

REGULATING SURROGACY CONTRACTS: CROSS-COUNTRY ANALYSIS OF LEGAL PRACTICES IN THE BALTIC STATES AND UKRAINE

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Abstract

The peculiarities of the legal regulation of contractual surrogacy relations within the Republic of Lithuania, the Republic of Latvia, and the Republic of Estonia laws, as well as due to Ukraine law are the subject matter of the article.

The aim of this contribution is to delineate the particularities of the legal regulation of surrogacy contracts within the Baltic States and Ukraine and to introduce recommendations for the improvement of the current civil legislation of the Ukraine in this matter.

In respect of the applicable legal rules, it can be concluded that the position of the Republic of Lithuania is near to a prohibition on surrogacy, whereas Latvia and Estonia take a somewhat regulatory restrictive stance. Unlike many European countries, where surrogacy is banned or not legally recognized, Ukraine allows contractual surrogacy but is devoid of any comprehensive legislative regulation.

The author establishes that currently in Ukraine contractual surrogacy relations are the subject of legal regulation of a subordinate normative legal act that allows the use of a contract to regulate surrogacy relations between spouses and a surrogate mother.

It is argued that in the conditions of geographical proximity of the Baltic countries and Ukraine, as well as the ban on the use of the reproductive method of surrogacy in the Baltic countries and the permission for its use in Ukraine, the basis is created for the development of "reproductive tourism" in Ukraine for citizens of Lithuania, Latvia and Estonia. In turn, this creates the prerequisites for the emergence of the problem of recognizing the legal force and legal consequences of a surrogacy contract concluded by citizens of the specified countries on the territory of Ukraine and in accordance with the legal order of Ukraine, as well as the legal consequences of the use of such a reproductive method.

Keywords: surrogacy, assisted reproductive technologies, surrogacy contracts, legal regulation.

Introduction

In recent years, surrogacy has turned out to be one of the most challenging questions of the modern private law and the most intriguing one from an interdisciplinary perspective. Traditional family formation was largely changed due to the accelerated evolution of the assisted reproductive technology, however this has introduced new legal problems concerning the rights of children, the intended parents, and the surrogate mothers (Calhaz-Jorge et al., 2020; Ellenbogen, Feldberg, Lokshin, 2021).

In comparative legal research, regulatory approaches to surrogacy tend to be perceived as a sensitive topic that touches on ethical, social, and public policy issues, and thus a wide variety of national regulatory models can be observed, ranging from banning surrogacy altogether to allowing contractual regulation of it (Mikelėnas, Mikelėnaitė, 2018; Pöder, Pöder, Kask, 2019). At the same time, the lack of common international rules in this area leads to legal uncertainty particularly in cases of reproductive tourism or trans-frontier cases.

In this way, the practical interest of considering the problem of legal regulation of contractual surrogacy relations in the Baltic countries and Ukraine is determined by at least two circumstances. The first is the common Soviet past of these countries. Despite the fact that Ukraine underwent a deeper transformation under the pressure of Soviet ideology than Lithuania, Latvia and Estonia, both

the scientific and practical interest is the path that these countries took after gaining independence in resolving the issue raised and how deeply they immersed themselves in its resolution. The second circumstance is the ideological and geographical proximity of these countries. The support provided by the Baltic countries to Ukraine, especially in the difficult conditions of Russia's illegal and unprovoked armed aggression against Ukraine, as well as the relatively small distance between Ukraine and the Baltic countries, only strengthens the ties between the states and creates the basis for their citizens to enter, in particular, into contractual surrogacy relations.

Analysis of the raised issue from a specific perspective is able not only to determine the features of modern regulatory and legal approaches to regulating contractual surrogacy relations in the mentioned countries, but also to identify their advantages and disadvantages, in particular for the formation of scientifically based proposals for further improvement of the provisions of the current civil legislation of Ukraine.

The aim of the article is to determine the features of the legal regulation of contractual surrogacy relations under the legislation of the Republic of Lithuania, the Republic of Latvia, the Republic of Estonia and Ukraine in order to create a scientific basis for the formation of proposals for further improvement of the provisions of the current civil legislation of Ukraine.

The object of the research is the legal relations associated with the application of ART, in particular within the framework of surrogacy.

The subject of the research is the legal regulation of contractual surrogacy relations in the law of the Republic of Lithuania, the Republic of Latvia, the Republic of Estonia and Ukraine.

In the process of writing the article, several interdisciplinary methods were used, which made it possible to conduct a comprehensive analysis of contractual relations in the field of surrogacy in Ukraine and the Baltic countries, namely:

Dogmatic method - was used to analyse the norms of the current legislation of Ukraine and the Baltic countries in the field of contractual relations of surrogacy.

Content analysis of scientific sources - a review of scientific publications in the field of surrogacy was conducted, which ensured the scientific validity of the study.

Comparative legal method - was used to compare the norms of legislative approaches to contractual relations of surrogacy in Lithuania, Latvia, Estonia and Ukraine, which made it possible to identify common features and differences in legal regulation.

1. Legal Regulation of Surrogacy Contracts in the Republic of Lithuania

On the way to forming a principled position on the issue of legal regulation of contractual surrogacy relations, the Republic of Lithuania has gone through a rather intense path of normative work, full of discussions and deliberations, which ultimately led to the current conceptual vision of ways to resolve the issue raised.

Lithuanian legal scholars began legal research into the procedure for using assisted reproductive technologies in the mid-1980s, that is, seven years after the birth in the United Kingdom of the first child conceived using such technologies.

The first legal act devoted to this matter was the Order of the Ministry of Health of the Republic of Lithuania of May 24, 1999, No. 248 "On Artificial Insemination" (Minister of Health, 1999). Its provisions allowed for limited use of assisted reproductive technologies. In particular, only married women could use the relevant services, and only a man could provide biological material for fertilization. At the same time, the regulatory and legal provisions established five methods of artificial insemination: intrauterine insemination, intrauterine gamete transfer; in vitro fertilization; intracytoplasmic sperm injection; intrauterine zygote transfer.

During the drafting of the Civil Code of the Republic of Lithuania in 2000, the possibility of legalizing fertilization of a woman's egg cell with gametes of a man with whom she was not in a marital relationship was discussed. However, prevailing ethical trends in society, heavily influenced by Catholic teachings, contributed to the rejection of this idea. Even this version of the relevant rules failed to gain support in Parliament (Mikelėnas, Mikelėnaitė, 2018).

In the Christian world, the Catholic Church fundamentally opposes all forms of assisted reproductive technologies, including surrogacy (Ellenbogen, Feldberg, Lokshin, 2021). This approach has taken official form. In 2015, the Conference of Catholic Bishops of the European Union condemned all forms of gestational surrogacy (Pöder, Pöder, Kask, 2019).

In this context, further legislative work was concentrated on drafting legal acts that envisaged only a limited application of reproductive technologies. The result of this meticulous work was the adoption in 2016 of the Law "On Assisted Fertilization." This legislative act comprehensively regulated relations connected with the use of assisted reproductive technologies. Among its fundamental provisions are the prohibition of commercial transactions regarding germ cells and embryos (Part Six, Article 3), as well as the prohibition of embryo donation (Part Eight, Article 3). However, most importantly, Article 11 of the Law established a complete prohibition of surrogacy. According to this legal provision, any civil transaction by which one woman undertakes to conceive, carry, and give birth to a child for another person or persons by renouncing her maternal rights to the child born (surrogacy) is null and void (Seimas of the Republic of Lithuania, 2016).

Furthermore, Article 1.80(1) of the Civil Code of the Republic of Lithuania stipulates that "any transaction that fails to meet the requirements of mandatory statutory provisions shall be null and void". In turn, Article 1.81(1) of the Code states that "a transaction that is contrary to public order or norms of good morals shall be null and void" (Seimas of the Republic of Lithuania, 2000).

The principled nature of this position on the use of surrogacy is underscored by the adoption on June 25, 2020, by the Seimas of the Republic of Lithuania of a resolution condemning all forms of surrogacy (Seimas of the Republic of Lithuania, 2020).

So, the legal regulation of contractual relations in surrogacy in the Republic of Lithuania has developed through a gradual process shaped by ethical, religious, and societal considerations. While early regulations allowed a limited application of assisted reproductive technologies, the prevailing influence of Catholic values and societal debates ultimately led to the establishment of a categorical prohibition of surrogacy. This prohibition, enshrined both in statutory law and reinforced by parliamentary resolutions, reflects Lithuania's principled approach, emphasizing the primacy of public order, morality, and ethical standards over contractual freedom in this sensitive domain.

2. Legal Regulation of Surrogacy Contracts in the Republic of Latvia

The normative approach to the use of surrogacy as one of the reproductive methods enshrined within the legal system of the Republic of Latvia is rather ambiguous. Surrogacy relations have not become the subject of separate legal regulation. At the same time, since July 1, 2002, the Law "On Sexual and Reproductive Health" has been in force in Latvia which provisions serve as the basis for the ambiguous understanding of the legal framework for the use of surrogacy as a reproductive method.

This Law regulates the use of assisted reproductive technologies (Articles 12–20). However, paragraph 4 of part one of Article 15 establishes a prohibition on the use gametes of the donor or the embryo for commercial purposes (Saeima of the Republic of Latvia, 2002).

Among all the legal provisions of the Law, this provision is most directly related to surrogacy relations. Yet, it primarily concerns the issue of the subject matter of a surrogacy contract and the object of the respective civil legal relations. Latvian scholars, particularly R. Prikule, raise reasonable doubts as to whether surrogacy as such can be considered as involving the commercial use of an embryo (Prikule, 2019).

Firstly, with regard to the subject matter, the question arises as to what should properly be considered as such: gametes/embryo, or rather the service of carrying an embryo/child. If the subject matter is defined as a service, then even where the surrogate mother receives remuneration for carrying and delivering a child, the aforementioned prohibition would not, strictly speaking, apply to these relations.

Secondly, the decisive factor lies in the specific features of the assisted reproductive technology itself and the terminology employed by the Law. Surrogacy, by its very nature, involves the transfer

of a human embryo conceived by another man and woman into the body of the "surrogate mother." From a proprietary perspective, the legal status of the embryo as a form of biological material remains a highly complex issue: who may be considered its legal owner, and whether it may at all constitute an object of ownership rights. At the same time, it is evident that, as a general rule, at least in the initial stage of such legal relations, the "surrogate mother" has no real interest in acquiring rights to the embryo. Her primary concern is usually the remuneration for carrying and giving birth to the child. This distinguishes such relations from cases in which an unmarried woman purchases male gametes for her own insemination, which may be viewed as more closely connected with "commercial use." Nevertheless, even in such cases, the question of what exactly should be understood as "commercial use" remains open to debate.

The above demonstrates the insufficient legislative elaboration of the issue at the level of the legal provisions of the Republic of Latvia. This, in turn, acts as an obstacle to the development of surrogacy relations within Latvia.

At the same time, legal scholars tend to regard this approach as amounting to a prohibition. They also note, however, that certain clinics still provide such services, though only to the extent of their medical aspects. Issues concerning contractual remuneration and the legal status of the child born as a result are left to be determined solely by the parties to the agreement (Prikule, 2019).

Nevertheless, even allowing for different interpretations of the notion of "commercial use," the commercial elements of a surrogacy contract may raise concerns of validity under Latvia's legal framework. It seems that paragraph 4 of part one of Article 15 of the Law of the Republic of Latvia "On Sexual and Reproductive Health" is specifically intended to prevent commercial practices in the sphere of assisted reproductive technologies. This reflects the state's negative stance toward the commercialization of such relations, which is largely grounded in ethical and moral reasoning.

In turn, Article 1415 of the Civil Code of the Republic of Latvia establishes that arbitrary and indecent behaviour, the purpose of which is contrary to religion, laws and morality or is aimed at circumventing the law, cannot be the subject of a transaction. Such a transaction is declared invalid. Similarly, Article 1553 prohibits the incorporation of unlawful or immoral terms into contracts, while Article 1570 specifies that such provisions produce no legal effect (Cabinet of Ministers of the Republic of Latvia, 1992)

So, In Latvia, there is no comprehensive legal regulation of surrogacy. Existing legal provisions, in particular the prohibition on the commercial use of gametes and embryos, create legal uncertainty and complicate the conclusion and execution of contracts in this area. The Civil Code further emphasizes the inadmissibility of terms that contradict morality or the law, effectively limiting the possibility of legalizing commercial surrogacy arrangements. As a result, the development of a corresponding legal mechanism remains constrained.

3. Legal Regulation of Surrogacy Contracts in the Republic of Estonia

The regulation of surrogacy relations in the Republic of Estonia has been largely shaped under the influence of religious beliefs. However, even apart from this factor, a significant part of Estonian society holds a critical attitude toward this reproductive method, particularly for ethical reasons, such as the perceived insufficient attention that surrogate mothers pay to the children they carry. At the same time, the issue of surrogacy remains a subject of active public debate in Estonia (Calhaz-Jorge, 2020).

Relations connected with the use of assisted reproductive technologies in Estonia are governed by the provisions of the Estonian Republic's Artificial Insemination and Embryo Protection Act. The Act, in particular, permits the insemination of a married woman with her husband's sperm upon his consent (Article 17), as well as the insemination of an unmarried woman with donor sperm (Article 22). At the same time, Article 23 of the Act defines the procedure for transferring an embryo created from a foreign ovum to a woman. However, firstly, such a method is allowed only as an exceptional measure, that is, when insemination by other means is impossible (Part 1, Article 23). Secondly, the donor must provide consent for fertilization (Part 2, Article 23). Thirdly, the father of the child is

deemed to be the man who consented to the insemination of the woman (Article 24), while the mother is the woman who gave birth to the child (Article 24).

Article 11 of the Act prohibits mediation in the artificial insemination of women outside the healthcare system and establishes the invalidity of any transactions carried out through such mediation (Riigikogu, 1997).

Moreover, and importantly, Article 120-1 of the Criminal Code of the Republic of Estonia establishes criminal liability for transferring another person's ovum or an embryo obtained from it to a woman in violation of the Artificial Insemination and Embryo Protection Act, as well as for private mediation concerning another person's ovum or embryo (Riigikogu, 2001).

So, the legal regulation of surrogacy in Estonia reflects a combination of strong ethical and religious influences, as well as societal concerns regarding the welfare of children carried by surrogate mothers. Estonian law, through the Artificial Insemination and Embryo Protection Act and relevant provisions of the Criminal Code, establishes strict limitations on the use of assisted reproductive technologies, emphasizing the exceptional nature of embryo transfer and the need for explicit consent from donors. The legal framework also prohibits commercial or private mediation in surrogacy arrangements, with violations subject to criminal liability. Overall, the Estonian approach demonstrates a cautious and highly regulated stance, aiming to protect both the rights of individuals involved and the public interest, while simultaneously limiting the development of surrogacy as a widely accessible reproductive option.

4. Legal Regulation of Surrogacy Contracts in Ukraine

In Ukraine, there is still no special legislative act that comprehensively regulates contractual relations in the field of surrogacy or, more broadly, the use of assisted reproductive technologies. At present, the legal framework is limited to a subordinate act – the Procedure for the Use of Assisted Reproductive Technologies in Ukraine, approved by the Order of the Ministry of Health of Ukraine of 9 September 2013 No. 787 (Ministry of Health of Ukraine, 2013).

At the same time, the analysis of existing provisions demonstrates that Ukrainian law generally tends to permit surrogacy as a method of treating infertility while ensuring the protection of the civil rights and interests of the parties involved. This orientation can be observed both in the withdrawn draft law "On Assisted Reproductive Technologies" of 19 July 2018 No. 8629 and in more recent legislative initiatives: the draft law "On Assisted Reproductive Technologies" of 28 December 2021 No. 6475 and its alternative version "On the Application of Assisted Reproductive Technologies" of 11 January 2022 No. 6475-1.

These legislative proposals place particular emphasis on regulating surrogacy relations, as well as on the medical and intermediary activities associated with the use of this reproductive method. The need to adopt a special law is explained by the high social importance of this issue and the impossibility of regulating it comprehensively through subordinate legislation alone.

The current Procedure devotes a separate section VI, "Surrogacy (Substitute) Motherhood," to this reproductive method. It defines the conditions for applying surrogacy (para. 6.1), the medical indications (para. 6.2), the requirements for the examination of a surrogate mother (para. 6.3), the list of requirements and contraindications (paras. 6.4–6.5), as well as the general algorithm of the procedure (para. 6.6 and others).

Only in the final provision of this section (para. 6.11) is the requirement established to submit a notarized copy of a written agreement between the surrogate mother and the intended parent(s) (woman, man, or married couple) as a necessary condition for the use of surrogacy (Ministry of Health of Ukraine, 2013). However, the Procedure does not provide any requirements concerning the content of such an agreement.

In the context of the general permissive approach to civil relations, this situation creates the most favourable conditions for the use of the contract as a tool for regulating surrogacy relations and for fully realizing the principle of freedom of contract. At the same time, the absence of a sufficient normative framework and binding provisions that would set minimum standards of protection creates

risks of violations of the subjective civil rights and legitimate interests of the parties to a surrogacy contract, which could be introduced through mandatory provisions of the relevant civil legislation of Ukraine.

Thus, Ukraine has one of the most liberal models of contractual regulation of surrogacy, although there is no comprehensive legislation. Ukraine should develop a separate law on surrogacy, in particular to regulate the legal nature of the contract, the rights and obligations of the parties. Defining the conceptual apparatus, including the concept of "surrogacy", a clear definition of the legal nature of the surrogacy contract, establishing a clear mechanism for recognizing paternity and protecting the rights of the child are priority issues that need to be resolved.

5. Results of the Comparative Legal Analysis of Surrogacy Regulation

The current legal situation in relation to surrogacy within the Republic of Lithuania, Republic of Latvia, Republic of Estonia and Ukraine is examined in comparative perspective, and it is shown that different systems of law converge and diverge when it comes to regulation of similar issues. While the Baltic States tend to adhere to either a strict or prohibitive approach, Ukraine is governed by a permissive regulatory model.

In the Republic of Lithuania, a very strong legal framework containing a plain and white prohibition of surrogacy as a method of reproduction exists. "The dominant ethical/social position expressed through this prohibition was in fact the protection of public morals and "the non-commercialisation" of reproductive technology."

There is no statutory ban on commercial surrogacy in Latvia, although its practice is facing substantial legal obstacles as the legislator forbade trade of gametes and embryos (including surrogacy agreements). Without a comprehensive regulatory regime, uncertainty will continue to prevail and the scope for contracts in this area will remain limited.

In the case of the Republic of Estonia, the law is not explicit but an anonymous form of surrogacy is prohibited due to mandatory provisions of Estonian Act on Artificial Insemination and Protection of Embryo and Estonian Penal Code that regulate the meanwhile permitted forms of assisted reproduction technologies and provides for criminal liability for mediation not in conformity with the law. This model shows a highly controlled and prudent regulation based on ethical considerations and the protection of public interests.

In comparison, Ukraine has the most liberal legal regulation on surrogacy. It means that under Ukrainian law, surrogacy is in principle allowed as a procedure for treating infertility, and the relations between the intended parents and the surrogate mother can be regulated contractually. Yet, the absence of a special law on surrogacy entails legal hazards and the necessity to further elaborate a comprehensive legal document.

Thus, the above comparative analysis indicates that the legal regulation of surrogacy is interrelated with each state's own moral, social and legal traditions and the degree of legislative maturity in relation to the ART (Assisted reproductive technology).

Conclusions

1. The legal frameworks of the Baltic States and Ukraine reveal varying models, from strict and prohibitive to liberal contractual regulations when it comes to regulating surrogacy agreements. These disparities are rooted in the social and ethical, as well as the legal, characteristics of each of the relevant states.
2. While Lithuanian law contains the absolute prohibition on surrogacy, Estonian and Latvian legislation contain indirect restrictions via limitations on the commercial use of gametes and harsh regulation of ART.
3. Ukraine applies a permissive model of surrogacy relations but since it lacks a specific legislative act dealing with the legal nature of a surrogacy contract, rights and duties of the parties and the

protection of the child's rights, it concurrently engenders potential legal conflicts and uncertainty in enforcement of law.

4. Summary results of the comparative analysis in the part of regulation of enabled reproductive technologies in civil law show that the principles of regulation are determined by social requirements, values of ethics and priorities of public policy. Meanwhile, legal norms do not only serve as the reflection of societal needs, but also organize the private relationship and make its legal implementation possible under the principles of public order and public morality.
5. The subsequent changes to the Ukrainian law on surrogacy should be an adoption on the special law on surrogacy that would regulate the legal status of the surrogacy contract, providing a level of clear procedural guarantees for all parties experiencing significant uncertainties now and which would contribute to the protection of the rights and legitimate interests of the child.

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SUROGATINĖS MOTINYSTĖS SUTARČIŲ REGLAMENTAVIMAS: TEISINĖS PRAKTIKOS ANALIZĖ BALTIJOS ŠALYSE IR UKRAINOJE

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Santrauka

Straipsnis skirtas surogatinės motinystės sutartinių santykių teisinio reguliavimo ypatumams pagal Lietuvos Respublikos, Latvijos Respublikos, Estijos Respublikos ir Ukrainos teisės aktus nagrinėti. Šio straipsnio tema – sutartinių surogatinės motinystės santykių teisinio reguliavimo ypatumai Lietuvos Respublikos, Latvijos Respublikos ir Estijos Respublikos teisės aktuose, taip pat Ukrainos teisėje.

Šio straipsnio tikslas – apibūdinti surogatinės motinystės sutarčių teisinio reguliavimo ypatumus Baltijos valstybėse ir Ukrainoje bei pateikti rekomendacijas, kaip patobulinti dabartinius Ukrainos civilinės teisės aktus šioje srityje.

Atsižvelgiant į taikomas teises normas, galima daryti išvadą, kad Lietuvos Respublikos pozicija yra artima surogatinės motinystės draudimui, o Latvija ir Estija laikosi šiek tiek ribojančios reguliavimo pozicijos. Skirtingai nuo daugelio Europos šalių, kuriose surogatinė motinystė yra uždrausta arba teisiškai nepripažįstama, Ukraina leidžia sutartinę surogatinę motinystę, tačiau neturi jokio išsamaus teisinio reguliavimo.

Autorė nustato, kad šiuo metu Ukrainoje sutartiniai surogatinės motinystės santykiai yra teisinio reguliavimo objektas, kurį sudaro žemesnio rango norminis teisės aktas, leidžiantis naudoti sutartį sutuoktinių ir surogatinės motinos surogatinės motinystės santykiams reguliuoti.

Teigiama, kad geografinio Baltijos šalių ir Ukrainos artumo sąlygomis, taip pat draudus naudoti surogacijos reprodukcinių metodą Baltijos šalyse ir leidus jį naudoti Ukrainoje, sudaromos sąlygos plėtoti „reprodukcinių turizmą“ Ukrainoje Lietuvos, Latvijos ir Estijos piliečiams. Savo ruožtu tai sudaro prielaidas iškilti problemai, susijusiai su šių šalių piliečių sudarytos surogacijos sutarties Ukrainos teritorijoje ir pagal Ukrainos teisinę tvarką teisinės galios ir teisinių pasekmių, taip pat tokio reprodukcinio metodo naudojimo teisinių pasekmių pripažinimu.

Reikšminiai žodžiai: surogacija, dirbtinio apvaisinimo technologijos, surogacijos sutartys, teisinis reguliavimas.