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PRAWO DO REPRODUKCJI W KONTEKŚCIE WSPÓŁCZESNEJ DOKTRYNY KONSTITUCJONALIZMU

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Streszczenie. Rozwój technologii biomedycznych pozwolił na dokonywanie prokreacji poprzez zastosowanie najnowszych technologii reprodukcyjnych, spośród których najbardziej radykalna jest metoda macierzyństwa zastępczego. Dlatego konieczna jest skuteczna regulacja prawna w zakresie tej kwestii, aby uniknąć towarzyszących jej problemów, w szczególności takich jak handel ludźmi, eksploatacja kobiet i dzieci, dyskryminacja z różnych powodów, niewypełnianie zobowiązań przez strony takich stosunków prawnych, naruszenie tożsamości prawnej dziecka urodzonego przy użyciu tej metody. Niniejszy artykuł ma na celu przedstawienie analizy prawnej korzystania z prawa do reprodukcji za pomocą metody macierzyństwa zastępczego. W ten sposób zbadamy naturę prawną instytucji macierzyństwa zastępczego i przeanalizujemy jej istnienie w krajach europejskich. W następnej części niniejszego badania przeanalizujemy podstawowe zasady komercyjnego macierzyństwa zastępczego jako najbardziej kontrawersyjnego rodzaju reprodukcji.

Słowa kluczowe: biomedycyna, prawa dziecka, macierzyństwo zastępcze, bezpłodność, prawa człowieka.

THE RIGHT TO REPRODUCTION IN THE CONTEXT OF THE MODERN DOCTRINE OF CONSTITUTIONALISM

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Abstract. The development of biomedical technologies has enabled the procreation using the latest reproductive technologies, among which the method of surrogacy is the most radical. Therefore, qualitative legal regulation of this issue is essential to avoid the problems that accompany it, in particular, human trafficking, exploitation of women and children, discrimination on various grounds, failure to fulfill obligations by the parties to such legal relations, violation of the fundamentals of legal identity of the child born with the help of this method. Therefore, this article is intended to provide a legal analysis of the use of the right to reproduction by the method of surrogacy. Thus, we reveal the legal nature and formation of the institution of surrogacy. In the next part of this study, we reveal the basic foundational principles of commercial

surrogacy as the most controversial form of reproduction. Surrogate motherhood is a chance not only for infertile couples to become parents, but also for same-sex couples (if such relations are legalized in the country domestic law), or couples where one of the partners has health problems other than infertility, which makes it difficult for a person to carry a baby on their own. Analyzing different countries of the world where commercial surrogacy is used, we see an extremely large difference in pricing for services provided. Generally, it depends on the economic development and welfare in the country of the surrogate mother. Ukraine could potentially become a center for surrogacy, which is related both to the economic accessibility of the procedure, the loyalty of the legislation, and the relatively high supply. We pay special attention to legal regulation of confidentiality that will be guaranteed for each subject of these relations. It is also the responsibility of the doctors and medical staff involved in the process to comply with this principle and there is the need to impose legislative sanctions for the dissemination of personal information regarding the procedure. We believe that the principle needs special attention from the state, since the method of reproduction affects the moral and ethical elements of a person and must be protected.

Key words: biomedicine, child rights, surrogacy, infertility, human rights.

Introduction. In the modern period around the world, it is possible to acknowledge a significant decrease in demographic fertility rates, which is associated with poor health (infertility) of people of reproductive age. According to WHO, «the incidence of infertility in marriage is 8,0-18,0%, and in Ukraine it is 17,0-19,5% of the total population of married couples. The cause of infertile marriage in 40-50% of cases is a pathology in one spouse, in 25-30% – in both, in 10-15% of cases it cannot be established» (World Health Organization). Reproductive health is extremely important for both the institution of the family and the people, as well as the economic potential of the state as a whole.

Nowadays, there is no full and comprehensive study of this topic, but it has been partly worked on by: Gloria Torres, Anne Shapiro & Tim K. Mackey studied the surrogacy in South American countries (*Torres G., Shapiro A., Mackey T. K., 2019*). Millbank J. (*Millbank J., 2015*) studied the commercial surrogacy in Australia. Smith E, Behrmann J, Martin C, Williams-Jones B. in their study focused on the problems of surrogacy in Argentina (*Smith E and oth., 2010*).

Surrogate motherhood sometimes becomes the only hope for people to become parents. Analyzing the situation of surrogate motherhood in European countries, it should be mentioned that in Portugal surrogate motherhood is allowed only in exceptional cases, in case of serious health problems, in an altruistic manner only and under the strict control of public authorities (*Raposo V. L., 2017*). In Sweden, Switzerland, Germany, Italy, and France all types of surrogate motherhood are prohibited.

Certainly, it should be mentioned that surrogate motherhood is a chance not only for infertile couples to become parents, but also for same-sex couples (if such relations are legalized in the country domestic law), or couples where one of the partners has health problems other than infertility, which makes it difficult for a person to carry a baby on their own.

Analyzing all peculiarities of a surrogacy contract, it should be noted that one of its key elements is the voluntary consent of the woman to the procedure. However, we have to mention the fact that in the developing countries there is a high risk of women

exploitation as their consent is reached through coercion, intimidation, harassment or deception.

A striking example is Cambodia, where women were recruited by means of involving in gambling, either a woman or her family members (*Audrey W., 2017*).

The low literacy and low educational attainment of women, which is inherent in developing countries, should also be taken into account. It all serves as a basis for exploitation because malicious firms often mislead women. It should also be noted that the surrogate mother who agreed to deliver a child is placed in extremely rigid conditions regarding the free movement and lifestyle, which can also be treated as a form of exploitation. An example is the case of women's exploitation in Thailand, where they were forced to become surrogate mothers by deception and coercion (*Thailand police investigate baby sales ring, 2011*). Another striking example of women exploitation is India, where gross human rights violations are observed and the child and woman are treated as commodities (*Surrogate motherhood, 2018*). We must state the fact of certain exploitation of surrogate mothers in Ukraine. Unscrupulous intermediary firms create inappropriate conditions for surrogate mothers and exercise complete control over their lives, with clear signs of exploitation (*Aljazeera, 2018*).

In this regard, there is a need to develop state policy in such a way that a careful analysis and control of the activities of such intermediary firms is conducted in order to avoid future offenses against women who have agreed to be gestational couriers.

Let us single out some basic principles that, in our opinion, could be defined common for all types of legal regulation.

1. Dominant value of human rights. Human rights are the fundamental values of every developed country in the world, regardless of gender, race, and nationality, and thus a person and their interests are upheld and protected and are of the highest priority to the state and the international community as a whole. This principle is the basis of the «Declaration of Human Rights» and also in the «Universal Declaration on the Human Genome and Human Rights», and «Convention on the Rights of the Child», «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».

2. Clear regulatory definition of the status of participants. In order to determine the fundamental principles on which the state policy on surrogacy should be built, it is necessary to involve the state directly in this process. The state should create legislative regulators of influence for full coverage of all subjects of these relations by legal protection of their rights. Surrogacy is exposed to many risks that could potentially create a danger of violation of the above-mentioned principle. For example, to avoid such phenomena as human trafficking, for a child that is carried by a surrogate mother not to turn into a product of sale, which we consider absolutely justified given the high purpose that this reproductive method sets for itself. We believe that in each country where this method is permitted, a specialized legislation is needed that could qualitatively protect the rights and interests of all participants in the method in order to comply with all the basic principles outlined above.

3. Protection of the legal interests of a surrogate mother. There are also a number of problematic questions about who can act as a surrogate mother. It is indisputable that a woman must be physically and psychologically healthy and have at least one healthy child of her own. Therefore, it is clear that there are objective reasons

for age restriction. In Ukraine, the lower age requirement corresponds to the age of majority – 18 years. In some countries, the age requirement is slightly higher: 20 in Armenia and 25 in Australia (*Marko Ya., 2016, p.86*), we consider this absolutely acceptable, since age of majority does not always indicate a psychologically stable condition that is characteristic of young people who have turned 18, so this restriction is quite justified. We believe that Ukraine should also set a higher age requirement than 18 years. This is due to the fact that every year in the world the age when a woman gives birth to her first child is increasing. For example, in the United States of America it is 33,4 years, in Russia – 21,5, in England – 24,3 years, in Italy – 30,9 years (Infertility in Europe). Since, in order to become a surrogate mother, it is a mandatory requirement to have a healthy child, so it is necessary to raise the age requirement in our country. We also believe that a woman of more mature age and with already acquired life experience will be more psychologically stable and responsible for her role as a surrogate mother. It should also be emphasized that every human body reaches full physical and psychological maturity at different periods. It is not always possible to say that this will happen at the age of 18. For example, the majority age in countries such as Guinea, Honduras, Egypt, Ivory Coast, Namibia, South Korea, Singapore is 21 years. Therefore, the age requirement for a surrogate mother should also be raised. Of course, in every state it is necessary to start from the peculiarities of growth and development of young people, but the acceptable age would seem to be 21-22 years, which will allow to speak more confidently about a certain maturity of a person for making such a responsible decision.

The upper age limit is also undefined. Some draft regulations propose to set it at 49, as it is the childbearing age recommended by WHO. However, we believe that in the commercial model of surrogacy, it is necessary to reduce the upper age requirement to 42 years, as it is the limit of the most favorable childbearing age, potentially causing the least harm to health, given the large amount of hormone therapy that can cause oncological diseases in the age of maturity and a woman is involuntarily exposed to many risks, which makes it necessary to reconsider these approaches.

Also, the woman must undergo a physical and psychological examination to determine her suitability for the role. «A surrogate mother is a woman who has given birth to a child as a result of artificial insemination by donor sperm or extracorporeal fertilization or embryo implantation with the aim to bear a child for other persons». In other words, ovum fertilization (of biological mother) by sperm (of biological father) occurs outside the body of the future surrogate mother, that is, biologically and practically the surrogate mother is used only as an incubator for carrying the child and has no genetic relationship with this child. If commissioners (expectant parents) cannot provide their biological materials for the procedure, donor gametes are used. The use of biological materials of a surrogate mother is also possible, but we believe that this is a serious complication of the process, and in some states is prohibited by law. First, because a surrogate mother feels a certain attachment to the child being aware of their genetic relationship, which complicates the process of separation of a surrogate from the child. In the case of using the gametes of a surrogate mother, it is considered as human trafficking. We believe that this phenomenon is not acceptable and does not correspond to the basic idea of the institution of surrogacy.

4. Legal regulation of confidentiality that will be guaranteed for each subject of these relations. It is also the responsibility of the doctors and medical staff involved in the process to comply with this principle and there is the need to impose legislative

sanctions for the dissemination of personal information regarding the procedure. We believe that the principle needs special attention from the state, since the method of reproduction affects the moral and ethical elements of a person and must be protected.

5. Right of a child born with the help of the method of surrogacy to acquire the citizenship of their biological parents. There are countries where there is a legal prohibition to use the reproduction method under research, which complicates and even deprives the right of a surrogate child to have a fulfilling life with biological parents. States such as France, Germany, and Switzerland refuse to register a child born with the help of this method in their registers, since state policy provides that only the woman who has given birth to the child can be the mother. ECtHR decisions reasonably point to violations of the rights to private and family life and to the violation of the United Nations Convention on the Rights of the Child. An example is the case of «*Menesson v. France*» and «*Labassee v. France*» (*Menesson v. France and Labassee v. France, 2014*), where the court found that the French state by refusing to properly recognize family ties between the child and the child's biological parents violates the rights of children as guaranteed by the «Convention for the Protection of Human Rights and Fundamental Freedoms». Another example is the following case. «On April 23, the Federal Court of Justice of Germany in Karlsruhe came to a decision that could serve as a reference point in the future for hearing similar cases in German courts. The substance of the case is this: at the end of 2015, at a maternity hospital in Kyiv, the Ukrainian surrogate mother gave birth to the child after artificial fertilization using biomaterial from the German couple from Dortmund. After the birth of the child, the Ukrainian authorities responsible for civil registration issued a birth certificate where the parents of the newborn child were the German married couple. According to German law, the mother of the child is the biological mother – a person who gave birth to the child. As the Federal Court of Justice of Germany has ruled, the adoption procedure should be used to eliminate legal conflicts regarding the legal status of the mother. It is to be expected that this decision will be referenced in the future by German judges when considering such claims» (German court made landmark decision on surrogacy in Ukraine). Bríd Ní Ghráinne Aisling McMahon are also focusing on this issue, «International surrogacy agreements involve a child born to a surrogate mother who is of a different nationality to the commissioning parent(s) in a state other than that of which the commissioning parent(s) are nationals or reside. Many of these arrangements lead to children being born stateless, which deprives that child of many rights that are directly linked to one's nationality as well as causing significant practical problems, such as difficulty in obtaining a passport. In undertaking the first Public International Law analysis of nationality and international surrogacy agreements, we map out how various provisions can be used to guarantee protections against statelessness» (*Ghráinne B., McMahon A., 2017*).

We believe that there is a way out – the most acceptable option is to adopt a child, which will be a certain guarantee for parents (commissioners) of the proper and timely acquisition of citizenship in their country and protection of the rights and interests of a child.

Conclusions. The history of surrogacy impresses us and strengthens our belief that the human procreation is one of the most important human rights. Analyzing different countries of the world where commercial surrogacy is used, we see an extremely large difference in pricing for services provided. Generally, it depends on the

economic development and welfare in the country of the surrogate mother. Ukraine could potentially become a center for surrogacy, which is related both to the economic accessibility of the procedure, the loyalty of the legislation, and the relatively high supply. Also, the prohibition of commercial surrogacy in Thailand and India only contributes to the development of a domestic market for these services. Analyzing the upper and lower age requirements of a surrogate mother, we came to the conclusion that the lower age requirement should be set at 21-22 years, because we believe that people should reach full physical and psychological maturity, which does not always coincide with the onset of majority age in our state. The upper age requirement is considered to be 42 years. Also, the time frame for a surrogate mother to give the child away should also be legally set, since in the postpartum period a woman is subjected to extreme stress and delaying the separation from the child will negatively affect her psychological state and the strengthening of maternal instinct, which will only complicate the already difficult moment of transfer of the child to the commissioners (biological parents). This is due to both the childbearing factor and the medical parameters, as older women are more difficult to tolerate hormone therapy, which is mandatory during this procedure, as well as its dangerous consequences for women's health.

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