



SURROGACY VERSUS ARTIFICIAL WOMB TECHNOLOGY: THE FUTURE OF REPRODUCTION IN THE EUROPEAN UNION

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DOI: <https://doi.org/10.7220/2029-4239.29.3>

SUMMARY

Author of this article discussed the issue of surrogate motherhood laws and practices in the European Union, and tried to consider whether the artificial womb technology (AWT) could constitute an alternative in terms of assisted reproductive technologies (ART) and other means of treating infertility. For the purpose of answering this question, a formal-dogmatic approach was applied. In order to provide necessary context, the legislative research was supplemented by the case law and secondary source research as well.

Part one provides a brief explanation of the artificial womb technology. It begins with a general understanding of ectogenesis, followed by a description of current AWT research, both in terms of medical sciences and the legal and ethical considerations carried out by different authors.

*Section two is dedicated to the phenomena of motherhood and surrogate motherhood. Author presents several definitions of “mother”, including a gestational, biological, genetic, social, and legal one. The attention is also drawn to the legal definition of a mother on the example of selected EU countries. In order to provide a better understanding of possible motives behind the introduction of *mater semper certa est* principle into the applicable law, Author refers to the amendment of the Polish Family and Guardianship Code from November 6, 2008, along with the explanatory memorandum to this amendment. Lastly, the concept of surrogate motherhood is explained.*

Part three discovers surrogate motherhood laws in different countries of the European Union. The diversity of approaches toward surrogacy is classified in the following manner: legalization of surrogacy (complete and partial), prohibition of surrogacy (complete and partial),

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and no regulation on surrogacy. Established classification is followed by examples of Cypriot, Spanish, and Belgian law.

It has been furthermore emphasized that, despite the inconsistency of the EU countries' law, surrogacy is still practiced and leads to various consequences in terms of, for example, legal recognition of parenthood. In this section, Author referred to the European Court of Human Rights' cases.

In the last part, most frequent critiques of surrogate motherhood are recalled: the high risk of commodification and commercialization of the human body, possible exploitation of women, and legal uncertainty of a child born through a surrogacy agreement. Author tries to assess whether AWT is devoid of them and therefore could constitute a less hazardous option when utilized for reproduction purposes, bearing in mind its possible consequences.

KEYWORDS

Surrogate motherhood, mother, artificial womb technology, ectogenesis, European Union.

INTRODUCTION

Approximately 1 in 6 people of reproductive age worldwide are affected with infertility². According to the WHO, it is a “disease of the male or female reproductive system defined by the failure to achieve a pregnancy after 12 months or more of regular unprotected sexual intercourse”³. However, two different types of infertility can be distinguished: *infertilitas*, understood as the incapacity of carrying a pregnancy to term, and *sterilitas*, which refers to problems with conceiving a child, either temporary (*sterilitas relativa*, *sterilitas temporaria*) or permanent (*sterilitas absoluta*) ones, and both in cases of absence of offspring (*sterilitas primaria*) and in cases of previously confirmed fertility, e.g. by a successful conception in the past (*sterilitas secundaria*). Most frequent identifiable factors causing female infertility include: ovulatory disorders, endometriosis, pelvic adhesions, tubal blockage and other tubal or uterine abnormalities, hyperprolactinemia⁴. Male infertility, on the other hand, may be caused by, *inter alia*, acquired or congenital urogenital abnormalities, environmental toxins, as well as endocrinological, genetic, and idiopathic factors⁵.

Humanity has been struggling with the problem of involuntary childlessness for many centuries, and for this reason, various conventional and unconventional infertility treatments have

2 World Health Organization: <<https://www.who.int/news-room/fact-sheets/detail/infertility>> [accessed 2024 05 28].

3 Id. See also: “WHO Manual for the Standardized Investigation and Diagnosis of the Infertile Couple” (Cambridge, 1993).

4 M.H. WALKER, K.J. TOBLER, “Female Infertility”, *StatPearls Publishing*, (2022).

5 S.W. LESLIE, T.L. SOON-SUTTON, M.A.B. KHAN, “Male Infertility”, *StatPearls Publishing*, (2023).

been developed in the history of mankind⁶. Nowadays, the most common treatments include: “ovulation induction, which refers to the use of pharmacologic treatments to induce ovulation, and ovarian stimulation, which is performed with the goal of inducing multiple mature ovarian follicles. Either timed intercourse or intrauterine insemination (IUI) may be used to achieve fertilization at the time of ovulation. Alternatively, mature oocytes may be retrieved directly from the ovary for fertilization using an ultrasound-guided needle (IVF).”⁷. Fertility-related treatments which include manipulating either eggs or embryos outside of a female’s body are called assisted reproductive technologies (ART)⁸. Nonetheless, even though ART has become increasingly commonplace since the first successful birth of a baby conceived by IVF in 1978⁹, infertility treatment is not always reimbursed by the government and thus may be unattainable for many patients¹⁰.

Involuntary childlessness can generate a range of serious socio-emotional consequences for infertile couples and individuals. Attitudes toward infertility, especially in family-oriented cultures, may result in one’s fear of possible humiliation and stigmatization, and eventually lead to isolation¹¹. Infertile people may also experience anger, guilt, depression, or even grief¹², as “just as the living mourn the dead, so do the infertile mourn the fact that they cannot produce the living.”¹³. What is more, regardless of the frequent, although unproven¹⁴ assumption that infertility is a “socially, mentally and physically damaging experience for the childless women rather than man”¹⁵, there is no doubt that childlessness can significantly affect men as well, notwithstanding the difference between male and female emotion regulation strategies or needs¹⁶. It should be highlighted that infertility treatment is still not available for many people, and even when it is, it may not be sufficient. For example, a woman may be capable of becoming pregnant, but as she experiences multiple miscarriages, it is not possible for her to carry a child to term (aforementioned *infertilitas*). Surrogate motherhood is one of the solutions widely explored by infertile couples or individuals in such cases. Nonetheless, surrogacy remains a contentious issue, both within and outside the European Union. For this reason, scientists continue to look for

6 R.S. SHARMA, R. SAXENA, R. SINGH, “Infertility & assisted reproduction: A historical & modern scientific perspective”, *The Indian Journal of Medical Research*, 148 (Suppl), (2018).

7 S.A. CARSON, A.N. KALLEN, “Diagnosis and Management of Infertility: A Review”, *JAMA*, 326(1), (2021).

8 M.E. GRAHAM, A. JELIN, A.H. HOON JR, A.M. WILMS FLOET, E. LEVEY, E.M. GRAHAM, “Assisted reproductive technology: Short- and long-term outcomes”, *Developmental Medicine & Child Neurology*, 65(1), (2023).

9 R. MATORRAS, V.S. CHAUDHARI, C. ROEDER, J.E. SCHWARZE, K. BÜHLER, K. HWANG, C. CHANG-WOO, S. INIESTA, T. D’HOOGHE, R. MATHUR, “Evaluation of costs associated with fertility treatment leading to a live birth after one fresh transfer: A global perspective”, *Best Practice & Research Clinical Obstetrics and Gynaecology*, 89, (2023), p. 3.

¹⁰ Id.

¹¹ A.M. MATTHEWS, R. MATTHEWS, “Beyond the Mechanics of Infertility: Perspectives on the Social Psychology of Infertility and Involuntary Childlessness”, *Family Relations*, 35(4), (1986), p. 482.

¹² Id., p. 481-484.

¹³ See footnote 11: p. 483.

¹⁴ See footnote 11: p. 484.

¹⁵ See footnote 6: p. 10.

¹⁶ J.R. FISHER, K. HAMMARBERG, “Psychological and social aspects of infertility in men: an overview of the evidence and implications for psychologically informed clinical care and future research”, *Asian Journal of Andrology*, 14(1), (2012).

alternative and improved solutions in the fight against infertility. The invention that has formed the basis of the following considerations, however, did not arise from reproduction research itself. Study on artificial wombs focuses primarily on the possibility of saving human life at its very early stages. Nevertheless, the debate over the use of such devices for other purposes, such as reproduction, was inevitable, and is still ongoing.

In this article, the characteristics of two phenomena - ectogenesis (in the form of artificial uteruses) and surrogate motherhood - are presented and then compared in order to reconsider the future of reproduction in the European Union from the perspective of possible strengths and weaknesses of the extrauterine development of a child. Since each of these phenomena may be perceived differently, depending on a number of factors including culture, religion, or the fact that the legal regulations of different EU countries on the issue of surrogacy may differ significantly, one of the purposes of this paper is to gather and demonstrate main arguments in the dispute over their validity. As surrogate motherhood has already been analyzed profoundly in the literature and the conclusions usually vary because of the above-mentioned variety of socio-legal factors, Author's goal is not to re-examine surrogacy itself, but to highlight most frequently raised dangers thereof and juxtapose them with the idea of future reproductive use of an artificial uterus in order to answer the question whether the artificial womb technology (AWT) carries the same risks or not, and therefore whether it could constitute an alternative for surrogate motherhood somewhere in the future. The reader should bear in mind that by selecting and presenting a variety of different arguments in the following sections of this article, not necessarily focused on solely one of the EU countries, the Author aimed to capture both the heterogeneity of the law of the European Union Member States and the enormous scale of the impact that the use of AWT could have on many branches of national law.

1. ARTIFICIAL WOMB: A BRIEF EXPLANATION

1.1. ECTOGENESIS

When considering artificial uteruses, it is impossible not to mention the issue of ectogenesis. This term was proposed in the first half of the 20th century by a British biologist and geneticist, John Burdon Sanderson Haldane¹⁷. Ectogenesis can be defined as “the growth of an organism outside the body in which it would normally be found, such as the growth of an embryo outside the mother's body or the growth of bacteria outside the body of a host”¹⁸, or “the growth process of embryonic tissue placed in an artificial environment, as a test tube”¹⁹. This “artificial environment” has been the subject of research of many scientists around the world.

Two types of ectogenesis can be distinguished: complete and partial, depending on whether the gestation of an embryo takes place completely outside of the human body, continuously from conception to term (as “birth” is certainly not the most adequate term when it comes to ectogenesis), or only partially, meaning that an embryo or a fetus is, at some point of its

¹⁷ C. ROSEN, “Why not artificial wombs?”, *The New Atlantis*, (3), (2003), p. 67-76; <<https://www.thenewatlantis.com/publications/why-not-artificial-wombs>> [accessed 2024 05 05].

¹⁸ Collins British Dictionary; <<https://www.collinsdictionary.com/dictionary/english/ectogenesis>> [accessed 2024 05 05].

¹⁹ Webster's New World College Dictionary, 4th Edition; <<https://www.collinsdictionary.com/dictionary/english/ectogenesis>> [accessed 2024 05 05].

development, transferred into an artificial womb from the mother's body²⁰. Seppe Segers reminds that a technique similar to partial ectogenesis is already commonly practiced in neonatology²¹. Each year, around 1 in 10 babies is born preterm²². Extremely premature babies are usually transferred to incubators, where they're provided with a more suitable environment for their organs to develop. Nevertheless, as such devices are air-based, the exposure of infants to air may lead to various medical complications. Scientists therefore aim to develop an alternative - artificial womb technology that would be safer for preterm babies as their lungs would be filled with fluid²³. AWT would also provide the baby with oxygen and necessary nutrients.

1.2. CURRENT RESEARCH ON ARTIFICIAL WOMBS

Even though AWT is nothing new²⁴, it's certainly been gaining momentum since 2017, when a group of researchers from the Children's Hospital of Philadelphia in Pennsylvania, USA, published the results of their study conducted on several lambs whose development was equivalent to that of an extreme premature human infant²⁵. Similar research has been conducted, for example, in Australia²⁶, but soon it reached Europe as well. The Eindhoven University of Technology in the Netherlands, together with partners, have been carrying out a research project called the Perinatal Life Support (PLS), funded by the Horizon 2020 Framework Programme of the European Union²⁷. As they point out, "Research into Artificial Placenta and Artificial Womb (APAW) technology for extremely premature infants (born < 28 weeks of gestation) is currently being conducted in animal studies and shows promising results. Because of the unprecedented nature of a potential treatment and the high-risk and low incidence of occurrence, translation to the human condition is a complex task. Consequently, the obstetric procedure, the act of transferring the infant from the pregnant woman to the APAW system, has not yet been established for human patients."²⁸. In 2023, the discussion about human trials begun in the United

²⁰ S. SEGERS, "The path toward ectogenesis: looking beyond the technical challenges", *BMC Medical Ethics*, 22(59), (2021), p. 2.

²¹ Id.

²² "152 million babies born preterm in the last decade", World Health Organization news release of May 9, 2023; <<https://www.who.int/news/item/09-05-2023-152-million-babies-born-preterm-in-the-last-decade>> [accessed 2024 05 08].

²³ See: Perinatal Life Support; <<https://perinatallifesupport.eu/>> [accessed 2024 04 22].

²⁴ See: C. BULLETTI, A. PALAGIANO, C. PACE, A. CERNI, A. BORINI, D. DE ZIEGLER, "The artificial womb", *Annals of the New York Academy of Sciences*, (2011); "Parents can look at their foetus in real time: are artificial wombs the future?", *The Guardian*; <<https://www.theguardian.com/lifeandstyle/2020/jun/27/parents-can-look-foetus-real-time-artificial-wombs-future>> [accessed 2024 04 22].

²⁵ E. PARTRIDGE, M. DAVEY, M. HORNICK et. al., "An extra-uterine system to physiologically support the extreme premature lamb", *Nature Communications*, 8(15112), (2017).

²⁶ See: H. USUDA, S. WATANABE, S. MIURA et. al., "Successful maintenance of key physiological parameters in preterm lambs treated with ex vivo uterine environment therapy for a period of 1 week", *American Journal of Obstetrics & Gynecology*, 217(4), (2017).

²⁷ See footnote 23.

²⁸ J.S. VAN HAREN, M.B. VAN DER HOUT-VAN DER JAGT, N. MEIJER et. al., "Simulation-based development: shaping clinical procedures for extra-uterine life support technology", *Advances in Simulation*, 8(29), (2023).

States²⁹. In order for the AWT to be tested on fetonates³⁰, American scientists must submit an Investigational Device Exemption (IDE) and receive approval from the Food and Drug Administration (FDA). However, for now, possible AWT tests would most likely apply only to human infants not suitable for a conventional treatment³¹. It should be furthermore highlighted that the proper development of a child depends not only on removing toxins and providing the baby with necessary nutrients and the right amount of oxygen, but also on a myriad of maternal factors. A pregnant woman stimulates the fetus, both positively and negatively, through her health, diet, or even movements and sounds. Obesity and smoking are among many factors that may cause harm to unborn children³². The use of synthetic wombs could potentially minimize some of the risks indicated above as the extrauterine environment would be precisely controlled and regulated. However, it must be noted that scientists and medical professionals are not yet fully aware of all aspects of human reproduction and prenatal life, thus there is no certainty that it would be possible to recreate secure conditions for fetonates. Nevertheless, for the purpose of further considerations, it shall be assumed that AWT could be perfected and routinely used in the future.

Despite numerous risks associated with the future use of AWT, such as, e.g. intracerebral hemorrhage³³, complete ectogenesis has been the focus of many scholars over the years. Peter Singer, an Australian well-known moral philosopher, wrote about this phenomenon already in the 1980s³⁴. Since 2017, when the first results of study on EXTra-uterine Environment of Neonatal Development (EXTEND) had been released³⁵, dozens of scientific papers have been published on ethical concerns regarding ectogenesis³⁶. Some authors argue that AWT would alleviate social inequities³⁷ as female reproduction would be separated from the woman. For the very same reason, others state that, “of all reproductive techniques, ectogenesis (...) poses the greatest challenge to women’s reproductive rights”³⁸. As the majority of EU citizens profess Christianity³⁹, religious approach toward AWT may also be observed in the literature. Two Polish authors, Catholic priests, published articles on Christian ethics of ectogenesis. Although

²⁹ See: <<https://www.technologyreview.com/2023/09/29/1080538/everything-you-need-to-know-about-artificial-wombs/>> [accessed 2024 05 29].

³⁰ Also: fetal neonates. See: F.R. DE BIE, S.D. KIM, S.K. BOSE, P. NATHANSON, E.A. PARTRIDGE, A.W. FLAKE, C. FEUDTNER, “Ethics Considerations Regarding Artificial Womb Technology for the Fetotate”, *The American Journal of Bioethics*, Vol. 23, No. 5, (2023).

³¹ See footnote 29.

³² L.J. MUGLIA, K. BENHALIMA, S. TONG, S. OZANNE, “Maternal factors during pregnancy influencing maternal, fetal, and childhood outcomes”, *BMC Medicine*, 20(1): 418, (2022).

³³ Z. HUANG, T. XIAO, W. ZHOU, “Artificial womb: a paradigm shift for saving extremely premature infants”, *Chinese Medical Journal*, Vol. 136(14), (2023).

³⁴ P. SINGER, D. WELLS, “Dzieci z probówki. Etyka i praktyka sztucznej prokreacji” [eng. “The reproduction revolution. New ways of making babies”, originally published by Oxford University Press in 1984], (1988, Wiedza Powszechna), p. 143-161.

³⁵ See footnote 25.

³⁶ See footnote 30.

³⁷ A. SMAJDOR, “The Moral Imperative for Ectogenesis”, *Cambridge Quarterly of Healthcare Ethics*, 16(3), (2007), p. 337.

³⁸ J.S. MURPHY, “Is Pregnancy Necessary? Feminist Concerns about Ectogenesis”, *Hypatia*, 4(3), (1989), p. 81.

³⁹ G.A. ZURLO, “Religions in Europe: A Statistical Summary”, in: (eds.) G. DAVIE, L.N. LEUSTEAN, “The Oxford Handbook of Religion and Europe”, *Oxford University Press*, (2021).

Wojciech Surmiak firmly notes that the idea of using AWT seems to be the ultimate sign of leading (wo)men “towards idleness and convenience, without any attempt to undertake the hardships of life”⁴⁰, Andrzej Muszala indicates certain circumstances in which ectogenesis could be in accordance with Christian principles:

As an alternative to abortion if the mother’s life is in danger;

In cases of *infertilitas*;

When it is necessary to perform hysterectomy during pregnancy due to the occurrence of female genital neoplasms;

In cases of *sterilitas* caused by uterine anomalies or the lack of uterus;

When the child’s life is endangered due to the intoxication of the mother’s body;

In the event of mother’s death⁴¹.

Even though there has been an ongoing discussion on the issue of ectogenesis and the future use of synthetic wombs for both the reproduction and life-saving purposes, no consensus has been reached so far. It should be highlighted that the implementation of AWT would undoubtedly cause severe consequences, both social and legal ones. Nonetheless, deliberations presented hereinafter pertain exclusively to the issue of surrogate motherhood and aim to answer the question whether, due to the reluctance of most Member States of the European Union towards surrogacy, artificial womb technology could constitute a more suitable alternative for couples and individuals incapable to produce children.

2. MOTHERHOOD

2.1. DEFINITION OF A MOTHER

The simplest dictionary definition of a mother is a “female parent”⁴², although usually at least several types of motherhood are distinguished in the literature: genetic, gestational, biological, custodial, legal, and social. As a result of the diversity of either languages or legal frameworks in various countries, authors however tend to operate with equivalent words or define them differently. Therefore, mentioned terms shall be understood hereinafter as follows:

genetic mother – a person who contributes to the genetic makeup of a child by providing the egg from which an embryo develops⁴³;

gestational (or birth, or physiological) mother – a person who carries and delivers a child;

biological (or natural) mother – both genetic and gestational mother;

⁴⁰ W. SURMIAK, “O ciąży bez kobiety w ciąży: ektogeneza i próba jej bioetycznej oceny”, in: (ed.) A. BARTOSZEK, “Familiaris splendor. Piękno życia rodzinnego jako wyzwanie dla społeczeństwa i Kościoła”, (2011), p. 130. All citations herein are translated by the Author.

⁴¹ A. MUSZALA, “Dylematy moralne związane z wykorzystaniem sztucznej macicy”, in: (ed.) J. BRUSIŁO, A. ŚWIERCZEK, “Evangelium vitae - most ku przyszłości”, *Uniwersytet Papieski Jana Pawła II w Krakowie Wydawnictwo Naukowe*, (2011), p. 57.

⁴² Cambridge Advanced Learner’s Dictionary & Thesaurus; <<https://dictionary.cambridge.org/dictionary/english/mother>> [accessed 2024 05 30].

⁴³ Webster’s New World Law Dictionary; <<https://www.yourdictionary.com/genetic-mother>> [accessed 2024 05 31].

custodial (or residential) mother – a person who has a primary or a sole custody of a child⁴⁴, or a person “granted primary responsibility for a child after a divorce”⁴⁵;

legal mother – a person who is recognized as a parent by the law, i.e. has legal rights and responsibilities for a child, for example, either a biological or an adoptive parent whose parental rights have not been terminated⁴⁶;

social mother – a person who raises a child (usually a custodian/legal parent at the same time).

Marta Trębaczewska proves that motherhood can take different forms⁴⁷. More “traditional” approach is based on the assumption that a woman becomes pregnant (using her own egg), carries a child, gives birth to it, and then raises it. In this case, the woman is not only the biological (so both genetic and gestational), but also the social (and most likely the legal) mother. However, in order to illustrate the complexity of this issue, Trębaczewska also presents the following example: a woman (A), unable to give birth to a child, decides to undergo surrogacy and use her own egg in the process. Her husband is the sperm donor, while her own gestational, genetic, and social mother (B) acts as the surrogate. After birth, the child is raised by woman A (both genetic and social mother) who, due to the fact that her mother gave birth to this child, becomes also its sister. Woman B as the physiological mother, on the other hand, is the child’s grandmother at the very same time⁴⁸. Such a situation may *prima facie* seem unreal or unacceptable. However, as research conducted by the Public Opinion Research Center in 2014 shows, as many as 41% of respondents believe that a mother who would allow to have an embryo coming from her ill daughter implanted in order to give birth to her child, has the right to do so, while 35% consider such a behavior appropriate⁴⁹.

The distinction presented herein is of particular importance in the context of the legal meaning of a “mother”. Adopting a certain definition by the lawmaker leads to numerous consequences, especially as regards surrogate motherhood, and even more when it comes to ectogenesis.

2.2. MATER SEMPER CERTA EST.

LEGAL DEFINITION OF A MOTHER

The Roman *mater semper certa est* principle, indicating that the woman who gives birth to a child is recognized as its mother, has been implemented into the law of many European Union

⁴⁴ Merriam-Webster.com Dictionary; <<https://www.merriam-webster.com/dictionary/custodial>> [accessed 2024 05 31].

⁴⁵ JUSTIA Legal Dictionary; <<https://dictionary.justia.com/custodial-parent>> [accessed 2024 05 31].

⁴⁶ <<https://www.lawinsider.com/dictionary/legal-parent>> [accessed 2024 05 31].

⁴⁷ M. TRĘBACZEWSKA, „*Mater semper certa est*”? Medycyna a kwestia rodzicielstwa”, in: (eds.) M. SYNOWIEC-PIŁAT, A. ŁASKA-FORMEJSTER, “Biologiczny wymiar życia populacji a jego socjologiczne interpretacje”, *Wydawnictwo Uniwersytetu Łódzkiego*, (2013), p. 38-40.

⁴⁸ Id.

⁴⁹ <https://www.cbos.pl/SPISKOM.POL/2014/K_153_14.PDF> [accessed 2024 05 05].

Member States, e.g. Croatia (“Djetetova majka jest žena koja ga je rodila”)⁵⁰, Germany (“Mutter eines Kindes ist die Frau, die es geboren hat”)⁵¹, Latvia (“Par bērna māti atzīstama sievietē, kas bērnu dzemdējusi”)⁵², Bulgaria (“Произходът от майката се определя от раждането”, “Майка на детето е жената, която го е родила, включително при асистирана репродукция”)⁵³, or Poland (“Matką dziecka jest kobieta, która je urodziła”)⁵⁴. The emphasis that legislatures place on the gestational mother seem to be losing validity in the light of ART development in recent years. However, sometimes the “non-traditional” manner of reproduction is in fact the very reason for introducing this principle to the law. For instance, the definition of a mother was introduced to the Polish law by the amendment to the Family and Guardianship Code. It was caused by the growing prevalence of assisted reproductive technologies. As stated in the explanatory memorandum to the amendment, “the lack of direct regulation on maternity issues results from the generally accepted certainty of this legal relationship based on the fact of birth. This certainty is increasingly undermined by the possibilities of modern medicine enabling the conception and childbirth without physical intercourse between human partners, particularly through fertilization outside the woman's body and carrying the pregnancy by a woman other than the donor of the gamete used in the medical fertilization procedure (so-called surrogacy). A dispute may arise as to which woman is the child's mother.”⁵⁵. As Marta Trębaczewska rightly points out, “the biological bond that may (but does not necessarily do) develop between the fetus and the pregnant woman has been assumed by the legislator as aprioric and positive, and more important than the psychological and emotional bond between the genetic material donor (or a genetically unrelated woman) wishing to surround [the child] with care and affection. It was

⁵⁰ “The child's mother is the woman who gave birth to it”, Article 58.a [Presumption of motherhood] of Family Law. See also: A. KORAC GRAOVAC, “Family Protection in Croatia”, in: (eds.) T. BARZÓ, B. LENKOVICS, “Family Protection From a Legal Perspective”, *Central European Academic Publishing*, (2021), p. 64.

⁵¹ “The mother of a child is the woman who gave birth to it”, Section 1591 [Maternity] of German Civil Code BGB; <https://www.gesetze-im-internet.de/englisch_bgb/index.html#gl_p6232> [accessed 2024 05 31].

⁵² “The woman who gave birth to the child is recognized as the child's mother”, Article 146 of the Civil Law; <<https://likumi.lv/ta/id/90223-civillikums-pirma-dala-gimenes-tiesibas>> [accessed 2024 06 01]. See also: United Nations Human Rights Office of the High Commissioner, Response of the Government of Latvia: <<https://www.ohchr.org/sites/default/files/Documents/Issues/Children/SR/Surrogacy/States/Latvia.pdf>> [accessed 2024 06 01].

⁵³ “Maternal origin shall be established by birth”, “Mother of the child is the woman who has given birth to it, including cases of assisted reproduction”, Article 60 (1) and (2) [Maternal Origin] of the Family Code; <<https://www.justice.government.bg/home/normdoc/2135637484/>> [accessed 2024 05 05], <<https://www.mlsp.government.bg/uploads/37/politiki/trud/zakonodatelstvo/eng/family-code.pdf>> [accessed 2024 05 05].

⁵⁴ “The mother of a child is the woman who gave birth to it”, Article 61⁹ [Motherhood] of the Polish Family and Guardianship Code; <<https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19640090059/U/D19640059Lj.pdf>> [accessed 2024 05 20].

⁵⁵ Sejm paper No. 629, Explanatory Statement to the Amendment of the Polish Family and Guardianship Code (2007), p. 21; <[https://orka.sejm.gov.pl/Druki6ka.nsf/0/1E8CDBD5F38B2E25C125746700371126/\\$file/629.pdf](https://orka.sejm.gov.pl/Druki6ka.nsf/0/1E8CDBD5F38B2E25C125746700371126/$file/629.pdf)> [accessed 2024 06 01].

assumed that this bond is formed without considering the factors that influence it and its occurrence.”⁵⁶. The adoption of *mater semper certa est* principle, notwithstanding the country and different societal views on motherhood, entails multiple consequences. Zaina Mahmoud and Elizabeth Chloe Romanis note that: “Legal motherhood emerges from a perceived ‘natural’ source, one that is grounded in gestation. Law does not define fathers or second female parents based on biological contributions; yet mothers are recognised through a particular biological contribution. (...) In this way, law affords those who do not gestate and birth freedom to make social determinations about their legal parental status, whereas biological determinism inhibits the freedom of gestating people to make such arrangements.”⁵⁷. This, on the other hand, is of particular importance when it comes to surrogate motherhood.

2.3. SURROGATE MOTHERHOOD

As mentioned before, surrogacy may be an adequate solution for couples and individuals struggling with infertility. Simply put, it is an arrangement in which a woman (surrogate/substitute mother) becomes pregnant either by using her own eggs (traditional surrogacy) or by implanting an embryo created through IVF (gestational surrogacy), then carries a child and gives birth to it in order to provide offspring for a third party (intended/commissioning parent or parents) who is often (but not always) unable to have children⁵⁸. Surrogacy agreement can be altruistic, meaning that the surrogate does not receive any financial compensation (beyond reimbursement of medical expenses that encompass, for example, prenatal care and delivery costs). Usually, altruistic surrogacy agreement is concluded with a person in close relation to intended parents, such as a family member or a friend. On the contrary, in commercial surrogacy arrangement the surrogate receives payment for her reproductive labor. Even though surrogate motherhood has been known to mankind since antiquity⁵⁹, no consensus on its ethics and legitimacy has been reached so far.

⁵⁶ See footnote 47: p. 41.

⁵⁷ Z. MAHMOUD, E.C. ROMANIS, “ON GESTATION AND MOTHERHOOD”, *Medical Law Review*, 31(1), (2023), p. 117, 119.

⁵⁸ See: The Britannica Dictionary: <<https://www.britannica.com/dictionary/surrogacy>> [accessed 2024 06 01]; Collins COBUILD Advanced Learner’s Dictionary: <<https://www.collinsdictionary.com/dictionary/english/surrogacy>> [accessed 2024 06 01]; Merriam-Webster.com Dictionary: <<https://www.merriam-webster.com/dictionary/surrogate%20mother>> [accessed 2024 06 01].

⁵⁹ See: F.R. STEELE, “The Code of Lipit-Ishtar”, *American Journal of Archaeology*, 52(3), (1948), p. 442, 448; The Code of Hammurabi, 144-147 <<https://avalon.law.yale.edu/ancient/hamframe.asp#:~:text=If%20a%20man%20take%20a,147.>> [accessed 2024 06 02].

3. SURROGACY IN EUROPEAN UNION

3.1. LEGALIZATION, PROHIBITION, OR LEGAL GREY AREA?

European Union Member States' view on surrogate motherhood is not unanimous. In the literature, four different legal approaches in this matter are distinguished: 1) surrogacy remains unregulated, although practiced; 2) surrogacy is not allowed, although its possible legalization is considered; 3) surrogacy is allowed; 4) surrogacy is forbidden⁶⁰. Proposed distinction, however, seems to be inaccurate⁶¹. First of all, any considerations about possible changes in the adopted legal framework of a certain country, aimed at either the prohibition or permission of surrogacy, are quite dynamic and thus should not constitute a separate category. Public opinion on different matters continuously evolves, more or less dramatically, and so can the law. What is more, many national legal acts are not accessible, and sometimes even when they are, translated documents are outdated or the translation is not provided at all. For this reason, numerous publications based on specific examples of EU Member States' laws or practices regarding surrogacy cannot serve as a valid reference point in further considerations. Therefore, in order to present and organize the diversity of legal approaches toward surrogate motherhood for the purpose of this article, the following classification has been established:

1. Legalization of surrogacy:
 - 1.1. Any form of surrogacy is permitted (complete legalization);
 - 1.2. Only specific forms of surrogacy are permitted (partial legalization);
2. Prohibition of surrogacy:
 - 2.1. Any form of surrogacy is prohibited (complete prohibition);
 - 2.2. Only specific forms of surrogacy are prohibited (partial prohibition);
3. No regulation on surrogacy:
 - 3.1. Surrogacy is practiced in all forms or not practiced at all;
 - 3.2. Only specific forms of surrogacy are practiced.

“Specific forms” of surrogacy encompass altruistic surrogacy (AS), commercial surrogacy (CS), traditional surrogacy (TS), and gestational surrogacy (GS). In most cases, commercial surrogacy is strictly forbidden in an effort to prevent both surrogates and children from being exploited and commodified. Some countries explicitly prohibit one form of surrogate motherhood (for example,

⁶⁰ N.I. GONZÁLEZ, “Regulating surrogacy in Europe: Common problems, diverse national laws”, *European Journal of Women's Studies*, 26(4), (2019), although in text: R.A. MAYDANYK, K.V. MOSKALENKO, “TOWARDS CREATION OF UNIFIED REGULATION ON SURROGACY IN EUROPE: RECENT TRENDS AND FUTURE PERSPECTIVES”, *Wiadomości Lekarskie*, 73(12, part 2), (2020), p. 2865.

⁶¹ It should be noted that authors refer to the issue of surrogate motherhood in Europe, and not particularly the European Union. Therefore, proposed categorization includes, among others, the Ukrainian legal framework.

CS or TS) under penalty of law, while permitting another form of it (respectively AS and GS) at the same time. For example, the Law on Medically Assisted Reproduction (69(I)/2015) of the Republic of Cyprus pertain to different aspects of surrogate motherhood, such as the necessity to obtain a court approval before the transfer of an embryo, or the fact that the surrogate is not the child's mother (Article 22, p. 1, 2a), but according to the Article 26, commercial surrogacy is a punishable criminal offense⁶². It is therefore an example of both the partial legalization, as only altruistic form of surrogacy is permitted and explicitly referred to in the law, and the partial prohibition, as the commercial form of surrogacy is also explicitly forbidden. However, other combinations of presented classification are also possible. For instance, there can be the partial prohibition of a certain form of surrogacy (e.g. the commercial one) that is not necessarily followed by partial legalization of another, opposite form (i.e. altruistic surrogacy) which therefore remains unregulated. Some Member States, on the other hand, establish a complete prohibition of surrogacy, notwithstanding its character. For example, Article 10 of the Spanish Law on assisted human reproduction techniques (14/2006) states that any surrogacy agreement, whether commercial or not, is null and void⁶³. Consequently, this matter is also regulated in the Spanish Criminal Code⁶⁴. Nevertheless, in many cases surrogate motherhood laws are not sufficient, or even non-existent. In the lack of proper regulations, sometimes the legislator's view on surrogacy can be decoded from different legal acts. In Belgium, for instance, “commercial surrogacy is devoid of legal value under certain principles in the Civil Code, such as the principle according to which the human body is extra-patrimonial and therefore cannot be traded”⁶⁵, but altruistic surrogacy can be, in fact, practiced. As Daniel Gruenbaum rightly pointed out, recognizing the gestational mother as the legal mother can be a “coherent choice for legal systems where surrogate motherhood, while not prohibited, is discouraged or strongly regulated. If a surrogacy agreement is entered into nonetheless, without complying with the prescribed rules, the consequence again would be that the parturient, not the commissioning woman, should be

⁶² <http://www.cylaw.org/nomoi/enop/non-ind/2015_1_69/full.html> [accessed 2024 05 12].

⁶³ “Será nulo de pleno derecho el contrato por el que se convenga la gestación, con o sin precio, a cargo de una mujer que renuncia a la filiación materna a favor del contratante o de un tercero”, Article 10(1) [Surrogacy] of Ley 14/2006, de 26 de mayo, sobre técnicas de reproducción humana asistida; <<https://www.boe.es/buscar/act.php?id=BOE-A-2006-9292>> [accessed 2024 06 02]. What is more, Article 10(2) the Law 14/2006 explicitly states that: “The parentage of the children born from surrogacy will be determined by childbirth”. C.M. PEDREÑO, “Surrogacy in Spain: Reality v Legality”, *International Family Law Journal*, (2014), p. 100; <https://dawsoncornwell.com/wp-content/uploads/2022/12/Surrogacy_Spain.pdf> [accessed 2024 06 02].

⁶⁴ Title XII “Criminal offences against relatives”, Chapter II “On pretended birth of a child and on alteration of the paternity, status or condition of the child” of the Organic Act 10/1995 of November 23 on the Criminal Code; <https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal_Code_2016.pdf> [accessed 2024 06 02]; <<https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444>> [accessed 2024 06 02].

⁶⁵ Council of Europe “Addendum to the Replies to questionnaire on access to medically assisted procreation (MAP), on right to know about their origin for children born after MAP”, CDBIO/INF(2022)13, p. 21; <<https://rm.coe.int/inf-2022-13-addendum-november-2022-e/1680ae852c>> [accessed 2024 06 02]; See also: <<https://www.coe.int/en/web/bioethics/surrogacy-search>> [accessed 2024 04 22].

considered the legal mother.”⁶⁶. The civil law can however work in favor of surrogacy agreements as well⁶⁷.

3.2. PROHIBITING = SOLVING THE PROBLEM?

Introducing the prohibition of surrogate motherhood into national law does not guarantee its cessation. François Foret and Fabio Bolzonar signalize that: “Although we lack comprehensive data on surrogacy practices, the existing scholarship has shown that gestational surrogacy has increasingly taken on transnational and commercial dimensions, with the recruitment of surrogate mothers often taking place in developing countries on behalf of Western would-be parents (...).”⁶⁸. The prevalence of transnational surrogacy agreements was most likely caused by either the limitations on the admissibility of this practice in the country of origin of intended parents (e.g. the requirement of being a married, heterosexual couple in order to access surrogate motherhood), or financial factors⁶⁹. Notwithstanding the reason, couples and individuals do indeed decide to undergo ART procedures abroad, including entering surrogacy agreements. Consequences of such decisions have been discussed by the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) in the past⁷⁰. In 2012, two Italian nationals alleged the violation of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights, the Convention), which states that: “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 crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”. The applicants, Mrs Donatina Paradiso and Mr Giovanni Campanelli, obtained a child through a surrogacy agreement. They were issued a birth certificate in Moscow, Russia, but it was never registered in Italy due to the criminal proceedings opened against the applicants by the Public Prosecutor’s Office. Paradiso and Campanelli were suspected of, among others, breaching the provisions on international adoption.

⁶⁶ D. GRUENBAUM, “Foreign Surrogate Motherhood: mater semper certa erat”, *The American Journal of Comparative Law*, 60(2), (2012), p. 479.

⁶⁷ See: D. FRINTOVÁ, O. FRINTA, “Surrogacy from the Czech perspective: ‘past the point of no return’”, in: (ed.) P. MOSTOWIK, “Fundamental legal problems of surrogate motherhood. Global perspective”, *Wydawnictwo Instytutu Wymiaru Sprawiedliwości*, (2019), p. 669.

⁶⁸ F. FORET, F. BOLZONAR, “How the European Union deals with surrogacy. Birth without borders as a driver of value conflicts?”, *Gender, Technology and Development*, 25(2), (2021), p. 131-132.

⁶⁹ R.A. MAYDANYK, K.V. MOSKALENKO, “TOWARDS CREATION OF UNIFIED REGULATION ON SURROGACY IN EUROPE: RECENT TRENDS AND FUTURE PERSPECTIVES”, *Wiadomości Lekarskie*, 73(12, part 2), (2020), p. 2865-2866.

⁷⁰ See footnote 68: p. 135-136. See also: Case of *Mennesson v. France*, no 65192/11, ruled by the ECtHR: <<https://hudoc.echr.coe.int/eng?i=001-145389>> [accessed 2024 06 02]; *Z v A Government Department, The Board of Management of a Community School*, Case C-363/12. It was ruled by the CJEU that “a refusal to provide paid leave equivalent to maternity leave to a female worker who as a commissioning mother has had a baby through a surrogacy arrangement does not constitute discrimination on grounds of sex”; <https://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=uriserv%3AOJ.C_.2014.142.01.0007.01.ENG> [accessed 2024 06 02].

After a few months, the child was removed from its intended parents, placed in a children's home, and eventually adopted by another family. It was considered in the judgment delivered by the Grand Chamber of the ECtHR on January 24, 2017, that: "(...) the immediate and irreversible separation of the child from his parents [is] tantamount to an interference with their private life (...). Nevertheless, it [was] also considered that the opposite scenario would have been tantamount to legalizing the situation created by them in breach of important rules of the Italian law. As a result, the Court decided that the national interests to prevent illegality and protect public order prevailed over the applicants' right to private life and concluded that there had been no violation of art. 8 of the [ECtHR]."⁷¹ Unfortunately, it was neither the first nor the last case of alleged violation of the mentioned article as regards surrogate motherhood⁷². What is more, in 2011, the EU adopted a directive on preventing and combating trafficking in human beings and protecting its victims. In 2024, forced marriage, illegal adoption, and the exploitation of surrogacy were added to the human trafficking crimes⁷³.

4. ARTIFICIAL WOMB: AN ALTERNATIVE?

Despite numerous doubts, surrogate motherhood may be perceived as an appropriate (or ultimate) means of executing reproductive freedom. Moreover, the growing prevalence of same-sex marriages can result in even greater interest in surrogacy agreements⁷⁴. Nevertheless, for the purpose of further considerations, it is necessary to summarize the most frequent critiques of surrogate motherhood:

- High risk of commodification and commercialization of both the surrogate's and the child's body⁷⁵;
- Possible exploitation of women lacking education and suffering poverty⁷⁶;
- Legal uncertainty of a child born through surrogacy agreement, whether national or transnational, particularly in terms of the United Nations Convention on the Rights of the Child and the European Convention on Human Rights.

Artificial womb technology only partially solves the problem which, according to many legislatures, surrogate motherhood actually is. Due to an extremely specific character of ectogenesis itself, its use outside of a clinic or a facility dedicated to the practice of assisted

⁷¹ <<https://strasbourgobservers.com/2017/04/04/paradiso-and-campanelli-v-italy-lost-in-recognition-filiation-of-an-adopted-embryo-born-by-surrogate-woman-in-a-foreign-country/>> [accessed 2024 06 02]. See: Case of *Paradiso and Campanelli v. Italy*, no 25358/12: <<https://hudoc.echr.coe.int/eng?i=001-170359>> [accessed 2024 06 02].

⁷² See also: Case of *C v. Italy*, no 47196/21: <<https://hudoc.echr.coe.int/?i=001-226391>> [accessed 2024 05 05].

⁷³ Council of the European Union, "Fight against human trafficking: Council strengthens rules", Press release: <<https://www.consilium.europa.eu/en/press/press-releases/2024/05/27/fight-against-human-trafficking-council-strengthens-rules/>> [accessed 2024 05 30].

⁷⁴ A.E. CIRIÓN, "Surrogacy in Spain. Medical, legal and ethical perspective", *International Physical Medicine & Rehabilitation Journal*, 7(2), (2022), p. 83.

⁷⁵ Id.

⁷⁶ Y. HIBINO, "The advantages and disadvantages of altruistic and commercial surrogacy in India", *Philosophy, Ethics, and Humanities in Medicine*, 18(8), (2023), p. 2.

reproduction seems unrealistic. The need to create adequate conditions for the ectogenesis process to be pursued, such as investing in specialist equipment and providing necessary means of monitoring proper development of a fetonate, minimize the risk of possible malpractices and abuses which are more likely to occur behind closed doors, just as it still does in some countries around the world in case of surrogacy⁷⁷.

Article 7 and 8 of the United Nations Convention on the Rights of the Child state, respectively, that: “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”, and that “States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference”. In order to protect children’s rights, including the right to identity, both the ectogenetic process and the scale of births through AWT would have to remain under control of a competent authority. It seems that the possible remuneration would not raise as many ethical concerns as commercial surrogacy due to the fact that, firstly, no potentially-exploited third party would be involved in the process, and secondly, as mentioned before, fertility treatments not being reimbursed by the government are not uncommon⁷⁸. However, the involvement of a third party - a surrogate - in the reproduction of a couple appears to be the primary source of doubts regarding surrogate motherhood, even though “there is little evidence of exploitation of [gestational carriers] because they voluntarily enter surrogacy contracts after being informed of risks; there is little evidence of post-surrogacy regret; surrogates are well compensated; and many would consider becoming [gestational carriers] again”⁷⁹. Moreover, as rightly pointed out by Yuri Hibino, “any surrogacy practice might potentially be exploitative, and to eliminate the exploitation of surrogate mothers, the entire process needs to be thoroughly monitored, regardless of whether it is commercial or altruistic. (...) it would appear more reasonable for the government, in seeking to reduce exploitation, to focus more on improving the autonomy, bargaining power, and empowerment of the women involved in surrogacy practices.”⁸⁰. Nonetheless, the AWT would not require the presence of another woman, and even more importantly, apart from the conception, it would not require the presence of any woman at all.

It should be borne in mind that any measures undertaken with the prospect of using AWT for reproduction purposes would have to be followed by profound legal reforms. The role of the gestational mother would be completely eliminated, creating a reality, previously unknown to both people and the law, in which only the genetic or social mothers exist. Consequently, it would be necessary to introduce numerous changes within the terminology of the applicable law, including, but not limited to, the *mater semper certa est* principle. To use the example of Polish legislation once more, not only the Family and Guardianship Code would have to be subject to changes, but also other legal acts, such as the Infertility Treatment Act of June 25, 2015. In its Article 2, point 28, it is noted that an “embryo” shall be understood as “a group of cells created as a result of the extracorporeal fusion of the female and male gamete, from the completion of

⁷⁷ See: Y. ZHAO, “Protection of rights and legal remedies for surrogate mothers in China”, *Humanities & Social Sciences Communications*, 10(823), (2023).

⁷⁸ See footnote 9.

⁷⁹ V. CALDER, “Defending Gestational Surrogacy Addressing Misconceptions and Criticisms”, *Cato Institute*, (2023), p. 3.

⁸⁰ See footnote 76: p. 8-9.

the process of gamete nuclei fusion (karyogamy) until the implantation in the endometrium”⁸¹. The emphasis is on the final destination of a transferred embryo, which is the woman’s body, and in case of surrogate motherhood this destination remains unaltered. However, the problem occurs when we consider synthetic wombs, as the embryo would never be placed in a human body. What is more, as highlighted by Victoria Hooton and Elizabeth Chloe Romanis, EU legal framework on maternity and pregnancy rights would have to be confronted, at some point, by further development of various means of reproduction, including the AWT⁸². Authors concluded that: “(...) the EU legal framework does not adequately address many issues raised in the process of reproduction. We expressed concern that many female people (with or without the physiology to become pregnant) may feel unable to opt for assistance in reproduction or feel as if they are punished by their reproductive choices because technologies that could offer opportunities (such as surrogacy and [Artificial Amnion and Placenta Technology]) would take them outside of the framework for protection from discriminatory employment practices.”⁸³.

Even though the AWT might theoretically be a solution for the skepticism about surrogate motherhood, there still are numerous ethical doubts regarding ectogenesis that cannot be ignored. For instance, a question can be raised whether a child placed in an artificial womb would not be deprived of the benefits coming from the mother’s body, meaning both the sustenance of nutrients necessary for the child’s proper development and the emotional bond formed during pregnancy. On one hand, we may assume that it would. On the other hand, however, we should ask if a child could not be deprived thereof also while gestated by a woman. By way of illustration: a surrogate may develop an emotional and presumably reciprocal attachment to the baby she carries, but she surrenders it anyway; a pregnant woman may be forced to significantly limit her mobility in order to decrease the risk of early labor; a woman may drink alcohol or smoke cigarettes while pregnant. It is worth recalling the words of Anna Smajdor, who wrote that:

*First, those who suppose that the mother’s bond is entirely dependent on her physical gestation of her child do a huge disservice to all the step- and adoptive parents who love their children dearly. More importantly, they sweep away any possibility of claiming that fathers can love their children as much as mothers do. (...) Conversely, mothers’ physical connection with their babies does not guarantee a secure and unconditional flow of motherly love. Plenty of women fail to bond with their naturally born children. (...) Physical gestation of a child is thus neither necessary nor sufficient for the development of a loving parental bond. The permutations of childrearing in our society are diverse, and it seems highly dubious to locate some kind of mystic essence of parenthood in gestation and childbirth if neither of these things can be directly associated with the development of the loving bond or with benefits to the child.*⁸⁴

Nonetheless, it is crucial to reach a consensus before taking any action which might cause legal incoherency or apply double standards in terms of human body, human life, and reproductive rights and freedoms. As Marek Safjan points out, reaching a consensus is not impossible. The

⁸¹ “Użyte w ustawie określenia oznaczają: (...) zarodek – grupę komórek powstałą wskutek pozaustrojowego połączenia się żeńskiej i męskiej komórki rozrodczej, od zakończenia procesu zlewania się jąder komórek rozrodczych (kariogamia) do chwili zagnieżdżenia się w śluzówce macicy.”, Article 2. 1 (28) of the Infertility Treatment Act.

⁸² V. HOOTON, E.C. ROMANIS, “Artificial womb technology, pregnancy, and EU employment rights”, *Journal of Law and the Biosciences*, 9(1), (2022).

⁸³ Id., p. 33.

⁸⁴ See footnote 37: p. 342.

author draws particular attention to four factors that seem to be fundamental for the development of a method for resolving bioethical dilemmas effectively:

- 1) The discussion should be based on substantive arguments, expressed freely;
- 2) The relationship between law and morality is undeniable. Highlighting the differences between them also proves that they intersect;
- 3) Majority's opinion on a given matter cannot completely determine the solution adopted. Minorities shall have a voice;
- 4) Undertaking any legislative actions must be preceded by a debate in which both the agreements and disagreements are set out⁸⁵.

Even though the guidelines presented by Safjan do not guarantee success in finding the consensus, any deliberations regarding not only AWT, but any kind of ethically questionable medical and non-medical advancement shall be based on substantive arguments and reciprocal cooperation between practitioners, scholars, and national legislatures.

CONCLUSION

In the light of all considerations made herein, it must be noted that, to some extent, artificial wombs could indeed constitute an alternative for surrogate motherhood. To summarize most crucial arguments in favor of AWT, it should be pointed out that:

1. The use of synthetic wombs for the purpose of reproduction of infertile couples and individuals would exclude any third parties from the process of producing children and thus minimize the risk of human exploitation;
2. Women's bodies would not be at risk of neither commodification nor commercialization;
3. Prenatal development could be monitored and thus protected more effectively.

However, it is imperative to recognize that, at the very same time, the above-mentioned arguments pose certain threats:

1. Not only any third party would be excluded from the reproduction, but also the mother;
2. Children would still remain at risk of commercialization, or at least commodification;
3. Fetuses developing outside the woman's body could be deprived of certain benefits, such as the possibility to form an emotional bond with the mother.

Reaching a consensus is an ongoing process. However, sometime in the future people might have to decide which of the options - either indicated herein or others, as yet unknown - will allow them to exercise their reproductive rights with the least possible harm caused, whether to the child, or to the intended parents, or to themselves.

⁸⁵ M. SAFJAN, "O metodach rozwiązywania dylematów bioetyki", *Państwo i Prawo*, 5, (1992), p. 51-59.

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SANTRAUKA

SUROGACIJA VS. DIRBTINĖS GIMDOS TECHNOLOGIJA: REPRODUKCIJOS ATEITIS EUROPOS SAJUNGOJE

Straipsnyje aptariami surogatinės motinystės įstatymai ir praktika Europos Sąjungoje bei svarstoma, ar dirbtinė gimdos technologija (DGT) galėtų būti alternatyva pagalbinio apvaisinimo technologijoms (PAP) ir kitoms nevaisingumo gydymo priemonėms. Siekiant atsakyti į šį klausimą buvo taikomas formalus-dogmatinis požiūris, pasitelkta teisės aktų bei teismų praktikos analizė.

Pirma dalis pateikia trumpą dirbtinės gimdos technologijos paaiškinimą. Ji prasideda bendra ektogenezės samprata, po kurios seka dabartinių DGT tyrimų aprašymas tiek medicinos mokslų srityje, tiek įvairių autorių atliktų teisinių ir etinių svarstymų kontekste.

Antra dalis skirta motinystės ir pakaitinės motinystės fenomenams. Autorė pateikia keletą „motinos“ apibrėžimų, įskaitant gestacinę, biologinę, genetinę, socialinę ir teisinę motiną. Taip pat atkreipiamas dėmesys į teisinę motinos apibrėžtį pasirinktų ES šalių pavyzdžiu. Siekiant geriau suprasti galimus motyvus, dėl kurių į galiojančius įstatymus buvo įtraukta mater semper certa est principas, autorė remiasi 2008 m. lapkričio 6 d. Lenkijos šeimos ir globos kodekso pakeitimu bei šio pakeitimo aiškinamuoju raštu. Galiausiai paaiškinama surogatinės motinystės sąvoka.

Trečioje dalyje nagrinėjami surogatinės motinystės įstatymai įvairiose Europos Sąjungos šalyse. Skirtingi požiūriai į surogatinę motinystę klasifikuojami taip: surogatinės motinystės legalizavimas (visiškas ir dalinis), surogatinės motinystės draudimas (visiškas ir dalinis) ir surogatinės motinystės nereglamentavimas. Pateikta klasifikacija iliustruojama Kipro, Ispanijos ir Belgijos teisinių sistemų pavyzdžiais.

Taip pat pabrėžiama, kad, nepaisant ES šalių teisės aktų nenuoseklumo, surogatinė motinystė vis dar praktikuojama ir sukelia įvairias pasekmes, pavyzdžiui, dėl teisinio tėvystės pripažinimo. Šiame skyriuje autorė remiasi Europos Žmogaus Teisių Teismo bylomis.

Paskutinėje dalyje prisimenamos dažniausios surogatinės motinystės kritikos: didelė komodifikacijos ir komercializacijos rizika, galimas moterų išnaudojimas ir teisinis neapibrėžtumas dėl vaiko, gimusio pagal surogatinės motinystės sutartį. Autorė bando įvertinti, ar DGT yra be šių trūkumų ir ar ji galėtų būti mažiau pavojinga galimybė, naudojama reprodukcijos tikslais, atsižvelgiant į galimas pasekmes.

REIKŠMINIAI ŽODŽIAI

Surogatinė motinystė, motina, dirbtinė gimdos technologija, ektogenezė, Europos Sąjunga.