

Surrogate Motherhood: Analysis of the Basis of the Legislation of Ukraine and Foreign Countries

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Abstract:

In modern conditions, the use of methods of additional reproductive technologies is becoming increasingly relevant, which justifies the need for proper legal regulation of relevant legal relationships. A detailed study of diverse national approaches to solving the problem of surrogate motherhood shows the ambiguity of the position of legislators. Therefore, a comparative analysis of the foundations of legislation in this area gains a special significance within the framework of legal science. The objective of the article is to analyze the essence and content of the institute of surrogate motherhood, evaluate the current legislation of Ukraine in the specified area and conduct comparative analysis with the legislation of other states, elaborate recommendations and outline the prospects for further development of the domestic legal regulation of the studied legal relations. According to the results of the research, the authors define the concept of 'contract of surrogate motherhood' and proposes the adoption of a scientifically and legally substantiated Concept of Legal Acknowledgement of the Institute of Surrogate Motherhood, within the framework of which there should be a single normative legal act – the Law of Ukraine 'On Surrogate Motherhood' with simultaneous amendments to the current legislation of our country.

Keywords: surrogate motherhood; contract of surrogate motherhood; auxiliary reproductive technologies; reproductive medicine; national legislation; genetic parents.

JEL Classification: K15; K36.

Introduction

The modern epoch is characterized by radical changes of the planetary scale, associated with the globalization of the economy, the introduction of innovative technologies, assimilation of the leading achievements in the development of political and intellectual and intellectual life in a variety of countries and nations. The leading role in providing full-scale transformations is taken by the features of demographic development, the prevailing tendencies of quantitative and qualitative population characteristics, the development of which every society seeks to implement in accordance with the concept of demographic policy, aimed at creating conditions for expanded reproduction of human potential (Constantin 2017; Mazilescu and Gangloff 2017).

The legal relationship of surrogate motherhood is closely linked to the demographic issue that exists in many countries around the world. In general, the current global demographic situation is due to socio-economic processes, and the achievement of the goals of the corresponding policy of democratic states depends to a large extent on the successful resolution of a wide range of tasks by ensuring accessibility and quality of health care for reproductive health, including reproductive technologies, a decrease in the share of jobs with heavy, harmful and dangerous conditions of work, etc. According to the statistics of the World Health Organization, infertility in the world directly affects up to 15% of the total number of marital couples of reproductive age (Women and health 2009). The described negative trends and the intensification of the innovative component of the modern world society are intensifying the activation of the development of reproductive technologies and forcing the development of the institute of surrogate motherhood. It is worth noting that scientists who are engaged in research in this field have made significant progress, in particular, there is increase in artificial insemination, there is the possibility of cloning people, moreover, the technology has reached the level when it becomes possible to grow the necessary tissues in laboratories. In this context, the legal regulation of the use of services of surrogate motherhood, which provides the opportunity for paternity, and at the same time compromises human rights and freedoms, it is becoming increasingly important, and therefore requires adaptive legislative regulation (Nyssanbekova *et al.* 2016).

It can be stated that the modern development of medicine in the field of reproductive technologies has led to the emergence of new social relations, other legal constructions and presumptions, which, in turn, have led to the necessity of development of law in the defined field with the aim for the most complete protection of the legitimate interests of the participants in such legal relations. One can discuss several legal subjects – a surrogate mother, genetic parents and a future child. Unfortunately, the existing legal basis in Ukraine in the above-mentioned area cannot be considered sufficient, mainly due to the lack of a single legal act that would regulate such legal relations connected to artificial reproductions (Da Costa 2015).

International practices reflect the variability of views on surrogate motherhood, indicating the presence of both supporters and opponents of this method, thereby correcting the legal regulation of the outlined scope (Samoylova 2014). Moreover, the legal systems of some states legally allow it, others prohibit, others do not have legal regulation at all. In particular, such an institution is legalized in the countries, the main laws of which establish constitutional foundations of surrogate motherhood, including the public order concepts: the right to privacy (birth of a child); the right to health (direct reproductive health); the right to motherhood and parenthood (in the context of the right for protection by the state of marriage, family, maternity, paternity and childhood) (Samoylova 2014). These states include Armenia, Belarus, Ukraine and others. However, in some countries surrogate motherhood is practiced in spite of the lack of legal regulation of this kind of relationships (for example, Brazil, India). The prohibition on the implementation of this kind of innovative reproductive technology as a method of implementing reproductive rights can take place only in the absence of constitutional grounds for this (such an approach is enshrined in the Swiss constitution (Federal Constitution of the Swiss Confederation 1999). There are also some examples of prohibition of surrogate maternity at the level of sectoral legislation, despite the existence of constitutional foundations for its implementation (Italy) (Constitution of the Italian Republic). Therefore, a comparative analysis of the positive experience of legal regulation of relations in the area of surrogate motherhood is considered relevant and expedient in order to further approve international practices in the national legislation of Ukraine.

Taking into account the above mentioned, the purpose of the article is to analyze the nature and content of the institute of surrogate motherhood, to assess the current legislation of Ukraine in the defined area and to make a comparative analysis with the legislation of other states, to formulate recommendations and outline the prospects for further development of domestic legal regulation of the studied legal relations. According to the set objective, the main tasks of the article are outlined as follows: (1) to consider definitions of the concept of 'surrogate motherhood'; (2) to describe legal regimes and types of surrogate motherhood in the context of the legislative consolidation of this institution; (3) to conduct a comparative analysis of the current legislation of Ukraine and other countries in the specified area; (4) to investigate the legal nature of the surrogate motherhood agreement; (5) to formulate theoretical conclusions based on the results of the research, to develop author's proposals for improving the national legislation and outline the prospects for its further development.

1. Literature Review

In the scientific literature there are no comprehensive studies of legal relationships that arise within the institute of surrogate motherhood, with the exception of articles that fragmentarily reveal issues and problems that arise when using reproductive technologies. In general, certain issues were considered by domestic and international scholars, in particular, Besedkina, Boryslavskaya, Gudz (in the context of the right to life), Stefanchuk, Shishka (in the field of reproductive rights). The contractual relations of surrogate motherhood are described in works of Abyatipova,

Antonov, Venediktova, Maidanik, Pundi, Svyneva, Kharaji, Yavoralt is also worth mentioning: Antakolsk, Vattras, Mayfat, Malein, Romovsk, Sopel, Stetsenko, Talanova, Shevchuk, which reveals various aspects of surrogate motherhood and the legal status of the human embryo.

The literature review has shown that in the scientific studies in post-Soviet countries in recent years the institute of surrogate motherhood was also not an independent subject of study; in the dissertation works only the issues devoted to the establishment of parental rights under the condition of the use of surrogate motherhood, the legal nature of the contract of surrogate motherhood, the realization of constitutional human rights was covered. In the international legal concept, the problems of surrogate motherhood were studied mainly by American and English scholars, in particular such as Jones, Landau, McCallum, Markens, Ragon, Field, Pinkerton, Storrou, Charo, Blyth, Bogedcho, Jackson, Lisett and McCallum, Fabr, Hancock, Hale and others.

Despite the large number of works in the field of surrogate motherhood, the regulation of this institute remains imperfect, with special difficulties in the interpretation of the conceptual-categorical apparatus. Moreover, the legislator eliminates the gaps extremely slowly, which does not correspond to the current development of the established legal relationships. Taking into account the above, it can be stated that the above-mentioned problem does not lose its relevance, given the innovative component of modern realities, and requires additional study, the formulation of proposals and recommendations in order to improve the existing legal regulation.

2. Materials and Methods

Methodological basis of the article consists of such methods as: dialectical, comparative legal, historical and legal, analysis and synthesis formal-logical, assertive, analogy, legal modeling and others.

The leading method in the research was the dialectical method of research of phenomena and processes, which allowed to determine the state, trends and prospects of the development of scientific research and legislative developments in the field of legal regulation of the Institute of Surrogate Maternity in Ukraine. A comparative legal method, which was used in the process of comparative analysis of the existing national legal norms in the field of surrogate motherhood with the legislative systems and the latest scientific developments of other countries, with a purpose to identify the positive legislative practice that is feasible and suitable for testing in our country, taking into account the peculiarities of the domestic legal system.

The historical-legal method has become useful when studying the genesis of the development of legislation, which regulates the use of auxiliary reproductive technologies in Ukraine and other countries; the methods of analysis and synthesis were used to establish the form and content of the institute of surrogate motherhood. In addition, these methods have allowed to outline the variability of the legal definitions of the concept of 'surrogate motherhood' both on the conceptual level and on the legislative level. The formal-logical method has allowed to identify gaps in the current national legislation of Ukraine in the investigated area. The conceptual conclusions were formulated in accordance with the purpose of the investigation. The method of analogy allowed to take into account the experience of other countries, to conclude that the adoption of new legal acts was necessary. During the formulation of legislative proposals, the normative-semantic method, logical methods of cognition and the method of legal modeling were used.

The methodology used was determined by the purpose of the article and the outlined objectives, which, in turn, allowed to elaborate the issues outlined in the article as much as possible.

3. Results

In recent years, the issues related to the legal relationship of surrogate motherhood, began to attract more attention of scholars, lawyers, lawmakers and practitioners, as evidenced by the emergence of a wide range of research. Given the lack of a single conceptual-categorical apparatus developed in the field of surrogate motherhood and the multivariable interpretation of the main terms, it is expedient to consider the definitions of the institute-forming concept of 'surrogate motherhood' on the conceptual, national-legislative and international-legislative levels. It is worth noting that in the scholars talking the definition of 'surrogate motherhood' in scientific works, as a rule, either mention only one or several of its types, or formulate the concept too broadly, losing the characteristics inherent exclusively in the surrogate motherhood.

An example of a one-sided interpretation and narrowness may be the definition proposed by Rozgon, where under surrogate, motherhood is proposed to consider fertilization of a woman by implantation of the embryo using the genetic material of the spouse for the further bearing and birth of a child, which, after birth, will be recognized as originating from the marriage. For the most part, such relationships are commercial in nature and take place on the basis of agreement between spouses and a surrogate mother (Rozhnon 2010, 122). Some scholars rightly point out that such an interpretation of the concept narrows the scope, leveling such subjects of legal relationships

as lonely individuals. International practice also confirms the weakness of the above thesis because in Canada, the United States of America and other countries, the fact of marriage between potential parents is not essential to signing the relevant contract.

In turn, Golovaschuk suggests that 'surrogate motherhood' should be considered as a method of auxiliary reproductive technologies, consisting of carrying an embryo by another female (surrogate mother) of an embryo of a person conceived by potential parents or one of them and a donor for the purpose of birth of the child and transferring the child to potential parents (Nyssanbekova *et al.* 2015; Golovaschuk 2017, 23). Hurtsilava defines 'surrogate motherhood' as a conception, using the methods of auxiliary reproductive technologies; carrying; the birth and subsequent transfer of a child under an agreement between a surrogate mother and potential parents (Hurtsilava 2007, 158). Rusanovova suggests to understand under the 'surrogate motherhood' the technology of reproduction of a person in which a woman gives voluntary consent to pregnancy in order to bear, give birth and transmit the newborn to other people - legal parents (Rusanovova 2008, 261). Chernysheva interprets this term as 'an act of medical intervention carried out by implantation of an embryo to a female (surrogate mother) organism (foreign or native genetic material) for the purpose of carrying it out and for the subsequent birth of a child to be passed on to parent-customers on the basis of contractual obligations' (Chernysheva 2012). Talanov proposes the following interpretation of the term 'surrogate motherhood': 'This is the fertilization of a genetically different woman (without the use of her biological material) by implantation or transplantation of the embryo using the genetic material of the husband and wife of the married woman for the purpose of carrying and giving birth to a child, which in the future will be recognized as arising from the marriage, on the basis of the relevant agreement between the spouses and the surrogate mother' (Talanov 2012, 42). Lezhenin considers 'surrogate motherhood' as a woman-volunteer carrying a fetus, received during fertilization of a donor egg by donor sperm and transferred to her uterus' (Lezhenin 2002, 384). Jackson expresses the view that 'surrogate motherhood' is a practice whereby one woman (surrogate mother) agrees to take a child who, after birth, should be passed to potential parents (father or mother) (Jackson 2010, 828). The similar definition of the concept is proposed by McCallum, Lisett, Murray, Dzhadva and Golombok (McCallum 2003, 1334).

Referring to the Dictionary of Assisted Reproductive Techniques of the World Health Organization and the International Committee for the Monitoring of Assisted Reproductive Technologies (ICMART), 'surrogate motherhood' is recognized as a auxiliary reproductive technology used to treat infertility, by which another woman carries and gives birth in lace of potential parents (Glossary of terms of ART).

Given the above definition of the concept under study, we can state that in concept the surrogate motherhood is considered from the point of view of the agreement (conclusion of the contract), the defined process (conception, bearing, birth of a child) or technology of reproduction of a person. The above doctrinal definitions adapt to the realities of the present and gradually receive their legislative consolidation both at the national and international levels.

It is worth noting that in modern law literature there is also no unity in the formulation of the name of the investigated method of additional reproductive technologies, for example, in Ukraine analogs of the term 'surrogate motherhood' are such concepts as 'auxiliary motherhood' and 'replacement motherhood'. In particular, in the Order of the Ministry of Health of Ukraine No. 787 of September 9, 2013, section 6 in the title simultaneously fixes these two terms, which, in turn, leads to the tautology and complications in law enforcement. In its turn, the World Health Organization uses the term 'gestational courier' (instead of the term 'surrogate mother'), which suggests to understand the woman whose pregnancy was the result of fertilization of oocytes by third-party sperm (patients). The process of carrying the child takes place in accordance with the terms of the contract, which, among other things, stipulates that one or both of the persons whose gametes were used for fertilization should be considered as the parents of the child' (Encyclopedic dictionary of medical terms).

In general, in the territory of our country, the term 'surrogate motherhood' has not yet received its legislative interpretation. Scientists emphasize that current national legislation does not provide legalized interpretation of the concept of 'surrogate motherhood', confirming only its existence in relations associated with reproductive technologies (Ablyatipova 2009, 167).

The direct mention of this institution originates in the legislation of the USSR, in particular the Law of the USSR dated May 22, 1990 'On Amendments and Additions to Certain Legislative Acts of the USSR on Matters relating to Women, Family and Childhood' (On Amendments and Additions to Certain Legislative Acts) amended to Fundamentals of the Union of Soviet Socialist Republics and republics of the Union on marriage and the family, approved by the Law of the USSR of June 27, 1968, in particular, the article 17 was supplemented and the issue of paternity was revealed as a result of artificial insemination. Subsequently, the 1992 changes to the Marriage and

Family Law of Ukraine from 1969 (Code of Marriage and Family of Ukraine) detail the procedure for donating in Article 56 and regulate the procedure for recording a mother's child and legal registration of paternity.

The analysis of the current family law of the country gives grounds to assert that, despite the European integration intentions of our state in the introduction of innovative medical technologies, proper legal regulation in the field of surrogacy is still on the stage of development and scientific discussion. Only fragmentary norms show the attempts to consolidate the existence of this institution at the legislative level. Some provisions, which reveal the essence of the process of surrogate motherhood and its consequences on the territory of the state, have been established in the Family Code of Ukraine (Family Code of Ukraine), in particular, Article 123 regulates the procedure for determining the origin of a child born on the basis of the application of auxiliary reproductive technologies. Individual references to the components of the studied institute are contained in the Law of Ukraine 'Fundamentals of the Ukrainian legislation on health care' (Fundamentals of Ukrainian Health Care Legislation, Article 48), the State Registration of Civil Status Acts in Ukraine (On Approval of the Rules for State Registration), the Procedure for the Application of Assisted Reproductive Technologies in Ukraine (On Approval of the Procedure for the Use of Assisted Reproductive Technologies), and others. The last of the above normative legal acts directly stipulates the term 'surrogate motherhood', at the same time, not revealing the legislative definition, determining the necessary conditions, indications and algorithm for the application of this method of auxiliary reproductive technologies, provides a list of documents necessary for the legal registration of this process. Such fragmentation and limitation in the legislative formulations testifies to the necessity and urgency of amending the current legislation of Ukraine and, moreover, the adoption of a single unified regulatory act that would contain detailed legal regulation of the existence of the surrogate motherhood institution.

It should also be noted that the civil law of Ukraine prohibits any arbitrary interference with personal life; provides freedom of contract and entrepreneurial activity, which in turn affects the investigated legal relationships. In addition, Article 281 of the Civil Code of Ukraine states that an adult woman or a person has the right by medical indications for the provision of therapeutic programs of auxiliary reproductive technologies in accordance with the procedure and conditions established by the requirements of the applicable national legislation (The Civil Code of Ukraine). The norm was confirmed also in clause 1.7 of the Instruction 'On Approval of the Procedure for the Application of Assisted Reproductive Technologies in Ukraine' (On Approval of the Procedure for the Use of Assisted Reproductive Technologies). So, we can talk about the existing but imperfect and fragmented regulatory framework in the field of regulating the legal relationship of surrogate motherhood.

In turn, if we look at the international practice of legalization of the studied institution and its conceptual-categorical apparatus, then one can note the heterogeneity of approaches to the given issue in view of support or prohibition of such innovative technologies.

The studied type of auxiliary reproductive technologies is legally permitted in countries such as Azerbaijan, Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Russia, Uzbekistan, Ukraine, Canada, Hong Kong, Israel, Belgium, Great Britain, Greece, Hungary, Denmark, Ireland, Cyprus, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Romania, Slovakia, Slovenia, Czech Republic, Estonia, New Zealand, Australia, South Africa, Thailand, USA (Bayborosha 2009, 101-102). Surrogate motherhood is practiced in the following countries: Brazil, India, Colombia, Ecuador, Finland and Peru. It is prohibited in Austria, Bulgaria, Germany, Italy, Norway, Malta, Spain, Portugal, Sweden, Switzerland, Taiwan, Tunisia, Turkey, Vietnam, Argentina, Croatia, Egypt, Japan, Philippines, Singapore; and also not applicable in Morocco, Jordan, Malaysia, Portugal, Uruguay, Venezuela (Jones 2007, 25, 51, 26, 15-16).

It is worth noting that in the concepts and the rights of foreign states there is no unified legislative definition of the concept of 'surrogate motherhood' and its types. Thus, in British law one can see the term 'surrogacy motherhood agreement', 'surrogate mother' (Surrogate Motherhood Treaty). Normative Acts of the Federal Republic of Germany use the term 'surrogate mother' (On Mediation at Adoption). The Code of Kazakhstan of September 18, 2009, No. 193-IV 'On the Health of the People and the Health Care System' provides an interpretation of the term 'surrogate motherhood', under which the legislator understands the carrying and giving birth of a child, including cases of preterm labor, for an agreement between a surrogate mother (a woman who carries a fetus after the introduction of a donor embryo) and potential parents (On the health of the people and the health care system, Article 100) (Ibraev *et al.* 2017; Bidaishiyeva *et al.* 2018).

Also, international scientific and legislative practice does not have a single approach to the selection of types of surrogate motherhood, therefore, within the framework of the article, we consider it appropriate to use the most common and used concepts. So, first and foremost, there was so-called traditional surrogate motherhood (or genetic), the basis of which is the presence of a genetic connection between a surrogate mother and her child born. The first program of traditional surrogate motherhood, which was planned and fully managed from the medical and

legal point of view by Surrogate Parenting Associates, Inc. in Louisville (USA), ended in 1980 with the successful birth of a child and the subsequent refusal of a surrogate mother from her in court in favor of the biological mother, in accordance with the current legislation of the country. Subsequently, this method was tested in the UK in 1985, however, it took 4 years to obtain permission from the British Medical Association for the program of surrogate motherhood (Svitnev 2006, 7). It is worth noting that in the territory of our country and throughout the post-Soviet space, for the first time the innovative method was tested in 1995 in the city of Kharkiv (History of Surimery). Despite the progress, this type of reproductive technology remains inadequately regulated in Ukraine, in particular, considering the above article of the Family Code of Ukraine, it is considered that it is solely a question of full (gestational) surrogacy, while other types are left out of the attention of the legislator.

The second kind is an unconventional surrogate motherhood (or gestational), the essence of which is that there is no genetic link between the surrogate mother and the child, this kind is the most widespread in world practice. Unlike surrogate maternity *sui generis*, there is no radical surrogate motherhood permitted in all countries that have legalized this institution in marriage and family relationships. When this method is used, the following genetic links between the child and the parents are possible: (1) communication with the parent alone; (2) connection with the mother only; (3) communication with both parents; (4) the child has no genetic links with his parents.

Some scholars separate partial and complete surrogate motherhood. In this case, 'partly' understood as the use of the genetic material of the surrogate mother and father of the child, completely – both parents (Dronova 2007, 9-10, 33-34, 186).

Despite the fact that the basis of the types under consideration is one criterion – a genetic link, the circle of persons between whom it exists is different. The most expedient, complete and substantiated classification that is worthy of attention and support can be considered a classification proposed by Antsuh, which distinguishes the following types, taking into account existing approaches:

- I Genetic connection between a surrogate mother and the child:
 - *sui generis* surrogate motherhood - implies the existence of a genetic link between a surrogate mother and her baby;
 - non-traditional (gestational) surrogate motherhood, based on the absence of a genetic link between a surrogate mother and the child.
- II The genetic link between a child born by a surrogate mother and both parents or one of the actual parents of this child:
 - complete surrogate motherhood means the presence of a genetic link between the two actual parents of a child born by a surrogate mother;
 - partial (truncated) surrogate motherhood – implies the existence of a genetic link between one of the actual parents of a child born by a surrogate mother and this child (Antsuh 2015, 79).

The explicit division into kinds has led to the emergence in legal science and legal practice of several legal regimes of the investigated method of auxiliary reproductive technologies. The first kind is the 'altruistic regime' in which the surrogate motherhood is permitted by the state, but the surrogate mother receives compensation for expenses only for medical care and other expenses related to pregnancy. Future parents concluding a contract with a surrogate mother are not entitled to pay for a child bearing and birth service. This approach is intended to avoid the transformation of the process into a product as a surrogate mother and a child (often considered a sale of children). 'Altruistic regime' was adopted in these countries: Australia, Canada, the United Kingdom, the Netherlands, Belgium.

The second kind – 'permission based', envisages the legalization of the method of surrogate motherhood at the legislative level. Examples of countries that are using such consolidation are Georgia, India, the Russian Federation, Ukraine. However, this legislative regime may have certain variations. Like, in Israel, surrogate motherhood is controlled by the state through a licensing system at all stages of the process. In South Africa, a contract with a surrogate mother should be certified by a court.

The third kind is 'prohibitive', according to which the conclusion of contracts on surrogacy is not allowed by law. The main reason for selecting such a regime was the moral and ethical principles, as well as the prevention of the transformation of children into goods and the abuse of surrogate mothers. Among the countries that mostly favor this regime are the following: France, Sweden, Hungary, Germany, Iceland, Italy, Japan, Switzerland, Pakistan, Saudi Arabia, Serbia (Brinsden 1999). Thus, in France surrogate motherhood is banned due to a contradiction to the legislative provision on the 'inalienability of the human body' (Kohler 2017, 72). In Germany, it is qualified as an offense, to make any attempted artificial insemination or implantation of a human embryo to a woman (surrogate mother) who is ready to abandon her child after her birth or to implant a human embryo (Act for

Protection of Embryos). In general, the prohibition or lack of legislative regulation for surrogate motherhood in a number of European countries leads to the fact that such relationships are increasingly characterized by the presence of a foreign element.

Some scholars suggest further separation of the fourth regime - 'uncertainty', according to which the investigated method of auxiliary reproductive technologies is not forbidden, and, in turn, legislation that regulates such legal relations in the states is absent. This group of countries includes Venezuela, Ecuador, Jordan, Colombia, Malaysia, Peru, Uruguay and others.

Regulation of the legal relationship of surrogate motherhood affects two main areas: international and national. The specifics of international legal regulation is due to several factors: the indirect regulation of this type of auxiliary reproductive technologies and the recommendatory nature of most international laws. Moreover, today's valid international agreements, the regulations of which would direct the application of the studied method, are still absent. It is worth mentioning that the World Medical Association Assembly in 1987 adopted the Declaration of the World Medical Association on in vitro fertilization and embryo transplantation (Déclaration de l'AMM sur la Fécondation), which contained provisions on surrogacy, but it was abolished in 2006. Currently, most scholars and practitioners directly associate the analyzed institution with human rights, applying international instruments for the protection of human rights by analogy. The following documents are devoted to the regulation of individual issues of surrogate motherhood at the international level. In particular, the articles of the UN Convention on the Rights of the Child establish the standards such as: the right not to be discriminated against on grounds of birth or parental status; the right of the child to obtain a name and acquire a nationality, etc. (UN Convention on the Rights of the Child). The International Covenant on Economic, Social and Cultural Rights (International Covenant on Economic, Social and Cultural Rights 1966) and the Convention on the Elimination of All Forms of Discrimination against Women (Convention on the Elimination of All Forms of Discrimination against Women 1979) established the right to health and maintenance, which in practice, in the context of the legal relationship in the field of surrogacy, is implemented through free prenatal care and treatment for a surrogate mother.

The Convention on Human Rights and Biomedicine (Oviedo, April 4, 1997) (Convention on the Protection of Human Rights) proclaimed that the interests and benefits of individuals must prevail over the interests of society and science (Article 2). Some researchers interpret this article as giving individuals who do not have the natural ability to give birth to children, the right to realize their reproductive capacity through the use of this type of auxiliary reproductive technology. Actually, the individuals living on the territory of countries where surrogate motherhood is prohibited go abroad (on a temporary or permanent basis) to participate in a program to overcome infertility. The norms of this document are indirectly extended to the assisted reproductive technology under study. Apparently, the prohibition in a country's legislation of such a controversial issue cannot be an obstacle to the realization of the right to maternity and paternity (Zashchirinskaya *et al.* 2017; Zashchirinskaia *et al.* 2018).

One more document - Recommendations of the Inter-Parliamentary Assembly of the member-states of the Commonwealth of Independent States 'On ethical and legal norms, safety of genetic medical technologies in the CIS member states' (Recommendations of the Inter-Parliamentary Assembly approved on October 31, 2007) are designed to harmonize the state policies of the Commonwealth countries in the field of ethical-legal regulation of genetic medical technologies and extend to all types of medical activities, involving the application of genetic technologies to humans. Given the fact that the implementation of surrogate motherhood is impossible without the use of genetic material necessary for the conception of the child, the requirements of these Recommendations can also be applied to the legal relationships of surrogate motherhood.

The Hague Conference on Private International Law emphasizes that, within the framework of the legal regulation of the Convention on the Protection of Children and Cooperation in the Field of Interstate Adoption (The Convention on the Protection of Children 1993), Countries may resolve issues in the field of treaties of international surrogate motherhood, providing for the impossibility of remuneration or compensation for such cooperation. The convention establishes, among other things, some procedural safeguards in Article 17, which stipulate that before a child is 'trusted' by future adopters, a number of important procedures need to be executed, and the central authorities of both countries must agree to such an adoption. Depending on conclusion of an international agreement on surrogate motherhood, the parties agree that the child will be 'entrusted' to parents without any prior formalities or safeguards.

Taking into account the abovementioned, it is possible to speak about the emergence of certain difficulties during the conclusion of a contract of surrogate motherhood, depending on the peculiarities of the legislative regulation of this procedure. Consequently, referring to the norms of the current legislation of Ukraine, we can see that there are problems of legal and moral and ethical nature. First of all, significant complications in the existence of the Institute of surrogate motherhood are due to the lack of its comprehensive legal regulation. It should be noted

that the application of the principle of freedom of contract provides for the opportunity for concluding contracts for the realization of personal needs and interests, moreover, if the future contract is not expressly provided for by the norms of the current national legislation, it nevertheless has the right to be existent provided that it conforms to the general principles of civil law. At the same time, the concept of freedom of entrepreneurship creates the factual basis for the provision of surrogate maternity services by specialized medical services in order to obtain monetary benefits for such services (The Civil Code of Ukraine).

It can be indicated that the obligatory legal basis gives rise to legal relations in the field of surrogate motherhood, and the conclusion of an agreement between the surrogate mother and spouses, which defines their rights, duties and other essential conditions. Under the contract on surrogate motherhood is understood an agreement between persons (a person) entitled to use this method of auxiliary reproductive technologies, that is, genetic parents, and a surrogate mother (Korenga 2012, 136). Unfortunately, the legislator has not yet established a draft model contract for surrogate motherhood, which is already considered as a necessary and urgent measure to avoid contradictions in law enforcement in the present.

In the law literature, there are several approaches to the definition of the legal nature of the surrogate motherhood agreement. Primarily, the issue about the assignment of a surrogate motherhood contract to a civil-law or family-type type of contract (Kvit 2016, 42) still remains. Contemplation of a contract of surrogate motherhood through the prism of civil and family law allows it to be perceived as a contract of a special kind. In the principle, sometimes the contract of surrogate motherhood uses the term 'inter-branch contract', because it regulates different in nature relationships in area of the rules of family and civil law (Pestrikova 2007, 70). The agreement of surrogate motherhood establishes two types of relations: property (payment for services related to surrogate motherhood, current expenses of a surrogate mother during pregnancy and childbirth) included in the scope of civil law, and non-property (the process of implantation of the embryo, carrying and birth of a child by a surrogate mother, establishment of motherhood and fatherhood), which are related to the domain of family law regulation (Kostruba 2018a; Kostruba 2018b; Kostruba 2018c). It should be noted that property relations make the contract of surrogate motherhood the closest to the contract of payment for the provision of services. At the same time, other scholars point out that such a contract can be both compensated and free, which does not provide the opportunity to refer the first type to one type of civil agreements, and free of charge – to another.

Secondly, some scholars, recognizing the civil law nature of the surrogate motherhood agreement, point out its similarity to the various types of contracts: leases; buying and selling; contract; payment of services; a mixed contract containing elements of the named contracts. Therefore, it can be stated that the membership of the contract of surrogate motherhood to a certain type of treaties remains controversial among the representatives of the legal principles, furthermore, at the legislative level, consensus has not yet been found. In any case, speaking of the legal nature of such an agreement, it can be characterized as bilateral and consensual. Moreover, law literature does not currently provide the only unified interpretation of the concept of 'agreement of surrogate motherhood.'

The spouses serve the contractors for the service, and the surrogate mother becomes the executor. Scientists offer a certain list of criteria to be met by the other party, in particular: (1) age – adulthood, the maximum age is not stipulated by law, however, from the practical point of view, the recommended age is 35-36; (2) the medical – surrogate mother should be completely mentally and somatically healthy, and also have no contraindications that would complicate or make it impossible for her to bear the child and give birth; (3) social - a person must, prior to the conclusion of the contract, give birth to a healthy child; (4) legal – granting a legally agreed consent by signing the corresponding application for implantation of the embryo, which is attached to the contract and is an integral part of it (Veres, 2013, 27-31). It should be underlined that no list of criteria in this issue can be considered exhaustive regarding the need for its expansion or reduction, depending on the terms of the contract. For example, in Greece, at the legislative level, there are no clear requirements for a surrogate mother, there are only a few comments about the deterioration of the physical condition of a woman, which is associated with an increase in her age. Also there is the need for the actual presence of the three areas of health of the surrogate mother: physical, mental and emotional.

It is worth mentioning the presence of legislative requirements in the territory of our country of the other party to the contract – the genetic parents of the child. In particular, it is expected that they should be of proper age and capable. Such a norm provides for the impossibility of providing genetic material to juvenile marriages, despite the gaining of full civilian capacity in connection with the marriage. In Greece, the mandatory requirements include the presence of citizenship for both parties to the agreement, which minimizes the cases of staying in the country for a short period, with the sole purpose of concluding a surrogate motherhood agreement. Such practice requires a well-founded evidence of the fact of long-term stay in the state and confirmation of the continuation of residence on its territory (A comparative study on the regime of surrogacy).

The analysis of the contemporary legislation of Ukraine gives grounds to assert that the standard form of the investigated contract was not approved yet. Based on the practice of concluding civil agreements and peculiarities of the matter of the surrogate motherhood agreement, it is expedient to conclude it in writing with a mandatory notarial certification. Such practice has already been established in the post-Soviet area, in particular, the norms of the Code of the Republic of Belarus on marriage and family provide for a similar procedure for the conclusion of such an agreement (Korbut 2011, 57). Also notable is the practice of the abovementioned Greece, where the procedure for concluding the relevant agreement is directly related to obtaining a permit from the judicial authorities to legalize the legal relationship in the field of surrogate motherhood. Therefore, there is an argumentative reasoning for the need to use this method of auxiliary reproductive technologies. Remarkably, the fact that the initiator of the court proceedings can be exclusively a woman will continue to receive maternity rights, the husband, in turn, is recognized by the father automatically without additional legal procedures. The United States has also resorted to a similar concept, but an agreement which is already in place in this country needs to be approved by the court; in case of non-compliance with such an agreement, it will be considered null and void, leaving the surrogate mother her right to a newborn child.

The content of the contract, in accordance with the law and practice of business, must constitute essential conditions, among which: (1) the entity stated for the provision of services; (2) the price determined by agreement of the parties; (3) the term of the contract etc. The latter condition requires the precise determination of the chronological framework of the contractual relationship between the entry into force of the contract and its termination or dissolution. In the United States, the law provides a wider range of essential conditions, among which, in addition to the already mentioned communications in the national legislation of Ukraine are: (1) the place of the contract; (2) the terms and procedure for payment for the services rendered; (3) the institution where the fertilization will take place; (4) a medical institution where the child is taken; (5) the responsibility of the parties of the agreement and others.

The most important part of the contract is clearly its content, which specifies all essential conditions, rights and obligations of the parties, as well as other provisions that the parties consider necessary to reflect in the contract. Unfortunately, for the most part, during conclusion of an agreement, the precise regulation of the provisions for legal liability in cases of non-fulfillment or improper fulfillment of the terms of the agreement is undervalued. In addition, a signed agreement requires additional legal support. Thus, the embryo transfer procedure also requires the registration of a contractual relationship between a surrogate mother, a genetic parent and a medical institution. From the point of view of practice and law, the cases where divorce is automatically terminating the agreement of surrogate motherhood are becoming more frequent, but such a situation and its consequences remain unregulated.

Taking into account the abovementioned and on the basis of the analysis of international legal practice, it is considered expedient to propose the proper definition of the concept of 'the agreement of surrogate motherhood', which implies a written in the form of a compulsory notarial certificate a remunerated or free contract between spouses and a woman, the provision of child bearing and birth-bearing services, provided that the method of auxiliary reproductive technologies is used, the right to which after birth automatically transits to the spouses.

The conducted study has shown the variability of views on the essence and content of the institute of surrogate motherhood, the multiplicity of legislative and doctrinal interpretations of definitions and peculiarities of national approaches to the subject under study, nevertheless, it can be stated that the legal relations presented on the territory of Ukraine remain unregulated, and the existing fragmentary norms that are scattered through different normative acts and require urgent systematization and consolidation. Therefore, it is considered possible to propose the development of a scientifically and legally substantiated Concept of Legal Legalization of the Institute of Surrogate Motherhood, within the framework of which a single normative legal act – the Law of Ukraine 'On Surrogate Motherhood' with the simultaneous introduction of changes to the current legislation of our country – should be developed.

4. Discussions

The scientific research of the surrogate motherhood institute in the context of a comparative analysis of the legislative regulation is undoubtedly supranational, therefore the proposed proposals should be considered in a complex context with national and international scientific approaches to the described issues.

Then, the elaboration of the essential characteristics of surrogate motherhood is associated with the emergence of legal, moral, ethical and psychological problems, in particular, surrogate motherhood, in some cases, may turn children into goods that one can buy and sell. The economic objectification of the unborn child disregards the child's psychological and biological subjectivity. In other words, such an embryo is considered to be an object

without any rights, mental life, and without a soul at all. The same applies to permission for abortion without medical indications. When carrying out medical manipulations to stop the life of the embryo through an external decision, the embryo is considered a priori as an object, not a subject. In simple words, in the case of gestational mothers the rights of the child-embryo are ignored in the same way as in the case of termination of his life in the result of abortion for which there is no legal liability in Ukraine; but there is a commercialization of this area, therefore, surrogate mothers gradually will turn into 'agencies' for providing such services, for which they receive their earnings; motherhood will become contractual work, that is, all moral establishments about the unity of mother and child are rejected.

The outlined problems need urgent solution, taking into account the positive international legal practice. In particular, the author's proposal for the adoption of the Concept of Legalization of the Institute of Surrogate Motherhood, within the framework of which a single normative legal act should be developed – the Law of Ukraine 'On Surrogate Motherhood', while simultaneously amending the current legislation of our country, which has already been fragmentally supported, and similar points of view have been suggested by scientists

Buhtiyarova made proposals for optimization of administrative legislation on maternity and childhood protection in Ukraine (Buhtiyarova 2018, 4). Golovashchuk, considering the lack of legal regulation of the types of surrogate motherhood, justifies their legal consolidation on the basis of the establishing the surrogate mother and the child, and propositions to amend article 48 of the Law of Ukraine 'Fundamentals of the Ukrainian legislation on health care' (Golovashchuk 2017, 16). Basay emphasizes the need to establish the definition of the concept of 'surrogate motherhood' from a legal point of view, to amend the Family Code and adopt an appropriate law that would resolve issues that remain outside the legal framework (Basay 2014, 63). Ablyatipova also emphasizes the need for adopting a unified normative legal act, in which the issue of surrogate motherhood would be solved in accordance with existing international standards (Ablyatipova 2009, 172). Yavor suggests the legal aspects of surrogate motherhood to be regulated by a separate law on reproductive medicine (Yavor 2012).

Therefore, the proposed author's legislative transformations are well-founded and consistent with the concepts of legal tenet and time requirements.

Conclusions

In today's conditions, for each country, the degree of its democratic development is determined by the level of observance of rights and freedoms, among which the leading place has the right to procreation, the implementation of which occurs through parenthood. In practice, the recourse of future parents to the methods of additional reproductive technologies is becoming more frequent, which justifies the need for proper legal regulation of such relationships.

Studying different national approaches to the solution of the problem of surrogate motherhood displays the ambiguity of the position of legislators. Thus, in some states surrogate motherhood is completely prohibited, in others - only commercial agreements are subject to prohibition, in the third countries – the use of auxiliary reproductive technologies in general is restricted. However, for the most part, surrogate motherhood is legalized by countries, including the CIS countries and the USA. At the same time, the possibility of one-to-four types of surrogate motherhood in different countries raises the probability of their non-recognition in certain states and, as a result, unrecognition of the legal relationship itself. Furthermore, the expert opinion on the legal nature of the surrogate motherhood agreements also diverges and remains uncompromising. The lack of proper regulation in the national legislation of Ukraine, as well as the unanimity of lawyers regarding the assignment of a surrogate motherhood contract to the number of agreements, the content of which is considered in the classical sense of civil law, which leads to the fact that the parties through the contract of surrogate motherhood cannot fully ensure and protect their rights

The polarity of views on the concept-categorical apparatus of the surrogate motherhood institute leads to difficulties in the application of law, therefore, a system of terms with unified interpretations, both at the national and international levels, should be developed in order to overcome the difficulties in regulating such relationships. Within the framework of the research, the author proposes the definition of the concept of 'contract of surrogate motherhood', which means a written agreement with a compulsory notarial certification, a paid or free contract between spouses and a woman, which is entrusted with the obligation to provide services for carrying and giving birth to a child on the conditions of application of the method of auxiliary reproductive technologies, the rights to which after the birth automatically switch to the spouses.

Taking into account the necessity of legislative transformations in the framework of the research, it is proposed to develop a scientifically and legally substantiated Concept of Legalization of the Institute of Surrogate

Maternity, within the framework of which a single normative legal act - the Law of Ukraine 'On Surrogate Maternity' with the simultaneous introduction of changes to the current legislation of our country.

Taking into account the foregoing, one can state that at the present stage, surrogate motherhood should to be reconsidered and improved through a legally established procedure with clear mechanisms for its implementation. In our country, outside of the legislative framework, there is still a wide range of relations in need of legal support. Apart from the area that attracts the attention of scientists, there remains a certain range of issues related to the definition of the legal content of reproductive rights, the mechanisms and limits of the implementation of these rights, the establishment of their place in the system of private law. Therefore, the realities of today require a well-balanced reform of the domain of surrogate motherhood and the field of reproductive medicine in general.

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