreative freedom. This specifically excludes the introduction of the legal compulsion of procreation and, conversely, its legal prohibition. The Constitution does not set the boundaries of procreative freedom in a definitive manner, as this freedom is not absolute. The constitutional limits of the freedom in question are therefore *prima facie* in nature and can be definitively established at the level of law. As Polish law inadequately regulates these issues, although couples and surrogates usually sign civil law contracts under such circumstances, it is difficult to enforce these arrangements later in reality. A surrogate cannot in any way force her 'contractors' to take the child from her. Under the current law, she is the mother of the child and bears all the consequences associated therewith. The only thing she could do was relinquish her parental rights and hand the child over for adoption under the provisions of the Family and Guardianship Code. Furthermore, the persons 'procuring' the child have no grounds whatsoever for the surrogate's surrender of the child, since, referring again to the definition of mother in the Family and Guardianship Code, the woman who gave birth to the child is its mother and therefore has legal title effective against everyone. The only issue that could possibly be invoked by those ordering a child

19 See judgement of the Constitutional Court of April 28, 2003, ref. K 18/02, OTK ZU No. 4/A/2003, item 32; judgement of the Constitutional Court of November 26, 2013.

'cheated' by a surrogate is, as indicated in the literature, the provisions on unjust enrichment. In relation to contracts, the principle of free formation of the content of a legal relationship is clearly confirmed from the positive side by Article 353¹ of the Civil Code, according to which the parties entering into a contract may arrange the legal relationship as they see fit, as long as the content or purpose of the relationship does not contradict the properties (nature) of the relationship, law, or principles of social intercourse. The sanction for violating the prohibitions provided in Article 58 of the Civil Code is the absolute invalidity of the legal act. The violation of the limits of freedom of contract marked by Article 353¹ of the Civil Code leads to the same result. Polish civilian lawyers pointed to several possible variants in concluding an agreement that could serve to achieve the effects of surrogacy²⁰. First, the agreement could include an obligation on the surrogate mother to consent to the adoption of the child after birth, while simultaneously obliging the sociological parents to apply for the adoption of that child and to provide certain monetary benefits to the surrogate mother. Second, the contract may take the shape of a conditional contract (under a condition precedent), regulating only certain property relations on account of a future and uncertain event, which is, at the time of the conclusion of the contract, the fact of the child's birth and its adoption by the sociological parents, providing, on the one hand, for a promise to provide a benefit to the surrogate mother, if she would consent to the adoption of the child by the sociological parents, and, on the other hand, for a promise to provide a benefit to bear the costs of the child's maintenance and upbringing by the sociological parents, if the adoption of the child would not come to fruition due to the withdrawal of this intention by the spouses or because of a negative decision of the family court on this matter.

7. De lege ferenda conclusions

It is worth noting that in the context of the axiology of the Polish Constitution, including its Article 18, special attention should be paid to the problem of infertility of a couple trying to have a child. In the case of a woman, infertility can take the form of an inability to carry a pregnancy and give birth to a live child. In such a case, using the service of a so-called *surrogate* may be the only chance for a couple to overcome the problem of infertility and have their own offspring. Surrogacy can have implications at the civil, familial, criminal, and/or private international law levels. The Court's rulings show how it also relates to human rights, the right to respect for family life, and the right to privacy. The unclarified status of this type of agreement raises many problems, and until the national legislature has a say on the preferred

²⁰ Wiśniewski, 2002, p. 435.

shape of this issue, all cases will be decided *ad casum*, depending on specific factual circumstances. New techniques of medically assisted procreation, which include the institution of contractual pregnancy, can help offset the effects of infertility, which is a growing problem in aging societies. However, this goal is achieved at the expense of other important values associated with procreation, such as the stability and explicitness of parental ties, responsibility and concern for life, and the treatment of offspring as gifts. Therefore, new reproductive technologies should receive special attention. Progress in medicine poses a series of growing challenges to global legislation in modern society. The use of the reproductive capacities of the female body for financial gain prejudices the social reprehensibility and criminality of childbirth contracts. The dynamics of medical progress go hand in hand with the problems of human fertility caused by the various environmental changes to which humans are subjected. Although surrogacy is not a technologically new way of reproduction, it is a novel approach of using the natural capabilities of the human body. New ways that differ from the accepted norms are also an important area *vis-à-vis* legislative consideration.

Surrogacy remains a contentious issue in Polish law, with the current legal framework inadequately addressing the complexities of assisted reproduction techniques. Despite the emergence of legislation surrounding *in vitro* fertilization in 2015, surrogacy remains largely unregulated, leaving crucial ethical and legal considerations unaddressed. The absence of explicit regulations has resulted in a myriad of legal ambiguities and ethical dilemmas. It is imperative for Poland to embark on a journey towards comprehensive surrogacy legislation, guided by the principles of human dignity, child welfare, and ethical practice. Central to this endeavour is the recognition of surrogacy within the legal framework. Clear definitions of parentage, rights, and responsibilities are essential for all the parties involved—surrogate mothers, intended parents, and donors. This recognition must prioritise the protection of human dignity, ensuring that no individual is exploited or commodified for financial gain. Moreover, Poland must unequivocally prohibit the commercialisation of surrogacy and any form of trafficking in children. Stringent measures are necessary to not only safeguard the well-being of surrogate mothers and children but also prevent their exploitation in surrogacy arrangements. Harmonising domestic legislation with international standards, such as the Convention on Human Rights and Biomedicine, will ensure alignment with global norms and facilitate international cooperation on surrogacy-related issues. Legislative reforms should prioritise the best interests of the child, establishing procedures for determining parentage and safeguarding the child's right to know their genetic ancestry. Additionally, ethical guidelines must be implemented to prohibit unethical practices and ensure the protection of vulnerable individuals. Public debates and consultations with stakeholders, including medical professionals, legal experts, ethicists, and the public, are essential steps in the

legislative process. Robust enforcement mechanisms and ongoing monitoring and evaluation will be necessary to assess the effectiveness of new legislation and address emerging challenges over time. In conclusion, the journey towards ethical and comprehensive surrogacy legislation in Poland requires concerted efforts to address the existing gaps and challenges. By prioritising human dignity, child welfare, and ethical practices, Poland can establish a legal framework that upholds the rights and responsibilities of all parties involved in surrogacy arrangements.

Bibliography

- Ciulkin-Sarnocińska, K. (2019), *Surogacja w ujęciu karnoprawnym i kryminologicznym [Surrogacy in criminal and criminological terms]* (doctoral thesis). Białystok: Uniwersytet w Białymstoku – Wydział Prawa, pp. 247-259.
- Fras, M. & Abłażewicz D. (2008), 'Reżim prawny macierzyństwa zastępczego na tle porównawczym [*Legal regime of surrogacy against a comparative background*]' *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*, vol. VI A.D. MMVIII, pp. 31-67 [Online]. Available at <http://www.europeistyka.uj.edu.pl/documents/3458728/3c4fd20e-64bc-42e9-95c4-baaadc5d3442> (Accessed: 1 January 2023).
- Holocher, J. (2019), 'Surrogate motherhood – terminological considerations. Three perspectives: theory and philosophy of law, legal doctrine, and public debate' in Mostowik P. (ed.), *Fundamental legal problems of surrogate motherhood. Global perspective*. Warsaw: IWS, pp. 163-170.
- Mikluszka, M. (2017), *Zagraniczne procedury tzw. macierzyństwa zastępczego (surrogacy motherhood) w świetle zasady handlu ludźmi – zagadnienia węzłowe [Foreign procedures of so-called surrogacy motherhood in light of the principle of human trafficking – key issues]*. Warsaw: IWS, pp. 5-9.
- Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted in New York on May 25, 2000 (OJ 2007 No. 76, item 494).
- Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted by the United Nations General Assembly on November 15, 2000 (Journal of Laws. 2005 No. 18 item 160).
- Skorupka, A. (2021), *Dopuszczalność dowodu sprzecznego z prawem w sądowym postępowaniu cywilnym [Admissibility of contradictory evidence in civil court proceedings]*, Warsaw, pp. 174-178, [Online]. Available at: https://https-siplex-pl.pulpit.uksw.edu.pl/#/monograph/369483189/58/skorupka-agnieszka-dopuszczalnosc-dowodu-sprzecznego-z-prawem-w-sadowym-postepowaniu-cywilnym?keyword=%22definicja%20matki%22&unitId=passage_12688 (Accessed: 1 January 2023).
- Śledzińska-Simon, A. (2022), 'Kobiety i płeć w Konstytucji [Women and gender in the Constitution]', *Państwo i Prawo*, 10/2022, pp. 74-90 [Online]. Available at: <https://assets.contenthub.wolterskluwer.com/api/public/content/1eeec018bc7f4ea58f33db625ac6edf0?v=564679eb> (Accessed: 1 January 2023).
- Wedeł-Domaradzka, A. (2021), 'Uznanie w prawie krajowym stosunku prawnego rodzic-dziecko między dzieckiem urodzonym wskutek umowy o surogację za granicą a matką intencyjną (intended mother) [Recognition in domestic law of

the parent-child legal relationship between a child born as a result of a surrogacy agreement abroad and the intended mother]', *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego*, vol. XVII, A.D. MMXIX, Warsaw, pp. 64-83.

- Wiśniewski, T. (2002), *Komentarz do kodeksu cywilnego. Księga trzecia. Zobowiązania [Commentary to the Civil Code. Book three. Obligations]*, t. 1. Warszawa, p. 435.
- Witczak-Bruś, P. (2021), *Surogacja. Aspekty prawne macierzyństwa zastępczego [Surrogacy. Legal aspects of surrogacy]*. Warsaw.