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SURROGACY – A BIOMEDICAL MECHANISM IN THE FIGHT AGAINST INFERTILITY

This paper reviews the issue of surrogacy. The author analyzes surrogacy and continues by conducting a comparative overview of two legal systems with different approaches to surrogacy. The analysis first looks at the legal system of Russia, as it represents a country that allows all forms of surrogacy, and then that of Germany, as a country with norms prohibiting all forms of surrogacy. In turn, the author reviews Serbian legal provisions, which also forbid all forms of surrogacy. The paper further explores whether there is justification for such legal provisions, i.e., it pinpoints potential problems that could arise if the legal provisions were to be changed. It is concluded that the Serbian legislator has decided to remain silent on this issue, most probably due to the fact that any amendments could raise questions that, at least for the time being, have no clear answers.

Key words: *Medically assisted reproduction. – Right to respect for private and family life. – Right to freely decide on birth. – Surrogate motherhood. – Health protection.*

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1. THE CONCEPT OF SURROGACY

Medically assisted reproduction can be defined as a segment of human reproductive medicine aimed at alleviating infertility in cases where the cause of infertility cannot be eliminated, hence creating space for considering various reproductive technologies (Mršević 2020, 3). Artificial insemination implies various techniques of intracorporeal (*in vivo*) and extracorporeal (*in vitro*) fertilization (Draškić 2022, 342). However, it seems that the classification under which the *mater semper certa est* rule can be tested (Jović Prlainović 2015, 43; Draškić 2022, 342) is of more relevance for the topic of this paper. To this end, a distinction is made between three types of procedures, i.e., between egg donation, embryo donation, and surrogacy. Although the importance of egg and embryo donation for the exercise of reproductive rights of an individual is unquestionable, the author will focus her attention on the surrogacy process, i.e., on surrogate motherhood.

The Warnock Report stipulates that surrogacy is the practice whereby a woman (surrogate mother) carries a child for another (intended mother) woman with the intention to give the child away after birth (Warnock Report 1984, ch. 8.1).[1] A surrogate mother is defined as a woman who agrees to carry a child (children) to term for the intended parents and who waives her parental right following the child's birth. On the other hand, a couple that wishes to fulfil their role as parents is most often referred to as "intended parents", "commissioning parents" (Draškić 2022, 346 fn. 9) or as "clients" (Bordaš 2012, 98). Typically, the intended parents conclude an agreement with the surrogate mother which stipulates that she will carry the pregnancy for them and give birth to the child. The agreement further provides that they will become the bearers of parental rights following the birth of the child and that they will raise the child as their own. They can, but do not necessarily have to be, genetically related to the child that is born following this agreement.[2] Medically speaking surrogacy consists of in vitro fertilization (most often using the eggs and/or sperm of the intended parents who are assisted) and of transferring a certain number of zygotes to the uterus of the chosen recipient woman, with her consent (Bila, Tulić, Radunović 1994, 128 as cited in Draškić 2022, 343). The first case of a child born through a surrogate mother was documented in the 1980s in the United

[1] See *The Report of the Committee of Inquiry into Human Fertilisation and Embryology (Warnock Report)*, HMSO, 1984.

[2] See *A Preliminary Report on the Issues Arising from International Surrogacy Arrangements, Preliminary Document No. 10 of March 2012*, drawn up by the Hague Conference on Private International Law (Hague Conference on Private International Law 2012, ii).

States of America (Kovaček Stanić 2013, 2; Jović Prlainović 2015, 42 fn. 3). Bordaš (2012, 98 fn. 3) stresses that it was precisely this case that marked the beginning "of the regular practice of human reproduction by engaging a woman that will give birth for another woman".[3]

It is important to highlight some specifics that are significant for a more precise defining of the concept of surrogacy. First of all, there are two types of surrogacy, depending on whose genetic material is used in the fertilization. Better said, a distinction is made between partial (genetic) and full (gestational) surrogacy. Partial surrogacy can be defined as a procedure in which a woman (surrogate mother) carries the pregnancy and gives birth to a child that is genetically hers (the surrogate mother's egg is fertilized using the genetic material of the man who will be the parent). In this case, the surrogate mother has the role of both a genetic and a gestational mother (Kovaček Stanić 2013, 3; Vidić Trninić 2015, 1162; Draškić 2022, 346 fn. 9). Full (gestational) surrogacy is a procedure in which a woman (surrogate mother) carries the pregnancy and gives birth to a child conceived using either the genetic material of the couple that wishes to have a child, or using donated genetic material (Bordaš 2012, 98 fn. 4 and 6; Kovaček Stanić 2013, 3; Draškić 2022, 346 fn. 9). In such situations, the surrogate mother is only the gestational mother. Kovaček Stanić (2013, 3) points out that gestational surrogacy is more appropriate for defining the term surrogacy because the surrogate mother replaces the genetic mother in carrying the pregnancy and giving birth to the child.

The surrogacy process, therefore, implies a specific contractual relationship between the surrogate mother and intended parents. This is why a distinction is made between altruistic and commercial surrogacy, depending on whether a gratuitous contract or an onerous contract has been concluded. Altruistic surrogacy agreements imply a contractual relationship in which the surrogate mother is recognized only the right to reimbursement of expenses incurred in connection with the pregnancy, but not the right to a reward.[4] Still, it should be noted that this requirement is not necessarily

[3] Translated by author. It should be noted that certain authors claim that surrogacy dates back to ancient times. According to the Old Testament, Sarah convinced her husband Abraham to take up a concubine, Hagar, who then bore him a son, Ishmael. Although conception occurred naturally, this case is seen as the earliest example of the practice of surrogacy. See Vlašković 2011, 1 fn. 1; Kovaček Stanić 2013, 2 fn. 3.

[4] Reasonable expenses may include medical costs, pregnancy costs and lost earnings. See Kovaček Stanić 2013, 5.

met in legal systems that only allow altruistic surrogacy agreements.[5] On the other hand, commercial surrogacy agreements present a contractual relationship in which the surrogate mother is recognized both the right to reimbursement of expenses and the right to a reward.

The final criteria that can be used for the classification of surrogacy is related to the role that the surrogate mother has with the intended parents. More precisely, the surrogacy may stem from family or friendly relations of the surrogate mother with the intended parents, or, on the contrary, the surrogate mother may have no previous relationship with the intended parents. Based on the practices of countries that allow this method of assisted reproduction, each of the three mentioned types of surrogacy has proven to be a mechanism with both positive and negative aspects (Kovaček Sanić 2013, 3).[6]

2. SURROGACY IN COMPARATIVE LAW

Although the issue of surrogacy is not uniformly regulated in comparative law, the generally accepted position is that surrogacy is prohibited in any form, i.e., "except for when it is carried out with the help of agencies that mediate, for money, in concluding these agreements" (Draškić 2022, 344, translated by author). However, despite the fact that a certain number of countries have opted for legal solutions that prohibit surrogacy, there are also those that have chosen a less conservative path. This is precisely why two legal systems with completely different approaches towards regulating

[5] Draškić (2022, 354) asserts that, for example, in English law the no-reimbursement condition is "largely ignored or circumvented, seeing as the sum of money that is paid to a surrogate mother presents a direct payment for the services she provides, rather than reimbursement of real and justified costs that she had to cover in relation to pregnancy and delivery of the baby" (translated by author).

[6] As a result, some scholars argue that if a surrogate mother is in a family relationship with one of the intended parents, the process of transferring the baby is easier and the contractual relationship is altruistic rather than commercial. On the other hand, this type of surrogacy can cause confusion in familial relations. Surrogacy stemming from friendly relations is, to some extent, similar to surrogacy based on family relations because there is a previous relationship between the surrogate mother and the intended mother, but it is also stressed that this form of "cooperation" can disrupt the friendship. Nevertheless, surrogacy in which there is no previous relationship between the surrogate mother and the intended mother has a specific negative side to it, which is nonexistent in the previous two cases – the inclusion of the commercial element. See Kovaček Stanić 2013, 4.

surrogacy have been selected for the discussion below. The author will firstly analyze the legal system of the Russian Federation, as it is a country with liberal solutions which allows for surrogacy to be carried out without any obstacles. The second system to be analyzed in this paper is the legal system of Germany; an example of a country that expressly prohibits surrogacy. It is interesting, however, to point out that, in recent years there has been a notably more flexible approach by the German courts in addressing the issue of surrogacy carried out abroad (international surrogacy).

2.1. Surrogacy in Russian law

As previously said, the discussion will primarily address the legislation of a country that allows every form of surrogacy. An example of one such legislation is that of the Russian Federation. The first surrogacy case in Russia was recorded in 1995 when the first twin girls were born using assisted reproduction.[7] Immediately after that, the Family Code of the Russian Federation[8] came into effect, which, albeit scantily, laid down the first rules on surrogacy (Svitnev 2016, 232–233). It stipulated that married persons who have given their consent, in written form, for the implantation of an embryo in another woman for carrying and bearing it, may be recorded as the child's parents only with the consent of the woman who has given birth to the child (surrogate mother).[9] The same law prohibited any subsequent dispute of the child's origin, following such registration of motherhood/parenthood.[10] Nevertheless, the Family Code failed to answer some of the main surrogacy-related questions. This is precisely why the Russian legislator enacted the Basic Law on Health Protection of Citizens,[11] in order to regulate surrogacy in greater detail. One of the dilemmas finally

[7] This surrogacy case led to certain problems because the surrogate mother found it difficult to accept the fact that she needed to part ways with the children that she had carried and gave birth to. It was precisely this case, as well as some other issues, that led to the adoption of the Family Code of the Russian Federation that contains norms related to the issue of surrogacy. See Weis 2017, 124–125.

[8] See Family Code of the Russian Federation (*Семейный кодекс Российской Федерации*) No. 223-FZ, dated 29 December 1995, amended 4 August 2022, entered into force 1 September 2022.

[9] Family Code, Article 51 para. 4 item 2.

[10] Family Code, Article 52 para. 3 item 2.

[11] Basic Law on Health Protection of Citizens (Федеральный Закон Российской Федерации Об основах охраны здоровья граждан в Российской Федерации) No. 323-FZ, dated 21 November 2011.

resolved with the enactment of this law was whether the Russian legislation allows both partial and full surrogacy.[12] More precisely, the provisions of the Basic Law on Health Protection of Citizens outline that the same woman cannot be a surrogate mother and an egg donor, hence indicating that only full (gestational) surrogacy is permitted in Russia.[13] The said law defines full (gestational) surrogacy as the process of carrying and delivering a child (including premature birth) based on a contract concluded between the surrogate mother (the woman carrying the fetus following the transfer of a donated embryo) and the intended parents, whose genetic material was used in the fertilization process.[14] In addition and unlike the Family Code, the Basic Law on Health Protection of Citizens recognizes the right to surrogacy to a wider scope of legal subjects. In other words, the right to surrogacy is granted not only to persons who are married, but also to heterosexual partners, as well as to single women. It is important to emphasize that a single woman has this right solely under the condition that there are medical indications preventing her from carrying and delivering a child (Weis 2017, 125).[15] In connection with this, Draškić (2022, 347) points out to two issues arising from such provisions. Firstly, only married couples are required to use their own genetic material in surrogacy procedures, i.e., the legislator does not stipulate this condition for heterosexual partners or for single women. Khazova (2016, 300) stresses that it remains unclear as to why the legislator opted for this approach and highlights that it is indisputable that, at least normatively, the law limits married couples' right to access to this method of assisted reproduction (see Svitnev 2016, 234). The second issue relates to the discrimination against single men. Better said, the previously mentioned legal provisions testify to the fact that single men are not granted the right to access to this method of assisted reproduction. This is why the constitutional provision on gender equality in health protection and provision of medical assistance is directly violated (Draškić 2022, 347 fn. 11).[16]

[12] Khazova (2016) underlines that, by using the term "implementation" in the Family Code, the legislator wanted to point only to the possibility of full surrogacy, and not partial surrogacy. However, she correctly concludes that this ignores a potential situation in which the egg of the surrogate mother was used for in vitro fertilization. See Khazova 2016, 285.

[13] Basic Law on Health Protection, Article 55 item 10. See Khazova 2016, 285.

[14] Basic Law on Health Protection, Article 55 item 9.

[15] Basic Law on Health Protection, Article 55 item 3.

[16] However, some authors note that on a practical level this right is also recognized for single men. Moreover, when ruling on whether a single man can be granted the legal status of a parent of a child born through surrogacy, the District Court in Moscow emphasized that there are no norms in Russian law that prohibit or limit the right of women or men to use mechanisms of medically assisted reproduction.

It seems, however, that one of the greatest inconveniences of Russia's legislation regarding the issue of surrogacy is related to the execution of surrogacy contracts: the intended parents can be registered as the child's parents only if the surrogate mother consents to it after the birth of the child (Khazova 2016, 285). Consequently, a surrogacy contract does not produce any legal effects if, following the child's birth, the surrogacy mother refuses to give away the child and consent to the registration of the intended parents as the child's legal parents. The intended parents (who can, at the same time, be the biological parents) therefore remain unprotected because "the surrogate mother always retains the right to decide whether she wants to execute the previously concluded surrogacy agreement, without having to bear any consequence" Draškić (2022, 348, translated by author). This solution was met with much criticism by legal scholars. That is because the will of the surrogate mother was placed above the child's interest to live with his/her biological parents (Draškić 2022, 347). It hence comes as no surprise that the general opinion of the Plenary Session of the Supreme Court of Russia concluded that the fact that a surrogate mother refuses to consent to the registration of intended parents as the child's legal parents cannot be used as an unconditional basis for resolving the issue of parental rights. Instead and in order to assess the case correctly, courts should take into account the circumstances of each case, primarily whether the parties concluded a surrogacy agreement and, if so, consider its provisions to determine whether the intended parents are also the child's genetic parents, why the surrogate mother failed to consent to the intended parents being registered as the child's legal parents, and, after taking into account all the circumstances of the case, as well as the principle of the best interest of the child,[17] to decide in the best interest of the child (Khazova 2016, 288). The Constitutional Court of Russia accepted the said general opinion already in 2018 when deciding on a case that involved precisely this matter. When deciding on a case in which a surrogate mother refused to give her consent to the registering of the intended parents as legal parents, the Constitutional Court of Russia rejected a constitutional appeal filed by the surrogate mother. The rationale of the court was that "the surrogate mother abused her rights, not only by acting contrary to the provisions of the surrogate contract,

The District Court in Moscow therefore passed down a decision under which a single man can be designated as the father, while the field for the name of the child's legal mother is crossed out. See Torkunova, Shcherbakova 2022, 29 fn. 51.

[17] Convention on the Rights of the Child, Article 3 para. 1: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

but also counter to the interests of the children born in the execution of this contract and whose genetic parents were a contractual party in the conclusion of the contract, as well as contrary to the interests of children from a previous marriage" (Draškić 2022, 349 fn. 16, translated by author).[18]

It was previously noted that surrogacy can be altruistic or commercial. The countries that allow surrogacy usually prohibit any form of its commercialization. Russian law, however, neither prohibits nor allows commercial surrogacy (Khazova 2016, 290). This is precisely why some authors note that a surrogate mother is entitled to reimbursement of expenses (medical costs, travel expenses, childbirth expenses, etc.) and to a reward for providing the service of carrying and delivering a child (Svitnev 2016, 236). Moreover, it is estimated that a surrogate mother may receive a sum of EUR 15,000 to EUR 30,000, on the basis of her right to a reward.[19]

However, another, more important issue related to surrogacy has been raised in Russia in the past two years. As Russian legislation is quite liberal in the field of medically assisted reproduction, it is of no surprise that "reproductive tourism", i.e., international surrogacy, has been a common occurrence. In this particular case international surrogacy refers to intended parents who are foreign nationals and who travel to Russia in order to conclude a surrogacy agreement with a surrogate mother in Russia whose duty will be to carry and deliver a child that she will then transfer to them.[20] Russia is especially interesting for foreign nationals, primarily because the costs of the process are considerably lower than in the European Union member countries that allow surrogacy (Svitnev 2016, 239). Moreover, foreign nationals enjoy the same rights as Russian citizens when it comes to the medically assisted reproduction services. Better said, in surrogacy cases that result in delivery of the child on Russian territory, foreign nationals are allowed to obtain a birth certificate for the child designating them as the child's legal parents. However, it is uncertain whether and to what extent such international surrogacy practices will continue. That is because the recent activities of the Russian legislator indicate a possible adoption of a law that would prohibit foreign nationals from using the services of surrogacy in Russia. The draft law lays down a number of rules of significance for international surrogacy. First of all, it stipulates that only a Russian national can be a surrogate mother. In addition to this, only

[18] Also see Khazova 2016, 286–289.

[19] These figures can go up to EUR 100,000 and in some cases surrogate mothers even acquire ownership of real estates which are worth even twice as much (Svitnev 2016, 236).

[20] For more on international surrogacy see Bordaš 2012.

Russian citizens as intended parents would have the right to surrogacy. This ban would not apply to cases in which one of the intended parents is a Russian citizen who is married to a foreign national or a stateless person (Federal Assembly of the Russian Federation 2022).[21] As reported by Reuters (Reuters 2022), a member of the working group who took part in the drafting of these provisions pointed out that the ban on foreign citizens and stateless persons using surrogacy services was a response to the recorded cases of death and trafficking of children born as a result of surrogacy arrangements concluded with foreign nationals or stateless persons marked as the intended parents. It should, however, be noted that for now, this presents a draft law and the question remains whether it will be adopted. However, it appears that potential legal norms restricting the right of foreign nationals to use surrogacy in Russia could cause significant difficulties, as Russia is one of the countries that is often the choice of foreign nationals for carrying out the surrogacy procedure. This problem becomes even more noticeable when taking into account the fact that, in addition to Russia, a large number of foreigners choose Ukraine as the country in which they want to carry out the surrogacy procedure. As we know, Ukraine and Russia are in an armed conflict at the time of the writing of this paper. As a result, conducting the surrogacy procedure in Ukraine is significantly more difficult and what is more, it opens up many unresolved issues that have not had to be raised in the past.[22] Seeing as the question remains when the conflict will end, it is clear that many foreigners are essentially denied the possibility of opting for a surrogacy procedure in Ukraine. If, in addition to this, the aforementioned draft law was to be adopted in Russia, additional difficulties for foreign nationals will appear because they would be denied the right to carry out the surrogacy procedure in Russia. This would in turn deprive foreign citizens of the right to carry out the surrogacy procedure in two European countries where the implementation of the international surrogacy procedure is otherwise very common.

[21] See Federal Assembly of the Russian Federation (2022).

[22] Due to the armed conflict, it has come to light that the interests of intended parents, surrogate mothers and agencies that provide mediation in the surrogacy process are actually opposed. A particular problem that has arisen is also related to the legal status and citizenship of the children born in surrogacy processes in conflict areas who, therefore, cannot leave the country. Consequently, many intended parents are in a desperate situation because they are not certain whether they will ever meet with the child and establish a parental relationship. For more details see Marinelli *et al*. 2022, 5647.

All previously said leads to the conclusion that Russia is an example of a legal system that recognizes the need to exercise and protect the reproductive rights of individuals, as well as the need to protect the interests of the child by using this specific mechanism of medically assisted reproduction. However, it can be claimed with equal certainty that there is also room for changes to the existing legal norms in order to resolve certain potentially disputed issues. Hence, the Russian legislator should lay down adequate amendments that would introduce changes to the existing provision under which a single man is not permitted to use surrogacy services. Moreover, having in mind that commercial surrogacy is also present in Russia, the author believes that the Russian legislator should present certain amendments that would regulate the contractual relationship between the surrogate mother and the intended parents in a more detailed manner, i.e., their rights and obligations, primarily the surrogate mother's right to a reward. Finally, although for the time being only a draft law is being discussed, it appears that potential legal norms restricting the rights of foreigners to opt for surrogacy in Russia could also cause considerable difficulties because the Russian Federation is one of the countries in which surrogacy is very popular. As already stated, this problem is even more noticeable taking into account the fact that, for many couples, the alternative is a surrogacy procedure in Ukraine, which is currently in an armed conflict with Russia. If this draft law was to be adopted, third persons, foreign nationals, could subsequently truly suffer significant consequences regarding the exercising of their reproductive rights.

2.2. Surrogacy in German law

In complete contrast to Russia are the legal systems that explicitly prohibit surrogacy, such as is the case with the German legal system. The German legislator addressed the issue of surrogacy in several different laws. First of all, it should be said that the Article 134 of the German Civil Code[23] stipulates that any legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion,[24] as well as that any legal transaction that offends public policy is void.[25] Additionally, the first section of The Embryo Protection Act,[26] titled Improper Use of Reproductive

[23] German Civil Code (Bürgerliches Gesetzbuch – BGB).

[24] German Civil Code, §138.

[25] German Civil Code, § 138 (1).

[26] Embryo Protection Act – Gesetz zum Schutz von Embryonen (Embryonenschutzgesetz – ESchG).

Technology, stipulates that anyone who attempts to carry out the artificial (*in vitro*) fertilization of a woman who is prepared to permanently give up her child to a third person after birth (surrogate mother) or to transfer a human embryo to a surrogate mother can be fined and sentenced to up to three years imprisonment.[27] It is noteworthy to underline that the said attempt is punishable by law only if it is perpetrated by healthcare workers because the legislator emphasizes that the intended parents and the surrogate mother cannot be criminally prosecuted (Klinkhammer 2016, 51).[28] The Act on Adoption Placement and on the Prohibition of Surrogacy Placement [29] stipulates that a surrogate mother is defined as a woman who is willing, on the basis of an agreement, to undergo artificial or natural insemination or to undergo implantation of an embryo that is not her own and who will, after giving birth, hand the child over to intended parents for adoption or other placement in permanent care.[30] Surrogacy placement relates to the matching of persons wishing to adopt or otherwise permanently care for a child born to a surrogate mother with a woman who is willing to act as surrogate.[31] Such surrogacy placement procedure is prohibited and punishable with a fine or with up to one year in prison. Moreover, any form of offering of surrogacy services or advertising of such services by adoption agencies is also forbidden (Dutta 2016, 37). Although it can be concluded that the German legislator has a negative attitude on surrogacy, regulating the issue of the legal status of intended parents could not be completely ignored because of the cases when surrogacy does occur.[32] However, this issue is addressed in a way that completely ignores the specificities of surrogacy as a process of medically assisted reproduction. The German Civil Code stipulates that the mother of a child is the woman who gave birth to it.[33] Such wording unequivocally gives precedence to the implementation of the *mater semper certa est* principle even if there is no genetic connection between the surrogate mother and the child. By laying down this norm, the legislator

27 Embryo Protection Act, § 1 (1) No. 1 and No. 7.

28 Embryo Protection Act, § 1 (3) and § 11 (2).

29 Act on Adoption Placement and on the Prohibition of Surrogacy Placement (Adoptionsvermittlungsgesetz – AdVermiG).

30 Act on Adoption Placement, §13a.

31 Act on Adoption Placement, §13b.

32 There are situations when the intended parents, surrogate mother and medical professionals decide to act contrary to the legal regulations and carry out the surrogacy process, i.e., situations when surrogacy is not banned (for example, it is possible to talk about the surrogate mother's natural insemination) or there are cases that refer to international surrogacy. See Dutta 2016, 39.

33 German Civil Code, § 1591.

intended to prevent the implementation of medically assisted reproduction procedures that lead to "split" motherhood (Gössl 2015, 451; Dutta 2016, 39). Consequently, an intended mother can be designated as the mother of the child only if that is preceded by the adoption of the child born through surrogacy (Gössl 2015, 451). The rules that apply to the establishment of fatherhood are to some degree more flexible than those for establishing motherhood. More precisely, there is a rebuttable legal presumption that the mother's husband is to be considered the child's father.[34] Therefore, in the case of surrogacy, the surrogate mother's husband would be considered the child's father. If the child's mother is single, the person who gave a declaration of recognition of paternity, and to whose declaration the mother consented, is to be considered the child's father.[35] Paternity can also be established by a court decision in two cases. The first case refers to all situations in which paternity has not been determined. In this scenario, the man who considers himself to be the father of the child can turn to the court asking it to pass a decision determining his out-of-wedlock paternity of the child.[36] The second case is somewhat more complicated because it involves a situation in which the paternity of the child has already been determined. The man who believes to be the father of the child has the right to contest the determined paternity only if he declares in lieu of an oath that he had sexual intercourse with the mother of the child during the period of conception and if there is no familial relationship between the child and the father whose paternity had previously been determined.[37] If the man who considers himself to be the father of the child succeeds in contesting the paternity of the man designated as the father of the child, when contesting the paternity the court will at the same time also pass a decision determining the paternity of the man who considers himself to be the child's father (Dutta 2016, 43). Such a norm raises the question of how the existence of sexual relations will be interpreted in practice and whether this condition truly has to be met. Some authors point out that the German Federal Court[38] took a liberal position on the issue of the existence of sexual relations between the man who considers himself to be the father and the child's mother (Dutta 2016, 42 fn. 23). It was hence said that the cases in which the fertilization of the woman happened using the genetic material of a donor who consented to such fertilization

[34] German Civil Code § 1592 No. 1.

[35] The man who considers himself to be the father (intended father) can give a declaration of paternity recognition even before the child's birth, even if his genetic material was not used for the conception of the child. See Dutta 2016, 41.

[36] See the German Civil Code § 1600d (1).

[37] See the German Civil Code § 1600 (1) No. 2 and § 1600 (2).

[38] The Federal Court of Justice (Bundesgerichtshof – BGH).

can be classified as the existence of sexual relations, unless the donor is anonymous.[39] Regarding the establishment of paternity of a man who considers himself to be the father of a child conceived through surrogacy, there are scholarly opinions that in case of the assessing of whether there was a sexual relationship between the man who considers himself to be the father of the child and the child's mother, the Federal Court of Justice would probably take the position that this condition is met if the genetic material of the man who considers himself the father was used and if he and the child's mother were acquainted (Dutta 2016, 43 fn. 24).

It is undeniable that, under the norms contained in the German legislation, acquiring the status of legal parents in the surrogacy procedure is made difficult for the intended parents. It is precisely for this reason that intended parents most often opt for adoption through which they can become the legal parents of a child born through surrogacy. If the intended parents are spouses, they can jointly adopt a child born by a surrogate mother.[40] In order for the adoption to take place, several requirements need to be met. The intended parents can be adoptive parents only if the child's biological parents consent to the adoption, i.e., the surrogate mother in the case of surrogacy (and also the surrogate mother's husband, if she is married). As the child's biological parent, the surrogate mother cannot give her consent before the child is eight weeks old.[41] Additionally, a decision on adoption is passed only if it is in the best interest of the child and if it can be expected that a parent-child relationship will be established between the adoptive parents and the child (Dutta 2016, 45). It should be noted that the assessment of the standard of the best interest of the child is raised to an even higher level when the intended parents are the adoptive parents. The German Civil Code emphasizes that a person who, for the purpose of adoption, has taken part in a procurement of a child that is unlawful or contrary to public policy or who has commissioned a third party for this or rewarded them for this, should adopt a child only if that is necessary for the best interest of the child and if can be expected that the child and the intended parents will create a family-like relationship.[42] Therefore, in this case, it is not enough for the court to

[39] See BGH 15 May 2013, *FamRZ* 2013, 1209, 2010.

[40] One of the intended parents who is married can also adopt a child alone if the intended parent's spouse is already designated at the child's father. See German Civil Code § 1741.

[41] German Civil Code, § 1747.

[42] German Civil Code, § 1741 No. 1.

assess that the establishment of adoption is suitable for achieving the best interest of the child, but that the establishment of adoption is necessary to protect the best interest of the child (Dutta 2016, 45).

Although the adoption procedure is a more favorable solution for recognizing the legal status of intended parents, compared to the application of the rules on establishing maternity and paternity, it seems that the simplest solution for the intended parents is to go abroad so that the surrogacy procedure can be carried out smoothly and in accordance with the law. However, German nationals encounter certain difficulties even in such cases. Better said, seeing that German law prohibits surrogacy, a particular problem arises when there is a need to recognize the legal status of intended parents in cases where the surrogacy procedure is carried out outside of Germany (international surrogacy). It is often the case that German citizens leave the country and carry out the surrogacy procedure in another country, only to then return to Germany and petition to be recognized as the legal parents of a child born through surrogacy in a foreign country. The German courts' initial position was that any form of recognition of the intended parents' legal status is contrary to public policy, even when the surrogacy procedure is allowed in the country in which it was carried out (Gösll 2015, 449 fn. 4). However, the views of the German courts changed after 2014. A same-sex couple, German citizens residing in Berlin, who were in a civil partnership, decided to travel to California to carry out the surrogacy procedure. The intended parents entered into a surrogacy agreement in accordance with Californian law. The surrogacy procedure was carried out using the genetic material of parent No. 1 and that of an unidentified woman. Before the child was born, parent No. 1 signed an acknowledgement of paternity of that child at the German consulate, which the surrogate mother consented to. In accordance with the decision of the Superior Court of the State of California, both intended parents were designated as the child's legal parents. The intended parents then returned to Germany and turned to the relevant municipal administration requesting it to establish their status as the child's legal parents. The relevant municipal administration refused the request to register their legal status, pointing out that that would be contrary to public policy. They were told that the intended parent who had donated the genetic material could be registered as the child's father, but that the decision of the Superior Court of the State of California cannot be recognized in its entirety (Gösll 2015, 450). Once the intended parents exhausted all previous legal remedies, they decided to turn to the German Federal Court of Justice, requesting it to answer whether two men can be designated as

the legal parents of a child born through surrogacy in a foreign country.[43] The Federal Court of Justice took the position that recognition of a foreign court's decision cannot be refused on the grounds that it runs counter to public policy, and instead ordered the relevant municipal administration to register the child's birth and the plaintiffs as the child's legal parents. The court pointed out that, in the case of surrogacy, a foreign court's decision recognizing intended parents the legal status of parents is not a violation of public policy if one of the intended parents is genetically related to the child (Klinkhammer 2016, 53). The Federal Court of Justice also stressed that the surrogacy procedure in the foreign country was carried out legally, that the child had no influence whatsoever on its creation, and that it thus cannot be responsible for the consequences arising from it (Klinkhammer 2016, 54). The court additionally pointed out that when assessing whether a foreign court decision is contrary to German public policy, the rights protected by the European Convention on Human Rights (ECHR)[44] must be considered. Citing the decisions of the European Court of Human Rights,[45] it emphasized

[43] Bundersgerichtshof Beschluss XII ZB 463/13, 10 December 2014.

[44] *Ibid*.

[45] The first case that the German Federal Court of Justice cited was *Mennesson v. France*. The applicants were the parents of girls born through surrogacy in the United States of America. They turned to the European Court of Human Rights claiming that the right to respect for their private and family life (Article 8 of ECHR), and that the children's best interests had been violated as they were unable to obtain recognition in France of the legal parent-child relationship lawfully established abroad. The European Court of Human Rights ruled that there had been a violation of the right to respect for private and family life of the girls born through surrogacy. The violation was primarily reflected in the fact that the French state authorities refused to identify the girls as the children of the indented parents (the applicants), even though they were identified as their children in the state in which the surrogacy process had been carried out. The European Court of Human Rights pointed out that this position undermined the children's identity within French society. In addition, it stipulated that the norms of French law, which refused to establish a legal relationship between the intended parents and the children conceived through such processes of medically assisted reproduction negatively affected not only the parents who chose a certain medically assisted reproduction treatment but also the children, thus affecting their right to respect for private life as well. Moreover, having in mind that one of the intended parents was the children's biological parent, and that biological parenthood is an important component of one's identity, it cannot be said that it is in the interest of the child to deprive them of a legal relationship of this nature where the biological reality of that relationship has been established and both the child and the intended parent demand full recognition thereof. In view of all this, the European Court of Human Rights held that the consequences of this serious restriction of the identity and right to respect for private life of the children, by preventing both the recognition and establishment of their legal relationship with their biological father, point to the fact

that a child's right to respect for private and family life, protected by Article 8 of the European Convention on Human Rights, must always be taken into account when deciding on the legal status of parents.[46] The Federal Court of Justice has, to a large extent, based its decision precisely on the rights and the wellbeing of the child born through surrogacy (Klinkhammer 2016, 54–55).[47] The Federal Court of Justice hence clearly pointed out that when deciding on the recognition of the legal status of parents, precedence should be given to the best interest of the child, and not to the protection of the German public policy. Nevertheless, it remains uncertain whether the Federal Court of Justice would have ruled the same way if the child born through surrogacy had been conceived without using the genetic material of one of the intended parents. That is because in the aforementioned case the court's decision was, among other things, based on the fact that there was a genetic link between one of the intended parents and the child.

Yet and considering the change of views of the Federal Court of Justice, it can undoubtedly be concluded that the German judicial authorities opted for a more flexible approach and in favor of recognizing surrogacy procedures carried out abroad, which is a shift compared to the previous understandings of the German courts. However, it remains to be seen whether that will open a small window of opportunity for the possibility of recognizing the right to carry out the surrogacy procedure in Germany, i.e., for relevant amendments to the legislation. For the time being, this seems unlikely because international surrogacy and surrogacy carried out in the territory of Germany cannot be equated. What is more, it is pointed out that this approach to the surrogacy process by the German legislator is a result of the intention to fully prevent the practice of carrying out the surrogacy procedure in the territory of Germany (Klinkhammer 2016, 54).

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that France had overstepped the permissible limits of its margin of appreciation. It is precisely for this reason, and taking into account the significance of the child's interests in weighing the competing interests at stake, that the European Court concluded that the right of the girls to respect for their private life was infringed. See *Mennesson v. France*, No. 65192/11, 26 June 2014, § 96–101. For more details on the facts in this case and the court ruling see Draškić 2022, 356–360.

46 Bundersgerichtshof Beschluss XII ZB 463/13, 10 December 2014.

47 The Federal Court of Justice primarily took into account the child's right to be cared for and to be brought up by its parents rather than anyone else. See Grundgesetz, Article 2 para. 1, in connection with Article 6 para. 2.

3. SURROGACY IN SERBIAN LAW

When speaking of medically assisted reproduction in Serbia, it should first be noted that the Constitution of the Republic of Serbia,[48] being the highest legal act, stipulates that every person has the freedom to decide whether they will procreate.[49] The legal content of the principle of deciding freely on whether to have children was most comprehensively defined by Stevanov (1977, 49) who believes that this principle encompasses several rights, one of which is precisely the right to conceive (naturally or artificially, the right to treatment of sterility, and the right to transplantation of gonads in order to birth a child) (Draškić 1992, 246).[50] Therefore, the right to access to medically assisted reproduction is one of the rights encompassed in the constitutional right to freely decide on procreation. Along with the Constitution of the Republic of Serbia, the same right is also protected by Article 8 of the European Convention on Human Rights,[51] which the European Court of Human Rights itself emphasized on a number of occasions.[52] However, the Serbian Family Act[53] envisages that only a woman has the right to freely decide on giving birth.[54] Nevertheless, since the constitutional norm entails that it is everyone's right to freely decide to procreate, and as this right entails the right to conceive, it is undisputed that every person, regardless of their sex, has the right to access to medically assisted reproduction.

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48 Constitution of the Republic of Serbia, *Official Gazette of the Republic of Serbia* 98/2006 and 115/2021.

49 Constitution of the Republic of Serbia, Article 63 para 1.

50 See also Mladenović 1989, 58.

51 Article 8 of the ECHR, which was ratified by the state union of Serbia and Montenegro in 2003, stipulates that everyone has the right to respect for their private and family life, home, and correspondence.

52 The European Court of Human Rights pointed out that "the right of a couple to conceive a child and to make use of medically assisted procreation for that end comes within the ambit of Article 8, as such a choice is clearly an expression of private and family life." See *S. H. and others v. Austria*, 57813/00, para. 82; Barać 2021, 176–177. For more details on medically assisted reproduction before the European Court of Human Right see Bordaš 2011, 313–333.

53 Family Act of the Republic of Serbia, *Official Gazette of the Republic of Serbia* 18/2005, 72/2011 – state law and 6/2015.

54 As can be noted, the Family Act grants this right only to women, hence undeniably violating the constitutional norm proclaiming that everyone is entitled to this right. Such provision became an integral part of the text of the law because, in the process of passing the Family Act, an amendment was adopted that changed Article 5 para. 1 of the Draft Family Act, which had been drafted by a committee of experts (Draškić 2020, 51).

The Law on Medically Assisted Reproduction[55] is of special importance to the subject matter. To that end this law defines that medically assisted reproduction is a procedure that is carried out in line with the modern standards of biomedicine, in the event of infertility and if there are medical indications for fertility preservation, enabling the joining of male and female reproductive cells to achieve pregnancy in a manner different from sexual intercourse.[56] Medically assisted reproduction implies the procedure of intracorporeal fertilization, which involves the introduction of sperm cells into the female reproductive tract or the introduction of eggs and sperm cells together into the female reproductive organs (*in vivo* fertilization), as well as the procedure of extracorporeal fertilization, which involves the joining of an egg and a sperm cell outside of the woman's body in order to create an embryo and transfer it to the woman's reproductive organs (*in vitro* fertilization).[57] The right to medically assisted reproduction is recognized to spouses of legal age and with legal capacity, to extramarital partners and to single women of legal age and with legal capacity.[58] This right is also recognized to women/men with legal capacity who have postponed the use of their reproductive cells due to the possibility of a decrease or loss of reproductive function.[59] It should be noted that medically assisted reproduction can be carried out using either the genetic material of the persons entitled to this right or the genetic material of donor(s).[60]

Serbian legislation envisages the possibility of conception solely through egg donation or embryo donation, while explicitly prohibiting surrogacy. The provisions of the Law on Medically Assisted Reproduction (LMAR) stipulate that a woman who intends to give a child away to a third-party following delivery, with or without payment of any kind, i.e. obtaining any other material or immaterial gain, is prohibited from taking part in medically assisted reproduction, nor is it permitted for a woman or any other person to offer surrogate services with or without payment of any kind, i.e., obtaining any other material or immaterial gain.[61] In addition, the same law establishes criminal sanctions for persons who include a woman intending

[55] Law on Medically Assisted Reproduction – LMAR, *Official Gazette of the Republic of Serbia* 40/2017 and 113/2017.

[56] LMAR, Article 3 para. 1 item 1.

[57] LMAR, Article 13 para. 2.

[58] LMAR, Article 25 paras. 1 and 2

[59] LMAR, Article 25 para. 3. For more on exercising this right and meeting the conditions for the exercise of this right, see Barać 2021, 178–187.

[60] LMAR, Article 29.

[61] LMAR, Article 49 para. 1 item 18.

to give a child, once it is born, to a third party with or without payment of any kind, i.e., obtaining any material or immaterial gains, or a person offering surrogate services of a woman or any other person, with or without payment of any kind, i.e., obtaining any material or immaterial gains, in a medically assisted reproduction procedure.[62] On the other hand, the Family Act contains a norm stipulating that the woman who gave birth to a child is considered to be the mother of the child.[63] The Family Act also stipulates that if a child was conceived using a donor egg in a medically assisted procedure, the maternity of the woman who donated the egg cannot be established.[64] Based on these legal solutions and in light of the fact that, as previously said, there is also a possibility of conception using donor genetic material, Kovaček Stanić (2013, 12) concludes that the legislator opted for a legal solution that gives legal parenthood precedence over genetic parenthood.

Some legal scholars have criticized this legal solution, presenting a number of arguments justifying the position that surrogacy should be allowed. Cvejić Jančić (2010, 11), being one of them, emphasizes that the ban on surrogacy violates the constitutional norms related to the right to procreate because the Constitution of the Republic of Serbia does not envisage the possibility of restricting this right by law or in any other way. Moreover, the said author points out that the ban on surrogacy violates the constitutional norm on gender equality[65] and the ban on discrimination based on gender.[66] She draws this conclusion from the fact that, when it comes to treating male infertility, all known and available medically assisted fertilization procedures can be carried out, while this is not the case when treating female infertility. Although the legislator allows for the treatment of infertility using egg or embryo donation, a woman who is able to produce her own eggs, but is unable to carry a pregnancy and bear a child, is denied the possibility of becoming the mother of a child that carries her genetic characteristics (Vidić Trninić 2015, 1165). The same authors also refer to

62 LMAR, Article 66 para. 1.

63 Family Act, Article 42.

64 Family Act, Article 57 para. 2. The same rule is also established in cases when a child is conceived with medical assisted reproduction using donor sperm. Therefore, there can be no establishing of paternity of the man who donated the sperm. See Family Act, Article 58 para. 5.

65 "The State shall guarantee the equality of women and men and develop equal opportunities policy." Constitution of the Republic of Serbia, Article 15.

66 "All direct or indirect discrimination based on any grounds, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability shall be prohibited." Constitution of the Republic of Serbia, Article 21 para. 3.

the issue of the national birth rate. The provisions prohibiting surrogacy are "particularly unacceptable" in cases where a woman who can bear children opts to limit herself by having one or two children while, on the other hand, a woman, wanting to have more children is prevented from starting a family with the help of another woman who is willing and able to do so (Cvejić Jančić 2010, 12–13; Vidić Trninić 2015, 1165).[67]

The author is of the opinion that there is room for a different interpretation of the aforementioned norms of the Constitution of the Republic of Serbia. In other words, it is questionable whether the prohibition of surrogacy can at all be said to restrict one's right to freely decide to procreate. The purpose of the constitutional norms is to prohibit the interference of the state in the rights of spouses and extramarital partners to have children that are naturally conceived. This, however, does not mean that the legislator must stipulate provisions which would allow for this right to be exercised through all medically available methods. It should be noted that some scholars are of the opinion that the holder of the right to freely decide on bearing children "does not at all times have to have the actual possibility for procreation of offspring" (Draškić 1992, 249 fn. 54, translated by author). Hence, it is evident that the Republic of Serbia has no duty to offer the users of this right a range of possibilities for exercising it. As a result, it can be stressed that the argument that the current legal norms restrict this right are improper. This opinion is based on the fact that the Constitution of the Republic of Serbia clearly stipulates that the provisions on human rights are interpreted to the benefit of promoting values of a democratic society, pursuant to valid international standards in human and minority rights, as well as the practices of international institutions that oversee their implementation.[68] With this in mind, it should be pointed out that it is questionable whether the provisions on human rights should actually be interpreted in a way that permits surrogacy. It is hence important to consider the case law of the European Court of Human Rights, as it is an international body set up to ensure the full implementation of the ECHR (Draškić 2019, 41), and particularly because the exercise of the right to freely decide on bearing children is protected by Article 8 of the ECHR (the right to respect for private and family life, home and correspondence).[69] Consequently, in

[67] See also Vlašković 2011, 331–332.

[68] Constitution of the Republic of Serbia, Article 18 para. 3.

[69] ECHR, Article 8: "Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or

interpreting the norms on human and minority right, the provisions of the ECHR and the practice of the European Court of Human Rights should be taken into account. With this in mind, it should first be pointed out that, in the judgment recently handed down in *Pejřilova v. the Czech Republic*,[70] the European Court of Human Rights stressed that, in a sensitive domain such as artificial procreation, concerns based on moral considerations or on social acceptability must be taken seriously.[71] For this reason and when examining the compatibility of a prohibition of a specific artificial procreation technique with the requirements of the Convention, the legislative framework to which it belongs to must be taken into consideration, and the prohibition must be

crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." When ensuring protection of the rights provided by Article 8 of the ECHR, the European Commission of Human Rights and the European Court of Human Rights often also ensured the protection of the reproductive rights of individuals. For more details see Barać 2020, 189.

70 This case involved a man and a woman who got married in 2012. As they were unable to conceive a child naturally, and the applicant's husband had a serious illness, they decided to undergo medically assisted reproduction. In June 2014 the applicant's husband had his sperm cryopreserved, signing a consent form agreeing to such preservation solely for the purpose of infertility treatment. However, he died before any further steps were taken. The applicant thus turned to the center where the sperm cells had been deposited with a request to have her eggs fertilized with her late husband's cryopreserved sperm. The center refused and instead suggested that the applicant petition the court in order to reach a settlement. The position of the domestic courts was that the center was under no obligation to carry out the requested procedure. The applicant appealed to the European Court, emphasizing that the state should allow her to continue the process of assisted reproduction using the cryopreserved sperm of her deceased husband. When stating her request, she cited the right to respect for private and family life, home and correspondence. In this specific case, the Court assessed whether the Czech Republic's interference with the applicant's rights protected by Article 8 of the ECHR had been in accordance with the law, whether its aim was legitimate, and whether it was necessary in a democratic society. The Court gave a positive answer to the first question, because this type of ban on posthumous fertilization was envisaged by law. The Court further found that the Czech legislature's decision to enact such provisions, and their interpretation by the domestic courts, indicated the intention to respect human dignity and free will, and that such action achieved a legitimate aim, namely the protection of morals and the rights and freedoms of others. Regarding the question of whether such interference was necessary in a democratic society, the Court emphasized that it did not find that the applicant's legitimate right to respect for the decision to have a child genetically related to her late husband should be accorded greater weight than the legitimate general interests protected by the impugned legislation. In view of all this, the Court concluded that there was no violation of the applicant's right to respect for private life. For more details see *Pejřilova v. The Czech Republic* No. 14889/19, of 8 December 2022.

71 *Pejřilova v. The Czech Republic* No. 14889/19, of 8 December 2022, § 58. See also *S. H. and Others v. Austria*, No. 57813/00, of 3 November 2011, § 112.

perceived in this wider context.[72] The European Court of Human Rights noted that states should enjoy a wide margin of appreciation in determining the most appropriate policy for regulating matters of artificial procreation, especially since the use of IVF treatment continues to give rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments.[73] Moreover, the Court answered the question regarding the permissibility of carrying out the surrogacy procedure in the legal systems of European countries. To that end, in the aforementioned *Case of Mennesson v. France*,[74] it was stressed that European states should be afforded a wide margin of appreciation in deciding on surrogacy because there is still no consensus on the issue of surrogacy among them as surrogacy raises sensitive ethical questions.[75]

Even if one were to accept the position that women in Serbia are denied access to all known and available medically assisted methods for the treatment of female infertility, this still does not mean that such a restriction is unjustified and that there is discrimination. In other words, the procedure of egg donation and embryo donation, where a woman who carries and gives birth to a child becomes its mother, differs significantly from surrogacy, where the surrogate mother has a contractual obligation to carry and give birth to a child, and then give the child away to the intended parents. (Kovaček Stanić 2006, 159). Restricting, i.e., denying the right to carry out the surrogacy procedure is closely linked with the specific nature of the contractual relationship between a surrogate mother and the intended parents. For example, an inevitable question that can be raised in the case of a surrogacy contract is whether the subject matter of the surrogate mother's obligation is permitted at all, taking into account the provisions of Law of Contracts and Torts (LCT).[76] Under the provisions of the LCT, the subject of obligation shall not be permitted if it is contrary to compulsory legislation,

72 *Pejřilova v. The Czech Republic* No. 14889/19, of 8 December 2022, § 58. See also with *S. H. and Others v. Austria*, No. 57813/00, of 3 November 2011, § 112.

73 See *Pejřilova v. The Czech Republic* No. 14889/19, of 8 December 2022, § 43. See also *Evans v. United Kingdom*, No. 6339/05, of 7 March 2006, §81; *S. H. and Others v. Austria*, No. 57813/00, of 3 November 2011, § 97.

74 *Mennesson v. France*, No. 65192/11, 26 June 2014.

75 *Mennesson v. France*, No. 65192/11, 26 June 2014, §§ 78, 79. See also Draškić 2022, 358.

76 Law on Contracts and Torts – LCT, *Official Gazette of the Socialist Federal Republic of Yugoslavia* 29/78, 39/85, 45/89 – decision of the Constitutional Court of Yugoslavia and 57/89, *Official Gazette of the Federal Republic of Yugoslavia* 31/93, *Official Gazette of Serbia and Montenegro* 1/2003 – Constitutional Charter; and *Official Gazette of the Republic of Serbia* 18/2020.

public policy or fair usage.[77] If the subject of an obligation is unlawful, the contract would be considered void.[78] Cigoj (1983, 169) argues that parts of the human body cannot be the subject of a legal transactions, unless this involves the disposal of body parts that does not pose a threat to life and health, i.e., if it involves altruistic aims (the health of another person). Seeing that in the present case the body of a surrogate mother, i.e., her uterus, is used to fulfill a contractual obligation toward the intended parents, and as it is conceivable that, through pregnancy, the surrogate mother exposes herself to a threat to her life or health, it could potentially be claimed that the subject matter of the surrogate mother's obligation is impermissible because it affects her personal sphere.[79] Such rationale can also be found when inspecting other legal systems in which surrogacy contracts are prohibited. For example, in French law, it is emphasized that surrogacy contracts are contrary to public policy and are therefore void (Pintens 2016, 18). Moreover, in a case reiterating that surrogacy contracts are prohibited, the French Court of Cassation also underlined that the human body and the status of a person are inviolable and thus cannot be viewed as goods.[80] Ethical reasons also speak against surrogacy contracts in order to avoid situations in which a child becomes the object of exchange between an infertile couple and a surrogate mother (Pintens 2016, 18). Moreover, while such a contractual relationship could negatively affect the psychological status of a child born in this manner, the prohibition of it could prevent the exploitation of women from lower social status (Draškić 2022, 355).[81] Since carrying out the surrogacy procedure implies a process that raises many important questions and intrudes on the surrogate mother's private life (unlike the processes of egg donation and embryo donation), it appears that the position of the authors who claim that prohibiting the surrogacy process violates constitutional norms must be relativized.

Finally, it is necessary to reflect on the views that the provisions prohibiting surrogacy are "particularly unacceptable" when women who are able to carry a pregnancy and give birth limit themselves and have only up to two children while, on the other hand, there are legal obstacles

77 LCT, Article 49.

78 LCT, Article 47.

79 For more details on types of inadmissibility see Cigoj 1983, 168.

80 Cass. (Ass. plén) 31 May 1991, D. 1991, note D. Thouvenin, JCP 1991 II, 21 752, note J. Bernard. Cited according to Draškić 2022, 355 fn. 29. For more details see Draškić 2022, 355.

81 She, however, underlines that there are also opposite examples, the best proof of which is *Mennesson v. France*. See Draškić 2022, 355.

for women who, although they want to, are prevented from having a child with the help of a surrogate mother. It appears that the position of such scholars is that the right to procreate encompasses the right to choose the manner in which the childbirth will occur. The right to freely decide on having children primarily relates to every person's right to make a choice on whether they want offspring or not (Kovaček Stanić 2013, 2; Draškić 2020, 51–53). Once a person has made this choice, their right to conceive, both naturally and artificially, is protected. Due to its biological aspect, the right to conceive naturally is far easier to realize. On the other hand, the right to conceive artificially implies infertility treatment by carrying out procedures that include various reproduction technologies of intracorporeal or extracorporeal conception, which is a more complex method. Consequently, it can be concluded that the surrogacy procedure, as a method of conceiving a child artificially, cannot be treated the same as other methods of conception. Thus, it is necessary to keep in mind that in carrying out the surrogacy procedure, there is a very specific obligation of the surrogate mother, as was previously explained. In addition to this, "pregnancy and childbirth actually lead to the creation of emotional bonds between a mother and a child the breaking of which is unnatural, even inhumane" (Kovaček Stanić 2013, 16, translated by author). Moreover, the protection of the right to found a family does not necessarily mean that this right will in fact be realized. Let's say a woman wants to terminate a pregnancy and her husband is against it. In such case the woman's husband, although granted the constitutional right to freely decide on having children, cannot in fact exercise his right and become a parent.[82] Even if the courts were to accept the position of legal scholars that the surrogacy procedure should be allowed it should not be overlooked that some questions of both biological and legal nature would definitely be raised, questions to which Serbia's legal system has no answers – at least not at the moment. Having all this in mind, the author is of the opinion that there is no place for the interpretation that the right to conceive artificially includes the right to surrogacy. Consequently, she does not see a correlation between a woman's right to choose to "limit" her own reproduction by wanting one or two children and denying the right to surrogacy.

It should be mentioned that a discussion of legislative changes allowing surrogacy procedures in Serbia was recently opened. The proposed Preliminary Draft of the Civil Code of the Republic of Serbia (Preliminary Draft) included a legal provision that allows for the conclusion of surrogacy contracts provided that certain conditions are met. The proposed norms have been defined in a way which offers alternative solutions for every provision,

[82] See Draškić 1992, 248 fn. 53.

therefore leaving the actual intent of the working group of the Preliminary Draft rather unclear. The Preliminary Draft defines surrogacy contract as a contract on child bearing for another, which can be concluded between a woman who would carry and give birth to a child (surrogate mother) and the intended parents, whereby the intended parents may be both spouses and extramarital partners, as well as single persons (man or woman).[83] The Preliminary Draft remains ambiguous regarding the form of surrogacy since alternative solutions are proposed, e.g. it provides for the possibility of surrogacy based on family relations, but bans surrogacy between individuals who are not related, and then proposes, as an alternative solution, to ban surrogacy based on family relations, while only allowing surrogacy between individuals who are not related.[84] Furthermore, it envisages the possibility of both partial and full surrogacy, with a criterion for determining the type of surrogacy different from the one accepted in comparative law.[85] Hence, it can be underlined that many dilemmas remain unresolved. Anyhow, the provisions contained in the Preliminary Draft should not be given much weight, bearing in mind that the said draft has been put *ad acta* and that it remains unclear whether and how surrogacy procedure will be regulated in Serbian law. Nevertheless, considering the specific legal nature of surrogacy contracts, there are several preliminary questions that need to be answered in order to adequately address the issue of carrying out the surrogacy procedure. In other words, the first question that needs to be answered is whether the surrogacy agreement is contrary to public policy, bearing in mind that it foresees carrying and giving birth to a child for another and handing the child over to the intended parents. Furthermore, the issue of the form of this contract would also have to be resolved, i.e., whether a surrogacy contract should be concluded with prior/subsequent consent of an administrative body, whether the agreement should be concluded in the form of a notary public record, or whether it should be envisaged that a surrogacy contract does not produce any legal effects pending the decision of the competent

83 Preliminary Draft, Article 2273.

84 Preliminary Draft, Article 2275.

85 In the Preliminary Draft, partial surrogacy refers to surrogacy carried out using the reproductive material of at least one of the individuals who wants a child (contrary to this, in comparative law, the distinguishing criterion is whether the egg of the surrogate mother was used in the surrogacy process). According to the solution proposed in the Preliminary Draft, full surrogacy refers to cases in which the reproductive material of both intended parents is used in the surrogacy process – while, in comparative law, full surrogacy includes the cases where the genetic material of one or both intended parents is used. For more details on the solutions proposed by the Preliminary Draft, see in Kovaček Stanić 2013, 14–15. See Vidić Trninić 2015, 1166 ff.

court, after which a parental legal relationship can be established between the intended parents and the child born through surrogacy.[86] Finally, the question whether both partial and full surrogacy should be allowed would also need to be answered. Kovaček Stanić (2013) asserts that Serbia's legal system should start off with more restrictive legal solutions, which is why it should only allow full surrogacy.[87] In addition to these, many other legal questions can be raised regarding the surrogacy procedure (issues related to the right to reimbursement of costs, right to termination of contract due to non-performance, impossibility of performance, right to termination of contract or amendment of contract due to changed circumstances, etc.). It is precisely for this reason that it can be unequivocally concluded that, at the present time, Serbia's legislation has not considered the issue of carrying out the surrogacy procedure to a sufficient extent and with adequate attention. As a result, it would be necessary to first resolve the numerous dilemmas that may arise in connection with medically assisted fertilization, and only then proceed with its implementation.

4. CONCLUSION

Surrogacy has been known as a mechanism of medically assisted reproduction for almost forty years now. Nonetheless, it is still not regarded as an appropriate infertility treatment, albeit the fact that it offers infertile couples a chance to become parents of a child that is genetically related to one or even both of them. On the contrary, the research and analysis presented by the author leads to the conclusion that the legal systems in Europe and around the world still do not have a uniform approach. However, the examples of different legal systems showcase that the division of legal systems into those that prohibit surrogacy, those that allow only altruistic surrogacy and those that allow every form of surrogacy is not necessarily nor should it be very strict. This paper presents a comparative review of two legal systems that can testify to that. On the one hand there is Russia, a legal system that features extremely liberal norms regarding surrogacy. This approach, however, raises certain issues, the most important being the justification of a surrogate mother's right to refuse, following the birth of a child, to consent to the registering of the intended parents as the child's

[86] For more details on form of surrogacy contracts, see Vlašković 2011, 333–335.

[87] If partial surrogacy were to be allowed, there would be risk of the surrogate mother refusing to hand over the child because of the genetic link between her and the child. See Kovaček Stanić 2013, 15.

legal parents. Nevertheless, the general opinion of the Plenary Session of the Supreme Court of Russia clearly stated that, when assessing whether a surrogate mother has the right to refuse to hand over the child and to consent to the intended parents being designated as the child's legal parents, the courts must assess the circumstances of the case (whether the parties concluded a contract and, if so, what do the provisions of the contract stipulate, and what is the reason for the surrogate mother's refusal to give consent), and to observe the principle of the best interest of the child. Moreover, it is emphasized that when passing its decision, the courts must resolve the case in the best interest of the child. In addition, and as previously stipulated, commercial surrogacy presents a controversial issue in Russia. That is why the author believes it is necessary to regulate the norms that refer to the right to a reward in greater detail, primarily in the context of potential abuse of women from lower social status who opt to offer their surrogacy services for financial reasons. Additionally, certain legal norms in Russian law are set in a way that raises the question of their constitutionality. In other words, in Russia, at least according to the law, the right to a surrogacy procedure is not recognized for men, which is a direct violation of the constitutional provision on the equality of men and women in health protection and provision of medical assistance.

Germany, on the other hand, is an example of a legal system that has opted for a more conservative approach, at least at first glance. Thus, several legal acts contain norms explicitly prohibiting surrogacy. However, according to legal scholars, this ban focuses on preventing surrogacy solely on the territory of Germany. The 2014 ruling of the German Federal Court of Justice, which stipulates that a ruling by a foreign court recognizing the legal status of intended parents does not constitute a violation of public policy if one of the intended parents is genetically related to the child, proves that this is in fact the case. In connection with this, the ruling of the Federal Court was primarily based on the need to recognize and honor the rights of a child born through surrogacy, i.e., the child's right to be cared for, before anyone else, by its parents as well as its right to upbringing. This ruling reflects the positions expressed in the rulings of the European Court of Human Rights.

It is notable that both legal systems, with two completely opposite approaches to regulating the issue of surrogacy, recognize the need to acknowledge the legal effects of surrogacy contracts so as to protect a child's interests. It should, however, be borne in mind that this position of the German courts, at least at this point, refers only to international surrogacy.

Serbia, similar to Germany, prohibits surrogacy. The norms of the Serbian Law on Medically Assisted Reproduction ban surrogacy. However, such position of the legislator is criticized by legal scholars. They point out that

this prohibition constitutes a violation of constitutional norms that proclaim the right of every person to freely decide on having children, and that a ban on surrogacy limits this right. Additionally, it is underlined that such prohibition discriminates against women because, unlike men, they are not recognized the right to use all available and known methods of medically assisted reproduction. However, the author offered a different interpretation of these norms and pointed out that the right to freely decide on having children should not necessarily be interpreted as an absolute right, which is best evidenced by the fact that some other rights that are part of the right to freely decide on having children are somewhat regulated (for example, the right to termination of pregnancy). It is also necessary to take into consideration the fact that the European Court of Human Rights clearly pointed out that member states enjoy a wide margin of appreciation in deciding on the matter of surrogacy, as there is still no general consensus regarding surrogacy because this question raises delicate ethical dilemmas. Along with the ethical quandaries, surrogacy contracts also raise dilemmas of legal nature, such as whether the surrogacy contract would be contrary to public policy, what form should it take, whether it could also be concluded as a commercial contract or take the form of an altruistic contract. This is why it is necessary to first resolve these dilemmas and only then embark on standardizing legal norms that recognize the right to the surrogacy procedure. Even if surrogacy is permitted, it would be important to start off with more restrictive solutions and only later assess whether there are also possibilities for accepting more liberal norms.

Finally, it should be kept in mind that, for some people, surrogacy is the only mechanism that would allow them to be genetically related to their child. It is precisely for this reasons that it appears questionable whether and to what extent it is possible to talk about prohibiting surrogacy in the long term, especially in light of the fact that infertility causes great stress for people, i.e., for (un)married couples, and that the birth of a child creates "the greatest feeling of fulfillment and purpose in life, also enabling them to respect their own identity and dignity" (Draškić 2013, 219, translated by author). Based on all that has been said, an inevitable conclusion is that it is necessary to define certain standards that would, at least to some extent, help states in standardizing rules on the surrogacy process.[88]

[88] The Hague Convention on International Private Law has taken on the initiative in an attempt to formulate a suitable international convention that would regulate various aspects of international surrogacy contracts, however there has been no progress so far. Even if it were not so, this would not resolve the problems in Serbian domestic law. See Draškić 2022, 369.

REFERENCES

[1] Barać, Ivana. 2020. Prekid trudnoće: Nove tendencije i stari nedostaci. 185–204 in *Zbornik radova Kopaoničke škole prirodnog prava – Slobodan Perović* 2.

[2] Barać, Ivana. 4/2021. Biomedicinski potpomognuto oplođenje i demografska politika. *Politička revija* 70(4): 173–195.

[3] Bila, Sreten, Ivan Tulić, Nebojša Radunović. 1994. *Osnove vantelesnog oplođenja*. Belgrade: Zavod za udžbenike i nastavna sredstva.

[4] Bordaš, Bernadet. 4/2012. Surogat materinstvo sa prekograničnim dejstvima: Stvarnost i pravo. *Zbornik radova Pravnog fakulteta u Novom Sadu* 46(4): 97–117.

[5] Cigoj, Stojan. 1983. Ništavost ugovora zbog predmeta. 165–172 in *Komentar Zakona o obligacionim odnosima*, edited by Borislav Blagojević and Vrleta Krulj. Belgrade: Savremena administracija.

[6] Cvejić Jančić, Olga. 10/2010. Akutelni izazovi biomedicinski potpomognute oplodnje. *Pravni život* 540(10): 5–23.

[7] Department of Health & Social Security. 1984. The Report of the Committee of Inquiry into Human Fertilisation and Embryology (Warnock Report). *https://www.hfea.gov.uk/media/2608/warnock-report-of-the-committee-of-inquiry-into-human-fertilisation-and-embryology-1984.pdf*, last visited 16 September 2022.

[8] Dutta. Anatol. 2016. Surrogacy in Germany. 35–47 in *Eastern and Western Perspectives on Surrogacy*, edited by Jens M. Scherpe, Claire Fenton-Glynn, Terry Kaan. Cambridge – Antwerp – Chicago: Intersentia.

[9] Draškić, Marija. 4/1992. Porodičnopravni aspekti artificijelne inseminacije. *Anali Pravnog fakulteta* 40(4): 239–264.

[10] Draškić, Marija. 2013. Biomedicinski potpomognuto oplođenje. 219–235 in *Razvoj pravnog sistema Srbije i harmonizacija sa pravom EU*, edited by Radmila Vasić i Ivana Krstić. Belgrade: Pravni fakultet Univerziteta u Beogradu.

[11] Draškić, Marija. 2019. *Porodično pravo i pravo deteta*. Belgrade: Pravni fakultet Univerziteta u Beogradu.

[12] Draškić, Marija. 2020. *Komentar Porodičnog zakona*. *Praksa Evropskog suda za ljudska prava. Praksa Ustavnog suda. Praksa redovnih sudova*. Belgrade: JP "Službeni glasnik".

[13] Draškić, Marija. 2022. Ugovor o surogat materinstvu – između punovažnosti i ništavosti. 341–373 in *Zbornik Treće regionalne konferencije o obveznom pravu*, edited by Marko Baretić and Saša Nikšić. Zagreb: Pravni fakultet Sveučilišta u Zagrebu.

[14] Государственная Дума. 2022. *Иностранцам могут запретить пользоваться услугами суррогатных матерей в России*. Maj 2022. [Gosudarstvennaya Duma. 2022. *Inostrantsam mogut zapretit' pol'zovat'sya uslugami surrogatnykh materey v Rossii*. Maj 2022.]

[15] Gössl, Susanne Lilian. 2/2015. The Recognition of a "Judgement of Paternity" in a Case of Cross-Border Surrogacy under German Law. Commentary to BGH, 10 December 2014, AZ. XII ZB 463/13. *Cuadernos de Derecho Transnacional* 7: 448–465.

[16] Hague Conference on Private International Law, Permanent Bureau. 2012. A Preliminary Report on the Issues Arising from International Surrogacy Agreements, *https://assets.hcch.net/docs/d4ff8ecd-f747–46da-86c3–61074e9b17fe.pdf*, last visited 16 September 2022.

[17] Jović Prlainović, Olga. 10/2015. Surogat materinstvo – argumenti *pro* et *contra*. *Pravni život* 10: 41–51.

[18] Jović Prlainović, Olga. 2017. *Biološki osnovi roditeljstva – Pravo i stvarnosti*. Kosovska Mitrovica: Pravni fakultet Univerziteta u Prištini sa privremenim sedištem u Kosovskoj Mitrovici.

[19] Kovaček Stanić, Gordana. 121/2006. Porodični zakon Srbije iz 2005. godine u kontekstu planiranja porodice. *Zbornik Matice Srpske za društvene nauke*: 157–170.

[20] Kovaček Stanić, Gordana. 1/2013. Biomedicinski potpomognuto začeće i rođenje deteta. *Stanovništvo* 51: 1–21.

[21] Khazova, Olga. 2016. Surrogacy in Russia. 281–306 in *Eastern and Western Perspectives on Surrogacy*, edited by Jens M. Scherpe, Claire Fenton-Glynn and Terry Kaan. Cambridge – Antwerp – Chicago: Intersentia.

[22] Klinkhammer, Frank. 2016. Surrogate Motherhood under German National and International Private Law, A Judical Perspective. 49–58 in *Eastern and Western Perspectives on Surrogacy*, edited by Jens M. Scherpe, Claire Fenton-Glynn, Terry Kaan. Cambridge – Antwerp – Chicago: Intersentia.

[23] Marinelli, Susanna, Alessandro Del Rio, Marco Straccamore, Negro Francesca, Giuseppe Basile. 2022. The armed conflict in Ukraine and the risks of inter-country surrogacy: the unsolved dilemma. *European Review for Medical and Pharmacological Sciences* 26: 5646–5650.

[24] Mladenović, Marko. 1989. *Porodično pravo u Jugoslaviji*. Belgrade: IRO Naučna knjiga.

[25] Mršević, Zorica. 2020. *Analiza uslova i načina ostvarivanja biomedicinski potpomognute oplodnje u Srbiji*. Belgrade: Labris – organizacija za lezbejska ljudska prava.

[26] Pintens, Walter. 2016. Surrogacy in France. 17–33 in *Eastern and Western Perspectives on Surrogacy*, edited by Jens M. Scherpe, Claire Fenton-Glynn, Terry Kaan. Cambridge – Antwerp – Chicago: Intersentia.

[27] Reuters. 2022. Russia moves to bar foreigners from using its surrogate mothers. 24 May. *https://www.reuters.com/world/europe/russia-moves-bar-foreigners-using-its-surrogate-mothers-2022–05–24/*, last visited 15 May 2023.

[28] Svitnev, Konstantin. 2016. Gestational Surrogacy in the Russian Federation. 232–240 in *Handbook of Gestational Surrogacy*, edited by Eric Scott Sills. Cambridge: Cambridge University Press.

[29] Stevanov, Miloš. 11/1977. Pravo na slobodno roditeljstvo. *Zbornik radova Pravnog fakulteta u Novom Sadu* 11: 43–58.

[30] Torkunova, Ekaterina A., Alena I. Shcherbakova. 2/2022. Surrogacy Regulation: Trends in International and Russian Law. *Moscow Journal of International Law*: 17–38.

[31] Vidić Trninić, Jelena. 3/2015. Surogat materinstvo u pravu Srbije (De lege lata i de lege ferenda) i pravu Makedonije. *Zbornik radova Pravnog fakulteta u Novom Sadu* 49(3): 1161–1190.

[32] Vlašković, Veljko. 2011. Surogat materinstvo na pragu našeg pravnog poretka. 323–347 in *Zbornik radova XXI vek – vek usluga i Uslužnog prava* 2.

[33] Weis, Christina Corinna. 2017. *Reproductive Migrations Surrogacy workers and stratified reproduction in St Petersburg*. Ph.D. thesis. Leicester: De Montfort University.

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