

Comparison of Surrogacy laws of Austria, Slovakia and Ukraine

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Introduction

Assisted reproductive methods have introduced solutions for intended parents to establish a family without any difficulties in one sense. Although, it is now medically possible for infertile persons and also same-sex couples to have a child, surrogacy initiated various ethical, political, commercial and legal debates. The issue of surrogacy in Central Europe is dealt with utmost sensitivity, also in international and European legal frameworks, due to the conflicts of rights, which are at stake around surrogacy as a procedure. These important aspects are the following, the best interest of the child principle, the potential objectification of the human body or its parts, protection of the embryo's life, of matrimonial bonds, of planned parenthood and reproductive health and freedom. These values are taken into consideration when a country defies its permissive or prohibitive legislation. The three subject's expectations, who take part in the surrogacy procedure, so the child, the intended parents and the surrogate mother are at conflict from various perspectives. From the child's perspective questions arise from the family life, the child-parent relationship, the legal status of the family, genetic and cultural identity, and obviously its best interest. Next, the intended parents wish to become parents even if that

is not possible naturally due to medical conditions, they can found a family by resorting to assisted reproductive procedures, such as surrogacy. By this they can preserve their reproductive freedom, right to healthy life, rights to freely found a family. The third subject is the surrogate mother's right to private and family life is the key feature. Ethical questions arise from the fact, whether the surrogate mother should make her uterus available for „rent” by objectifying her body in her vulnerable position.¹

These concerns have been already resolved in some European Court of Human Rights (ECtHR) cases, however they were based on the special circumstances of the case and common grounds for an unquestionable European standard could not be derived from them, only tendencies of the decision making of the ECtHR.

The selected countries differ not only in their legislation regarding surrogacy, but also in political, economic circumstances as well, despite being territorially and historically connected to each other. Their legal solution to surrogacy can be justified by the socio-economic background of the given state. Some of these states were represented before the ECtHR with cases connected to surrogacy. These decisions evaluated the legislation of the given country as well as the actions of the public authorities.

However, as long as surrogacy is considered to remain a sensitive issue, member states have a big scale of margin of appreciation, when evaluating the necessity and proportionality of the concerned legal restriction of the public authority. This among many other reasons causes the pluralism in legislation of surrogacy in European countries.

Assisted reproductive methods

It is necessary to explain the basic terms and processes of assisted reproductive methods, to highlight their complexity, in order to reveal the legally relevant nuances these procedures introduce.

Assisted reproduction is mainly considered as a treatment for infertility. The World Health Organization has recognized and proclaimed it as a disease since 1977. Infertility is characterized as an inability to conceive a child, which

¹ NAVRATYIL, Z. *A varázsló eltöri a pálcáját? A jogi szabályozás vonulata az asszisztált humán reprodukciótól a reprodukív klónozásig.* Budapest: Gondolat Kiadó, 2012, pp. 140–141.

can be caused by both female and male factors, or a combination thereof.² On the other hand, nowadays not only infertility motivates the concerned persons to turn to assisted reproductive methods to found a family, but also aesthetic reasons. Moreover, same-sex couples consider surrogacy, which are even more controversial factors.

The most recent method of assisted reproduction is the so-called IVF.³ These are a series of procedures used to help with fertility or prevent genetic problems and assist with the conception of a child. During IVF, mature eggs are collected (retrieved) from ovaries and fertilized by sperm in a lab. With the classic conventional method, IVF is waited for spontaneous fertilization, which is therefore left to chance from this phase of the cycle. Fertilization, however, may fail, so the trend in this scientific discipline is moved towards even larger laboratories intervention using micromanipulation techniques at all stages of the cycle.⁴

For clearance, traditional surrogacy is the result of artificial insemination of the surrogate mother with the intended father's sperm, making her a genetic parent along with the intended father. Gestational surrogacy (host/full surrogacy) is defined as an arrangement in which an embryo from the intended parents or from a donated oocyte or sperm is transferred to the surrogate uterus. In gestational surrogacy, the woman who carries the child has no genetic connection to the child. During traditional surrogacy the surrogate mother's eggs are used and she is the genetic mother of the child. The pregnancy comes about either through insemination procedure with the sperm of the intended father or donated sperm or through sexual intercourse with the intended father or another man.⁵ In some cases the genetic parents of the surrogate child are not the intended parents, because the egg and the sperm are both donated by third persons.

² World Health Organization. GA31 Female infertility, In: *ICD-11 for Mortality and Morbidity Statistics* [online]. [Q 2022-12-01]. Available at: <https://icd.who.int/browse11/l-m/en#/http://id.who.int/icd/entity/1237004558>.

³ In vitro fertilization.

⁴ National Health Service. Overview IVF. In: *NHS* [online]. Last rev. 18. 10. 2021 [Q 2022-11-01]. Available at: <https://www.nhs.uk/conditions/ivf/>.

⁵ PATEL, N. H., JADEJA, Y. D., BHADARKA, H. K., PATEL, M. N., PATEL, N. H., & SODAGAR, N. R. Insight into Different Aspects of Surrogacy Practices. *Journal of human reproductive sciences* [online]. 2018, 11(3), pp. 212-218 [Q 2022-11-01]. Available at: https://doi.org/10.4103/jhrs.JHRS_138_17.

Moreover, we also differentiate altruistic (gratuitous) surrogacy, in which the surrogate mother is not paid, or only remunerated for her expenses associated with the surrogacy (usually the intended parents cover such expenses), and commercial surrogacy in which the surrogate mother is paid beyond the expenses associated with the surrogacy.⁶

These are the factual backgrounds of surrogacy, which definitely alters and challenges the traditional concepts of parenthood and founding a family, thus with these methods a lot of new state of affairs can arise, which have been biologically obvious beforehand.

Surrogacy regulations in Austria

One of the examined countries is Austria, which in general could be considered the most progressive, and economically enhanced countries of the three, however the approach towards surrogacy is not so evident. The domestic legislation⁷ until 1992 was very restrictive towards ART.⁸ After more than a decade the new Law on Reproductive Medicine from 2014 has legalized some options⁹ for ART, but surrogacy as such remained prohibited. The legal framework in Austria regarding the different methods of assisted reproduction went through various alterations, mainly by virtue of the judgements of the ECtHR.

Firstly, a domestic decision on surrogacy in the Constitutional Court case of 11 October 2012 should be introduced. The Constitutional Court decided on an appeal handed in by the parents of the twins, who were born in Ukraine 2010. There had been suspicion beforehand that the twins were born from a surrogate mother, but later on the Austrian Youth Welfare Agency determined the Austrian citizens to be legal custodians of the children. However, Austrian authorities later on refused to recognise the Austrian nationality of the children.¹⁰

The applicants objected that their constitutional right to equal treatment among nationals has been violated, as well as their rights to private and family

⁶ PATEL, N. H. et al. *Insight into Different Aspects of Surrogacy Practices*, p. 214 [Q 2022-12-05].

⁷ Reproductive Medicine Law 1992 (Fortpflanzungsmedizinengesetz, 1992).

⁸ Assisted Reproductive Technology.

⁹ Permits egg donation, PGD in some cases and heterologous sperm donation for IVF/ICSI and lesbian couples.

¹⁰ Constitutional Court of Austria (Verfassungsgerichtshof), Case no. B99/12 ua (11. 10. 2012) [online]. [Q 2022-12-09]. Available at: <https://caselaw.statelessness.eu/node/135>.

life in line with Article 8 of the Convention. They argued that the Austrian authorities based their decision out of suspicion without substantially acknowledging the fact that the couple had handed in enough evidence to prove the pregnancy (with artificial insemination), so there has not been a surrogacy arrangement. The opposing party referred to similar cases in their practice, the couple's evidence was not dependable, and that there was a reasonable suspicion of the involvement of a surrogate mother, because surrogacy in Ukraine is legal.

The Constitutional Court in its reasoning referred to the case law of the ECtHR. Article 8 also includes the child's right to identity. The basis of the Court's augmentation was formulated around the best interest of the child principle. Although the prohibition of surrogacy is part of Austrian public policy, thus the rejection of Ukrainian birth certificates where surrogacy is legal could be justified, it is unacceptable when children are involved. Basically, the denial of foreign civil acts on assumably „intended parenthood” could risk the children becoming stateless, when neither the surrogate's motherhood could be acknowledged.

In other words, the Austrian Constitutional Court created an interesting approach to surrogacy cases in general, where acknowledging filial relationships, whether based on surrogacy or not, is required to achieve a result that is in the best interest of the child.

Secondly, in the case of Austria we ought to mention the legal attitude towards egg (oocyte) donation, which was covered in the case of *S.H. and Others v. Austria*¹¹. The applicant argued that Austria violated the Articles 8 (right to respect for private and family life) and 14 (prohibition of discrimination) of the European Convention on Human Rights, because only sperm donation was considered legal, while surrogacy and other assisted reproductive techniques were not. The Court found that these regulations did not violate the Convention, and on the other hand provided basic legal and ethical arguments, which motivates the state regulations on surrogacy. It was confirmed that Article 8 does not guarantee absolute entitlement when one turns to assisted reproductive services, because member states can freely decide which of these techniques they legalize. The main arguments to support the actual legislation (selective reproductions, exploitation and humiliation of women) were sufficient. Additionally, the Court mentioned the possibility to travel into different European

¹¹ *S.H. and Others v. Austria*, no. 57813/00 (Judgement from 3. 11. 2011).

countries, where surrogacy is permitted, thus promoting „surrogacy tourism“ which on the other hand is reasonably problematic.¹² Later on the legislation on egg donations was changed in 2015, but surrogacy as a whole remained forbidden.¹³

From this case it became obvious that the Court allows a wide margin of appreciation to the member states on regulation of delicate topics such as assisted reproductive methods, so Austria can freely justify their argumentation on the forbidding legislation on surrogacy. However, by the Court's argumentation on popularizing cross-border surrogacy, the Austrian citizens can easily outplay the home regulations by entering into a surrogacy arrangement in a permitting country.

Surrogacy regulation in Slovakia

Generally, the Slovak legislation tends to take quite a conservative approach regarding reproductive rights.¹⁴ Slovakia is one of the countries that has not regulated surrogacy legally. When examining the actual legal situation in relation to surrogacy, both public and private law aspects should be considered. Firstly, from the public law aspect, the question is whether there is the chance for the surrogate mother to access assisted reproductive health services (in this regard she is in the position of a oocyte donor), basically does the health-care provisions allow the donation of reproductive cells. Secondly, private law concerns arise from the question, how the Slovak civil legislation determines maternity, whether it is possible to transfer parental rights and responsibilities from a surrogate mother to the intended parents.

¹² JACKSON, E. S. H. and Others v. Austria. *Reproductive Biomedicine Online*. 2012, Vol. 25, No. 7 [Q 2022-11-10]. Available at: <https://pubmed.ncbi.nlm.nih.gov/23063823/>.

¹³ Constitutional Court of Austria (Verfassungsgerichtshof), Case no. B99/12 ua (11/10/2012) [online]. [Q 2022-12-15]. Available at: [https://www.ris.bka.gv.at/Dokumente/Vfgh/JFT_09878989_12B00099_00.html](https://www.ris.bka.gv.at/Dokumente/Vfgh/JFT_09878989_12B00099_00/JFT_09878989_12B00099_00.html).

¹⁴ Also the methods of home birth are not regulated positively, in fact, the law is silent on this legal matter. This forces the midwives to practice their profession at the risk of being criminally prosecuted afterwards, and also necessitates the pregnant woman to give birth in neighbouring countries, where home birth is legal (f.e. Hungary). Moreover, the topic of abortion and its availability is politically debated frequently. There have been attempts to make the actual regulation stricter (prolonging the deadline for evaluation whether the woman intends to get abortion; prohibit advertising for the need or availability of abortion, for services or goods provided or offered for the purpose of abortion), but no such bills have been passed by the Slovak National Council yet.

To answer the first question, Slovakia lacks in a complex and comprehensive legislation on the usage and availability of assisted reproductive methods in general. We could highlight, that the basic principles of reproductive medicine is laid down in the bylaw of the Ministry of Health of the SSR no. 24/1983 on the adjustment of conditions for artificial insemination of 10 October 1983.¹⁵ However, this regulation contains such outdated concepts of assisted reproductive services, that it is not corresponding with the advanced methods of reproductive medicine of today. Overall, some assisted reproductive methods are regulated in recent legislation,¹⁶ although these touch only upon individual fragments of the issue.

The Slovak Act on Family¹⁷ highlights that the main purpose of marriage is to establish a family and the proper upbringing of children, which generally indicates the traditional approach to family in Slovakia. Moreover, the Roman law principle of „*Mater semper certa est*“¹⁸ was adopted by the legislator in family law in § 82 p. 1 of the Act on Family, stating the Mother of the child is the one who gave birth to it. This also implies, that regardless of the occurrence of surrogacy procedures, Slovakia has picked a narrower on this topic.

Even in the case of a secret birth, or by placing the child in the rescue nests, the woman who gave birth to the child is still considered to be the mother, but her data will not be entered in the register.¹⁹ In order to avoid any misunderstandings about the child's origin, the Family Act, which states that: „*If there is any doubt as to who the mother of the child arises, the motherhood shall be determined by the court on the basis of the findings of the birth.*“²⁰ Furthermore, regarding the validity and acknowledgement of surrogacy arrangements the second point in the Family Act indicates that any contracts which are contradicting the principle of the mother is the person, who gave birth to the child, are void.²¹

¹⁵ Measure of the Ministry of Health no. 24/1983 on circumstances of artificial fertilisation (Záväzné opatrenie Ministerstva zdravotníctva SSR č. 24/1983 o úprave podmienok pre umelé oplodnenie z 10. októbra 1983).

¹⁶ Act no. 317/2016 Coll, on the requirements and procedures for the transplantation of human organs, human tissue and cells (Zákon č. 317/2016 Z.z., o požiadavkách a postupoch pri odbere a transplantácii ľudského orgánu, ľudského tkaniva a ľudských buniek).

¹⁷ Act no. 36/2005 Coll., on Family (Zákon č. 36/2005 Z.z., o rodine).

¹⁸ The mother is always certain.

¹⁹ CÍRÁK, J., PAVELKOVÁ, B., ŠTEVČEK, M. *Rodinné právo*. Bratislava: Heuréka, 2010, p. 34.

²⁰ § 83 p. 1 Act No. 36/2005 Coll., on Family.

²¹ § 83 p. 2 Act No. 36/2005 Coll., on Family.

In conclusion it seems to be obvious why the Slovak legislator has not taken any progress in redefining the issue of assisted reproductive methods, nevertheless surrogacy options. By preferring to acknowledge motherhood on a gestational basis, having a conservative approach to reproductive and sexual rights and the law being silent on the institution of surrogacy, indicates that Slovakia is treating this issue with indifference.

Surrogacy regulations in Ukraine

The solely one of the permitting countries regarding surrogacy close to the Central European region is Ukraine. This practice is far from being new, as commercial surrogacy has been legal since 1997.²² However, only gestational surrogacy is allowed, where the principle of donor confidentiality is maintained, aiming to ensure the protection of the rights of the three subjects in a surrogacy arrangement (intended parents, surrogate mother, child).

As of today, there is no legislation in Ukraine, that comprehensively regulates surrogate motherhood and surrogacy practice. The primary legal permission of surrogacy stems from the Family Code. Pursuant to Art. 123 establishing maternal and parental affiliation in case of medical assistance „1. *If the wife is fertilized by artificial procreation techniques upon written consent of her husband, the latter is registered as the father of the child born by his wife. 2. If an ovum conceived by the spouses is implanted to another woman, the spouses shall be the parents of the child. 3. Whenever an ovum conceived by the husband with another woman is implanted to his wife, the child is considered to be affiliated to the spouses.*“²³ From these formulations we can derive that Ukraine contradicts the roman law principle of *Mater semper certa est*, neither corresponds with the widely accepted concept of acknowledging gestational motherhood primarily. Art. 123 of the Family Code clearly bases legal parenthood on the biological lineage between intended parents and the child born from a surrogate mother.

²² REZNIK, O. M., YAKUSHCHENKO, Y. M. Legal considerations surrounding surrogacy in Ukraine. *Wiadomości Lekarskie*, 2020, Vol. LXXIII, Issue 5, pp. 1048-1052 [online]. [Q 2022-11-16]. Available at: <https://wiadlek.pl/wp-content/uploads/archive/2020/WLek202005139.pdf>.

²³ Family Code of Ukraine no. 2947-III of January the 10th, 2002 [online]. [Q 2022-12-15]. Available at: <https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5d667af64>.

Other relevant legal documents which legalize assisted reproductive methods include Civil Code of Ukraine, the Order of the Ministry of Justice of Ukraine No. 52/5 of 18 October 2000, and the Order of the Ministry of Health of Ukraine On approval of the Procedure for the Use of Assisted Reproductive Technologies in Ukraine No. 787 of 09 September 2013.²⁴ The Order 52/5 concerns the issue of drafting the birth certificate to a child born from a surrogacy agreement,²⁵ the latter legal document regulates the procedure for the use of assisted reproductive technologies.

The Civil Code of Ukraine in its various Articles stipulate the legal access to assisted reproductive procedures. Mainly, Part 7. Of Art. 281 describes that an adult woman or man has the right, based on medical indications, to carry out treatment programs of assisted reproductive technologies in accordance with the procedure and conditions established by law. Moreover, the legal requirement for being a donor of blood, its components, as well as organs and other anatomical materials and reproductive cells, is stipulated in Part 1 of Art. 290 of the CC of Ukraine. Art. 139 of Part 2. of the Civil Code tend to reduce maternity establishment disputes, by prohibiting questioning maternity in cases where the procedure of transferring a human embryo conceived by the couple as a result of the use of assisted reproductive technologies into the body of another woman was carried out.

From the practical side, surrogacy and other ART procedures are carried out in special accredited healthcare institutions. Surrogacy contracts are drafted between the intended parents and a surrogate mother. The contract must be made before a notary in order to verify the established consents and requirements, and monetary compensation can be agreed upon by the parties with no limit.²⁶

²⁴ International Agency "Assisted Motherhood". Ukrainian Legislation. In: *ASSISTED MOTHERHOOD* [online]. [Q 2022-11-16]. Available at: http://www.surrogacy.in.ua/en/legal_system_in_ukraine.html.

²⁵ Paragraph 11, Chapter 1, Section III states: "*When a child is born by a woman who was implanted a human embryo conceived by the spouses as a result of the use of assisted reproductive technologies, state registration of birth shall be made upon the application of spouses who consented to such implantation. In such case, the document confirming the child's delivery by such woman shall be accompanied by a statement confirming her consent to registration of the spouses as parents, the authenticity of signature on which shall be notarized, and a certificate of genetic affinity of the parents/mother or father/ with the fetus*".

²⁶ ALEGRE, C. L., NAVARRO, A M. Á., CRESPO, S. S. Gestational surrogacy: an European overview and the Spanish case. A feasible proposal? In: *Themis, European Judicial Training Network* [online]. 2020 [Q 2022-11-20]. Available at: <https://www.ejtn.eu/PageFiles/18747/TH-2020-03%20ES.pdf>.

Despite the permitting nature of the Ukrainian legislation for ART, especially surrogacy, the concrete regulations contain shortcomings and potential of abuse, thus there have been multiple projects and drafts submitted to the Verkhova Rada aiming to provide more comprehensive legal framework on surrogacy.²⁷

Lastly, the above mentioned legal and practical side enables the execution of ART and surrogacy practices too. However, the overall legislation itself does not explicitly²⁸ regulate surrogacy, which may cause complications in these markedly sensitive legal relationships.

Conclusion

Assisted reproductive technology has introduced a large scope of medical solutions for infertile couples to found a family, however surrogacy seems to be the most debated, as it triggers many ethical and legal questions.

The multicolor of legal reactions to this sensitive issue can be represented through the legislation of the three countries in the Central European region, despite the decision making of the ECtHR and the continuously ongoing europeanization and unification of law in Europe. However, in this regard, the domestic legislation enjoys prime attention and significance, because the ECtHR approaches these cases with a relatively „open-mind“ by giving the member state a large margin of appreciation in their legislation of delicate topics.

This carefulness of the ECtHR was represented in case of Austria, where it highlighted the importance of free discretion of the country to decide whether to constrain surrogacy or not. Austria with this validation could maintain its prohibitive legislation towards surrogacy, but could also permit certain assisted reproductive techniques.

From the Slovak domestic legislation we can demonstrate how certain countries can take the path of the complete non-regulation of surrogacy methods. The lack of detailed regulation on ART, the implicit „ban“ on surrogacy arrangements, and the determination of motherhood on gestational basis all

²⁷ For more information see: <https://jurfem.com.ua/en/assisted-reproductive-technology-new-legislative-initiatives/>.

²⁸ There are some problematic areas from a legal point of view regarding ART. For example the lack of legal definition of “surrogate motherhood”, “surrogate mother”, lack of legal requirements of the form and content of surrogacy arrangement, just to name a few.

reflect and contribute to the conservative approach Slovakia generally demonstrates in the field of reproductive and sexual rights.

One prime example of permitting legislation on surrogacy comes from Ukraine, where even commercial surrogacy has been acceptable since the 1990s. There, the domestic legislation tries to protect all the three subjects of the surrogacy arrangement, also lessens the complications when issuing the birth certificate of the child. Despite the complex legislation of ART, some key features and concepts are not taken into consideration in these laws, which may endanger the legal certainty of the parties.

By examining all the three legal approaches (prohibition, permission, non-regulation) a state can choose in regulating surrogacy through the examples of Austria, Slovakia and Ukraine, we can conclude that neither of them may seem satisfactory. The lack of an European standard in this regard may cause serious inadequacies, on the other hand one shall respect the ethical and moral reasoning of the state when drafting a regulation on such a delicate issue. However, this free attitude may not be maintainable in the future, especially with the strong emergence of international surrogacy cases.