

## DIFFERENT LEGAL APPROACHES TO THE REGULATION OF SURROGACY IN UKRAINE AND BALTIC STATES

Nadiia Horobets

Lecturer, Ph.D. in Law, Academic and Research Institute of Law,  
Sumy State University  
57 Petropavlivska Str., Sumy, Ukraine  
<https://orcid.org/0000-0002-0282-2775>  
[n.horobets@aspd.sumdu.edu.ua](mailto:n.horobets@aspd.sumdu.edu.ua)

Yuliia Yakushchenko

Ph.D. student, Academic and Research Institute of Law,  
Sumy State University  
57 Petropavlivska Str., Sumy, Ukraine  
<https://orcid.org/0000-0001-8169-1250>

**Abstract.** The paper examines legal approaches to regulating surrogacy in Ukraine, Lithuania, Latvia, and Estonia. The research was successfully initiated by highlighting empirical data demonstrating an increase in the number of infertile couples and, accordingly, the growth of the surrogacy market, which confirms the relevance of this issue. The authors clarified the content of the concepts of “assisted reproductive technologies” and “surrogate mother”. The historical aspects of the emergence and development of surrogacy globally and the attempts at its legal regulation at the state level have been revealed. The authors reviewed the main provisions of legal acts regulating surrogacy in Ukraine, Lithuania, Latvia, and Estonia. It was found that the legal regulation of surrogacy was consolidated in Ukraine earlier than in the Baltic countries. In Ukraine, surrogacy is allowed only for spouses for medical reasons, the list of which is enshrined in legislative acts, while foreigners have access to such services. It was found that altruistic and commercial surrogacy is prohibited in Lithuania. The legal provisions make it impossible to enter a surrogate agreement, even if it could be concluded. It has been established that surrogacy is not directly regarded as a crime under the criminal law of Lithuania. It is emphasized that commercial surrogacy is indirectly prohibited in Latvia, but heterosexual couples and infertile single women can seek medical help for procreation. In Latvia, the criminal legislation does not directly provide for the criminal liability for surrogacy arrangements. It is determined that the Estonian legislation provides married and single women with access to medical care if there are medical indications for reproductive treatment but provides for criminal liability for gestational surrogacy. It is concluded that the legislation of Ukraine is favorable for surrogacy. In contrast, in the Baltic countries, the opposite approach is due to such risks as human trafficking, exploitation of women, commercialization of children, etc.

**Keywords:** surrogacy, surrogate mother, surrogacy procedure, assisted reproductive technologies, medically assisted reproduction, reproductive rights.

## INTRODUCTION

The issue of using surrogacy is growing along with the problem of infertility. The World Health Organization (WHO) determines that infertility is a disease of the male or female reproductive system in which it is impossible to achieve a state of pregnancy after 12 months or more of regular unprotected sexual intercourse. For many couples, having and raising a child is essential for their quality of life. However, more than 186 million people worldwide have infertility, most of the residents of developing countries (Inhorn, Patrizio, 2015, p. 411). According to A. Direkvand-Moghadam et al., infertility is diagnosed in almost 10% of couples of reproductive age worldwide (Direkvand-Moghadam et al., 2014, p. 40). The latest data from the United Nations Population Fund (UNFPA) show that Southern Europe, Eastern Europe, and East Asia have the lowest birth rates in the world: an average of 1.5 children per woman.

Casella C. et al. underline that for the majority of infertile couples the loss of the opportunity to have a child is unacceptable (Casella et al., 2018, p. 119). Ford M. suggests that infertility in couples who want to become parents may be the cause of strong emotional stress (Ford, 2008, p. 84). Nowadays, one of the ways to solve this problem is to use assisted reproductive technologies (ART, or their other name is medically assisted reproduction (MAR)). Surrogacy is a form of ART that allows those who have serious reproductive health problems to have a genetically born child. Some authors estimate surrogacy to be a growing market worth \$US2.3 billion to \$US6 billion annually (Deonandan, 2020, p. 269).

Given the trend towards an increase in the number of infertile couples and the rapid growth of the surrogacy market, the states face the issue of legal regulation of the institution of surrogate motherhood, which determines the relevance of the chosen research topic. Of particular interest are approaches to the legal regulation of surrogate motherhood in Ukraine and the Baltic countries, including Lithuania, Latvia, and Estonia, given their shared history of being part of the former USSR and the almost simultaneous use by these countries of assisted reproductive technologies of this era.

## MATERIALS AND METHODS

The study of various legal approaches to the regulation of surrogate motherhood in Ukraine and the Baltic countries employed general and special methods of scientific knowledge, including historical, logical semantic, monographic, and comparative legal methods. The historical method made it possible to reveal the historical aspects of the emergence and development of the institution of surrogacy in the world. The logical semantic method within the framework of this study made it possible to clarify the essence of the concepts of “surrogacy” and “assisted reproductive technologies”. The monographic method was used to develop the content of the latest scientific research on the selected topic and the use of their provisions in this study. The comparative legal method became the basis for studying the legislation of Ukraine, Lithuania, Latvia, and Estonia, regulating relations in surrogacy, identifying common and distinctive features in the legislative approaches of the above countries toward the institution of surrogacy. To study legal approaches to the regulation

of surrogate motherhood in Ukraine and the Baltic countries, official empirical data were used, the generalization and analysis of which made it possible to take a broader look at the problem of the institution of surrogacy.

## RESULTS AND DISCUSSIONS

According to the International Glossary of Infertility and Infertility Care (2017), ART is aimed at treating infertility disorders through a variety of interventions, procedures, surgeries and technologies. In particular, ARTs include induction/initiation of ovulation, ovarian stimulation, uterine transplantation, and sperm insemination of a male/partner or donor, which may be intrauterine, intracervical, or intravaginal (Zegers-Hochschild et al., 2017). Surrogacy is one of the reproductive technologies that is accompanied by services such as in-vitro fertilization (IVF), intracytoplasmic sperm injection (ICSI), and preimplantation genetic diagnosis (PGD) (Deonandan, 2020, p. 269).

It should be noted that today for 3-5% of women in the world who are diagnosed with absolute infertility due to severe pathologies of the reproductive system (Mayer-Rokitansky-Kuster-Hauser syndrome, hypoplastic uterus, leiomyoma, etc.) surrogacy is the only option to have a genetically related child (Brännström et al., 2018, p. 569). Saravelos, S. et al. state that the prevalence of congenital uterine anomalies is about 6.7% in the general population, about 7.3% in the infertile population and about 16.7% in the recurrent miscarriage population (Saravelos et al., 2008, p. 415).

In the case of such pathologies, besides surrogacy, there exist only experimental or highly experimental methods that could be used to circumvent the problem of infertility. They include uterus transplantation and ectogenesis. Despite several successful attempts at uterine transplantation, this complex, life-threatening surgical procedure is still under experimentation (Zaami et al., 2017).

Ectogenesis involves in vitro fertilization, implantation and full development of the fetus outside the human body in the artificial womb, which simulates the natural uterus. It should be noted that such technology is of deeper concern than the use of IVF or surrogacy as it entails risks such as the ability to “produce” children, potential risks to ectogenetic infants, and deep inequalities between rich and poor couples (Abecassis, 2016).

The term “surrogate mother” was first mentioned in a Council of Europe report. Accordingly, the Council of Europe proposes that a surrogate mother should be understood as a woman who is carrying a child for another person and who has agreed before pregnancy that the child should be transferred to that person after birth. Instead, the WHO uses the term “gestational courier”, meaning a woman who is pregnant with the consent that she will give birth to a prospective father (s). Gametes may come from prospective parents and/or third parties (or parties) (Zegers-Hochschild et al., 2017).

The development of surrogacy can be divided into several stages: from traditional surrogacy, which has become a prerequisite for the development of modern gestational surrogacy, to the introduction of surrogacy in current infertility treatment programs.

One of the earliest examples of surrogacy can be found in the Old Testament (Genesis 16: 1-15). Sarah, Abram’s wife, could not give birth to a child and invited her maid, an Egyptian named Hagar, to conceive and bear Abraham’s child. There are other cases in history where

rabbis or concubines in different countries were surrogate mothers (Lones, 2016, p. 23). The longest inscription that came from ancient Rome (Laudatio Turiae) contains an indication of surrogacy as a “reasonable means” to overcome childlessness (Sills, Healy, 2008).

Traditional surrogacy already existed in Sumerian Mesopotamia in the middle of the XVIII century BC. At that time, surrogacy was already enshrined in law in the Code of Laws of King Hammurabi and was carried out legally. The Hammurabi Code (1780 BC) was the first legal document to regulate surrogacy (e.g., rule 145).

A new stage in the development of surrogacy began after discovering artificial insemination methods in the 17th—mid-20th centuries. This stage was characterized by the active work of scientists and the lack of regulatory consolidation of the method of surrogacy.

In the middle of the 20th century, the invention of the IVF method gave a significant impetus to gestational surrogacy. The first baby born after the use of IVF technology was born in 1978. After successful IVF, the patient Leslie Brown with absolute tubal infertility gave birth to a daughter, Louise (Steptoe, Edwards, 1978). At this stage, the legislative regulation of this method takes place (in the UK in 1985, the world’s first law on surrogacy was adopted, “Baby M.” and “Johnson v. Calvert” cases were considered in the courts), which are of decisive importance for the further regulation of surrogacy).

There are currently no international legal instruments that directly address the issue of surrogacy arrangements. Although according to Dumitru A. E. et al. legal regulation of surrogacy should provide adequate protection for the gestational carrier and the unborn fetus (Dumitru A. E. et al., 2022). However, judicial and administrative authorities deal with issues related to ART in general and surrogacy in particular in the context of human rights and interests in accordance with international law. International legal instruments concerning human rights in the context of surrogacy include the Universal Declaration of Human Rights, the UN Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, the International Covenant on Civil and Political Rights, the International Convention on Economic, Social and Cultural Rights. These international instruments can be used to interpret the rights of the surrogate mother, including reproductive rights and the right to fair working conditions, as well as the rights of the child born as a result of surrogacy, including the principle of the best interests of the child and the right to a name and citizenship.

Each country has its position on the legal regulation of surrogacy, based on specific arguments that are ethically decisive for it. It is understandable because surrogacy is a sensitive issue surrounded by ethical debates. It is associated with a number of risks, including medical and psychological risks, coercion and exploitation risks, and issues related to autonomy, freedom and justice (Gunnarsson Payne, 2020, p. 183). Moreover, religion plays an important role in people’s attitudes towards surrogacy: from complete acceptance to complete rejection of it with many intermediate options, the Catholic Church being stricter than the Orthodox Church regarding medically-assisted reproduction (Sallam, 2016, p. 38). There are countries where surrogacy is illegal (Germany, Italy, Spain, France); where altruistic surrogacy is allowed (Netherlands, Canada, UK); where both altruistic and commercial surrogacy is legal (Ukraine, Georgia); as well as countries where there is no prohibition or any legal regulation concerning surrogacy arrangements.

However, after Ukraine and the Baltic states gained independence in 1990–1991, the countries followed different pathways. Ukraine has adopted surrogacy-friendly legislation, while Baltic States (although having slightly different approaches) adopted restrictive policies towards applying surrogacy arrangements.

In Ukraine, the first successful attempt at in vitro fertilization was undertaken in Kharkiv in 1990 (Khmil, Khmil, 2015, p. 3), and the first surrogacy program in Ukraine was implemented in 1995 in Kharkiv. Ukraine's first surrogacy program was carried out in 1995 in Kharkiv. As a result of this program, a surrogate mother gave birth to a child for a daughter who did not have a uterus (Basai, 2014, p. 83). The first IVF child on the territory of the Baltic States was born in Estonia in 1995 (Sõritsa, 2018). In the USSR, ART was regulated by the Order of the Ministry of Health of the USSR On Expanding the Experience of Using the Method of Artificial Insemination of a Donor for Medical Reasons No. 669 of May 13, 1987.

### *Ukraine*

In 1992, even surrogate motherhood received regulatory consolidation in independent Ukraine by adding part four to Art. 56 of the Code of Marriage and Family of Ukraine of June 20, 1969: “a wife who gives written consent to her husband for fertilization and the birth of a child by another woman (donor) is recorded a mother of this child and has no right to dispute the record”. It settled the issue of using surrogacy, which was the beginning of the development of legal relations pertaining to surrogacy arrangements. The first regulation of assisted reproductive technologies in the Baltic States was introduced with the Artificial Insemination and Embryo Protection Act of 1997 in Estonia. Latvia was the next to adopt the Sexual and Reproductive Health Law in 2002. In 2016, Lithuania adopted the Law on Assisted Fertilization. It is feasible to consider the legal regulation in each country separately.

The term “surrogacy” first appeared in the Order of the Ministry of Health of Ukraine “On Approval of the Instruction on the Use of Assisted Reproductive Technologies” of December 23, 2008. However, the order of the above-mentioned Ministry “On Approval of the Procedure for Assisted Reproductive Technologies in Ukraine” No. 787 dated September 9, 2013 repealed the previous regulatory legal act.

Section 6 of the Order No. 787 defines the conditions for surrogacy, indications for surrogacy, contraindications, organizational and legal principles of its use, and a list of documents for surrogacy. It should be noted that the indications for the use of surrogacy are purely medical, which excludes the possibility of using this method of ART for social reasons.

The right to conduct ART is enshrined by the Civil Code of Ukraine, which states that an adult woman or man has the right on medical grounds to conduct treatment programs for ART following the procedure and conditions established by law (Part 7 of Art. 281). Thus, this provision indicates again that ART can be used in Ukraine only for medical reasons, and treatment with ART for social reasons is not provided in the current legislation of Ukraine. Moreover the Family Code of Ukraine provides for the possibility of using ART only for spouses (Art. 123). Thus, under Ukrainian law, a single woman or man cannot be treated for infertility through a surrogacy program.

A problematic issue in the context of the use of ART, and especially surrogacy, remains the issue of access to these services for foreigners who choose Ukraine for the implementation of



ART programs, taking into account several advantages: use of commercial surrogacy, which is allowed in Ukraine without any restrictions concerning the amount of remuneration for a surrogate mother; no need to obtain permission from a particular agency or commission; no need for the adoption procedure; according to the legislation, a surrogate mother does not receive any parental rights in relation to a child born as a result of a surrogacy program. The legal parents of a child born by a surrogate mother are considered exclusively genetic parents (Puhach, 2018, p. 70).

The participants in the surrogacy procedure conclude an agreement with each other, although the form of the surrogacy agreement is not enshrined in the legislation of Ukraine (Fedorchenko, 2016, p. 67). To protect the rights of potential parents, national legislation stipulates that in the case of transfer of an embryo conceived by spouses into the body of another woman with the help of ART, the parents are the spouses (paragraph 2 of Article 123).

Registration of a child born through surrogate motherhood is carried out under the Law of Ukraine “On State Registration of Acts of Civil Status” and the Order of the Ministry of Justice of Ukraine “On Approval of the Rules for State Registration of Acts of Civil Status in Ukraine”. Registration of a child born as a result of surrogacy arrangement is carried out at the request of the spouses, and the surrogate mother submits her consent to the registration of these spouses as the biological parents of the newborn child, as well as a certificate proving the genetic relationship of the baby with the parents.

Thus, Ukraine has very lenient legislation regulating surrogacy arrangements. It is a growing infertility treatment destination, which raises concerns. Because the majority of developed countries prohibit surrogacy and do not recognize surrogacy arrangements, the rights of children born using this type of ART may be violated, and there are concerns about the coercion and exploitation of women who become surrogate mothers.

### *Lithuania*

In Lithuania, ART is regulated by the targeted law – the Law “On Assisted Procreation” (14 September 2016 No. XII-2608). The adoption of this Law was preceded by many debates among scientists, politicians, and representatives of the Catholic Church on different issues that did not include surrogacy (Mikelėnas, Mikelėnaitė, 2018). The Seimas of the Republic of Lithuania committees and the general public have discussed the draft laws several times. This is one of the longest discussed and debated health issues legislation in this area because of highly sensitive ethical issues.

The Law of the Republic of Lithuania “On Assisted Procreation” determines surrogacy as a civil agreement when a woman undertakes to conceive, carry and deliver a baby to another person or persons after giving up her maternity rights to the child born (Article 11).

Article 3(8) of this Law prohibits embryo donation and Article 11 prohibits both altruistic and commercial surrogacy arrangements and also declares that “Civil transactions in which one woman undertakes to conceive, carry and deliver a baby to another person or persons after giving up her maternity rights to the child born (surrogacy) are null and void.”

The Law states that all matters relating to assisted reproduction must be in the best interests of the child born as a result of using assisted reproduction (Art. 3(1)); all decisions

should be made pursuant to the principle of women's health priority and equality (Art. 3(2)); all decisions should be made after considering the potential benefit-to-risk ratio to the mother and/or child (children) born as a result of assisted reproduction (Art. 3(3)). It can be stated that surrogacy is prohibited because it may not be possible to ensure the above principles when entering and exercising surrogacy arrangements.

The analysis of the other provisions of the Law "On Assisted Reproduction" indicates the impossibility of enforcing the surrogate agreement even if it could be concluded. According to Article 5(3), assisted reproduction may be carried out for persons who entered into the marriage or registered partnership agreement under the law. According to Article 3(7), assisted reproduction may be carried out only using the gametes of the fertilized woman and the donor of the gametes, the spouse or cohabitant residing with them under the law, unless the gametes of one of the spouses or partners are damaged or insufficient and therefore cannot be used.

Some provisions of the Lithuanian Civil Code implicitly prohibit surrogacy. Paragraph 5 of Article 2.25 stipulates that the objects of commercial contracts may not be the human body, its parts or organs and tissues. In the case of such agreements, they are void. This provision contradicts the possibility of commercial surrogacy. Paragraph 2 of Article 3.5 obliges individuals in the process of exercising their family rights and responsibilities to comply with the law, respect the rules of public life, the principles of good morals and act in good faith. Surrogacy is usually considered to be a phenomenon that contradicts good morality principles. Thus, it cannot be an appropriate type of ART. Paragraph 1 of Article 1.78 provides that a transaction is void regardless of the relevant court judgment, if the law explicitly indicates the nature of the voidness, and the parties can not ratify such a transaction. Thus, surrogacy transactions are also considered null and void under the Lithuanian Civil Code.

At the same time, it should be discussed that surrogacy is not considered a crime explicitly under the Lithuanian Criminal Code. According to the Code, a person aware of or seeking that the victim's organ, tissue, or cells would be taken is also considered a crime. The commentary to this provision explains that, among others, this crime includes selling or purchasing sperm, ovum, embryo, embryo cells, or other genetic material.

According to Article 147 of the Lithuanian Criminal Code, human trafficking "shall be punishable by imprisonment of between two and ten years." This provision may be considered a prohibition of surrogacy.

It should also be noted that the Seimas of the Republic of Lithuania issued the Resolution "On Condemning all Forms of Surrogacy" of the 25th of June 2020 No. XIII-3160. Referring to the UN Universal Declaration of Human Rights (Art. 1), the UN Convention on the Rights of the Child (Art. 7, 8, 9, 10, 20, and 35), the UN Slavery Convention (Art. 1), the Convention on Human Rights and Biomedicine (Art. 21), the UN Convention on the Elimination of All Forms of Discrimination against Women (Art. 6), the European Parliament resolution of 5 April 2011, the Constitution of the Republic of Lithuania (Art. 38), etc., it condemns all forms of surrogacy and cross-border surrogacy, notes "that commercial surrogacy violates several instruments under international law and the right of every person to be protected from becoming an object of trade or property," etc. This resolution calls on the President, the

Government and the Ministry of Foreign Affairs of the Republic of Lithuania, among other things, to condemn all forms of surrogacy and reproductive tourism, “to take active steps, at the international level and, in particular, among the European Union Member States, to ban surrogacy as a form of trafficking in human beings and women.”

### *Latvia*

Medically assisted procreation in Latvia is governed by the 2002 Sexual and Reproductive Health Law, which does not contain provisions on surrogacy. Latvian Law allows heterosexual couples and single women with infertility to resort to medically assisted procreation (§ 2 of Section 13). Thus, when applying for medically assisted procreation, there is no requirement for a couple to be married, which is a more liberal provision than the Lithuanian Law.

However, surrogacy is prohibited implicitly. Article 146 of the Latvian Civil Law states that “the mother of a child shall be recognized the woman who has given birth to the child.” There is also a paternity presumption. If the child is born to a married woman in a duly registered marriage, her husband is considered the child’s father (§1 of Section 21). Otherwise, if the marriage is not registered, the provisions of the Civil Law shall apply (Section 21).

Moreover, the Sexual and Reproductive Health Act prohibits the use of donor gametes or embryos for commercial purposes (Section 15, paragraph 4). In the case of medical reproduction, the law prohibits requiring recognition of paternity of the gamete donor (Section 22). It is obvious that this law indirectly prohibits commercial surrogacy in Latvia.

Article 1415 of the Latvian Civil Code states that transactions involving unauthorized or indecent acts the purpose of which is contrary to religion, law or moral principles are considered null and void. Because surrogacy is surrounded by debates and considered to contradict moral principles, all surrogacy transactions should be void.

The Latvian Criminal Law does not impose direct criminal liability for surrogacy arrangements, as the issue of surrogacy is not the object of regulation in the legislation of Latvia.

It should be noted that section 154.1 of the Criminal Law of Latvia envisages criminal liability for human trafficking in specific cases, similar to Lithuanian legislation, and the definition of human trafficking is given in Section 154.2 of the Criminal Law. Paragraph 3 of the Section defines exploitation, and paragraph 4 deals with the state of vulnerability. However, the relationship between human trafficking or exploitation and surrogacy must be considered in each specific case to reveal the elements of an offense.

### *Estonia*

The first legal act regulating assisted reproductive technologies was adopted in Estonia in 1997. It was the Artificial Insemination and Embryo Protection Act.

Nowadays, Estonian legislation provides both married and single women access to medically assisted procreation, provided there are medical indications for such reproductive treatment (§ 5 of Chapter 2 of the above-mentioned Act). A donor’s ovum may be used if there are no other alternatives for a woman (§23(1)). However, section 83 of the Family Law Act recognizes a child born as a result of artificial insemination in accordance with § 23 of the Artificial Insemination and Embryo Protection Act as derived from the woman who gave



birth to it. Thus, these provisions deny the possibility of an agreement on surrogacy. The Estonian Penal Code (§132) provides for criminal liability for the transfer of a foreign ovum or embryo or fetus derived from it to a woman who intends to transfer the child after birth to another person. This indicates the criminalization of gestational surrogacy in Estonia. It also envisages pecuniary punishment for the same offense committed by a legal person. Thus, Estonian legislation even imposes punishment on the perpetrators who participate in surrogacy arrangements. However, in October 2015, the Social Affairs Committee of the Parliament considered that surrogacy should be allowed for noncommercial use under certain medical conditions (Leibetseder, Griffin, 2020).

## CONCLUSIONS

Policymakers in different countries still discuss medical and legal psychological aspects, trying to elaborate a better legal framework for surrogacy arrangements. It should be mentioned that when talking about various controversial issues related to surrogacy arrangements, we deal with the values going far beyond the scientific domain. They pertain to cultural notions and ideals, which include the issues of motherhood and parenthood, equality, justice, etc. Thus, the legal approach to surrogacy must merge legal, medical and psychological facts with the cultural norms and values of a particular society.

Ukraine adopted a surrogacy-friendly approach and became one of the surrogacy destinations of the world, even providing access to surrogacy to citizens of those countries where surrogacy arrangements are prohibited by law. The Baltic States have the opposite attitude. Primarily, the concerns about human trafficking, coercion of vulnerable women, and commercialization of children had driven the prohibition on surrogacy arrangements in the legislation of three Baltic States.

However, as Piersanti V. et al. indicate, the efforts should be made at the international level, and it is not enough for national legislatures to devise new laws, or amend existing ones (Piersanti et al., 2021). For example, in Ukraine, which does not have any law targeting ART and surrogacy specifically, under current conditions, the prohibition of surrogacy may lead to the development of an underground and unregulated market of surrogacy services, thus making all parties to the surrogacy agreement even more vulnerable.

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