ETHICAL AND LEGAL ASPECTS OF SURROGACY IN ALBANIAN LEGISLATION

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Abstract

Nowadays a growing number of couples are entering surrogacy procedures wanting to fulfill their parental desires at all costs. A surrogate mother carries and gives birth to a child for an ordering couple and on the basis of a previously concluded agreement between them she relinquishes her parental right. Sometimes it happens that surrogacy is effected on an altruistic basis, but in most cases surrogate mothers are paid a certain amount of money and this form of surrogacy is even more widespread. As the use of surrogacy around the world has been increasing, it is of particular importance to address whether a surrogacy agreement is legal or not. Legality issues, such as infant trading and trafficking, violation of the dignity of surrogate mothers and children born through these agreements, as well as whether adoption is necessary or whether the child is legitimate, are of particular importance in surrogacy agreements. This paper shall elaborate various legal and ethical implications of surrogacy, as well as the current legal regulation of this phenomenon by the Albanian legislation.

Keywords: commercial surrogacy, altruistic surrogacy, criminal sanction, statelessness, legal regulation

1. Understanding of and legal approach to surrogacy

The ever-increasing infertility prevalence in the world has led to an advancement of assisted reproductive techniques. Surrogacy is resorted to as an alternative when an infertile woman or couple are unable to reproduce. Surrogacy as a practice covers a diversity of situations where a woman carries and keeps a child on behalf of someone else. The word 'surrogate' is likely to have its origins from the Latin word 'surrogatus', meaning a substitute, that is, "a person appointed to act for another person" (Basha, 2017). Discussion of surrogacy agreements requires an explanation of the different types of such an arrangement. Surrogacy is an agreement where a surrogate mother bears and delivers a child for a couple or another person. There are two general types of surrogate arrangements: the traditional and the gestational ones. The traditional surrogacy involves artificially inseminating a surrogate mother with the intended father's sperm, giving her the status of the genetic and gestational mother. In gestational surrogacy an embryo, which is impregnated by in vitro fertilization, is inserted into the uterus of the replacement mother who carries and delivers the baby. In this case the surrogate mother is not the child's genetic mother, but only her carrier. Traditional and gestational surrogacies can be further categorized into altruistic and commercial surrogacies depending on whether or not the surrogate mother receives a financial remuneration for her pregnancy (Saxena, Mishra, & Malik, 2012). In altruistic surrogacy arrangements, the surrogate

mother does not receive any payment for carrying and giving birth to the child, except for reimbursement of medical and other reasonable expenses: on the other hand, in commercial surrogacy arrangements, a surrogate mother receives a payment for her service in addition to the required payment for reasonable expenses (Wells-Greco, 2016, p. 38).
From the ethical perspective, there are different views on surrogacy categories. Most religions and organizations are opposed to surrogatism, especially its commercial aspects, considering it as immoral, against the unity of marriage and birth, or against the dignity of women and children born through such an agreement; as a result, they call upon the law-makers to consider surrogacy as illegal (2013, p. 23). On the other hand, liberal approaches emphasize the need for the state and law to remain neutral toward competitive moral standards, by supporting, among others, John Stuart Mill's principle that only harmful practices should be prohibited by law. Legal arrangements seem to be trying to cope with these different moral views, on the one hand, and a number of ethical issues involved in surrogacy procedures affecting the family structure and child welfare, the nature of motherhood, and the opposite views of politicians, feminists and pro-life activists, on the other hand (2013, p. 23).

In Europe, the legal surrogacy map looks fragmented and uneven. In some countries, surrogacy arrangements are explicitly prohibited by law. Surrogacy is prohibited in countries such as Austria, Germany, France, Norway, Sweden, Estonia, Spain and Italy. French law, for instance, forbids surrogacy of any type, either gestational or traditional. This approach is generally based on a political perspective which considers these agreements as a "violation of the human dignity of the child that will be born through this agreement, and to a surrogate mother", thus comparing them with trade commodities (2012, p. 9). The obvious effect of this legal approach is that surrogacy agreements reached in violation of national law are invalid and unenforceable in the sense of their legal effects. In many of those states, the entry into surrogate agreements also results in criminal sanctions against the parties involved or any mediator and medical institution facilitating such arrangements. There is another group of states which does not regulate surrogacy by law. Here we can mention Belgium, Greece and Finland where, due to the lack of legislation regulating surrogacy, an agreement between parents and a surrogate mother has no legal force. However, some of these countries, like Britain, Denmark, the Netherlands and Hungary, allow altruistic surrogacy, while prohibiting commercial surrogacy by criminal provisions or on the ground that such an agreement would be contrary to other criminal law provisions, such as child trafficking (2012, p. 10). In addition to these two groups of states, where one group has banned surrogacy totally while the other group does not regulate it specifically, there is a third group of states where surrogacy is legally and entirely permissible. In countries such as Ukraine, Belarus and Russia, surrogacy is the most commonly used method of infertility treatment (A Comparative Study on the Regime of Surrogacy in EU Member States, 2013).

We have already highlighted that United Kingdom is one of the states that maintains a liberal approach to applying surrogacy. This perception is supposed to stem from Britain's liberal legislation on the application of reproductive techniques. Although British legislation prohibits "trading" in surrogacy, or the conclusion of a surrogacy agreement for profiteering purposes, it allows *ex post facto* regulation of surrogacy where it is carried out under certain conditions. Here the aim is related to the transfer of parental right after the birth of a child from a surrogate mother to the commissioning parents. The process usually involves a retrospective review of the agreement in order to determine whether the terms of the legislation have been met, thus allowing the transfer of parenthood through a Parental Order. Section 54 of the Human Fertilization and Embryology Act 2008 provides for the Parenthood Act according to which "On an application made by two people

("the applicants"), the court may make an order providing for a child to be treated in law as the child of the applicants if: the child has been carried by a woman as a result of artificial insemination and that the gametes of at least one of the applicants has been used to bring about the creation of the embryo." For surrogacy to be effective, a number of conditions must be satisfied, according to which the applicants must be a husband and wife, each other's civil partners, or two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other. Both applicants must have attained the age of 18 at the time the order is issued (Human Fertilisation and Embryology Act 2008, Section 54, 2008).

Contrary to the United Kingdom law, in France, pursuant to Article 16/7 of the Civil Code, since 1994 all commercial or altruistic surrogacy agreements are considered unlawful and are sanctioned by the law by annulling every kind of agreement relating to procreation or gestation on account of a third party. French legislation does not allow egg donation, as it is guided by the principle that "the woman who gives birth [to a child] is the child's mother". Consequently, based on this principle, it also prohibits the application of surrogacy techniques and such an agreement will be considered null and void and produce no legal effects. In the **Mennesson** case (Mennesson v. France, 2014), the highest court in France, Cour de Cassation, ruled that giving legal effect to foreign surrogacy agreements was contrary to public policy as surrogacy threatens the symbolic image of women and the principle of human dignity, which enjoys constitutional recognition. These public policy principles relate to the principle that human body and individuals' legal status cannot be traded or subject to private contractual agreements. In France, dignity is often considered as an obligation in the sense that it is a duty to maintain individuals' worth of their human condition. Individuals themselves are free to decide what constitutes their own dignity, provided that this decision does not harm the dignity of others. According to Article 227-13 of the French Criminal Code, any act which constitutes the stimulation of birth or concealment of birth in a manner that alters the civil status of the child concerned, such as the identification of another person as the child's legal mother, other than the woman who gave birth to the child constitutes a criminal offense and is punished by three years' imprisonment and a fine of € 45,000. In addition, carrying out medically assisted procreations (including surrogacy) are illegal under the Public Health Code, and may be punished by five years' imprisonment and a fine of € 75,000 under Article 511-24 of the Criminal Code. These laws make it explicit that surrogacy of any type is forbidden in France (Rutuja, 2017). Despite the fact that French legislation is considered conservative, it is not able to prevent the application of surrogacy in practice, which becomes legal under the "cloak" of adoption.

German legislation also contains a number of specific provisions forbidding the application of surrogacy. Under those provisions, egg donation and, therefore, any form of surrogacy is prohibited. The German Embryo Protection Act of 1990 states that any person who carries out an artificial fertilization or transfers a human embryo into a woman who is willing to give up her child permanently after birth (surrogate mother) will be punished by up to one year's imprisonment or a fine (The German Embryo Protection Act, Article 1, 1990). Moreover, the German courts have upheld that surrogacy is contrary to Article 1 of the German Constitution which states that human dignity is inviolable. Under the German law, making a person subject of a contract, including the use of a third party's body, for reproduction purposes is impermissible.

2. Surrogacy in light of the ECHR and the dilemma of surrogate children's statelessness (statelessness dilemma)

Cases relating to surrogacy agreements raise several issues mainly under Article 8 (Right to respect for private and family life) of the European Convention on Human Rights. In order to determine

whether the interference by the authorities in applicants' private and family life is permissible in a democratic society, the European Court of Human Rights (ECtHR) has considered whether such an interference had been provided for by law, pursued a legitimate aim and was proportionate to the intended purpose. In the case **D. and Others *v.* Belgium** (D. and Others v. Belgium, 2014), the Court considered the refusal by the Belgian authorities to allow entry in its national territory of a child who was born in Ukraine through a surrogacy pregnancy. The applicants, two Belgian nationals, alleged, *inter alia*, that their separation from the child on account of the Belgian authorities' refusal to issue a travel document had severed the relationship between the child and his parents, which was contrary to the child's best interests and in violation of his right to respect for family life. The Court considered that the appealed situation fell within the ambit of Article 8 of the Convention; however, it declared the applicants' appeal concerning their temporary separation from the child as inadmissible and ungrounded, and found that the Belgian authorities had not violated the Convention in carrying out checks before allowing the child to enter Belgium. Furthermore, the Court noted that the refusal to authorize the entry to Belgian territory of a child born through a surrogate procedure was held until the applicants had submitted sufficient evidence to allow the confirmation of a family tie with the child. This undoubtedly resulted in an effective separation of the child from the applicants and amounted to an interference in their right to respect for family life. However, the Belgian State had acted in accordance with its broad discretion to rule on such matters and the Convention could not oblige the States to authorize the entry to their territory of children born through surrogate agreements.

The existing situation of legal vacuum leaves open the issue of legal parenthood by raising dilemmas as to who the legal parents of a child to be born should be: the surrogate mother and her partner, commissioning parents, or genetic parents in cases where a child have been conceived through gamete donors? From the moment the states have declared themselves against surrogacy, they have found themselves in a situation where they have had to apply their legislation on parenthood. Acting under their respective national laws, France and Italy, for instance, have refused to establish legal ties between a child and ordered parents. Faced with such a situation, the European Court of Human Rights has concluded that the right to respect for the child's private life was violated and that the lack of parental ties would adversely affect the formation of the child's identity and the child's right to preserve that identity, thus being incompatible with the child's best interest. This also raises the issue of the child's right to have access to information about his or her basic identity, as confirmed by the judges in Paradiso and Campanelli (Paradiso and Campanelli v. Italy, 2017) decisions, leaving open the question of determining the details about surrogate and genetic parents. The issue has been highlighted by Richard Blauhoff and Lisette Frohn, where it is noted that "everyone should be able to create the essence of his or her identity and ... that identity minimally involves parent-child relationship." (Blauwhoff & Frohn, 2015, p. 222)

Returning to Paradiso and Campanelli case, one of the main issues raised in that case was the removal of the child from his family setting after the Italian state had refused to recognize the child's birth certificate. According to the ECtHR case law, the existence of family life within the meaning of Article 8 depends mainly on the presence of the facts. Therefore, although the commissioning parents were not considered *de jure* by the Italian authorities as the child's legal parents, they were considered *de facto* as social parents. Thus, the ECtHR found that there had been a violation of the child's right to family life because it considered the state's decision to remove the child from his family setting as an extreme measure to which recourse the state authorities should have only as a very last resort. According to ECtHR's jurisprudence, refusal to recognize birth certificates of children born through surrogacy constitutes a violation of the children's fundamental right to private and family life given the consequences it brings about. In addition to these ethical

and moral consequences, and harm to dignity, statelessness is an additional issue of concern that affects children born through surrogacy arrangements.

Nationality is the legal relationship existing between a nation and an individual. On the other hand, is implies the relationship between a person and the domestic law (Liechtenstein v. Guatemala, 1955). Acquisition of nationality at birth may occur on the basis of two principles: *jus soli* (right of the soil) and *jus sanguinis* (right of blood). Nations operating under the *jus soli* principle provide nationality to those individuals who are born within the territories over which they extend their sovereignty. On the other hand, nations operating under *jus sanguinis* principle grant nationality based on the nationality of a child's parents or predecessors where one of the child's legal parents is a national of the country (Tina, 2013).

The issue of establishing the nationality of a born child, in cases where a couple travels from one state to another in order to fulfill their parenting ambitions through surrogacy, is a relatively new phenomenon that emerged along with reproductive tourism. Cases of international surrogacy agreements entail inherent dangers where the status of a replacement mother or commissioning parent does not qualify her or him to have nationality issued to children born of such agreements. In such situations, a child's nationality is often subject of dispute because countries do not pursue a uniform approach. For example, if a couple employs a surrogate woman in a foreign nation operating under the *jus soli* principle, their child will not be born stateless as he or she will enjoy the nationality of his or her country of birth, although there is no guarantee that the couple's country of birth will recognize the child as its citizen (Tina, 2013). On the other hand, if a child is born through a surrogacy procedure in a nation operating under the *jus sanguinis* principle, it may happen that the child will not be recognized as a citizen of any nation. Determining the legal parents in countries applying *jus sanguinis* is difficult where two nations have adopted different approaches to surrogacy. In such a situation, children born through that surrogacy agreement are stateless.

Such was the situation in **Mennesson and others *v.* France** (Mennesson v. France, 2014) case where a French couple had hired a woman in California to be their surrogate and as a result two twin girls had come to life. The girls born of this surrogacy were not considered as French citizens, although the children were identified in another country as the first and second applicants' children. However, France denied them nationality under the French legislation. The Court considered that a contradiction of that nature adversely affected the children's identity within the French society as surrogacy is illegal in France and the highest court in France, Cour De Cassation, considered it as incompatible with public policy.

In the **Jan Balaz *v.* Anand Municipality** case (Jan Balaz Vs. Anand Municipality and 6 ors, 2009), a German couple had ordered a surrogate pregnancy in India, where the commissioning father's sperm and a donated egg had been used, and as a result two twin boys were born. According to Indian laws, which allow surrogacy, the children' birth certificates were issued on behalf of the ordering parents. However, German authorities refused to grant German nationality to the twins born to a surrogate mother because of the strict anti-surrogacy laws practiced in Germany, thus effectively leaving the twins in an ambiguous situation, as they could not remain with the commissioning parents, nor the surrogate mother in terms of their nationality because the Indian state had issued their birth certificates in the names of the German parents. While German nationality was denied to the twins, the commissioning parents tried to obtain Indian passports, claiming that the children were Indian citizens, but the courts refused to recognize them as Indian citizens on the ground of the non-existence of an Indian parent. Later on, passports were issued on

humanitarian grounds; however the Ministry for Foreign Affairs subsequently retracted this action and asked Balaz to hand the passports back to the Indian authorities. Despite their appeal to the High Court of Gujarat moving the Court to rule that passports be re-issued, the Indian Passport Authority refused to release the passports for the twins.

One of the most controversial and significant cases in the Indian judiciary concerning the acquisition of nationality for a child born to a surrogate mother is that of **Baby Manji** (Baby Manji Yamada vs Union Of India & Anr, 2008), where the baby was born to an Indian surrogate woman for a couple from Japan. The Japanese couple had used the husband's spermatozoid and an egg donated by an Indian woman in order to create the embryo. The main dispute started before the baby was born, when the Japanese couple divorced before the birth, and the mother denied claiming the baby. The husband, Mr. Yamada, tried to have an Indian passport issued for the baby, but according to Indian laws, a birth certificate was needed, containing the mother's and father's names, and it was unclear for the registrar whose name had to be entered in the document as the child's mother, i.e. the surrogate mother's, the commissioning mother's or anonymous egg donor's name. The authorities, therefore, refused to issue a birth certificate for Manji. Moreover, as Mr. Yamada was not Indian and they were not sure who the child's mother would be, the authorities refused to issue an Indian passport.

More than half of the countries in the world lack nationality laws, or the latter provide inadequate protection in matters of granting nationality to children born in their territories. Nationality laws may in certain cases set forth protective measures, but there may be gaps in their implementation (I am here, I belong, The urgent need to end Chilhood statelessness, 2015). Truly, it is up to the states to decide, as part of their sovereign power, on the rules related to the acquisition, change and loss of nationality. However, the states' freedom of action in relation to nationality is also restricted by their obligations emanating from the international treaties they are parties to, customary international law and general principles of law. According to Article 15 of the Universal Declaration of Human Rights "*Everyone has the right to a nationality*" (The Universal Declaration of Human Rights, 1948). Furthermore, the Convention on the Rights of the Child, ratified by the European countries universally, obliges governments to fulfill each child's right to acquire a nationality. Article 7 of the Convention states: "*The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.*" In addition, Article 8 further protects the children's right to preserve their identity, including nationality (Convention on the Rights of the Child, 1989). Furthermore, in order to eliminate the problem of lack of nationality, more specific conventions have been adopted, such as the Convention on the Status of Stateless Persons and Convention on the Reduction of Statelessness.

The right to a nationality is very important, as it constitutes the basis of an individual's civil and political rights. Stateless individuals are forced to cope with a lack of rights in the international arena as well as in the domestic arena. Because nationality is the primary link between an individual right and international law, a stateless individual lacks the necessary facilities to have his or her rights ensured and safeguarded in the international sphere. Stateless persons often lack the fundamental rights enjoyed by the citizens equipped with a nationality because statelessness affects socio-economic rights such as education, employment, social welfare, housing, health care, and civil and political rights, including: freedom of movement, protection from arbitrary detention and

political participation. In the worst cases, statelessness can lead to conflict and cause displacement of an entire population (What is Statelessness? The Campaign to End Statelessness by 2024, 2015).

With regard to the situation in Albania, surrogacy does not affect the statelessness of children. Albanian family law foresees the concept of surrogacy and surrogate mother in Article 261 of the Family Code which refers to surrogacy adoption. Albanian law considers adoption as a way of acquiring nationality (Law no. 8389 "On Albanian Citizenship", 1998). On the other hand, adoption is irrevocable under the Family Code of Albania. Thus, if a child acquires nationality through adoption, he or she will not forfeit it because of the revocation or annulment of the adoption. These provisions ensure that in the case of a surrogacy adoption the general adoption rules shall apply and consequently no child may remain stateless. It is worth noting that the Albanian state has adhered to the Convention relating to the Status of Stateless Persons through Law No. 9057, dated 24.04.2003, “On the Accession of the Republic of Albania to the Convention relating to the Status of Stateless Persons”. Likewise, in 2003 it adhered to the Convention on the Reduction of Statelessness; in 2002 it ratified the European Convention on Nationality, and in 1991 it ratified the Convention on the Rights of the Child.

In conclusion, it can be noted that states that create statelessness may gain some temporary political advantage by securing their domestic value system; on the other hand, however, denationalization coupled with exclusion from participation in domestic state value processes can lead to serious consequences to the stability and growth of the state itself (Walker, 1981). The influence of statelessness is even more sensitive and intense in relation to children, since they are denied their fundamental rights from birth. Their stateless status implies that they do not enjoy a legal personality and their voice is too powerless to influence the society in which they live, thus putting in question their very existence as human beings.

3. Surrogacy in the legal system of Albania

Countries where surrogacy is not regulated by law share a number of common features. In these countries, the legal status of a child born through a surrogacy agreement will be determined by the general laws on legal parenthood. The inability to legalize a surrogacy agreement implies that, in order to secure their parenting rights, the intended parents often have to rely on the surrogate mother’s continued approval. Albania is also part of those countries where surrogacy is not regulated by law. In Albanian legislation, the concept of surrogacy and surrogate mother has apparently developed mainly in the framework of the law doctrine, and has not become subject of specific elaboration. The term surrogacy is mentioned in Article 261 of the Family Code, which provides for surrogacy adoption and also makes reference to the Law on Reproductive Health (Law no 9062 "Family Code" , 2003). However, neither the Law on Reproductive Health nor any other laws regulate any form of surrogacy, commercial or altruistic, thus creating a gap in this matter. The law makes no mention of the surrogacy agreement that may be concluded between a surrogate mother and ordering parents, but it does not prohibit it either. Only the chapter on transitional provisions of the Law on Reproductive Health contains an article that appoints the Ministry of Health as the authority responsible for determining specifics relating to a surrogacy adoption (Law no 8876 "On Reproductive Health", article 43/c, 2002). Here we notice a trend in which domestic legislation not only fails to prevent the application of surrogacy, but also requires a more detailed regulation of it. Apparently the lawmaker in Albania has intended to have a tolerant approach in relation to reproduction techniques, despite the fact that, with all our research to find a specific act

on surrogacy, those efforts proved unsuccessful because no by-law was found in this respect. In the absence of pertinent legislation, clinics performing assisted reproduction procedures and subsequently surrogacy procedures act on the basis of applicants' requests and needs by setting up internal procedures designed to facilitate altruistic surrogacy arrangements. In our research of a few clinics where couples with fertility problems are treated, doctors stated that surrogacy in Albania is being carried out with an ever-increasing intensity even though it is still considered a taboo. Surrogacy applicants demand maximum discretion and require that their identity is kept secret as a form of "protection" from social opinion because such an issue is still sensitive and the application of surrogate techniques (as well as other assisted reproduction techniques) requires not only special medical attention, but also a detailed legal analysis, especially related to the respect of the participants' rights and dignity, and consideration of public order norms.

Conclusion

Surrogacy remains regulated at a national level throughout Europe where some countries allow surrogacy by law, such as Ukraine, Belarus and Russia, while other countries like Italy and France have been very vocal not to support surrogacy babies by sanctioning surrogacy even in the provisions of their respective penal laws. In addition, a group of states consider surrogacy a means of procreation not regulated by law yet. Albania is also part of those countries where surrogacy is not regulated by law. It is a known fact that at the time of entry into force of the legislation regulating to assisted reproductive health as a new type of activity in Albania brought from countries with developed technology and legislation, the needs and used tactics were still in their initial phase, while the cultural, religious and social level brought considerable limitations to the participants. What raises questions is the reason why the Albanian lawmaker even after so many years, when assisted reproductive techniques have evolved, has taken no action yet to review the applicable legislation. Obviously no attention is being paid to this issue, particularly to surrogacy arrangements, which has brought about an inclination of legislation towards a liberal system where control is individual, based on the autonomy and self-regulation of the relationships between the participants and clinics. At this point, it is imperative and urgent for the Albanian legislator to intervene by regulating surrogacy through normative acts which lay down the legal and ethical principles upon which this procedure should operate.

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